

Lawka Pala

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LawKa PaLa

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BURMA LAWYERS' COUNCIL

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**WISDOM IS POWER TO TRANSFORM A SOCIETY INTO
A JUST, FREE, PEACEFUL AND DEVELOPED ONE**

Legal Journal on Burma

Legal Journal on Burma is published three times a year by Burma Lawyers' Council. The journal contains academic articles relevant to legal and political issues in Burma including: constitutional reform, rule of law, federalism, refugees, judicial independence, martial law, and religious freedom. Articles are written by practising lawyers, academics, and experienced Burmese opposition activists. The views expressed in the articles are those of each author and not of Burma Lawyers' Council. The journal also, where relevant, reproduces copies of important documents relating to Burma, such as statements on behalf of the Burmese parliament. The journal's production is funded by the Friedrich Naumann Stiftung from Germany.

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Part A: Special Features

Militarized development is always unsustainable

*Burma Lawyers' Council
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*originally published in Social Watch Report 2011

Decades of military rule have fostered a repressive political environment in which democratic principles are flouted, public resources are exploited for the benefit of the military elite and human rights and the rule of law enjoy little respect. Without basic rights, the voiceless people of Burma suffer the consequences of economic mismanagement that undermines the environment and retards sustainable development. Burma urgently needs strong democratic institutions that promote sustainable development, public participation and accountability.

Despite the country's abundance of natural resources, a majority of the Burmese people face challenging life conditions as a result of governmental economic mismanagement. More than 32% of the population lives below the poverty line.¹ Burma ranked 132 out of 169 countries in the 2010 UNDP Human Development Index.² The lack of public participation in developing economic policies is reflected in the Government's allocation of only 0.5% of the gross domestic product (GDP) for health, and 0.9% for education.³ Meanwhile, the Government pours more than 60% of its spending into State-owned businesses.⁴

The lack of democratic institutions effectively bars the public from participating in decision-making on economic, social and environmental policies. Abuse of power is rampant. Development projects are used to line the pockets of military officials at the expense of citizens.



The military regime, known as the State Peace and Development Council (SPDC), organized a national election in November 2010 – the first in 20 years – but it was characterized by flawed election laws and repressive practices. The SPDC continues to hold the reins of government in Burma, officials regularly abuse their power to further their own interests. Because no means currently exist to hold them accountable, they face little to no repercussions for these abuses.

2008 Constitution and 2010 elections

The 2008 Constitution entrenched military rule by reserving a quarter of national parliamentary seats and a third of state and regional parliamentary seats for military representatives appointed by the Commander-in-Chief.⁵ The military appoints all of the members of the Union Election Commission (UEC), the government body responsible for ensuring that elections are free and fair.⁶ Election laws bar political prisoners from joining parties and place restrictions on campaigning activities of political parties. In response to the restrictive laws, the National League for Democracy (NLD), and other key opposition groups boycotted the elections, further delegitimizing the results.⁷

The elections were also marred by voter intimidation, electoral fraud and corruption.⁸ One of the most common complaints concerned the manipulation of voting results through the collection of votes in advance and vote-rigging.⁹ In some areas, villagers were threatened with land confiscation and the discontinuation of public services if they did not vote for the regime-backed Union Solidarity and Development Party (USDP).¹⁰

The military regime has further entrenched its position through laws that obstruct judicial independence.¹¹ The President has the power to appoint and dismiss Supreme Court Justices at his discretion.¹² The Supreme Court does not exercise jurisdiction over military or constitutional issues. Additionally, the Constitution guarantees impunity to members of the ruling military regime, thereby preventing the judiciary from enforcing the law in cases involving them.¹³ Pervasive corruption further undermines the legitimacy of the judiciary, as well as its ability to protect the rights of individuals and hold government officials accountable.¹⁴

In most countries, civil society organizations play a fundamental role in the promotion of democratic principles and help ensure transparency, accountability, defense of human rights, and public participation. In Burma, these organizations are stifled by repressive restrictions or outright bans on civil society activities.¹⁵ In the absence of a vibrant civil society military junta rule is unchecked, unmonitored, and unaccountable.



The grim face of militarized development

SPDC has sold rights to exploit domestic resources to neighbouring countries, generating billions of dollars, yet the Burmese people have not seen the economic benefits.¹⁶ Instead, in pursuing its own interests and militarizing development projects, the government has exploited local villagers and exposed them to human rights abuses.

Villagers are systematically subjected to forced labour by Burmese army troops.¹⁷ For example, during the construction of the Yadana gas pipeline in Eastern Burma, a joint venture of the French-owned Total and the US-owned Unocal (now owned by Chevron), Government soldiers and proxy military groups providing security forced civilians to cut down trees, serve as porters, and build military infrastructure.¹⁸ Those who refused were beaten, raped, tortured and killed.¹⁹

Large-scale land confiscation is another prevalent development-related government abuse. Villagers receive nominal or no compensation for the farmland seized. In 2010, approximately 2,500 acres of land in Southern Burma were confiscated and distributed to logging companies.²⁰ Villagers who live by the China-sponsored development of the Shwe gas pipelines in Western Burma also report that authorities have been confiscating land without compensation.²¹

Many Burmese rely primarily on farming for their livelihoods. Forced labor leaves them much less time to cultivate their land, while confiscation completely deprives them of their source of food and income.²² Additionally, militarization of areas with development projects, which is common, is often accompanied by an increase in unofficial taxes, imposed on local villagers by soldiers.²³ These corrupt practices not only heighten food insecurity, they also close off educational opportunities: farmers can no longer afford to send their children to school.²⁴

Environmental impact

The severe environmental degradation that frequently results from these projects further exacerbates their negative social and economic impact. Unsustainable logging, shrimp farming and hydro-electric projects, as well as extractive industries have seriously damaged the environment. For example, air and water pollution created by a 2010 coal mining partnership agreement between Chinese and Burmese companies in Shan State have contaminated water supplies and caused approximately 2,000 cases of skin disease.²⁵ This concern is the largest cooperative mining project between China and Burma, located in the Sagaing Division. The venture could release toxic chemicals during the refining process.²⁶

The environmental risks associated with development projects are not disclosed



to affected communities,²⁷ and in the absence of the rule of law there victims of development-related government actions have no viable legal recourse. Order 1/99, which outlaws forced labor, it is hardly enforced.²⁸ When individuals subjected to forced labor and land confiscation have filed complaints, the SPDC has retaliated against them and their lawyers through criminal charges and arbitrary sentences to hard labor camps.²⁹

The country's environmental laws are not enforced. Although the Forest Law emphasizes the importance of conserving and protecting Burma's forests,³⁰ between 1990 and 2005, the country lost almost 20% of its forests,³¹ and in recent years the rate of deforestation has increased. Similarly, although the Myanmar Mines Law of 1994 requires permission from land users before a mining permit is issued, in practice villagers are not consulted and their lands are typically confiscated.³²

Additionally, no law requires that companies seeking to invest in development projects in Burma consult with affected communities. Even when companies have taken the initiative to do so, the environmental impact assessments that were commissioned have been fundamentally flawed, leading to inaccurate conclusions.³³ For example, the third-party environmental impact assessment commissioned by the French oil company Total's on the Yadana gas pipeline project relied on the testimony of Burmese villagers procured through interviews conducted in the presence of military intelligence officials.³⁴

Conclusions

Strong democratic institutions that promote good governance are an essential prerequisite for sustainable development. This entails respect for the rule of law and human rights, effective public participation, access to knowledge, and accountability in the management of public resources.

Democratic principles must be strengthened in Burma through free and fair elections, an independent judiciary that upholds the rule of law, and a constitutional review that involves all stakeholders. Public participation should also be incorporated into all stages of development so that the people can shape economic policies, become fully aware of the social and environmental impact of all development initiatives, and have the power to hold government actors and companies accountable for any rights violations.

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Burmese government land grabs: Farmers without rights

U Myo and Lane Weir

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The Burmese authorities are selling off plots of Burma's land to the highest bidder. In 2002, Saytoktaya Township farmlands were illegally occupied so that the government could build a military service factory. Fields and crops were bulldozed and no compensation was provided.

In May 2009, authorities in Arakan State confiscated farms for the purpose of providing land for a Chinese gas pipeline construction project from the Indian Ocean to Mainland China. The promised compensation never materialized.

In December 2010, the government permitted a large Chinese company, Two Diamond Dragon, to confiscate hundreds of acres of farmland from local people in Kachin State.

These are just examples of a rash of cases over the past decade in which the Burmese authorities have grabbed farmers' land in pursuit of royalties and tax revenues, seemingly oblivious of the heartache caused to farmers, workers and families who are suddenly left with virtually no means of support.

As a result, many workers and farmers are left with no option but to leave Burma to pursue work as migrant labourers in neighboring countries, particularly Thailand.

Jackie Pollock, the director of the MAP Foundation in Chiang Mai, Thailand, says that for migrant labourers 'moving away from their homes, families and friends to work in Thailand is a huge decision. But there is comfort for those migrants that move knowing that they have a home to return to'.



But, as Pollock states, 'For those who migrate because their land has been confiscated, even this last shred of security is torn from them, making the migration a traumatic experience'.

An analysis of Burmese domestic law clearly illustrates the illegality of these land confiscations, resulting in heightened vulnerability and insecurity for Burmese workers and farmers.

The problem situated in domestic law

After struggling under British colonial power, the 1947 Constitution brought in prior to independence the following year, represented liberation for the Burmese people. Under colonial rule, there had been no rights for peasants and workers. However, under the new Constitution and subsequent laws passed by the legislature, protection for peasants and workers emerged.

