



Part D: The Rule of Law

(D . 1)

Response to Kyaw Ye Min regarding the Extension of Daw Aung San Suu Kyi's Detention

On 11 June, the state-run *New Light of Myanmar* published an editorial by Kyaw Ye Min, defending the SPDC's continued detention of Daw Aung San Suu Kyi. Min, however, should be viewed as a mouthpiece of the regime, and his editorial must be interpreted as a policy statement from the SPDC itself. The proper media for such a message is a government office such as the Attorney General's Office and not the *New Light of Myanmar*. The argument insists that Daw Suu's six-year-old house arrest is the proper application of a valid and just law. With dangerously flawed reasoning, the regime indicates that any law is defensible so long as it serves the good of the nation. Using a disturbing comprehension of legal principles, the SPDC then attempts to show that Daw Suu's house arrest follows the *1975 Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts* (also called the *1975 State Protection Act* or simply the *Act*) to the letter. Curiously, the argument concludes by pointing to controversial and widely condemned legislation elsewhere as proof that the SPDC is following the example of other jurisdictions. The following is a rebuttal to the *New Light of Myanmar* editorial that wholeheartedly condemns both the *Act* itself and the illegal restriction of Daw Suu's liberty.

The SPDC's Flawed Legal Premises

The editorial is premised on the notion that a government is justified to "take action" that will satisfy its responsibilities of "safeguarding sovereignty and independence of the nation as well as ensuring community peace and the rule of law." While one would be hard-pressed to argue that governments do not take on such responsibilities, the SPDC neglects to mention that a state's capacity to act in this regard is bounded by the rights of its citizens. National security is of the utmost importance and any government is obliged to protect its citizens to the best of its ability. However, nothing can justify the arbitrary restriction of an individual's liberty. By prioritizing the state without safeguarding the individual, the editorial follows the same utilitarian calculus that rationalized the great atrocities of the twentieth century – from Holodomor to the Holocaust to the Great Leap Forward – and triggered a human rights paradigm in response. A state's right to self-defence is crucial but it is not absolute, and various



international standards specify that laws enacted to protect the state must take into account the inalienable rights of the individual.

In delineating its obligations, the SPDC proposes a paternalistic characterization of the relationship between citizen and state in which “[t]he government and the people are like the parents and their children.” This analogy is a poor one. Whereas the relationship between parent and child is born of a natural duty that exists between the former and the latter, citizens are not born from, and raised by, the state. State power and authority, rather, are derived from the will of the people. The SPDC has continuously ignored the will of Burma since free elections took place in 1990. Accordingly, the junta lacks the legitimate authority to rule, let alone to restrict individual liberties in order to further its skewed conception of the common good.

The Illegality of Daw Suu’s Detention in Burmese and International Law

The heart of the editorial is an attempt to demonstrate that Daw Suu’s house arrest is proper application of Burmese law. Pointing to evidence no one has ever seen or heard, it informs the reader that Daw Suu and her allies “were corresponding with insurgents who are engaged in armed insurgency against the government, and were posing great threats to the national security, receiving cash and kind from insurgent groups and foreign governments.” The SPDC adds that “[d]ue to the crimes they have committed, they well deserve flogging punishment as in the case of naughty children,” and lauds itself for having restrained itself in the interests of national reconciliation.

This argument might have held an ounce of credibility if the regime sponsored a legal system that followed due process. The junta’s legal track-record of *in camera* trials, confessions given under duress, and a complete lack of transparency, however, means that such claims cannot be trusted. Further, Article 9 (e) of the *Act* stipulates, “If sufficient facts for filing a lawsuit have been gathered, the person against whom action is taken shall be handed over to the judicial authorities immediately.” The SPDC’s failure to comply leads one to believe that no such evidence, in fact, exists.

It is far more likely that Daw Suu has been detained because, as the symbolic leader of Burmese democracy, she represents a genuine threat to the SPDC’s hold on power. The *Act* is designed to remove dangers posed to Burma as a whole, an objective entirely different from protecting against a challenge to the generals’ rule. The SPDC sees the nation’s interests as the same as its own, and this is insufficient cause to violate Daw Suu’s human rights. Preventative detention is punishment for intent alone. While this – a serious infringement of the principles of fundamental justice – might be justified in cases of extreme danger to national security, it cannot be equated with the far less



pressing danger of a challenge to the continuation of the SPDC's illegitimate rule.

