



## Part ( B ) Judiciary in Burma

# The Role of Judiciary In Promoting Human Rights And The Rule of Law

In Burma, the ruling State Peace and Development Council (SPDC) has institutionalized human rights abuses through what has been commonly characterized as Burma's "injustice system."<sup>1</sup> Arbitrary arrests and unlawful prosecutions, used by the regime to silence its critics and discriminate against ethnic minorities and women, are perpetuated by the state's judiciary, which serves merely as "an appendage of executive authority."<sup>2</sup>

### **A. THE INDEPENDENT AND IMPARTIAL JUDICIARY: THE FOUNDATION FOR THE RULE OF LAW**

In the realm of human development, one of the core principles and drivers of economic growth, political modernization and the protection of human rights is the rule of law -- a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions.<sup>3</sup> In the most basic sense, it is a system that protects the rights of citizens from arbitrary and abusive use of government power and has the effect of furthering democracy.<sup>4</sup>

Since its inception, the SPDC promised to usher in a functioning democracy, including an August 2003 announcement of a seven-step road map towards a democratic transition. Thus, it had a duty to establish and promote the rule of law as an indispensable part of its legal-political system. Indeed, as a state party to the Geneva Conventions and as a UN member state, the government in Burma has had an ongoing international legal obligation to protect its civilians by, among other things, a politically independent and impartial judiciary, an institution which is crucial to the establishment of the rule of law.<sup>5</sup> It is necessary for resolving disputes among citizens as well as between citizens and the government in an unbiased, transparent, predictable and interpretive methodology.<sup>6</sup> Political independence is achieved through the separation of powers, which ensures that the courts are respected by all parties to the dispute, especially by the government itself.



## B. A BRIEF BACKGROUND OF BURMA'S JUDICIARY

### 1947 Constitution and Burma's Judiciary

With independence of Burma, 1947 constitution came into force and that was landmark in Burma's journey to democracy. The Judicial system was based on Common Law tradition. The Union Judiciary Act<sup>7</sup> governed the judiciary. The main difference was the establishment of the Supreme Court, as the Highest Court of the land. It was the Court of final appeals but the feature of the system was that it was vested with powers to enforce fundamental rights guaranteed in the constitution. Burma's Judiciary then was independent and impartial and separation of powers was practiced.<sup>8</sup>

### 1974 Constitution and Burma's Judiciary

In the aftermath of the 1962 military coup, the judiciary lost its independence. Then the military regime applied 1974 constitution and people's judicial system was created.<sup>9</sup> Accordingly, separation of powers was no longer practiced in accordance with the constitution.<sup>10</sup>

### Burma's Judiciary after 1988 Military Coup

Following the 1988 popular democratic uprisings, the military staged a coup again in September 18, 1988. Then, the Constitution was abolished and judiciary has been instituted under its total control. Judiciary Law 5/2000 (the "Judiciary Law"), implemented by the SPDC in 2000, provides the framework for the current legal system. Although under the Judiciary Law the judiciary is charged with "administering justice *independently* according to law," (emphasis added),<sup>11</sup> the Judiciary Law undermines, if not eliminates, the separation of powers and leaves the civil society in Burma with no legitimate means of challenging the executive authority.

### Burma's Judiciary and Independence Issue

From judicial aspect, "independence" issue has never been placed for debate in any public meeting or media or law schools or otherwise. Particularly, 'independence from executive' is an untouchable topic for all legal communities and academicians who are knowledgeable, while it is unfamiliar with the general public who do not have enough knowledge on judicial norms. The principle, "Administering justice *independently* according to law," provided not only in Judiciary Law 2000 but also in Article 19(a) of the 2008 Constitution<sup>12</sup>, does not actually guarantee institutional independence of judiciary. In today's Burma, judiciary does not exist as an independent institution, while the judicial proceedings themselves are also not independent in practice.



## The Judiciary Law 2000

The Judiciary Law 2000 has no provision for how judges are to be appointed, how they can be removed, or their conditions of service. These matters are not provided in any other current law or constitution in Burma, and so are left to the military's discretion. All appointments and dismissal were made only at the whim of ruling junta freely without publicizing any ground, consulting with the legal community, and receiving any suggestion from elected representatives. The current Chief Justice was appointed by the military in 1998. This was done by a military decree, which also effectively dismissed over 60 judges. On November 14, 1998, the SPDC "permitted to retire" to five, out of six judges in the Supreme Court, without providing any reason for their resignations and the vacant positions were replaced with four judges. The possibility of 80% of the Supreme Court judiciary simultaneously retiring is so unlikely that the event raises questions as to the independence and autonomy of Burma's judiciary.

