

## **The Dangers of Soldiers Judging Soldiers**

*Burma's Constitutional court can protect some civilians from the dangers of the Courts-martial system, if it is brave enough. But for others, there is currently no legal protection from military impunity.*

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*^Originally published in Mizzima*

A review of Burma's 2008 Constitution leaves one with the realization that the document creates a judiciary that is designed not to promote the interests of justice but rather the interests of the regime. From the Presidential appointment of Justices with only the pretense of Parliamentary approval, to the subjective and vague provisions under which Justices can be impeached and removed from office, to the Constitutional guarantees of amnesty for all manner of crimes committed by the government, there are a number of Constitutional provisions that serve to subvert the rule of law within Burma. The provisions establishing a separate system for military justice are no exception. The 2008 Constitution carves out a separate legal system for the military, beholden to no-one but the Commander-in-Chief of the military. Soldiers, the authors of the 2008 Constitution seem to believe, can only be judged by soldiers.

In fact, the recent Constitution goes the furthest of Burma's successive Constitutions in keeping the military separate from the judicial system that governs the rest of the Union. Burma's 1947 Constitution, established after the country's independence from Britain, made the Supreme Court the highest law of the land

and allowed Parliament to determine to what extent the military system could restrict the Constitutional guarantees of due process. Even the 1974 Constitution, established under General Ne Win's military dictatorship, created a Council of People's Justices which oversaw all the courts of the state, including courts of military justice. It is only in the 2008 Constitution that Burma's military courts become a system completely unto themselves. Under this Constitution, one cannot appeal outside the military to protest a decision made by the military courts. By setting itself apart from the law that governs the rest of Burma, the military also places itself above the law.

Nowhere is this more obvious than under Article 343(b) of the new Constitution, which makes the Commander-in-Chief the final authority on military justice. He can overturn the ruling of the Courts-martial, giving him the power to undo any punishment handed down by the Courts. The Commander-in-Chief, however, is not a legal professional. He does not have the requisite training, background, or even motivation to consider the demands of justice. Instead, his sole concerns are military ones. If the Commander-in-Chief determines that the needs of the Defence Forces are best served by allowing high-ranking military officers to commit all manner of crimes, there is nothing to stop him from doing so.

Similarly, Article 319, which states that the Courts-martial shall adjudicate Defence Services personnel, enables an extended military court system where civilian victims are liable to receive unfair treatment. The ranks of the military judiciary come from medium-level officers. In a dispute where the defendant is another officer, and the accuser is an enlisted man or even a civilian, the military judges will naturally be biased towards their fellow officer. While a civilian court system is primarily tasked with ensuring the interests of justice, the Courts-martial have a collection of other goals, such as the maintenance of military readiness and discipline, to consider when conducting their affairs. And while the civilian court system may be confusing for those who are not legally educated, the military justice system contains its own set of unique procedures and rules that are likely to make court proceedings seem entirely incomprehensible to civilians.

Such a situation creates dangers for groups such as military families, who under this system are vulnerable to abuse from military officers and who have no avenue for recourse but that of a military court. As a hypothetical, imagine a situation wherein a Defence Services officer attacks the relative of one of his enlisted men. The family's best chance for a fair trial lies within the civilian courts, but cases such as these will be tossed out of the civilian courts in favor of a trial before a Court-martial. As long as civilian courts are denied jurisdiction over cases like these, civilian families of military members will be forced to operate in a legal system where the odds are stacked against them.

However, there may be a way to safeguard the rights of these vulnerable groups while working within the Constitutional framework: It depends on whether the Constitutional Tribunal, Burma's highest authority for Constitutional questions, would consider the argument that crimes committed by military members who are acting in a non-military capacity can fall within the jurisdiction of the civilian courts.

There are a variety of offenses that members of the Defence Services may commit that have nothing to do with their duties as members of the military. Drug smuggling is a relevant example, as it is an open secret that the military is intimately involved with the drug trade. Imagine a case where an off-duty military officer, out of uniform, is arrested for possessing drugs. The police may not even know the suspect is a military officer when they arrest him, and yet his status as a member of the military protects him from appearing before a civilian court.