This identification, by security agencies, of their interests as identical to the nation's interests happens in various countries; Burma is exceptional, however, because unlike elsewhere its courts are incapable of overseeing this process. The landmark Singaporean case of *Chng Suan Tze v. Minister of Home Affairs*, for instance, emphasized that the executive's powers to detain are subject to judicial review and stated, "All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power." A similar statement has emerged from the New Zealand courts. In 1998, a Court of Appeal judge in that country ruled, "[T]he Courts will be astute to ensure that the misuse of power is not cloaked by claims of national security... [S]ecret organisations of this kind from time to time misuse their powers in relation to individuals and institutions...[and therefore] it is essential that the judicial process be exerted...firmly, to keep the organisations and the officers within the law."

The editorial suggests the *Act* allows for six years of detention without trial, as opposed to the consensus of legal experts in civil society and the international community that the law should be read as providing at most for a five year maximum. The six year interpretation relies on a contentious reading of the word "continued" in Article 14 of the *Act*, and one that has conveniently emerged only after Daw Suu's detention has entered into its sixth year. The SPDC's statutory interpretation, however, is a moot point because Daw's Suu's house arrest is illegal regardless of the wording of Article 14.

Article 9 of the *Act* includes the following provisions:

- (b) Only necessary restrictions of fundamental rights shall be decided;
- (c) The duration of such restriction shall be kept to a minimum...
- (g) When any threat ... has ceased to exist, the restriction order shall be annulled immediately.

Even if assumed that, in 2003, the SPDC had reasonable cause to place Daw Suu under house arrest, it is implausible that this remains the case today. If Daw Suu had been involved in anti-government plots at the time of her arrest, she cannot conceivably have remained part of those plots after more than five years of isolation. The necessary and logical conclusion of the above is that any pressing and substantial reason that may have existed for the detention of Daw Suu has expired, thereby eliminating any legal justification for her house arrest.



The continued detention of Daw Suu is an abuse of the *Act* and a violation of international legal principles including rights against arbitrary detention, cruel and unusual punishment and the rights to the presumption of innocence and liberty of the person. Such principles are included in the *Universal Declaration of Human Rights*, which the Burmese Minister of Foreign Affairs specifically endorsed at the 54th United Nations General Assembly: “We fully subscribe to the human rights norms enshrined in the Universal Declaration of Human Rights. Here, I wish to underscore that the government does not condone any violations of human rights, and the type of democracy we envision will guarantee the protection and promotion of human rights.” These rights are further reinforced in other international treaties, such as the *International Covenant for Civil and Political Rights*, which even without Burmese ratification represent generally accepted international standards.

The restrictions placed upon Daw Suu are not only illegal, but also fit the *Rome Statute*’s technical definition of crimes against humanity. Article 7 §1(e) provides that these crimes include “imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law”. Daw Suu’s detention violates fundamental rules of international law because she was detained for purely political purposes, not for any wrongdoing. The *Rome Statute* stipulates that for an act to constitute a crime against humanity, it must be “part of a widespread or systematic attack directed against any civilian population...” Sufficient evidence has been gathered by both UN organizations and NGOs to demonstrate that the SPDC’s human rights violations have been both “widespread” and “systematic” (*see, e.g., Report of the Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro. U.N. Doc. A/HRC/4/14 12, p. 11, 12 Feb. 2007*).

The Example of Other Jurisdictions

The editorial attempts to exculpate the excesses of the SPDC by pointing to statutes in other countries that are functionally similar to the *Act*. The laws referred to – specifically those passed by Malaysia, Singapore, the United States and the United Kingdom – are all controversial attempts to address the tension between national security and individual freedoms. The widespread criticism that each has faced should make it clear that none has satisfactorily resolved this tension, and that, collectively, they represent neither a trend nor a new development in customary international law.