Then, on July 1999, another six judges were added<sup>13</sup> and then total number of Supreme Court judges was eleven. Since then on, no news was officially released by the junta that any one or more of Supreme Court judges were dismissed or forced to resign repeatedly. After that, in February 2003, more five judges were appointed and as such total number of Supreme Court judges was 16. It was against the existing Judicial Law 2000; because, total number of Supreme Court judges to be appointed in total is twelve. All the processes for appointment and dismissal of Supreme Court are done at the whim of junta. The term "judicial tenure" is mockery for the current judiciary in Burma. Furthermore, there is no judges' association to protect the security of judicial tenure.

It is clear that the military regime has no tolerance for independent judges. Judges that seek to perform their judicial duties as impartial adjudicators cognizant of the democratic separation of powers are typically dismissed while others bow to pressure from the military to retain their appointments. As to the removal of judges at lower levels, it is difficult for international observers to know how bad the situation is, as this information is kept from the international community.

### **C. The SPDC Uses The Judiciary To Deprive Citizens of A Rights To A FAIR TRIAL IN ORDER TO SUPPRESS POLITICAL DISSENT**

The Universal Declaration of Human Rights (1948) recognizes that:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." (Article - 10)

The SPDC currently uses the judiciary as a means of suppressing political dissent. Indeed, in a crackdown that started in October 2008, Burma's courts have



sentenced over 200 political and labor activists, internet bloggers, journalists, and Buddhist monks and nuns to lengthy jail terms.<sup>14</sup> In 2009, the judiciary sentenced four political activists for the alleged “crimes” of wearing white clothes, calling for Buddhist prayers and organizing a letter-writing campaign to inform the generals of the plight of the people. As a result of their humanitarian actions, the activists had been tortured, spent a year of detention without charge, without access to family and lawyers, had a trial without representation (their lawyers were imprisoned for contempt for trying to represent them) and were sentenced for hundreds of years of imprisonment for their supposed crimes. They are representative of thousands of other prisoners wrongfully and inhumanely detained by the Burmese junta.<sup>15</sup>

### **Judges Must Enforce SPDC Directives, Including Discriminatory Laws**

In many instances, military authorities dictate verdicts in political cases, regardless of the evidence or the law. In addition, the existence of unjust laws -- enacted to deprive citizens of universally recognized rights -- further restricts the judiciary’s independence, because judges are required to interpret these laws in line with the military dictates by using fabricated evidence.

One such law is the 1975 State Protection Law, which allows the military to preemptively arrest and charge people for crimes that may “endanger the sovereignty and security of the state or public peace and tranquility”—even if they have not yet been committed. This provision has been frequently used by the courts to imprison political opponents of the military junta. For example, the renowned National League for Democracy (“NLD”) leader and Nobel Peace Prize laureate Suu Kyi was jailed in May 2003 under this arbitrary provision.

Another example is the 2004 Electronic Transaction Law, the purported aims of which are to support modernization, increase opportunities for development in various social sectors, and enable communication with international organizations, regional organizations, foreign countries, government departments. In reality, this law was promulgated by the SPDC in order to charge and sentence political opponents of the military. Specifically, Section 33 of this law outlines “Offences and Penalties” for the misuse of electronic transaction technology including:

- (a) doing any act detrimental to the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture;
- (b) receiving or sending and distributing any information relating to secrets of the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture.<sup>16</sup>



The utilization of the above provisions to prosecute political activists who simply use the internet or mobile phones has become routine. Recently, a supposed violation of this law was used to sentence prominent pro-democracy leader Min Ko Naing, Chairperson of the All Burma Federation of Student Unions and 88 Generation Students group, and nearly forty other dissidents to sixty-five years in prison.<sup>17</sup> Similarly, in early January 2009, NLD Chairman Min Aung was sentenced to an additional 15 years of prison under the same act.<sup>18</sup>

Under Section 505(b) of the archaic Burmese Penal Code, people can be charged for any statement, rumor, or report made “with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility”.<sup>19</sup> The junta has used this law to repress and punish those taking part in free expression, peaceful demonstrations, and forming organizations.<sup>20</sup> Most notably, Section 505(b) was used in-part to charge U Gambira, leader of the All Burma Monks’ Alliance and key activist in the 2007 Saffron Revolution – a peaceful protest -- with a total of 68 years in prison.<sup>21</sup>

### **Legal Counsel Can’t Perform Adequately**

In a well-functioning legal system established under the rule of law, “there must be a recognized, organized and independent legal profession, which is legally empowered and willing to provide legal services.”<sup>22</sup>