Section 30 of the Constitution provided that the 'State is the ultimate owner of all lands' and that 'subject to the provisions of this Constitution, the State shall have the right to regulate, alter or abolish land tenures or resume possession of any land and distribute the same for collective or cooperating farming or to agricultural tenants' and that 'there can be no large land holdings on any basis whatsoever. The maximum size of a private land holding shall, as soon as circumstances permit, be determined by law'.

These provisions marked an attempt to provide land and security to small farmers and workers in Burma.

Prior to independence, the wealthy elite owned large estates that they, along with the colonial government, had confiscated from small farmers. The majority of farmers, then, were forced to work as tenants on these estates. Tenants were required to pay exorbitant rents, in the form of crops, to the landowners. Unable to pay the rent, many farmers accumulated enormous amounts of debt and suffered from heightened vulnerability. Farmers across Burma aspired to own the farms that they worked.

Following independence in 1948, the Tenancy Law and the Land Nationalization Act supplemented the constitutional provisions on land described above. The Land Nationalization Act, for example, set out to ensure that land was owned by farmers in small holdings by giving the government wide powers over the use and distribution of land. However, subsequent amendments to these laws, particularly the Tenancy Law, enabled large landowners and the government to continue leeching more and more resources from the farmers. Corrupt government officials and large landowners used the Tenancy Law as a mechanism for quashing the rights of Burmese farmers and workers.



Compounding the problem is the issue of low wages. Laws passed in December 1948 and November 1949 set basic minimum wages for farmers. Unfortunately, the governments of General Ne Win and the State Peace and Development Council (SPDC) ignored these laws. Instead of aiding those that the 1948 and 1949 governments attempted to benefit, they have disregarded the basic needs of farmers and instead governed for the benefit only of the government and its cronies.

The current government continues to govern in contrast to both the 1948 and 1949 laws and international standards on minimum wages by setting the level far below an adequate amount. Burmese workers earn a minimum wage of just 12,000 kyat (US\$ 13.2) per month, in stark contrast to the 30,000 kyat minimum that Burmese government employees receive.

By comparison, Burmese workers receive the lowest compensation among ASEAN countries. For example, what a Burmese worker earns in a month, a Thai worker is guaranteed in just three days of work. The inability to earn a living that meets their basic needs forces many workers to seek employment in neighbouring countries.

In sharp contradiction to the current treatment of workers in Burma, the 1963 Tenancy Law and the 1963 Law Safeguarding Peasant Rights were intended to protect farmers. The Law Safeguarding Peasant Rights, for example, stipulates in Section 3 that 'notwithstanding anything elsewhere contained in any existing law, a Civil Court shall not make a decree or order for: (a) a warrant of attachment for or confiscation of agricultural land; neither for employed livestock and implements, harrows and implements, other animate and inanimate implements, nor the produce of agricultural land, (b) prohibition of work upon or entry into agricultural land, (c) prohibition of movement or sale in whole or part or use of employed livestock and implements, harrows and implements, other animate and inanimate implements, or the produce of agricultural land and (d) arrest in detention of a peasant in connection with any matter included in paragraphs (a) (b) and (c)'.

Ongoing illegal government action

The reality today is that the rights of farmers and workers are not being protected in accordance with the law.

This was illustrated on March 9, 2011 in proceedings in the Burmese legislature, the country's new Parliament. On that day, three representatives in the legislature, Aung Thein of Ywangan Constituency, Aung Zin of Pazundaung



Constituency and Ye Tun of Hsipaw Constituency, posed questions that received responses inconsistent with Burmese domestic law.

For example, Aung Zin asked why, in contrast to the purposes of the 1963 Tenancy Law and the 1963 Law Safeguarding Peasant Rights which aims to protect the interests of farmers owning small land holdings, the land of peasants was now being confiscated and nationalized in order to construct large factories and contract resources to foreign companies for the purpose of developing large agricultural holdings. This, he suggested, had turned farmers back into tenants.

He asked if the government could justify the apparent inconsistencies between domestic law and government action. The Minister for Agriculture and Irrigation, Htay Oo, responded by arguing that the government was acting to serve the interests of peasants who constituted the majority of the population and that these actions were taken in accordance with domestic law. He failed to provide reasons as to why this was the case.

The government's actions cannot be justified. Clear contradictions between government action and domestic law can be seen on three grounds. First, the government attempted to use the powers conferred on them by the Land Nationalization Act to justify the confiscation of farmland from small farmers. However, it was the intent of the legislature when it passed the act to enable the government to provide land for farmers, not to aid government officials in their attempts to line their own pockets by making contracts with foreign multinational companies. The government permits these activities because they enable the collection of taxes from the foreign companies. The intent of the Land Nationalization Act and the actions taken by the government are clearly inconsistent.

Second, the actions taken by the government by actively engaging in confiscation, or enabling the confiscation of farmland, represents a clear violation of the Law Safeguarding Peasant Rights. As documented by the International Labour Organization, the government has arrested and detained farmers who have protested the illegal confiscation of their land.

Finally, the government has violated the provisions of the 2008 Constitution. Section 36(d) of the Constitution provides that the state 'shall not nationalize economic enterprises'. By confiscating land from small farmers in order to provide land and resources to foreign companies for the benefit of government officials, the 2008 Constitution has clearly been contravened.

Life for farmers and workers in Burma is growing increasingly more difficult. The minimum wage fails to provide the 'just and favourable remuneration' that ensures 'an existence worthy of human dignity' guaranteed by Article 23 of the Universal Declaration of Human Rights.



As a result, many Burmese citizens are forced to leave their families and communities to work as migrant labourers in neighbouring countries. Further, the government's efforts to confiscate the land of small farmers in order to profit from foreign investors has increased the vulnerability of many Burmese citizens. These actions have been taken in sharp contrast to both Burmese domestic and international laws.

The government has provided no reasonable justification for their actions and, therefore, the government is acting in an illegal manner inconsistent with their responsibilities to the Burmese population.

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Undemocratic November, 2010 Election in Burma

Lane Weir

**Originally published in Rights Review*

On November 7, 2010, Burma had its first election in two decades. In 1990, the opposition party National League for Democracy (NLD), led by Nobel Peace Prize winning activist and recently released political prisoner Aung Sun Suu Kyi, recorded a landslide electoral victory, surprising even the ruling military junta. Unfortunately, the junta, or State Peace and Development Council (SPDC), refused to yield the reigns of power and has continued to control the state through oppressive tactics over the course of the past twenty years. In the run-up to the 2010 election, the SPDC repeatedly violated human rights as it worked to ensure its continued dominance over the Burmese state.

In 1990, the junta argued that the election results could not be recognized as the polls took place in the absence of a constitution. They suggested that a constitution must be drafted and approved before another election could occur. The drafting of a constitution was to be a part of the SPDC's "Roadmap to Democracy." Eighteen years later, in 2008, the SPDC put forward a constitution for referendum.

Controversial provisions in the proposed constitution include guaranteeing the military a quarter of the seats in parliament, making military personnel immune from civilian prosecution and granting key ministerial portfolios to military officers. In addition, the proposed constitution barred anyone married to a non-Burmese citizen from standing for election. This provision specifically targeted Suu Kyi whose deceased husband was British.

Just a few short weeks following 2008's devastating Cyclone Nargis, with many Burmese communities in disrepair and international agencies barred from delivering aid or monitoring government actions, the constitution was put to referendum. It was passed by an improbable 92% of the electorate. Both the result and government tactics associated with the referendum were met with widespread skepticism



Perhaps still contemplating their surprise 1990 electoral loss, the SPDC was not satisfied that they had taken enough steps to ensure electoral success coming into the election year. As a result, in early 2010 several new electoral laws were passed. These included the Election Commission Law that appointed allies of the military to the Commission controlling all aspects of the election. The Commission's powers included authorization to cancel the election in any area for "regional security" interests. This law is commonly thought to have been an attempt to suppress votes from minority ethnic groups.

The Political Parties Registration Law, the People's Assembly Election Law and the National Assembly Election Law banned prisoners (including over 400 political prisoners of the NLD), anyone from "outlawed organizations," or anyone using religion for political purposes from standing for election or voting. This final provision was an obvious attempt to prevent Buddhist monks, instrumental in the 2007 Saffron Revolution, from partaking in the electoral process.

Finally, an additional order, Directive 2/2010, imposed severe restrictions on political party activities, including requirements for parties to apply a week in advance for permission to hold gatherings either at campaign offices or at other locations, barring the chanting of slogans, marching or carrying flags, giving speeches or publishing materials that would "tarnish" the image of the state, criticizing the constitution or harming community peace.

In addition to passing a military friendly constitution and manipulative electoral laws, the SPDC engaged in several other activities to ensure its electoral success. The powerful state-run Union Solidarity and Development Association (USDA) and all of its extensive resources were rolled into the largest government-backed party, the Union Solidarity and Development Party (USDP), headed by current Prime Minister Than Shwe. The USDP has taken over the USDA's offices in almost every region of the country.

Paramilitary and government police forces used to crack down on protests in both 2003 and 2007 have been used to monitor the activities of opposition parties and intimidate opposition candidates and supporters. Furthermore, systematic human rights abuses by the military have been committed against ethnic nationalists in various regions of the country. In addition, the government denied international observers access to the country to monitor the election.

Results from the election were clear: the junta's democratic façade was successful and pro-military groups continue to hold power in Burma. It appears as though the government's long campaign of suppressing political dissent through legislation, force, harassment and intimidation has created a climate wherein the Burmese people are unwilling or unable to risk opposing the military junta.



