



# THE NEW REGIME'S JUDICIARY UNDER THE 2008 CONSTITUTION

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Chapter 6 of the 2008 Constitution of Myanmar addresses the judiciary and outlines the formation of the courts. There are three types of courts created under the Constitution, namely the Union Supreme Court with its lower domestic courts, the Military Court and the Constitutional Tribunal. The Supreme Court has no jurisdiction over the Constitutional or Military Courts. The three institutions are independent of one another but, ironically, the Constitution states that the Supreme Court is the highest court of the Union. Matters in the Military Court or Constitutional Tribunal cannot be referred to the Supreme Court, so it is patently wrong to say that it is the highest court. This lack of authority is made clearer in Article 295 which sets out the disputes the Supreme Court can handle, including appellate/provisional jurisdiction and other original judicial powers that are vested in the Supreme Court. Thus, the presentation of the Supreme Court as a high court equivalent to that of other countries is misleading since most foreign supreme courts do not have such limitations. Referring to the Supreme Court as the highest court in the Union is appropriate only in relation to its ability to issue enumerated writs and act as a court of final appeal for domestic legal matters.

Section 295(b) of the 2008 Constitution states that the Union Supreme Court is the highest appellate court of the Union. No appeal is available from the Military Courts or Constitutional Tribunal to the Supreme Court. Hence Section 295(b) is also misleading. Article 298 states that the Chief Justice may present information regarding the judiciary to the Parliament. According to Articles 299(ii)-(iv), the Chief Justice and other Supreme Court Judges will be nominated by the President. This effectively means that the executive controls the judiciary, violating the cherished principle of judicial independence.



When reading the constitution as a whole, it becomes apparent that the domination of the military is supreme and the judiciary is a mere arm of the political system under the shadow of military domination. While some provisions give the appearance of democracy and independence, other provisions essentially nullify these principles. Authoritarianism is the hallmark of the 2008 Constitution, and the Constitution has not created a legal order in which an independent judiciary is empowered to review the legality of all official acts. Furthermore, the Constitution has not codified the separation of powers among the three branches of government.

A vital part of the transition to a constitutional democracy in Burma is the transformation of the judiciary into a fully independent branch of government. The military regime has totally undermined the principle of judicial independence in the Constitution. The Union Solidarity and Development Association (USDA) dominates political life and controls the Executive branch, national assemblies and local governments. Thus, any analysis of the relationship between the judiciary and other branches of government is largely an analysis of the USDA's attitude towards the judiciary and its belief about the role that judiciary should play. The Constitution was the product of military mind and attitude of the military to independence of judiciary is well known over three decades of its misrule.

The matter of selection of judges is intrinsically bound with judicial accountability. It is critical to the public perception of independence and impartiality which the Constitution does not provide. Basic constitutional values and the rule of law are each dimensions of the transition to democracy as are ethnic and gender justice, and judicial accountability. The appointment of judges with strong underlying values, and independence, is similarly aimed at achieving these goals.

The study of the transition of South Africa's judiciary from an apartheid regime to a democracy is pertinent and one can draw many lessons as Burma is transitioning from a military regime to a "disciplined democracy." A fundamental factor in evaluating the independence of the judiciary is the selection process of judges. In South Africa, judges are selected by the Judicial Service Commission (JSC), a constitutionally-mandated body composed of judges, practicing advocates and attorneys, academics, members of the legislative and executive branches, and presidential appointees. The diverse membership of the JSC provides a significant check and balance to the power of the executive to make such appointments. The President of South Africa, after consulting with the JSC, appoints the Chief Justice. Appointments of all judges are preceded by the consent of the JSC.



The independence of the judiciary stems from the notion of separation of powers whereby the executive, legislature and judiciary are three separate parts. Separation ensures that the executive cannot interfere with the judiciary. These basic principles are missing from the 2008 Constitution. The judiciary should decide matters impartially on the basis of facts and in accordance with law without any direct or indirect restriction, improper influence, inducement, pressure, threat or interference. The rights of parties before a court should be respected so that impartiality of the judiciary is seen to be practiced. Judges should be free to form and join association or represent their interests, to promote their professional training to protect their judicial independence. In the selection of judges there should be no discrimination. The racial and gender composition of the judiciary influences public perception of judicial independence. Ethnic nationalities must be provided with representation in the team of judges. Conditions of service and tenure are to be secured and there should be no arbitrary insecurity in judicial terms. Disciplinary proceedings, suspension and removal should only be possible with a two thirds majority of National Assembly votes and the consent of a JSC-type body is a must. The present constitution does not provide these provisions.

The role of the judiciary as guardian of the constitution ensures that the fundamental rights of citizens as stipulated in the constitution are held paramount. Rule of law is supreme when the judiciary serves as an impenetrable bulwark against the excessive assumption of power in the executive or legislative branches. The power of judicial review allows the judiciary to investigate and even invalidate acts of others that are held to be ultra vires.

Although the Constitution guarantees fundamental rights, thousands of political prisoners are languishing in jail. The Supreme Court has the inherent power to take judicial notice of illegal detention and release the person concerned. Section 296(a) states that the Supreme Court has powers to issue writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari.

As independence of judiciary is important, equally important is to free the judiciary from corruption. This is the most serious malaise for the judiciary. The Constitution does not provide an institution which can eradicate this sickness. The process of impeachment for higher court judges and disciplinary proceedings for all judges does not provide sufficient scrutiny. In spite of their existence, corruption is rampant. An independent judiciary must be formed vested with all powers of investigation, trial and punishment.

Independence of the judiciary is not the sine quo non of obtaining justice. Courts must also act according to law as understood by the judges. Unfortunately, in Burma, Judgment is given in many cases according to the bribe received. This is



partially due to the fact that the laws in Burma are archaic and outdated as most are of colonial origin. For example, a prisoner under trial will stay in jail for years as the trial drags on because provisions for bail are outdated. Accused persons cannot be granted bail. The Criminal Procedure Code, Penal Code, Evidence Act, and Civil Procedure Code our British colonial masters' gifts to the Constitution, provide for many laws but not much genuine relief. A Law Revision commission must be formed. The state of existing laws nullify whatever glamour has been put on the face of the constitution.

The judiciary under the Constitution is merely old wine in a new bottle. The 2008 Constitution has rendered the judiciary a cog in the bureaucratic machinery and justice is as elusive as ever. The pre-constitution era of the judiciary has not changed as the constitution has made no dent on it. Who will say that the present judiciary is different from the military-ruled judiciary? The vicious cycle continues. It lends truth to the contention that democracy is fake and the constitution a great fraud. In determining a nation's rank in political civilization, no test is more decisive than the degree in which justice, as defined by the law, is actually realized in its judicial administration. If this test is applied to Burma it is a sad, negative story. The role of the judiciary as a vital component of the government has for too long been ignored in Burma.

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