Under the SPDC, lawyers, like judges, do not enjoy effective freedom to perform their professional functions. There have been numerous instances of the military intimidating and harassing lawyers, including detaining, arresting and prosecuting a lawyer, or revoking his license on suspicion of his involvement in a politically motivated case. For example, lawyer Saw Kyaw Kyaw Min had been defending 11 clients, all members of the NLD. In late October 2008, a Rangoon court sentenced him to six months in prison under Section 228 of the Burmese Penal Code for contempt of court, forcing him to first spend weeks in hiding and then flee to Thailand. According to the Human Rights Watch report, Saw Kyaw Kyaw's punishment was for failure to instruct his clients, on the judge's order, to turn around after his clients turned their backs on the judge to protest the unfair way were being questioned by the prosecution. The report further stated that three other lawyers - Nyi Nyi Htwe, U Aung Thein, and U Khin Maung Shein - were arrested and sentenced to terms of four to six months in prison on the same charges.<sup>23</sup>

Particularly shocking is the SPDC's record on retribution involving courageous attorneys who represent victims who suffered human rights abuses at the hands of members of the military, including sexual misconduct, forced labor and child soldiering. Often lawyers are threatened and even arrested for simply taking on



such cases. In one such case, on January 19, 2009, lawyer Pho Phyu, who has represented political activists in the past, was arrested shortly after his dismissal by the authorities as defense lawyer for labor activists who were arrested after reporting a case of forced labor by local authorities to the International Labor Organization (“ILO”). 24

During court proceedings, defense attorneys are usually forced to play a largely symbolic and sinister role in the administration of justice. Although they are permitted to call and cross-examine witnesses, their task is usually limited to striking a deal with the judge to obtain a lenient sentence for their client, often through state-sanctioned bribes. Lawyers who are not prepared to participate in the corrupt court system by paying bribes risk prosecution under the Contempt of Court Act for their alleged improper attitude towards the judges.

### **Due Process and Fair Trial Guarantees Are Ignored in Practice**

Principle 2 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states:

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.<sup>25</sup>

Under the SPDC and SLORC’s rule in Burma, however, these important principles of the rule of law are consistently ignored. Although there are concrete procedures for arrest and detention contained in the Burmese Criminal Procedure Code, these are frequently not followed in practice. The arrest and pre-trial detention process often includes arbitrary arrest by military personnel; prolonged interrogation accompanied by torture and ill-treatment; incommunicado pre-trial detention, and the denial of access to lawyers, families, and adequate medical care.

This pattern is particularly evident where persons are arrested on political grounds. Political prisoners are routinely held for periods longer than 24 hours without a warrant or special order from a magistrate, and do not have the opportunity to challenge the lawfulness of their detention before a court. It is common for suspects and detainees to receive no information concerning the charges against them or the legal provisions under which they are brought.

As stated previously, the unlawful detention process often involves the victims’ inability to challenge the legality of their detention with proper legal advice, even though the Judiciary Law Chapter IV, Article 5(f) states that the administration of justice in Burma will be based, in part, on “guaranteeing in all cases the right of defense.” For example, throughout the case of Suu Kyi lawyers are often



denied access to courtrooms, and in the case of human rights defender U Myint Aye and two co-accused, who were sentenced to life imprisonment for an alleged bombing plot, the first defendant was not represented in court despite his attempts to have a lawyer. His original counsel was also charged and imprisoned in a separate case. 26

Even in circumstances where detainees are permitted to contact a lawyer, widespread poverty and the absence of an effective legal aid system renders this right meaningless in practice. Thus, there is no right to a lawyer in Burma's judicial system, and accused people are rarely able to obtain their advice and services before or during trial.

### **Prosecutors Are An Extension Of The Military Regime**

Violations of universally recognized tenets of criminal law and procedure continue during the conduct of criminal trials. In each trial, the state's case is made by a public prosecutor, a lawyer employed by the state. According to the international standards, a prosecutor must maintain some degree of independence from the governmental apparatus, properly investigate and conduct their functions impartially and without discrimination, and see to it that violations of the law, which do not result in complaining victims, can be brought before the courts.<sup>27</sup>

This is clearly not the case under the rule of the SPDC. The prosecutor is not accountable to any ethical or professional standards; thus, he has the power to decide not to prosecute cases, no matter how awful the crime or clear the evidence that it occurred as charged, especially if the potential case will shed an unfavorable light on the government. At trial, the prosecutor has the power to exclude favorable evidence and witnesses in cases where the state wants to protect the accused member of the military. During criminal trials, many people accused of crimes in Burma reported that they were not allowed to call key witnesses to testify on their behalf. Indeed, in the case of Suu Kyi, the Court allowed only one defense witness. By contrast, the prosecution presented 17. Similarly, in the case of against U Tin Min Htut, who was accused of writing a letter to the United Nations Secretary General in which he criticized the government, a line of police testified for the prosecution but the defendant was unable to present witnesses.<sup>28</sup> .

Thus, the manipulation or disregard of the procedural law in criminal prosecution in Burma renders the international and local requirements for due process meaningless.