Three interesting developments have taken place since the election. First, in a move symptomatic of Burma's continued struggles, thousands of refugees fled the country in the days immediately after the election following conflict between government forces and ethnic groups. Second, in an attempt to boost the credibility of their fictitious transition to democracy, the government has allowed Suu Kyi, no longer an election threat, to be released after spending 15 of the last 21 years under house arrest. There is little doubt that her actions will continue to be monitored closely and that it would surprise few if she were to be charged, once again, with bogus crimes. Finally, some international organizations and foreign governments have proposed that sanctions placed on Burma be removed in light of the recent election. Pro-democracy activists have widely criticized these suggestions for legitimizing the new government.

Activists and organizations dedicated to a more democratic and equitable Burma continue to do incredible work. However, the junta has stubbornly retained and entrenched its dictatorial rule by masquerading as a democracy. The "Road to Democracy" has reached its "successful" conclusion and Burma is no more democratic than it was prior to the November election.

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Under Review: Burma's Failure to Comply with the Convention on the Rights of the Child

*Burma Lawyers' Council
Lane Weir*

Introduction

In 1991, Burma ratified the Convention on the Rights of the Child (CRC). Every seven years, the Committee for the CRC (Committee) does a review to assess whether member states have adhered to the principles of the Convention. Burma will come up for review in 2012. After the government submitted a report to the Committee in 2009, a group of organizations called the Child Rights Forum of Burma submitted a "Shadow Report" detailing the challenges currently facing children in Burma. Subsequently, the Child Rights Forum requested that the Burma Lawyers' Council do a legal analysis of the status of children in Burma. This analysis, focusing primarily on issues related to the Committee's recommendations from 2004 following Burma's last review, the 2008 Constitution and concerns about the rule of law in Burma, was then submitted to the Committee for a pre-sessional hearing on 24 June 2011. This article details the main points that were raised in the submission to the Committee.¹

Implementation of 2004 Recommendations

Over the last seven years, the Burmese government has failed to implement the vast majority of recommendations from the 2004 review. Even where initiatives have been undertaken, they have been largely inadequate. As a result, the situation for children, as related to the Committee's recommendations, has not improved and the rights of children have not been advanced.



In 2004, the Committee recommended that the *Village Act* and the *Town Act* be amended so that they no longer permit the use of forced labor. Though an order was issued in 2005 banning the relevant provisions, the Acts were not repealed. As a result, the 2005 order could simply be supplanted or withdrawn by a new directive.

The Committee recommended that Section 66(d) of the *Child Law*, permitting the use of corporal punishment against children, be repealed. This provision has not been repealed. Therefore, the provision forbidding the willful maltreatment of a child still contains an exception for "a parent, teacher or a person having the right to control the child" where the admonition is "for the benefit of the child." The vagueness of the terms "person having the right to control the child" and "for the benefit of the child" provides for excessive interpretive discretion. As a result, and despite the 2004 Committee recommendations, the *Child Law* continues to license the use of corporal punishment.

The Committee also expressed concern with the fact that the *Child Law* distinguishes between children (individuals under the age of 16) and youth (between the ages of 16 and 18). The government suggests that preparations to amend the age of a child to anyone 18 years or younger are "underway." However, these changes have not materialized and, absent the promised changes, children between the ages of 16 and 18 are deprived of protections that should be afforded to them under the CRC.

The Committee pointed to the wide variety of international human rights instruments that the government of Burma has failed to ratify. The CRC and the Convention on the Elimination of All Forms of Discrimination Against Women remain the only international human rights agreements Burma has ratified. In contrast to recommendations by the Committee, the government has failed to ratify any other relevant human rights instruments.² This failure limits the ability of the international community to monitor the status of children in Burma.

The Committee made several recommendations with respect to the inadequacies of the National Committee for the Rights of the Child. The Burmese government has described the National Committee as the "main instrument for implementation" of the CRC with a mandate to "implement effectively and successfully" the provisions of the *Child Law*. According to Section 4 of the *Child Law*, the Chairman of the National Committee is the Minister for Social Welfare, Relief and Resettlement. The "Heads of relevant Government departments and organizations" are also members of the Committee. The *Child Law* stipulates that Committee members include "representatives from non-governmental organizations" and "voluntary social workers." However, domestic



lawyers and researchers describe the Committee as being "invariably" composed of only "SPDC supporters."

Following the disbanding of the SPDC and the subsequent election in November 2010, the Ministry for Social Welfare, Relief and Resettlement has merged with the Ministry of Labor under Chairman U Aung Kyi. Other members of the National Committee include the heads of relevant government departments and organizations. However, since the election, the government has not disclosed any information regarding the identity of the other Committee members. Nonetheless, it is understood that the Committee continues to have strong ties to the current government, consequently preventing it from acting as an unbiased watchdog.

In its report, the government highlighted the existence of Child Rights Committees at the Township level. These Committees were formed in accordance with the Rules and Regulations for the *Child Law* enacted in 2001. However, to date only ten Committees have been established.³ Even where Committees have been established, they have failed to advance the interests of children in their designated localities. For example, when a lawyer in Dagon Township reported child rights violations with respect to a child who had been trafficked and a child who had been abused, he received no response from the local Committee. Lack of awareness as to the existence of the Committees also contributes to their inefficacy. In many cases, people are not aware that they have been established at all.

The Committee noted that Burmese domestic law fails to provide sufficient protections for all children from sexual exploitation and trafficking. The government takes the position that children are comprehensively protected by existing law, pointing to a number of provisions in the *Child Law*, the *Burmese Penal Code* and the *Anti-Trafficking in Persons Law* to make this case. However, the safeguards contained in these laws fail to adequately protect children.

First, the *Child Law*, as noted above, defines a child as an individual under the age of 16. Therefore, individuals between the ages of 16 and 18 are left largely unprotected by domestic legislation.

Second, convicted offenders face relatively light sentences. Section 65 of the *Child Law* lays out the punishments for a number of child exploitation offences. Acts such as inducing a child to escape from a training school, home, temporary care facility or custodian and harboring, concealing, or preventing a child from returning to where he or she was taken, carry a prison term of up to six months and a fine of up to 1, 000 kyat (US \$1.35). Under Section 66, acts such as employing a child to beg for personal benefit and willfully mistreating a child



carry a maximum sentence of two years imprisonment and a 10,000 kyat (US \$13.50) fine. In neighboring Thailand, offenders of comparable offences under the *Anti-Trafficking in Persons Act* face imprisonment of between four and ten years and a fine of between 80,000 and 250,000 baht (US \$2,626 – 8,206).

According to the government "the Ministry of Home Affairs has planned to organize a special police force for child protection under the Myanmar Police Force in collaboration with UNICEF." However, this police force has not been established. In addition, no supplementary training for dealing with cases related to child rights violations have been provided to officers in the Myanmar Police Force.

Further, the implementation of strategies combating the exploitation and trafficking of children has been insufficient. The government alleges that "great care" has been taken, and "great emphasis" has been placed on trafficking issues. The government points to Section 6 of its report as evidence of these efforts. However, there is no evidence of preventative measures taken to deal with the root causes of trafficking in this section. The only discussion of implementation is that "repatriation, rehabilitation and follow-up programmes for trafficked children have been systematically carried out." The government's report goes on to state that in 2006 nine trafficked victims under six years of age were "repatriated" and "reintegrated." This section of the government's report is problematic for two reasons.

First, it fails to provide the information necessary to gauge the government's performance. Instead of detailing the number of people who have been prosecuted under anti-trafficking and anti-exploitation laws, it looks retrospectively at repatriation of trafficked persons. Judicial opinions would also be extremely helpful in illustrating how child rights offenders are treated under domestic law. However, in Burma, while judges provide oral and written opinions for their judgments, this information is not made public. Lawyers involved in a case receive registered copies but they are not allowed to publish them. Because most proceedings are conducted in a closed court, there is little awareness as to how the aforementioned offences are prosecuted so as to protect the rights of children. Such information would clearly indicate the effectiveness of the government's anti-trafficking and anti-exploitation measures.

Second, the number of trafficking victims indicated in the government's report fails to account for the seriousness of trafficking in Burma. In the same timeframe in which the government acknowledged nine trafficked victims under six years of age, the "Shadow Report" documented 133 cases of human trafficking from Kachin and Northern Shan State alone, a quarter of whom were children. The CRC is meant to address the challenges faced by all children,



not just those under six years of age. The numbers presented by Burma inadequately reflect the seriousness and breadth of human trafficking in Burma.

The problems highlighted above are exacerbated by the government's failure to follow the Committee's aforementioned 2004 recommendation to change the definition of a child to include all children under the age of 18. As a result, many children are left unprotected by Burmese domestic law. However, even where protections are in place, they fail to comprehensively address the challenges faced by children in Burma.

The Committee also made several recommendations with respect to the inadequacies of Burma's juvenile justice system. The government suggests that the juvenile justice system, laid out in Sections 37-49 of the *Child Law*, sufficiently addresses issues associated with children accused of committing crimes. Unfortunately, there are several serious shortcomings with these provisions. First, they afford an unacceptable amount of discretion to relevant state actors. For example, when referring to the speed at which juvenile cases are to proceed to trial, Section 37 stipulates that this is to happen "as soon as possible." Section 40 ("may establish") suggests that it is optional for the Supreme Court to establish juvenile courts. Also, Section 46 does not provide a framework to determine what is required to find that a "child is of so unruly or depraved a character or absolutely uncontrollable" so as to justify a sentence of imprisonment.

Of equal concern is the inadequate implementation of Section 40, which provides for the establishment of juvenile courts. Though juvenile courts have been established in Rangoon and Mandalay, they serve just 25 of Burma's 325 townships. Judges in other Burmese townships have been "entrusted with special powers to try juvenile cases," but there is no evidence that judges have received the requisite training to effectively manage issues related to child offenders. Though the government argues that trainings have taken place, lawyers from inside Burma suggest that these trainings have not been provided to most Township judges. These lawyers also take the position that most judges follow no special procedure (as stipulated by the *Child Law*), and demonstrate no expertise when dealing with accused children. Given that there are only two juvenile courts covering a mere eight percent of Townships and limited training has been offered to judges presiding in those courts, the government has failed to implement adequate protections for children in the juvenile justice system."