But despite the lengths the Constitution goes to in order to insulate the Courts-martial system, the document does not actually state that the Courts-martial shall be the *exclusive* adjudicator of Defence Services personnel by mere virtue of their being members of the military. The Constitutional Tribunal could determine that if members of the Defence Services are arrested for crimes that are not related to their status as military members, these crimes can fall under the jurisdiction of the civilian courts.

Such an interpretation gains strength from the words of Article 343, the article that makes the Commander-in-Chief the final authority for the Courts-martial system. Article 343 refers to "the adjudication of military justice." While military justice can be interpreted as "a system of justice dealing with members of the military," it is more appropriately interpreted as a "a system of justice dealing with military matters." The prosecution of a military man for drug smuggling has nothing to do with that man's role in the military. Similarly, an officer who engages in a domestic dispute is not acting in his capacity as an officer of the army.

Article 20 of the Constitution makes a similar statement: that the Defence Services has the right to independently administer and adjudicate all affairs of the armed forces. Presumably, this includes judicial affairs. But drug smuggling is not an armed forces affair, even if it is practiced by members of the armed forces.

The Constitution also declares, in Article 294, that the authority of the Supreme Court cannot infringe on the powers of the Courts-martial. However, questions

over jurisdiction are separate from questions of authority. To put it another way, deciding when cases go to a certain court is different from determining the hierarchical relationship between courts. Although the Constitutional Tribunal's ruling would affect whether individual cases would end up in a Court-martial or a civilian court, the ruling would not affect the Courts-martial's ability to exercise control over its own affairs.

For a public-spirited lawyer or judge, it should be possible to at least propose this interpretation to the Tribunal. Article 323 of the Constitution provides any court with the right, and in fact the obligation, to bring a Constitutional issue to the Constitutional Tribunal if the provisions of a certain law are suspected of contravening the Constitution. If a member of the military were to be arrested and tried in civilian court for offences committed while off-duty, there would necessarily arise a dispute over whether civilian law could apply to the defendant. The Constitutional Tribunal, if it was willing to act to safeguard the rights of military families and other potential victims of abuse from off-duty military members, could then find that civilian laws apply to members of the Defence Services when their alleged crime is an "off-duty" one. The military member would not even have to be officially off-duty at the time; the relevant test could simply be whether his alleged crime was related to his military service. The Courts-martial's exclusive jurisdiction over military personnel would thus be confined to "on-duty" crimes committed as a result of that person's role as a member of the military.

It is fundamental to point out that although this step by the Constitutional Tribunal would go some way towards creating accountability for crimes committed by members of the Defence Services, it is nowhere near enough to curb the system of impunity that results from the Constitutional guarantees which place the military outside the rule of law. The variety of abuses committed by the military over the years often result from high-level official and unofficial policies and military practices which are carried out throughout the ranks of the Defence Services. It is lamentably easy to provide illustrations of such policies: the infamous Four Cuts policy promulgated by the military in ethnic areas is one such example. Others include the military's policy, officially banned but unofficially practiced, of forcibly recruiting child soldiers and using forced labor for military projects. Instances of military members performing acts of sexual abuse in ethnic areas are similarly the result of the military practice of sexual violence as a weapon of warfare, as numerous women's groups have proven and despite the vocal but disingenuous protestations of innocence on behalf of the government. It is a deeply distressing fact that these crimes are committed by military members in connection with their status as members of the Defence Forces.

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These types of crimes will never be impartially prosecuted within the military system, which would rather cover up the truth about the human rights abuses that result from its own policies. True change will only come from serious reform, such as significant amendments to the Constitution or even the drafting of a new Constitutional document, reforms that will not occur with Burma's present military-controlled government. But in the short-term, the Constitutional Tribunal could take the brave step of finding military members who commit non-military-related crimes subject to the authority of civilian courts. Such a step would probably go against the will of Burma's generals, but it would help protect one vulnerable group from the dangers of Burma's military, a military that is otherwise accountable only to itself.