The Malaysian and *Singaporean Internal Security Acts* (ISA) are both sourced in a 1960 law passed before Singapore’s withdrawal from the Malay Federation. Both are anachronisms that have outlived their intended purpose – the suppression of Communists – and have for decades invited the scorn of the international community. At the time of the ISA’s codification



Malaysia's first Prime Minister, Tunku Abdul Rahman, attempted to allay fears by declaring: "I gave solemn promise to Parliament and the nation that the immense powers given to the government under the ISA would never be used to stifle legitimate opposition and silence lawful dissent." Sadly, the governments of neither Malaysia nor Singapore have lived up to the Rahman's promise, and the ISA has become a tool of suppression used over the years to arrest religious minorities, trade unionists, human rights activists, journalists and political opponents.

Called "an abbreviation which strikes fear and stifles the development of a just and equitable society" by the Malaysian Bar Association, the ISA continues to form a backdrop for arbitrary detention, torture and custodial death. At best, these practices deviate from those generally endorsed and upheld by the international community; at worst, they constitute gross violations of human rights. The Asian Human Rights Council and Amnesty International have associated the law with the violation of a plethora of international human provisions, from the right to a fair trial to freedom of expression. Singapore's 32-year detention (23 in prison and 9 under house arrest) without trial of Chia Thye Poh, cited specifically, is perhaps the most infamous incident of abuse perpetrated under the aegis of the ISA. He was eventually released, having never been charged. Poh's experience has been likened to that of Nelson Mandela, with the Singaporean regime taking on the role of apartheid South Africa. In sum, the only example that the SPDC seeks to follow is that of an international human rights pariah.

Looking beyond Southeast Asia, the editorial cites – not without satisfaction – post September 11 counterterrorism laws in the US and UK as further evidence that countries sacrifice individual rights for the sake of national security. While it may be true that these jurisdictions, along with several other Western liberal democracies, have enacted such measures, the editorial offers only a biased, one-sided analysis of the situation.

The PATRIOT Act is one of the most controversial laws ever passed in the US. The American Civil Liberties Union describes the PATRIOT Act as a threat to "the bedrock values of liberty, equality and government accountability on which the nation was founded." The law has also been criticised by the United Nations. The editorial fails to mention that, unlike the SPDC, the US government permits the criticism of its laws and policy in a free press and subjects the PATRIOT Act to the checks and balances of its democratic institutions. Various US Court decisions have considered the legality of the US's security laws. Telling in this regard is the fate of another US counterterrorism law, the Military Commissions Act (MCA). On 12 June 2008 (a day after Min's article was published), the US Supreme Court, in the case of *Boumediene v. Bush*, deemed Section 7 of the MCA to be unconstitutional for



its denial of habeas corpus to the detainees of Guantanamo Bay. The decision effectively rendered void the MCA.

The democratic institutions of the UK act similarly to serve as a check on executive power. *The Anti-terrorism Crime and Security Act 2001*, passed in the aftermath of September 11, was rendered invalid by a 2004 House of Lords decision, which deemed it to be incompatible with the *European Convention of Human Rights* (ECHR). Likewise, the law's replacement, the *Prevention of Terrorism Act 2005*, itself the creation of bi-cameral Parliamentary debate, was deemed to be in partial breach of the ECHR in a subsequent Court of Appeal Judgment. Furthermore, former Prime Minister Tony Blair experienced his first defeat in the House of Commons when he attempted to pass a bill that would permit the detention of terror suspects for up to 90 days without charge. Blair's successor, Gordon Brown, recently – and narrowly – passed a similar bill that extended the length of detention to 42 days, a decision which has been criticised as unnecessary by various policing and security officials in the UK. The law's passage is likely to come at a great political cost to Prime Minister Brown.

By evoking terror laws in the US and the UK, the SPDC inadvertently draws a comparison that shows Burma's flaws to be systematic and deep. The laws passed in these two Western jurisdictions are genuine but imperfect attempts at reconciling national security with individual liberty. Laws in Britain and the United States, however, are subject to the oversight of democratic institutions, such as a free media and independent judiciary. In Burma there is no discourse, but rather a silence that allows the SPDC to act in impunity. It is one thing to fail to strike a proper balance between the needs of the state and those of the individual; it is quite another to propagate a system of governance that necessarily precludes the realization of personal freedoms. In a sense, the *Act* is an outgrowth of an inherently flawed political system designed to perpetuate the power of a few. The SPDC may argue the legality Burma's laws but it cannot begin to defend them as valid and just.

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