Even if cases involving accused children were tried in accordance with the relevant provisions of the *Child Law*, there would be serious shortcomings with the juvenile justice system. Section 43(b) stipulates that juvenile courts have the power to "continue the case in the absence of the child, notwithstanding the stage of inquiry or trial of the case, if it is considered that the presence in the



court of the accused child is not necessary." This provision fails to provide adequate legal protections to the accused child. It does not explain what is meant by the child's presence not being "necessary." Further, it leaves several opportunities for infringing on the child's legal rights. For example, there could be a clear conflict of interest if an absent child was represented by a government-appointed lawyer.

Section 43(d) states that the Court may announce and/or use photographs revealing the identity of a child accused of having committed an offence, or a child who is participating as a witness in any case, on the radio, television, newspapers and other publications if it is believed to benefit the child. The potential publication of the name or photo of an accused child runs in sharp contrast to the principles of the CRC (namely, Article 40(vi), which guarantees the right to privacy at all stages of the proceedings). This is particularly concerning given the wide discretion afforded to judges.

There are several shortcomings with respect to the implementation of the *Child Law's* juvenile justice provisions. In most instances, juvenile cases are tried in the same courtrooms as all other cases. Contrary to the *Child Law*, there are reports of children being detained with adults where they face increased risk of physical and sexual abuse. Section 619 of the *Manual of Rules for the Superintendence and Management of Jails in Burma* (the *Jail Manual*) stipulates that "in jails where there is no separate ward [for juvenile offenders], juvenile prisoners who are detained... shall be confined at night in separate sleeping places and, during the daytime, shall be kept rigorously under the eye of an elderly and responsible warder." Keeping them "rigorously under the eye" of a warder provides insufficient protection to detained youth. Instead, separate facilities or areas should be guaranteed at all times to ensure that other detainees cannot victimize children.

In contravention of Section 41(c) of the *Child Law* there have been multiple instances of child offenders not being offered bail. In addition, the facilities used to house street children who are rounded up by the authorities have been found by researchers to lack "sufficient food, water, toilets, clothes, space and safety provisions." Under Section 628 of the *Jail Manual*, which states that "juveniles, under 16 years of age, shall not be punished by reduction of diet," the use of food restrictions as a mechanism for punishment remains an option for children aged 16-18.

Though Section 68 of the *Child Law*, instructing the Court to determine whether an accused individual is a youth before commencing a trial, refers to "youth," many of the aforementioned juvenile justice provisions in the *Child Law* refer only to "children." Further, judges continue to treat children between the ages of



16 and 18 as adults. In one case, where an 18 year-old was charged for alleged crimes committed during the Saffron Revolution, a judge stated his understanding that the accused should be tried by a juvenile court but then denied a request by the defendant to do so. Even for those protected by the relevant provisions of the *Child Law*, the provisions inadequately reflect the considerations and measures that must be taken in order to have an effective juvenile justice system that reflects the principles of the CRC.

The Committee also noted the fact that the *Child Law* contained no provisions that ensure legal assistance for children who break the law. In 2004, the government stated that there was an existing requirement that a lawyer be appointed at the government's expense when the child cannot afford one. Unfortunately, there are no available statistics on how often and under what circumstances the government has provided a lawyer to an accused child. Lawyers from inside Burma have suggested that they have never seen the government provide a child with a lawyer. Instead, most children appear in court unrepresented.

Finally, the Committee recommended that the minimum age of criminal responsibility be increased. The government suggests that preparations are "being made" to amend the *Child Law*, changing the age of criminal responsibility from seven to 10 years under Section 28(a) ("nothing is an offence which is done by a child under 7 years of age") and to 12 under Section 28(b) ("nothing is an offence which is done by a child above 7 years of age and under 12 who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion"). However, at the time of reporting these changes have not been made. In accordance with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the age of criminal responsibility should be set to reflect "emotional, mental and intellectual maturity." Though many countries have an equally low age for criminal responsibility, it is particularly problematic in a country such as Burma, where most information on how juvenile offenders are treated is unavailable and the efficacy of the justice system remains an ongoing problem.

2008 Constitution

In 2004, the government pledged that a new constitution would "contribute to the establishment of democratic institutions and to major political, economic and social advances." The Committee recommended that the government expedite the drafting process and incorporate child rights into the new Constitution.



On 10 May 2008, Burma held a referendum on the new Constitution. Though there was widespread criticism about the legitimacy of the referendum process, the Constitution was approved and put into force. Unfortunately, the new Constitution is a flawed document that does more to entrench the power of the current government than it does to protect the rights and freedoms of the Burmese people.

First, the new Constitution significantly limits the fundamental freedoms of children in Burma. For example, Article 354 guarantees the rights to "express and publish freely," "assemble peacefully" and "form associations and organizations." However, these rights are curtailed by a clause stating that they apply only where they are executed in a manner "not contrary to the laws [that are] enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality." Similarly, Article 407 of the Constitution states that political parties "shall have no right of continued existence" where they are "declared an unlawful association under existing law." These clawback clauses enable the government to arbitrarily override rights guaranteed by Articles 13 and 15 of the CRC. They also represent a departure from Section 13 of the *Child Law*, stipulating that "every child has the right to express his or her own views in matters concerning children." These Constitutional provisions fail to entrench child rights in domestic law, and instead expand the powers afforded to the ruling government.

Second, most provisions in the Constitution afford rights only to citizens. Article 345 stipulates that in order to be a citizen one must be "born of parents both of whom are nationals of the Republic of the Union of Myanmar" or already be "a citizen according to law on the day this Constitution comes into operation." These restrictive terms exclude many individuals and groups. Most dramatically, and in sharp contrast to the Committee's recommendation, the Constitution fails to provide a path to citizenship for the Rohingya people.

Where it does not conflict with the Constitution, the *1982 Burma Citizenship Law* is still applicable. This means that the "Council of State may decide whether any ethnic group is national or not." Given the government's history of hostility towards the Rohingya, it is unlikely the Council of State would make a determination favorable to this population. The plight of stateless Rohingya people is further aggravated by Section 43 of the *Citizenship Law*, allowing only those with: (a) "parents, one of whom is a citizen and the other a foreigner," (b) "parents, one of whom is an associate citizen and the other is a naturalized citizen to apply for naturalized citizenship," (c) "parents, one of whom is an associate citizen and the other a foreigner," (d) "parents, both of whom are naturalized citizens" or (e) "parents, one of whom is a naturalized citizen and the other a foreigner" to apply for citizenship. For children, it is particularly troublesome that naturalized citizens must be 18 years of age. Since many of



the rights afforded to children in the Constitution are afforded only to citizens, those without citizenship continue to be denied the rights they are guaranteed under the CRC.

Third, though there are provisions related to child rights in the 2008 Constitution, they have been largely disregarded by the government. Article 32 stipulates that the Union shall "care for mothers and children, orphans, fallen Defence Services Personnel's children, the aged and the disabled." Article 351 states that "mothers, children and expectant women shall enjoy equal rights as prescribed by law." Article 367 states that "every citizen shall, in accord with the health policy laid down by the Union, have the right to healthcare." Article 22(c) states that the Union shall assist "to promote socio-economic development including education, health, economy, transport and communication, so forth, of less developed National races." The government's failure to advance the interests of children with respect to education and healthcare is well documented by the "Shadow Report." As a result of extensive use of clawback clauses, limited access to the protections afforded by the Constitution and ignorance for the provisions in the Constitution guaranteeing access to essential social services, the 2008 Constitution has failed to advance the rights of children in Burma.

Rule of Law

Laws protecting rights have very little meaning when they are not enforced. Problems caused by the government's refusal to submit to the rule of law may be one of the most difficult challenges facing Burma's children. The government has taken a number of measures that would, in theory, advance the interests of children in Burma. Child's Rights Committees have been formed at the National and Township levels, legislation and amendments to legislation have been passed and a new Constitution has been entrenched in domestic law. However, as a result of the government's failure to show deference to the rule of law, children have not benefited from these measures.

For example, the Tatmadaw continues to use child soldiers despite the existence of the Committee Forbidding Recruitment of Children and associated provisions in domestic law. While there has been a degree of cooperation with the International Labor Organization to demobilize some child soldiers, the widespread recruitment of child soldiers continues with impunity. Similarly, despite having signed the ILO Convention 29 and having voided provisions in the *Village Act* and the *Town Act*, Burmese authorities continue to use forced labor.

Article 445 of the Constitution states that "[n]o proceeding shall be instituted against the said Councils [SPDC and SLORC] or any member thereof or any



member in the Government, in respect of any act done in the execution of their respective duties." This provision effectively grants total immunity to members of the military junta for violations of international and domestic law committed against civilians, including children, over the past two decades.

A key indicator of the pervasiveness of the rule of law is the strength of civil society. In Burma it is very difficult for civil society to act in an effective and constructive manner due to extensive governmental restrictions. For example, following Cyclone Nargis the government heavily restricted the actions of community based organizations and international NGOs as they attempted to provide aid to affected populations.

Finally, corruption is pervasive throughout the judicial system in Burma. Lawyers from inside the country report that though there is an appeals process, judges typically only hear cases at the appellate level when bribed. With respect to children, Section 49 of the *Child Law* provides a mechanism for appealing the decision of a court of first instance. However, it is reported that appeals are seldom accepted for cases involving children and children are left without anyone to help navigate Burma's corrupt judicial system.

These examples illustrate the degree to which the rule of law fails to guide legal and political processes in Burma. By showing no respect for the rule of law, the government has failed to advance the interests of children in Burma.