Currently in Burma, the police, an important institution to operate a criminal justice system and to support the smooth function of an independent judiciary,



have lost its image to stand as a neutral body that treats everyone the same. The whole police institution has been dominated by ex-army and army personnel in its leading role. Police are totally subservient to the military. They dare not take action against the military personnel who commit crime over civilian people.

#### **D. POLICE: A TOOL FOR OPPRESSION**

Burma Police Manual, Article 1056, provides that the police are obligated to build a cordial and cooperative relationship with the citizenry. They must work together with the people to create a secure society. It is clear that under this Article, the police must not presume that they are somehow superior to ordinary people. Their relationship is not one of master and servant, or shepherd and sheep. Unfortunately, the current situation in Burma is not consistent with Article 1056. Rather than the collaboration called for in the Manual, many police officers impose their view of law enforcement upon the citizens without receiving any community input. This results in unsafe communities where the police have an adversary relationship with the community members.

Burma Police Manual, Article 1060, provides that police officers cannot have other jobs. Accordingly, any breach of this provision constitutes a criminal offence, punishable three months imprisonment or fine, not more than the amount of three months salaries, or both. This Article seeks to ensure the independence and neutrality of the police force by requiring officers to serve only one master. The current chief of the Burma police, Brigadier Khin Yi, is violating Article 1060. In addition to his police post, he is also a Brigadier in the army. He must either resign as chief of police or resign from the army. Other countries, even military governments such as Thailand's, respect the independence of the police. After the recent coup in Thailand, no military official took over the top police position.

Pursuant to Section 32 of Police Act and Section 38 of Rangoon Police Act, any Magistrate or District Superintendent or Assistant or Deputy Superintendent of Police, or Inspector or officer in charge of a police-station, may stop any procession or public assemblies for maintenance of law and order. Nevertheless, it can happen only when the concerned people violate the conditions of a license granted under Section 31(3) of Police Act and Section 37(3) of Rangoon Police Act. As the police did not allow application processes for licensees to this end contrary to provisions in Police Act, any public procession or assembly shall not be deemed to be an unlawful assembly. As such, any arrest of peaceful demonstrators is unlawful.

The Chapter V of the Code of Criminal Procedures, which is the effective national law in Burma, provides how arrest can be made. Accordingly, arrest without warrant or without an order from a Magistrate can be made for suspects categorized in section 54 of that law. Arrest of innocent civilian who par-



anticipated in peaceful demonstration, took place in Rangoon on April 22, 2007 was unlawful as it was not in accordance with provisions enshrined in the section 54 of the Code of Criminal Procedure. Ensuring full compliance with the instructions of the military officials, the police wearing civilian suits made such unlawful arrests.

Burma Police Manual, Article 1142, Chapter 48, Part 1, states that all police must wear their police uniforms while on duty (with exceptions made for positions such as undercover detectives). Brigadier Khin Yi violates this provision of the Manual as well. He always wears his military uniform, even when he is serving the police force. Anyone who sees him knows that he is under the thumb of the SPDC military regime. He wholly lacks the neutrality and independence so important for a police officer, and even worse, the police chief. This master-servant relationship between the SPDC and the Burma police force undermines both the dignity of the profession and the trust that the people have for the police. Understandably, the people of Burma cannot trust a police force that is simply a pawn for the military junta. As such, current position of police in society does not facilitate the emergence and functioning of independent and competent judicial system in Burma. Similar situation will remain the same as the SPDC's 2008 Constitution does not address this crucial issue relevant to police.

#### **E. VICTIMS PROSECUTED OR INTIMIDATED BUT PERPETRATORS NOT PUNISHED**

As part of its ongoing campaign to cover up the military's human rights violations, the government actively discourages complaints regarding military abuses by retaliating against anyone who speaks up through victim intimidation tactics, including threatening and/or prosecuting victims and witnesses. There is a firmly ingrained culture of impunity for heinous crimes committed by members of the military under the direction or blind eye of the SPDC and the intimidation and prosecution of victims leaves them without recourse and, even more disturbingly, punishes them for the violence they have already suffered.

The commission of heinous crimes and culture of impunity have been most severe in rural ethnic areas and are related to activities surrounding ongoing armed conflict.<sup>29</sup> For example, Burmese women's organizations have documented 875 cases of rape from 1988 to 2006 and believe that number is a mere fraction of the total number because of the difficulty in accessing communities under SPDC control and the fear and stigma that keeps women and girls from reporting rape. Many times rape victims have been imprisoned and tortured after making formal complaints or bringing their story to the press.<sup>30</sup>

Similar patterns have been observed in the cases of forced labor and child soldiering in Burma. The government does not appear to have applied the penal



code of military regulations in any child soldiering cases, which could have resulted in imprisonment. Thousands, if not tens of thousands, of child soldiers are believed to be serving in the army; their parents are often silent because reporting these cases to the authorities is often counter-productive. When a researcher for an international organization asked a community leader whether parents report their children's forced conscription into the army, the man responded that it was too dangerous because local authorities would punish the parents, and the ILO and the UN would be powerless to protect them.<sup>31</sup>

Thus, the authorities continue to maintain a culture of impunity not only by restricting access to complaints mechanisms, but by harassing and taking legal action against those who bring complaints against the military.