Conclusion

In failing to implement the recommendations provided by the Committee in 2004, the government continues to be in serious contravention of the principles and provisions of the CRC. As a result, the situation for children in Burma continues to be characterized by insecurity and vulnerability. These problems are exacerbated by a Constitution that fails to protect the interests of all children and the government's lack of respect for, and deference to, the rule of law. Since ratifying the CRC in 1991, the status of children in Burma has not improved. Instead, the government has continued to rule oppressively with no regard for how its actions impact the rights of children. Consequently, Burma's children are being deprived of the rights and protections afforded to them by the CRC.

(Endnotes)

1. Note: for access to the full text of the submission provided to the Committee or to the "Shadow Report" please contact leslieble@gmail.com

2. These instruments include the: *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, *Optional Protocol on the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, *Hague Convention*



on the Protection of Children and Cooperation in Respect of Intercountry Adoption, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial; Discrimination, the Convention Against Torture, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Convention Relating to the Status of Refugees, 1954 Convention on the Status of Stateless Persons, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Convention Against Transnational Organized Crime and the Convention Against Transnational Organized Crime.

3. Township Committees have been established in: Dagon Township, Thanlyin Township, Shwepyithar Township, Hlaingtharya Township, Htantabin Township, Twantay Township, Thaketa Township, Mingaladon Township and Hmawbi Township.

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Burma's System of Impunity: A Legal Argument for Why Burma Cannot Find Resolution for its Heinous Crimes Domestically

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As a variety of international actors, including over a dozen countries and a score of civil-society organizations, increase their calls for a United Nations-mandated Commission of Inquiry to be established for the purpose of investigating the systematic violation of human rights in Burma, the Burmese regime has repeatedly argued that “An independent investigation in international law requires the exhaustion of local remedies.”¹ This statement, made by the Burmese delegation at its Universal Periodic Review in January 2011, is accurate to the point that, if Burma were both able and willing to impartially and effectively investigate human rights violations through domestic mechanisms, and to appropriately act on the results of such investigations, the international community would be obliged to wait for domestic judicial systems to run their course before initiating an international investigation of heinous crimes within Burma. If Burma cannot or will not hold its human rights violators to account, however, it becomes both the right and the responsibility of the international community to intervene.

Currently, there exists a system of impunity within Burma that renders it impossible to obtain an impartial examination of human rights violations within the country, violations for which high-ranking members of the Burmese government bear responsibility. Despite the fact that Burma has a new government that claims to be both civilian-led and democratic, the system of impunity within the country remains unchanged. In fact, recent events such as the establishment of the 2008 Constitution and the 2010 elections have only served to entrench this system of impunity, despite their democratic veneer.



The Burmese government, realizing that the acknowledgment of a system of impunity in Burma leads to the complete dismissal of their argument that international action is not needed to advance the cause of justice within Burma, has vigorously denied that a system of impunity exists. Burma's Attorney General, Dr. Tun Shin, declared at the country's Universal Periodic Review that:

“There is no impunity in Myanmar. No one is above the law. The legal maxim nemo est supra leges² is the accepted principle. Citizens, military and police personnel are not above the law and action will be taken against them when the law is breached.”³

At its Universal Periodic Review, the government delegation also denied the existence of any political prisoners or prisoners of conscience,⁴ claimed that allegations of sexual violence were merely attempts to discredit the armed forces,⁵ and asserted that government censorship in Burma was consonant with the maintenance of fundamental rights.⁶ As numerous international organizations have demonstrated these claims to be patently false, it is clear that the Burmese government's allegations that there is no culture of impunity cannot be taken at face value.

At its Review and within other forums, the Burmese government has advanced several arguments to support its assertion that there is no system of impunity within Burma: Firstly, that the recent Constitution has advanced the rule of law and created a democratic system; second, that the judiciary is sufficiently independent; third, that lawyers within Burma are free from a climate of pressure which would influence their role as officers of the court; and fourth, that the government-created Human Rights Body is an effective tool for judging human rights violations.

All of these assertions are patently false, as this paper will demonstrate. This paper will first explain how the 2008 Constitution has enshrined a system of impunity that makes it impossible to achieve an impartial examination of human rights abuses domestically. In the next section, it will show how the judicial system is completely dependent on the will of the executive, and has been constructed to serve the interests of the ruling military elite. Thirdly, this paper will illustrate how lawyers within Burma are not free to adequately represent their clients' interests when those interests contravene the will of the ruling regime. Next, it will present the case for how the domestic Human Rights Body within Burma is a completely ineffective tool that is led by the same government officials who are supposed to fall within the Body's scrutiny. And finally, it will show how the legislative system within Burma has been set up to ensure that any reforms to this system of impunity will be blocked by the military.



While this paper does not claim to offer a complete list of the legal mechanisms which constitute a system of domestic impunity within Burma, it seeks to remove any confusion as to this point: The legal system within Burma is completely incapable of bringing high-level perpetrators of human rights violations to account. Therefore, international legal action such as the establishment of a United Nations-mandated Commission of Inquiry to impartially investigate reports of human rights violations is the only way for the international community to honor its responsibilities to both the people of Burma and the cause of justice.

Article 445: The Immunity Clause

Perhaps the gravest example of how impunity is enshrined in the 2008 Constitution is Article 445, commonly known as the Immunity Clause, which states that “No proceeding shall be instituted against the said [previously-ruling] Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.” This provision acts as a guarantee of amnesty for any government official who has committed any crime, as long as the crime was committed as a result of their official duties. The military general who committed war crimes, the chief of intelligence who has arrested and tortured political dissidents, the army commander who used forced labor for construction projects; all of these characters could find refuge from the consequences of their acts, which are accepted as crimes by international standards, by hiding under the auspices of Article 445. This is in contravention to customary international law, for which there is no amnesty for heinous crimes. It is also, more notably, in contravention to Burma’s treaty obligations as a signatory to the Convention on the Prevention and Punishment of the Crime of Genocide⁷ and the Geneva Conventions.⁸

The Genocide Convention stipulates that punishment for commission of the act of genocide is irrespective of whether the offender is a private individual or member of the government⁹, while the Geneva Conventions similarly state that signatories have a duty to pass legislation criminalizing grave breaches of the laws of war, to bring perpetrators of these breaches to justice, and to redact domestic law contrary to the provisions of the Conventions. ¹⁰ Signatories are also prohibited from absolving themselves or others from liability for these breaches of the laws of war.¹¹ These international obligations stand in stark contrast to Article 445, which appears to place a complete shield of amnesty over governmental action.

Were Burma to have a fiercely independent judiciary, it would be possible for judges to attempt to narrowly interpret the scope of Article 445, arguing that the “respective duties” of Government members apply only to a subsection of



all actions taken in the name of the Government. At the very least, this interpretation could be proposed for debate within Burma's Constitutional Tribunal, the final arbiter of Constitutional disputes. But because the Burmese judiciary possesses a subservient role to the executive, as explored in the following section of this paper, it is unlikely that they will advance an interpretation contrary to the will of the regime.

The Judicial System: Independent in Name Only

Appointing Judges

The President of the Union of Myanmar is given complete power in choosing the head of the Supreme Court, or the Chief Justice of the Union. While the President's nomination must be confirmed by the Parliament,¹² the legislature is in fact confined to confirming that the nominee passes a set of Constitutionally-prescribed qualifications. Unless the nominee fails to meet these qualifications, which govern such basic criteria as ensuring that the nominee is a Burmese citizen, the Parliament has no authority to reject the President's nomination.¹³ As a result, the Chief Justice owes his appointment completely to the President.

Together, the Chief Justice and the President choose the nominees to fill the remaining seats on the Supreme Court. Again, the legislature's role is confined to an examination of the nominee's biography in order to confirm eligibility for the position.¹⁴ Similarly, the President is able to appoint his choice for the Chief Justice of the different Regions and States within Burma, albeit with the "co-ordination" of the Chief Justice of the Union and the Chief Minister of the region or state.¹⁵ The exact level of consent required, by either the Chief Justice of the Union or the relevant Chief Minister, to constitute a threshold level of "co-ordination" may later need to be determined by Burma's Constitutional Court. Regardless, these provisions demonstrate that the Constitution ties not only the Supreme Court but rather every level of the judiciary within Burma to the President. These connections undercut any hope that the judiciary can operate as an effective check to the power of the ruling regime.

The President himself, under the 2008 Constitutional structure and within the traditional power structure of the ruling junta, is deeply beholden to the military. The military is one of the three groups within Parliament allowed to choose a nominee for President,¹⁶ and the military is also guaranteed 25% of the seats within Parliament,¹⁷ providing them with a large voting bloc to ensure their candidate is selected. This voting bloc is strengthened by the retired military members of Parliament, who are nominally civilians but who can be expected



to vote in lockstep with their active-duty counterparts. Beyond this, the only major political party, the United Solidarity and Development Party, which began as the political wing of the military establishment, can also be expected to cast their votes in support of the military's favored candidate.

The President shares Executive powers with the powerful National Defence and Security Council, a collection of junta leaders including several high-level military members. In an Executive-invoked state of emergency, the President devolves sovereign powers to both the Commander-in-Chief and the National Defence and Security Council, which then operate with no checks against their power¹⁸ and with complete amnesty for any measures taken during the state of emergency.¹⁹ Beyond its perpetuation of a system where the military junta operates above the law, this arrangement of executive power also ensures that the President must work most closely with other members of the junta in order to effectively operate.

As yet another means of manifesting control over the President, the military is singlehandedly able to impeach the President, though not to remove him; the necessary number of members of Parliament to impeach the President is "not less than one-fourth" of either House,²⁰ the exact number Constitutionally granted to the military. The Presidential appointments to the judiciary are thus a stand-in for the military's preferences.

Dismissing Judges

While the Constitution appears at first glance to provide some protection against a justice's summary removal from office, in reality the charges upon which a judge can be removed are subjective and vague: charges include "misconduct" or "inefficient discharge of duties assigned by law."²¹ Justices are also required to be "free from party politics";²² breach of this provision also would constitute cause for dismissal.²³ The requirement that judges be free from party politics is similar to the Constitutional provisions against the abuse of religion for political purposes.²⁴ The provisions against "abuse of religion" provide the government a tool against members of the Buddhist clergy who protest the regime, and against leaders in ethnic communities with large Christian or Muslim constituencies. Similarly, the prohibition for members of the judicial branch to refrain from party politics can be easily abused by the regime. And although the actual dismissal of a Justice requires two-thirds of the legislature, the President is allowed to impeach any Justice on his own initiative.²⁵

The members of the Constitutional Tribunal of the Union, which serves as the final authority on Constitutional matters, are more isolated from the Executive during the appointment process than members of the Supreme Court



of the Union. The President only appoints three of the members of the Constitutional Tribunal, including the Chairperson, with the Speakers of both houses of Parliament also allowed to appoint three members each.²⁶ However, the President is similarly allowed to impeach members of the Tribunal for such violations as “misconduct,”²⁷ “inefficient discharge of duties assigned by law,”²⁸ or involvement in the activities of a political party.²⁹ This provides the President with a significant measure of power over the job security of those who decide how to interpret Constitutional provisions.

Impeachment is not the only way for a member of the judiciary to leave office, however. He is also allowed to resign, and while the Constitution mentions that this resignation must be of the justice’s “own volition,”³⁰ the ruling junta has previously used enforced resignations as a tactic for controlling the Supreme Court. In 1998, the State Peace and Development Council (the junta’s previous incarnation), “permitted the retirement” of five out of the six judges of Burma’s previous Supreme Court.³¹ No reasons for their mass resignations were provided.

Finally, the Constitution provides another avenue for executive control over the will of the judiciary by allowing a range of equally acceptable numbers of judges to sit on both the national Supreme Court and the regional High Courts. For the Supreme Court, the President is allowed to appoint between seven and eleven Justices,³² while for the High Court of a state or region the President is allowed to appoint between three and seven Justices.³³ These malleable figures allow the president to counteract the will of resistant Justices by placing additional Justices, more pliant to his will, on the bench. Thus, even if the President is unable to dismiss a Justice or compel his resignation through non-legal means, he can counteract the effect of a noncompliant Justice through additional appointments. The regime has proven more than willing to use court-packing tactics in the past: Although the 2000 Judiciary Law restricted the pre-Constitutional Supreme Court’s numbers to twelve, the military regime did not hesitate to appoint justices to the Court in excess of this number in order to help ensure a compliant judiciary.³⁴ With the new Constitution, the junta will be able to similarly manipulate the membership of the judiciary while remaining within the letter of the law.

Impeachment, enforced resignations, and court-packing are all tactics which the military-led “civilian” government have at their disposal to control the behavior of high-level judges, even after the Justices have been appointed to their positions. Combined, these tactics provide the regime with a powerful level of control over the judiciary, further ensuring that the judicial branch will not operate independently and that their actions will not be impartial.



Lawyers: Controlled through Punishment and Intimidation

While judges follow the orders of the regime, there is another class of “officers of the court” who are controlled by the regime through a system of punishment and intimidation. The Burmese legal system has a long record of putting lawyers who advocate for causes contrary to those of the regime, most commonly defense lawyers for clients arrested on politically-motivated charges, at a serious disadvantage within the courtroom. The court may label their questions or evidence inadmissible, or deny them access to necessary files or evidence. Lawyers have been prevented from speaking with their clients in public or even from meeting with them at all. In several cases, defense lawyers have been arrested for contempt of court or other trumped-up charges, and sent to prison during their clients’ case. The persecution of lawyers who attempt to represent a legal counterpoint to the wishes of the government stands in stark contrast to the promises of the 2008 Constitution that the government would enhance the principles of Justice, Liberty and Equality.

Burmese law contains many vague and arbitrary laws subject to subjective determinations, which can be used by both the police and judges to punish lawyers advocating causes that contravene the will of the regime. One such example is the Association Act, which contains clauses criminalizing organizations that commit acts that “may effect [sic] or disrupt the regularity of state machinery”.³⁵ This law, which criminalizes even the potential for disruption and offers no criteria for judging what constitutes disruption, has even been used against individuals, such as lawyer Pho Phyu during his defense, in early 2009, of farmworkers whose land had been confiscated by the government.³⁶

Burmese law also contains provisions that appear tailored to provide judges with tools to arbitrarily punish lawyers who challenge court proceedings. The Contempt of Courts Act,³⁷ which has remained unaltered since 1926, provides a penalty for up to six months in prison, along with a fine, for lawyers found to be in contempt of court. The Act makes no effort to define the characteristics of contempt, making any determination of contempt completely dependent on the will of the judge. Human rights groups have pointed out that this dangerous lack of definition for ‘contempt’ has led to systematic abuse of the provision on the part of judges. For example, in 2008, lawyers U Aung Thein and U Khin Maung Shein withdrew from representing detained democracy activists as part of an agreement with their clients to protest the unfairness of the trial. The lawyers pointed out that they were being prevented from meeting with their clients and preparing an adequate defense, and that the family members of the accused were not allowed to enter the courtroom. In response, the court found both lawyers in contempt of court and sentenced them to several months in prison.³⁸



Besides the Contempt of Courts Act, the Burmese Penal Code contains a provision (Article 228) declaring that “Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sifting (*sic*) in any state of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.”³⁹ The provision is similarly open for abuse by the courts; “any interruption” is a broad category that essentially allows the judge to punish a lawyer for any disagreement with the course of court proceedings. Although this provision attempts to penalize the same behavior as the Contempt of Courts Act, the fact that Article 228 is apart from the Contempt of Courts Act means that there is no impediment to a court finding a lawyer guilty of contempt under both bodies of law, essentially doubling the sentence to a maximum of one year in prison.

Beyond imprisoning defense lawyers, the regime has also found it fit to simply suspend or disbar lawyers with whom they disagree, preventing them from practicing law. U Aung Thein, for example, found his license revoked in May 2009, on the charge that he was not abiding by legal ethics, when he was serving as a legal advisor to Daw Aung San Suu Kyi.⁴⁰ This is not an isolated example of the regime disbaring a lawyer for political reasons; the Asian Law Resource Center, an INGO based in Hong Kong which cooperates closely with the Asian Human Rights commission, has compiled a list of over 200 Burmese lawyers who have recently been suspended or deregistered, and reports that many such suspensions or disbarments are a result of actions “that the authorities found inimical to their interests.”⁴¹ The Center also points out that:

“In a country with lawyers numbering in the thousands, this is a large percentage that speaks to the attempts to contain and coerce the profession as a whole. The ALRC has followed a number of cases of deregistration closely and is aware that the lawyers who have suffered this penalty have been informed by written communication of what has happened to them and have been denied the opportunity to present a defence, although the law allows for this.”⁴²

The Burmese government’s willingness to use both procedural and substantive legal rules to prevent defense lawyers from providing their clients an adequate defense within the domestic legal system are far from acceptable by international standards; for example, the indictment of defense lawyers for attempting to defend their clients against the government appears to be in violation of Articles 7 and 10 of the Universal Declaration of Human Rights, both of which aim to safeguard the principle of equal protection before the law.



Similarly, Burma's castigatory attitude towards activist lawyers violates several provisions of the Basic Principles on the Role of Lawyers, a set of guidelines released by the United Nations in 1990 to govern the safeguarding of the proper role of lawyers.

Among other requirements, the guidelines include basic principles regarding access to lawyers, such as the prohibition against making access to lawyers dependent on political stance or other opinions;⁴³ the assurance of a defendant's prompt access to a lawyer;⁴⁴ and the necessity of providing adequate access to a lawyer without censorship or interception of lawyer-client information by authorities.⁴⁵ Governments are similarly tasked with ensuring that lawyers are not prevented from pursuing legal practice due to political views or other opinions.⁴⁶ The Burmese government, through its interference with the legal rights of political arrestees and its punitive actions against lawyers who dare to take such cases, fails to meet this basic threshold of safeguards intended to ensure an adequate role for lawyers within Burma's domestic judicial system.

With the vagueness of certain laws, and with other laws seemingly having no *raison d'être* other than to punish those seeking to defend their clients against the assertions of the regime, the Burmese legal system is currently incapable of ensuring that lawyers who seek to speak out against power will be respected and protected from government excess. As long as lawyers remain unprotected from punitive action as a consequence of their legal advocacy against the will of the regime, a system of impunity remains in place.

The Military Courts-Martial: Live by the Sword, be Judged by the Sword

Even if the regular court system operated independently from the ruling government, a large portion of the junta's crimes would remain protected by the Burmese system. The Constitution establishes a separate set of military Courts-martial, not beholden to the Supreme Court, that adjudicate all crimes committed by the Burmese military. While many countries possess their own courts-martial systems, there are normally restrictions on the jurisdictional reach of these courts, as well as institutional checks on the power they wield. Not so in Burma, where the government remains within the power of the military establishment.