#### **F. THE ROLE OF THE JUDICIARY WILL REMAIN THE SAME**

As a result of the continued domination by the military, the Burmese judicial system will continue to lack powers afforded to its counterparts in liberal democracies. Similar to the language of the Judiciary Law, the language of the new constitution will remain hollow in light of the unfavorable context for its implementation. The 2008 Constitution proposed to adhere to the following judicial principles:

- (a) to administer justice independently according to law;
- (b) to dispense justice in open court unless otherwise prohibited by law;
- (c) to guarantee in all cases the right of defense and the right of appeal under law.

Considering that the Judiciary Law of 2000 had language which was almost identical to the provisions above, it is reasonable to assume that without the proper separation and balance of powers, judicial independence and impartiality will remain nonexistent.<sup>32</sup> This is especially true in light of the fact that many of the oppressive laws that have been passed by the SPDC used to detain thousands of political activists who oppose the regime will remain – as operative and potent weapons of persecution -- in the same hands. Since the 2004 Electronic Transaction Law and the 1975 State Protection Law are not contrary to the Constitution, they will remain in operation and will continue to bound judges to their application to prosecute and sentence political dissidents.<sup>33</sup>

Furthermore, pursuant to the Constitution, the Supreme Court, the highest judicial body in Burma, will be prohibited from interpreting the legality of the constitution, which is a necessary check to the executive and legislative branches in functioning democracies. <sup>34</sup> This omission renders “rule of law” obsolete.



## **The Judiciary Will Remain a Non-independent Tool**

Burma's 2008 Constitution ensures that the judiciary will remain a non-independent tool of the government. The articles of the Constitution that relate to the appointment and removal of judges indicate that the President will have excessive control over the make-up of the Supreme Court. The Constitution states that the President will nominate individuals for the positions on the Supreme Court, High Courts of Regions and States, and the Constitutional Tribunal of the Union.<sup>35</sup> The article then instructs the Union Assembly (Pyidaungsu Hluttaw), similar to Parliament, to approve of the President's nominees.<sup>36</sup> While many developed democracies allow the President to make such nominations, the Constitution takes a marked departure from international norms by declaring that the Parliament must approve a given nominee unless he or she fails basic qualifications. The Constitution effectively eliminates the check Parliament would have over the President regarding judicial nominations and grants the President exclusive control over the composition of the country's courts, including its Supreme Court. The Constitution lets the President's power over the judiciary seep through all the levels of the country's courts.

## **The Impeachment Practice Will Remain the Same**

The impeachment provisions in the Constitution are also problematic. They allow for impeachment by the President or Parliament for vague reasons including "inefficient discharge of duties."<sup>37</sup> The President of the Parliament can wield such a vague phrase to impeach judges who appear unfavorable to the government. Another ground for impeachment of judges at the Supreme Court, High Courts of Regions and States, and the Constitutional Tribunal of the Union is a lack of loyalty to the Union.<sup>38</sup> The President or Parliament presumably would have the ability to decide whether a judge was demonstrating a lack of loyalty to the state. This part of the Constitution allows the President and Parliament to remove judges who appear to depart from the leadership's agenda. The 2008 Constitution therefore allows the executive and legislative branches to unduly interfere with the composition of the judiciary. No Constitutional provision exists to limit such interference. Judges in this system would remain forever under the watch of the President and Parliament, unable to make decisions that depart from their policies.

## **Lack of Judicial Tenure Will Remain the Same**

In a number of democratic countries, judges at the high levels of the judiciary are nominated for life. Life tenure allows judges to make decisions without concern of falling under political disfavor. Judges in such a system are independent from other branches of government. The ability of the President and Parliament to remove judges for vaguely defined reasons effectively denies judges



life tenure. The Constitution also includes strict age limits on judges at the Supreme Court and High Courts of the Region and State which keep term lengths to a maximum of 20 years.<sup>39</sup> Judges nominated to the Constitutional Tribunal of the Union are limited to five-year terms.<sup>40</sup> Even if there were no interference by the executive or legislative branch, judges still would be denied life tenure even at the highest levels of the judiciary.