The jurisdiction for Burma's Courts-martial has little in the way of limitations; the Constitution says only that the Courts-martial "shall adjudicate Defence Services personnel."⁴⁷ With such an unrestricted mandate for the Courts-martial, it appears unlikely that a member of the military will ever fall within the jurisdiction of a civilian court, regardless of the alleged crime. To underscore the point that the military is outside of the traditional court system, the Constitution also goes on to explicitly declare in a separate provision that



the Courts-martial fall outside the jurisdiction of the Supreme Court of the Union.⁴⁸

Human rights groups have amassed a comprehensive amount of information pointing to the Burmese military as the perpetrator of a large range of crimes. The Harvard Law report “Crimes In Burma” declared in 2009 that past “numerous military campaigns against ethnic nationality groups led to a litany of human rights violations.”⁴⁹ International observers state that these crimes continue on to the present day. In his 2010 report to the Human Rights Council,⁵⁰ Special Rapporteur on the Situation of Human Rights in Myanmar Tomás Ojea Quintana described some of these crimes reported to have been committed by the Burmese military, including forced displacement,⁵¹ forced labor,⁵² recruitment of child soldiers,⁵³ rape and sexual violence,⁵⁴ pillage and destruction of villagers’ livelihoods,⁵⁵ extrajudicial killings,⁵⁶ indiscriminate attacks upon civilian populations,⁵⁷ and the use of anti-personnel landmines.⁵⁸ All of these categories constitute serious violations of international law, and similarly constitute actionable offenses under the Rome Statute of the International Criminal Court.

It is fundamental to underscore the fact that these crimes are not simply isolated incidents committed by low-level soldiers without direction; instead, they are part of a comprehensive campaign to break ethnic resistance to the Burmese military junta, initiated by high-ranking military commanders and enforced by military order throughout the chain-of-command. For decades, the Burmese military has utilized a “Four Cuts” policy that aims to weaken ethnic militias by cutting them off from access to resources within ethnic areas.⁵⁹ This policy has had the direct consequence of officially validating and in fact mandating the above-listed human rights abuses. Similarly, other systematic abuses such as forced portering and the recruitment of child soldiers can be directly traced to military strategies promoted at a high-level within the military. With the courts-martial serving as the only means to judge Defence Services members, the Burmese legal system has created a situation where the military is in charge of investigating human rights abuses that directly resulted from its own high-level policies.

Not only the jurisdiction of the courts-martial, but the composition of the military judiciary underscores the low likelihood of receiving an impartial trial for military members accused of heinous crimes. Judges for Burmese Courts-martial are normally composed of medium-level military officers, hardly a credible source for impartially determining whether the Burmese military regime has committed systematic war crimes or other heinous crimes. Any credible examination of the military’s role in these crimes has to be investigated and presided over by a force other than that of the military, and this will not happen within Burma.



The Constitution further declares that “the decision of the Commander-in-Chief of the Defence Services is final and conclusive” in regards to the adjudication of military justice,⁶⁰ a provision which grants the Commander-in-Chief appellate power over the decisions of the Courts-martial. Were the Courts-martial to return a guilty verdict against a soldier accused of heinous crimes, the Commander-in-Chief could simply overturn it. This renders the entire Courts-martial system dependent on the will of the Commander-in-Chief, who can prevent his subordinates from being ever held to account for enforcing military policies that led directly to systematic human rights violations. It also renders the Commander-in-Chief above the law; there is no domestic court capable of punishing him for any offense.

The Burmese Human Rights Body: A Smokescreen

Outside of the traditional court system is Burma’s Human Rights Body, which has been around in some form since 2000 but which the regime re-launched after the events of the 2007 Saffron Revolution in an attempt to forestall international criticism. The government has pointed to its Human Rights Body as proof that it is willing and able to handle human rights violations domestically. The government junta explained in its Universal Periodic Review that the Body, as part of the Ministry of Home Affairs, received 503 complaints between January and August 2010. Of those complaints, “action had been taken on 199 complaints, 203 complaints were under investigation and 101 complaints had been found to be false.”⁶¹ However, in his March 2011 report to the General Assembly, Professor Quintana pointed out that the Human Rights Body had admitted that, out of these more than 500 complaints, not a single one of these complaints involved crimes against humanity or war crimes.⁶²

Even were the Human Rights Body to investigate these crimes, which they have not yet done, any attempt to indict or even investigate the actions of military members in connection to war crimes or crimes against humanity may foul afoul of the Constitutional provisions designating courts-martial as the exclusive judicial body for crimes committed by the military. In fact, although the Body is mandated to accept “complaints and communications from those whose human rights are reportedly being violated, carrying out necessary investigations and taking proper actions although they are not included in the mandate of the Body,”⁶³ it is unclear what these proper actions would be. Without specified “proper actions” within the mandate of the Body, the power of the Body to compensate victims, punish perpetrators or even announce their findings remains unclear.



The debate over whether the Human Rights Body's limits are drawn is eclipsed by the fact that, even if the Body's mandate were construed to allow a full range of power to investigate crimes and act upon their findings, the Body would still contribute to a domestic climate of impunity. Significant structural problems render the Body completely incapable of acting as a truly independent guardian of human rights in Burma.

Human rights observers like David Mathieson at Human Rights Watch have pointed out that the Human Rights Body is far from compliant with the international principles that govern such institutions.⁶⁴ The Principles Relating to the Status of National Institutions, or the Paris Principles, drafted in 1993, are intended among other things to provide a blueprint for an adequately impartial national human rights institution. Within this blueprint are requirements that civil society be represented⁶⁵ and that government representatives serve only in an advisory capacity.⁶⁶

The Myanmar Human Rights Body, in contrast, is part the government apparatus. In its Universal Periodic Review, the government admitted that the Body was not yet in line with the Paris Principles, but argued that the Body was "still in its initial stages."⁶⁷ This claim, that the Human Rights Body is in its nascence, is less convincing upon the recollection that the Body is actually the renewal of a former human right body. The Myanmar Human rights Committee was initially formed in April 2000, and it was reformed as the Human Rights Body in November 2007, when the international community was considering a response to the regime's crackdown on protestors in the Saffron Revolution.⁶⁸ The Human Rights Body has thus existed in some form for over a decade, rendering it unclear as to why it is not yet up to the standards of the Paris Principles.

The government's claim to eventually transform the Body into a Paris Principles-compliant organization is even less convincing when considering the fact that, weeks after its Universal Periodic Review, the government announced an order to "reform" the Human Rights Body. Within the order was the announcement that the Body would continue to be led by Government ministers.⁶⁹

These Government ministers, in order to adequately fulfill the mandate of the Human Rights Body, would have to investigate themselves and their departments for violations such as excessive force in repressing protests, politically-motivated arrests, torture, and other abuses of power. The resulting conflict-of-interest renders it obvious that the Human Rights Body exists for a purpose other than that of promoting justice and reconciliation for the country.



The Military's Legislative Stranglehold

While Burma's military dictatorship has ensured that they will maintain power after the 2010 elections through their control of the judiciary as a tool of the state and through their use of above-mentioned provisions of the 2008 Constitution, they have taken similar steps to guarantee that the system cannot reform itself without their consent. The fact that the Constitution guarantees that 25% of all seats within Parliament go to serving members of the military, and that these military members of Parliament all be handpicked by the Commander-in-Chief, ensures that the legislature will be hard-pressed to ever act against the military's interests. But the Constitutionally-mandated composition of the Parliament actually renders it impossible to remove the foundations of the governmental system which ensure a climate of impunity for the military and other members of the regime.

In order to amend the Constitution, the Parliament must have the approval of more than seventy-five percent of its members,⁷⁰ providing the military with *de facto* veto power over any proposed Constitutional amendment. This fact undercuts the argument advanced by some international observers that the 2008 Constitution, although fundamentally flawed, nevertheless provides the foundation for gradual reform.⁷¹ Such an argument presupposes the idea that anti-democratic provisions within the Constitution can be gradually corrected so that Burmese society eventually ascends to a more democratic level. But such a transformation is impossible within a system where the military can single-handedly block Constitutional reforms.

The International Centre for Transitional Justice, in its September 2009 paper *Impunity Prolonged*, underscores this point by using the example of Indonesia's transition from military rule to democracy:

“One of the fundamental reasons Indonesia has been able to move forward in its transition from military dictatorship to democracy is that the previous guarantee that 30 percent of seats in parliament go to military officers was not entrenched in the constitution. Therefore, those laws could be amended. The quota gradually decreased over seven years and now no longer applies.”⁷²

However, in Burma's new “civilian” government it is impossible to repeal the provisions guaranteeing the military 25% of all Parliamentary seats, because this amendment would ironically require the acceptance of the military itself in order to pass. Similarly, amendments to strengthen the role of the judiciary, to



limit emergency powers or to provide the legislature with more autonomy in confirming nominees cannot pass without the acceptance of the ruling powers. Even the Immunity Clause cannot be removed without the consent of those who have the most to gain from the Clause's existence. This Constitutional framework paralyzes any prospective transition from a system of impunity to a system of accountability, placing the prospects for justice exclusively outside the ambit of Burma's current legal system.

Conclusion: An Entrenched System of Impunity

The new Constitution has created a system where the judiciary branch functions as an extension of the executive, the legislative branch is unable to act without the consent of the military, and government members are given amnesty for their crimes. In short, it has perpetuated the system of impunity upon which the military junta has relied for decades. Judges owe both their appointment and their continued job security to the regime, while lawyers are similarly vulnerable to punishment if they act against the government. The military is responsible only to itself, in the form of military courts-martial which constitute the Constitutionally-approved vehicle for judging crimes of which Defence Service members were a part. Similarly, Burma's Human Rights Body is led by the same ministries of the government that have a vested interest in dismissing or burying human rights complaints.