### **The Executive's Control Will Remain the Same**

The Constitution will allow the President ultimate control over the nation's judicial system at all levels. The executive would have the power not only to install favorable individuals in judicial positions but would also have the ability to remove such individuals at whim. Such a system does not allow the courts to promote human rights and the rule of law. Judges under the design of the 2008 Constitution will remain under the control of the government and will not be able to exercise their obligation to fairly seek justice.

### **Financial Control Will Remain the Same**

The judicial sector is not financially independent from the executive. The Constitution calls for a financial commission that would be led by the President and other members of the executive branch.<sup>41</sup> This commission would provide funding to the judicial sector. Because the executive would control the financing of the judiciary, the President could determine whether courts have the adequate resources to protect human rights and the rule of law. Under the Constitution, the executive could seemingly decide to underfund courts so that they are unable to fulfill the rights of citizens.

### **Denial of Public Hearing Will Remain the Same**

A constitution should protect the fundamental rights and freedoms of the people. One of these fundamental rights is the right to a public trial – one of the hallmarks of free judicial systems around the globe. Public trials deter inappropriate behavior on the part of the court, maintain public confidence in the judicial system, allows the public to know that justice is being administered fairly, and allows accurate reporting of court proceedings.<sup>42</sup> Such openness protects the accused in criminal trials by ensuring that the court proceedings are fair and allow the free dissemination of information to the public. Courts often have the ability to keep trials private if a public trial would be detrimental to the ends of justice.

Burma's criminal law provides for public trial in most situations. Section 352 of the Code of Criminal Procedure describes the situations in which a trial can be shielded from the public, which include if it is necessary to protect minors, secret technical processes, rape victims, matters related to national security, other



witnesses, or future prosecutions. However, the law does not prohibit the existence of a trial held where the public cannot have easy access. In Burma, under the rule of the military regime, a large number of trials were held in the campus of prison or jail where the public hesitates to visit.

One notable example is the trial of democracy leaders Min Ko Naing, Ko Ko Gyi and others, leaders of the 1988 uprising after they were arrested with numerous others in August 2007 during a protest march.<sup>43</sup> The demand of the student leaders for public trial then was rejected by the court. Although human rights groups argued for their trial to be public, the courts conducted the trial outside of the public watch.<sup>44</sup> In situations such as this, judges can convict and sentence opposition leaders behind closed doors upon instructions from the junta to oppress its political opponents.

The lack of public trials has serious consequences for Burma's judiciary.<sup>45</sup> When courts hear politically motivated cases outside of the public view, the junta has immense control in the outcome of the case. Civil society groups are unable to check whether the trial is fairly adjudicated. Information that comes out from the trial is limited to the official decision; independent actors are rendered unable to give opinions about the trial. The lack of public trials allows the junta to be the sole source of information about what happened at a given judicial proceeding. Keeping trials out of the public view is a mechanism through which the authorities can use the court system to control the population.

The SPDC's 2008 Constitution will not bring about a change in the status quo. There is no right to public trial enshrined in the 2008 Constitution, which signifies that closed trials will continue to mark Burma's legal system in the future. After the implementation of the Constitution in the upcoming elections, in politically motivated cases, closed trials will remain permanent figures in Burma's legal system.

### **The Judiciary Will Remain Silent with Regards to the Conduct of the Military**

According to the new Constitution, the "Defense Services has the right to independently administer and adjudicate all affairs of the armed forces."<sup>46</sup> Therefore, the judiciary, including the Supreme Court, will not have jurisdiction over military justice, which is handled by a system of court martial, in which the commander-in-chief has the power of a unilateral decision which is "final and conclusive."<sup>47</sup> Due to the regimented and hierarchical organization of military command, and the subordination of military judges to superiors, the formation of such a court lacks the necessary standards of independence and impartiality.<sup>48</sup> Indeed, the establishment of separate military tribunals denies access to courts for victims of atrocities committed at the hands of the military under the direct



command of the Commander-in-Chief of the Defense Services, who has been and will be a member of the SPDC.<sup>49</sup> Interestingly, the Constitution fails to account for the fact that the Commander-in-Chief can himself be guilty of civil and even criminal misconduct; failing to provide for any removal mechanisms should any such conduct come to light.

The lack of any appellate jurisdiction by any civilian judicial authority runs counter to the practices of democratic countries governed by the rule of law. In the United Kingdom, for example, although all military forces are subject to the jurisdiction of military courts, the elaborate appeals process permits appeals from Court Martial courts to be made to The Court Martial Appeal Court, made up mostly of judges from the civilian Court of Appeal for England and Wales, and subsequently to the Supreme Court of the United Kingdom – the court of final appellate jurisdiction for all courts, military and civilian alike.<sup>50</sup> The same is true in the United States; after all appeals in the military courts have been exhausted, the Supreme Court is the final authority on issues of law arising out of any subordinate military court. According to the Indian Army Act, army courts can try personnel for all kinds of offences except for murder and rape of a civilian, which are tried by civil courts.<sup>51</sup> Finally, in some countries, such as Germany and France, court martial does not exist during the time of peace and civilian courts are used exclusively even in matters involving those respective countries' military forces.<sup>52</sup>

Not only does the current model deviate from the military court laws of established democracies, it even contradicts the law in place in Burma under the 1959 Army Act. Specifically, that law gave the Chief Justice of the Supreme Court the power to form an appellate court, comprised of justices of the Supreme Court, certain army officials and legal academicians not affiliated with the government, in order to adjudicate cases involving the military.<sup>53</sup> Unfortunately, this essence of sensible legislation will be permanently repealed so long as the 2008 Constitution is effective.

## **G. THE CURRENT STATUS OF JUDICIARY IN BURMA AND 2008 CONSTITUTION**

Burma's judiciary has been unable and unwilling to deal with rampant, systematic and heinous human rights violations taking place on Burma's soil under the auspices of those regimes. Judicial independence and impartiality remain nonexistent.<sup>54</sup> The courts, through SPDC directives, serve mainly to oppress political opponents and ethnic minorities. Judges and lawyers are unable to perform their professional functions impartially for fear of reprisals, should they be identified as opponents of the regime. Due process and fair trial guarantees are ignored in practice and procedures for arrest and detention are frequently violated, particularly where persons are arrested on political grounds.



Although it purports to institute a system of checks and balances, including an independent judiciary, the new Constitution will only serve to further human rights violations and render the judiciary impotent by: entrenching the present military regime and giving it unfettered powers to conduct its own affairs unchecked by the judiciary; giving the SPDC (or its successor) unabridged powers during so-called states of emergency, including the right to strip individuals of constitutionally guaranteed protections in the 2008 Constitution; providing amnesty for the criminal regime, thus keeping thousands of victims away from any domestic recourse; and requiring judges to continue enforcing other existing laws that conflict with democratic principles and have been used by the regime to commit human rights violations.

As fourth core human rights element, Mr. Tomas Ojea Quintana, UN Special Rapporteur on the situation of human rights in Myanmar, provided recommendations for judiciary in September 2008, as follows: 55

- (a) Exercise full independence and impartiality, particularly in cases involving prisoners of conscience;
- (b) Guaranteeing due process of law, including public hearings, in trials against prisoners of conscience;
- (c) Refraining charging individuals for alleged infringement of national laws which are under review according to recommendation No. 1;
- (d) Establishing effective judicial mechanisms to investigate human rights abuses in order to fight impunity;
- (e) Seeking international technical assistance with a view to establishing an independent and impartial judiciary that is consistent with international standards and principles.

However, unfortunately, a single recommendation has not yet been met given that the military regime ignores them evidently.

## **H. CONCLUSION**

If there is one thing that's clear from the 2008 Constitution, which is a product of a discriminatory, criminal regime, it is that it will do next to nothing in the way of implementation of the Rule of Law in Burma. From the above analysis it will appear that the striking feature of the existing Judiciary in Burma is its mockery of justice. In order to transform Burma into a democratic, peaceful nation, the Rule of Law must be established, comporting with the paramount principles of the Separation of Powers and Independence of the Judiciary. Two things need to happen to reach that lofty goal. One, there must be a new Constitution, written with the participation of and accepted by all politically viable parties, that guarantees the separation of powers, the independence of the judiciary and which facilitates the enactment of judicial laws, and which protects and promotes the rule of law based on democratic principles. Second, there must be a



government that promotes the rule of law and respects international law and the constitution which it adopts. Thus, the SPDC's 2008 Constitution must be revised before the elections in 2010 and the following period are convened in order to account for the above criticisms.