As a set of legal institutions that aim to promote justice and enhance the rule of law, Burma's domestic system is untenable. As a legal system that aims to protect those in power from the consequences of their heinous crimes, it is quite effective. Burma's legal processes entrench a system of impunity and render victims of human rights within Burma voiceless. The responsibility falls upon the international community to rectify these injustices. As this article is being written, the Burmese military has been waging a new offensive in Kachin state. The offensive is just one of the long line of abuses committed by the Burmese military, which will not be resolved if the international community continues to believe that Burma has any interest in reforming its behavior without international pressure. The increasing calls for a Commission of Inquiry, an international and impartial investigation into crimes committed in Burma, should be heeded. Burma is incapable of handling such a Commission on its own; instead, the international community must act for the cause of justice and on behalf of the people of Burma.

(Endnotes)

1. UN Human Rights Council. "Report of the Working Group on the Universal Periodic Review: Myanmar." 24 March 2011. A/HRC/17/9. ¶103(c).
2. "No one is above the law"



3. A/HRC/17/9, at ¶103(g).
4. *Id.* at ¶51.
5. *Id.* at ¶94.
6. *Id.* at ¶56.
7. Burma became a signatory to the Convention on December 20, 1949, and ratified the Convention on March 14, 1956.
8. Ratification and accession on August 25, 1992.
9. "Convention on the Prevention and Punishment of the Crime of Genocide." Adopted by the General Assembly on 9 December 1948. Article IV
10. "First Geneva Convention, 1949." Article 49.
11. *Id.* at Article 51.
12. Known as the Pyidaungsu Hluttaw.
13. "Constitution of the Republic of the Union of Myanmar." September 2008. Article 299(d)(ii)
14. *Id.*
15. *Id.* at Article 308(b)(i).
16. Article 60(b)(iii).
17. Articles 141(b) and 109(b).
18. Article 427.
19. Article 432.
20. Article 71(b)
21. Articles 302(a) and 311(a)
22. Articles 300(a) and 309(a)
23. Articles 302(a)(ii) and 311(a)(ii)
24. e.g. Article 364.
25. Articles 302(a) and 311(b).
26. Article 333.
27. Article 334(a)(iii).
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29. Articles 333(e) and 334(a)(ii).
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44. *Id.* at Article 7
45. Article 8
46. Article 10
47. "Constitution of the Republic of the Union of Myanmar" at Article 319.
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52. e.g. at ¶63.
53. e.g. at ¶75.
54. e.g. at 63.
55. e.g. at 61.
56. e.g. at 67.
57. e.g. at 61.
58. e.g. at 73.
59. See e.g. "Crimes in Burma."
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Part B: Constitutional Law

How the 2008 Constitution restricts multi-party democracy in Burma

U Myo

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Burma's 2008 Constitution, touted as bringing 'democratic' reforms to the country, has instead institutionalized bias in favour of the army and the ruling elite.

Heralded as a crucial part of the military government's 'roadmap to democracy', the 2008 Constitution was put to a referendum on 10 May, 2008. Though many reputable Burmese groups and international organizations claimed the process was fraudulent, the government hailed the referendum as a success that showed high approval for the new Constitution.

Unfortunately, the entrenchment of the new Constitution has been a victory for the ruling elite, not for the Burmese people.

The claim put forward by the new government is that the 2010 elections marked a transition to a multi-party democratic system. However, the 2008 Constitution's provisions restrict opposition parties and organizations, entrench continued military presence in the national government and grant impunity to past and present government officials.



With respect to the rule of law, the 2008 Constitution is unfair and unjust, depriving the Burmese population of their political right to the genuine multi-party democratic system stipulated by the new Constitution.

A careful look at the articles of the country's new Constitution illustrates the inconsistencies between the claim that the Constitution and subsequent election mark a turn to multi-party democracy and the limits placed on potential for a democratic system by the provisions of the new Constitution.

Section 7 of the 2008 Constitution provides that the 'Union practices genuine, disciplined multi-party democracy'. However, Section 407 states that where a political party infringes one of several stipulations, 'it shall have no right of continued existence'.

These stipulations include a prohibition on parties that have direct or indirect contact with groups or associations deemed 'unlawful' by the government, parties that directly or indirectly receive financial or material support from foreign governments or associations or from religious organizations and groups that 'abuse religion for political purposes'.

Section 408 states that where a party infringes one of the stipulations, their party registration will be revoked.

These provisions are easily subject to abuse, granting wide powers to the government, clearly impeding Section 7's promise of a 'genuine' multi-party democracy. These arbitrary restrictions merely concentrate power in the hands of the ruling party.

Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states that, 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. This idea, manifested in the 'one person, one vote' principle, is absent from Burma's 2008 Constitution.

Sections 74, 109(b) and 141(b) clearly illustrate this problem. Section 74 stipulates that in addition to elected officials, the Pyidaungsu Hluttaw [Burma's bicameral legislature] is to be comprised of Defence Services Personnel nominated by the Commander-in-Chief. Section 109(b) states that 110 individuals, or one-third of the total number of representatives, can be nominated by the Commander-in-Chief to the Pyithu Hluttaw [lower house]. Section 141(b) provides that the Commander-in-Chief reserves the right to nominate 56 individuals, or one quarter of the total number of representatives, to the Amyotha Hluttaw [upper house]. Sections 74, 109(b) and 141(b), therefore, permit the presence of government-appointed military representatives in the Pyidaungsu Hluttaw.



This means that the 2008 Constitution allows for 25 per cent of the officials in the Hluttaw to serve as unelected appointees. This represents a significant departure from the ‘one person, one vote’ principle. More broadly, it reflects an unjust departure from a multi-party democratic system in which officials are duly elected.

Similarly, Article 14 of the ICCPR states that ‘all persons shall be equal before the courts and tribunals’.

However, Article 445 of the 2008 Constitution states that ‘all policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and State Peace and Development Council [SPDC]... shall devolve on the Republic of the Union of Myanmar. No proceeding shall be instituted against the said Councils or any member thereof or any member in the Government, in respect of any act done in the execution of their respective duties’.

It is clear that SPDC military regime officials and their government allies are granted immunity by the provision. This is in sharp contrast with the principle of accountability within a functioning multi-party democracy.

What elements are required in a multi-party democracy?

Freedom of expression and the freedom of association are two fundamental principles of democracy. Article 19 of the Universal Declaration of Human Rights stipulates that ‘everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’.

Freedom of expression is necessary in order for true political dialogue in the public sphere and, therefore, is a necessary precondition for genuine multi-party democracy.

The right to freely form associations is also fundamental to a functioning democracy. Article 20 of the Universal Declaration of Human Rights (UDHR) states that ‘everyone has the right to freedom of peaceful assembly and association’. This right is also reflected by Article 22 of the International Covenant on Civil and Political Rights. These rights mean that workers, farmers, students and religious groups must be legally entitled to form unions. Similarly, it allows people to form and join political parties. The ability to do so is a necessary precondition for a multi-party democratic system.



Why is a multi-party system so important to Burma?

A genuine multi-party system is essential to re-establishing the rule of law in Burma. Unfortunately, Burma has not seen this type of government since General Ne Win imposed a one-party system following his coup in 1962.

The presence of many ethnic minorities is one reason a multi-party democratic system is so essential to the rule of law in Burma. It would allow for various regions to be governed by those with the closest understanding of the issues faced by groups and individuals in the locality. Ethnic minorities would be represented in the political sphere and would be less inclined to resort to violence.

A thriving multi-party democratic system would ensure that ethnic, social and political minorities have their voices heard in the Hluttaw. Opposition groups representative of minorities would be able to represent the views of those groups on an ongoing basis. In a genuine multi-party democracy, as opposed to the current political situation in Burma, opposition groups are not merely present during electoral periods. Instead, they serve a vital role to the functioning of government in a continuous manner.

The mere existence, then, of multiple parties during elections does not ensure a functioning democracy. Instead, opposition parties must be given a level of respect at all times by ruling parties. Opposition parties must be given the opportunity to get involved in the legislative process as good governance flows from a dialogue between parties.

At present, Burma's one-party state heavily restricts any potential for a multi-party democracy and, therefore, fails to represent the diverse interests of the Burmese population.

Despite promising a genuine multi-party democracy, the current Burmese Constitution only serves to restrict the activities of potential opposition groups and entrench the continued political presence of the ruling elite.

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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 2nd 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 2nd 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 2nd 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 2nd 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.¹ 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.² 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.³ Similarly, every citizen is under an obligation to share the Constitution's primary objectives of non-disintegration of the union and national solidarity.⁴ 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.⁵

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.⁶

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.⁷ 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.⁸ 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.⁹

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.¹⁰

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.¹¹ 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.¹² 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.¹³ 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."¹⁴ In addition, fundamental rights may be restricted or suspended altogether¹⁵ 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."¹⁶ 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."¹⁷

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.¹⁸

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.¹⁹ 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.²⁰ 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.²¹ 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.²² 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.²³ 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.²⁴ 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.²⁵ 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.²⁶ 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.²⁷ 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)

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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Burma Lawyers' Council

EVERYONE IS EQUAL BEFORE THE LAW.

Wisdom is power to transform the society into
a just, free, peaceful and developed one.

MISSION STATEMENT

“By vigorously opposing all unjust and oppressive laws, and by helping restore the principle of the Rule of Law, the Burma Lawyers Council aims to contribute to the transformation of Burma where all the citizens enjoy the equal protection of law under the democratic federal constitution which will guarantee fundamentals of human rights.”

THE STATUS OF ORGANIZATION

The Burma Lawyers' Council is an independent organization which was formed in a liberated area of Burma in 1994. It is neither aligned nor is it under the authority of any political organization. Individual lawyers and legal academics have joined together of their own free will to form this organization.

OBJECTIVES OF THE BLC

- Promote and assist in the educating, implementing, restoring and improving basic human rights, democratic rights, and the rule of law in Burma;
- Assist in drafting and implementing a constitution for Burma, and in associated matters of legal education; and
- Participate and cooperate in the emergence of a Civil Society in Burma.

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