### (Endnotes)

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- 1 The Asian Legal Resource Center, "*BURMA: Institutionalized denial of fundamental rights and the 2008 Constitution of Myanmar* Asian Legal Resource Centre (ALRC)," September 1, 2009.
- 2 *Id.*
- 3 See e.g. "What is the Rule of Law?" The University of Iowa Center for International Finance and Development, by Helen Yu and Alison Guernsey; Stephenson, Matthew. "Rule of Law as a Goal of Development Policy," World Bank Research (2008).
- 4 R. Rigobon & D. Rodrik, 'Rule of Law, Democracy, Openness, and Income: Estimating the Interrelationships', NBER Working Paper No. W10750 (September 2004).
- 5 See e.g. "*The Rule of Law Inventory Report*," Hague Institute for the Internationalisation of Law (HiIL), Hague Academic Coalition (2007-04-20).
- 6 "*The Rule of Law Inventory Report*," at Pg. 17.
- 7 The Union Judiciary Act 1948; Burma Code Volume 1, Page 191.
- 8 Union Judiciary, Chapter 8 of the 1947 Constitution, Page 35.
- 9 1974 Constitution, Chapter 7, Page 49.
- 10 Article 73 (d), 79, and 109 of the 1974 Constitution
- 11 Judiciary Law, 2000, The State Peace and Development Council Law No. 5/2000, 27 June 2000, Chapter II, Article 2.
- 12 The report of the UN Special Rapporteur on the situation of human rights in Myanmar, Tomas Ojea Quintana, 5 September 2008; P. 21, para 104, "The new Constitution, if correctly interpreted, provides for due process of law and for an independent and impartial judiciary (Article 19)."
- 13 SPDC Order No 3/99 issued on July 8, 1999.
- 14 "*Human Rights Watch, Burma: Lawyer's Testimony Highlights Distorted Justice*," 16 December 2008, available at: <http://www.unhcr.org/refworld/docid/494b62ea26.html> [accessed 2 February 2010].
- 15 "*Human Rights Watch, Burma: Lawyer's Testimony Highlights Distorted Justice*."
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- 17 '*Min Ko Naing & "88 Generation Students" Given 65 Years*' Mizzima (15 November 2008) <<http://www.mizzima.com/news/inside-burma/1307-min-ko-naing-a-88-generation-students-given-65-years.html>> .
- 18 "*Taungnugok NLD chair's jail term extended by 15 years*," DVB (5 January 2009) <<http://english.dvb.no/news.php?id=2062>>
- 19 The Penal Code (1860), Section 505(b).
- 20 Human Rights Watch '*2100 by 2010: Free Burma's Political Prisoners*' Human Rights Watch (16 August 2009) <<http://www.hrw.org/en/free-burmas-prisoners/background>> accessed on 2 November 2009.
- 21 '*U Gambira to Serve Total of 68 Years in Prison*' Mizzima (21 November 2008) <<http://www.mizzima.com/news/inside-burma/1343-u-gambira-to-serve-total-of-68-years-in-prison.html>> accessed on 10 November 2009.
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- 24 "*Lawyer Pho Phyu arrested*," DVB, Jan. 19, 2009, <[http://english.dvb.no/print\\_news.php?id=2111](http://english.dvb.no/print_news.php?id=2111)> accessed on February 2, 2010.



25 See e.g. The Asian Legal Resource Center, “*BURMA: Institutionalized denial of fundamental rights and the 2008 Constitution of Myanmar Asian Legal Resource Centre (ALRC)*,” September 1, 2009.

26 “*The Rule of Law Inventory Report*,” at Pgs. 16-17.

27 The Asian Legal Resource Center, “*BURMA: Institutionalized denial of fundamental rights and the 2008 Constitution of Myanmar Asian Legal Resource Centre (ALRC)*,” September 1, 2009.

28 “*Impunity Prolonged: Burma and its 2008 Constitution*,” International Center for Transitional Justice (September 2009), Pg. 17.

29 *Id.* at Pgs. 11-14, 29.

30 *Id.* at Pg. 28.

31 UNHRC ‘Human Rights Situations that Require the Council’s Attention, Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana’ (2009) UN Doc A/HRC/10/19.

32 Constitution of the Republic of the Union of Myanmar (2008), Article 446.

33 Constitution of the Republic of the Union of Myanmar (2008), Article 295.

34 Constitution of the Union of Myanmar, art. 299(c)(i), 308(b)(i), 327.

35 *Id.*, art. 299(c)(ii), 308(b)(ii), 328.

36 *Id.*, art. 302, 311, 334.

37 *Id.*, art. 301, 310, 333.

38 *Id.*, art. 301 (listing qualifications for judges at the Supreme Court), art. 310 (listing qualifications for judges at the High Courts of Regions and States).

39 *Id.*, art. 335.

40 *Id.*, art. 229, 230.

41 See U Aung Htoo, *The Status of Trials in Burma: A Brief Analysis from the Fair Trial Perspective*, available at <http://www.ncgub.net/NCGUB/articlec21a.html?story=20081124133256315>.

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43 See Min Lwin, *88 Generation Students Go On Trial, Irrawaddy*, 3 Sept. 2008, [http://www.irrawaddy.org/article.php?art\\_id=14169](http://www.irrawaddy.org/article.php?art_id=14169).

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46 Constitution of the Republic of the Union of Myanmar (2008), Article 319.

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50 *Id.*

51 “What is Court Martial?” January 29, 2010, [www.ndtv.com/news/India](http://www.ndtv.com/news/India)

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54 *The report of the UN Special Rapporteur on the situation of human rights in Myanmar, Tomas Ojea Quintana, 5 September 2008; P. 21, para 105.*

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