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## THE INCONGRUOUS RETURN OF HABEAS CORPUS TO MYANMAR

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### INTRODUCTION

A cartoon published in the state-run periodical *Shwenaingan* during May 2009 neatly captured the contradictory features of the 2008 Constitution of Myanmar. While the charter purports to guarantee its citizens equality, in cartoon form it stands with arms and legs outstretched, guarding the entrance to a new peaceful, modern, developed and discipline-flourishing democratic nation. Outside the entrance is the reason for its posture: darkly clad troublemakers are trying to get in. But the constitution has foiled them. It is not treating them as equals at all. They belong to some category of persons for whom the rights it proclaims do not belong even in principle, let alone in practice.

The new charter is not so much a supreme law as it is a supreme statement of how law in Myanmar has been subordinated to ruling group interests, evoking certain ideas of the Nazi jurist Carl Schmitt. Its obsessive concern with dangers to national sovereignty of the type visualized in the cartoon speak to his dictum that, "The specific political distinction to which political motives and actions can be reduced is that between friend



and enemy” (Schmitt 2007, p. 26). Its section 20(f) situates the armed forces in the place of his executive president as guardian of the constitution. How they are to play that role is not explained, but by Schmitt’s criterion — that the sovereign is he who decides the exception (Schmitt 1985, p. 5) — Myanmar’s top military officer, not its president, remains the ultimate authority. And a full chapter of the constitution is devoted to undefined states of emergency during which the commander has unrestrained authority, again as Schmitt would have it. Its subtext is that anyhow he has the prerogative to ignore its terms where expedient.<sup>1</sup>

At the same time, the charter restores features of the 1947 Constitution that were written out of its 1974 counterpart. Among these, the constitution has reassigned the Supreme Court authority to hear writ petitions, including for habeas corpus.<sup>2</sup> This writ holds a special place not only in the emergence of civil rights globally but also in the earlier constitutional history of Myanmar or, as it was known then, Burma. By studying its return we can obtain a better understanding of the current troubled status of civil rights in Myanmar and can also interrogate the contents of the 2008 Constitution as a whole, and situate those contents with reference to the institutional arrangements of the contemporary state. With these objectives, I have organized the body of this chapter in four parts, as follows.

First, I locate the return of habeas corpus to Myanmar against a global backdrop. The writ’s long pedigree is attractive for judiciaries and governments seeking to enhance their standing in the international community through safeguards of citizens’ rights on paper. In reality, it has often done much less to protect liberties than applicants and advocates have often hoped, especially at times when it is needed most. Therefore, any prospects for its use in Myanmar must be tempered by acknowledgement of its inherent practical limits.

Second, I examine habeas corpus as an important element in the legal and political dynamics of Burma in the years after independence and before military rule. Its rise and fall in earlier decades paralleled those of the independent judiciary. To understand why its return is incongruous, we need to be aware of how the country’s criminal justice institutions lost stature in the past, and with what consequences for the present.

Third, I sketch some broad categories of possible applicants for habeas corpus in Myanmar under the new constitution, consider the reasons that they might apply, and identify some barriers that they are likely to encounter, drawing on the experiences of people in other authoritarian

settings, particularly in parts of South Asia with a shared colonial legal heritage. But citizens of Myanmar face peculiar difficulties when seeking to obtain redress for wrongs, which are distinctive from those of their neighbours and that again go to the constitution's incongruity.

Fourth, I consider how some applicants might succeed in an environment profoundly hostile to the defence of individual rights against the interests of the state. I argue that these hypothetical cases speak not to judicial capacity to monitor and constrain government personnel — the capacity upon which habeas corpus is premised — but to how the country's judiciary is a surrogate of the executive, its authority extending only so far as non-judicial officials allow. The new constitution itself firmly establishes this fact, by declaring powers formally separated only “to the extent possible”.<sup>3</sup> Thus the constitution negates normative commitments even as it pretends to declare them, at once dividing yet combining the apparatus of state, guaranteeing yet denying the equality of its subjects, and entertaining complaints yet confining them to the parameters set by its guardian.

## HABEAS CORPUS

The new constitution empowers the Supreme Court of Myanmar to issue a number of prerogative writs — written orders on matters given priority over others on the court's docket — yet globally habeas corpus stands apart from the others as “the great writ of liberty” (Duker 1980, p. 3). It has obtained this title by virtue of its original and ancient principle: that upon request a court is entitled to call for a detainee to be brought before it, literally to “have the body”. It is an extraordinary remedy, in that if within the law there are other possibilities for a detainee to be called before a court within a lawful time period then those ordinary avenues may be used in lieu of habeas corpus.<sup>4</sup> Robert Sharpe sketches it as follows:

The writ is directed to the gaoler or person having custody or control of the applicant. It requires that person to return to the court, on the day specified, the body of the applicant and the cause of his detention. The process focuses upon the cause returned. If the return discloses lawful cause, the prisoner is remanded; if the cause returned is insufficient or unlawful, the prisoner is released. The matter directly at issue is simply the excuse or reason given by the party who is exercising restraint over the applicant (Sharpe 1989, p. 23).

Habeas corpus was from early on an important defence against arbitrary and illegal custody and over time increasingly also against custodial abuses like torture, cruel and inhuman treatment and extrajudicial killing. In his landmark work on the law of the English constitution, Albert Dicey went so far as to say that the right to issue directives in the manner of habeas corpus is at the crux of the relationship between the judiciary and executive (Dicey 1982, p. 135). Its force in common law was such that Lord Justice Farwell warned that its use in British-controlled territories could undermine colonial rule, observing that: "The truth is that in countries inhabited by natives who outnumber the whites, such laws [as the Habeas Corpus Act], although bulwarks of freedom in the United Kingdom, might very probably become the death sentence of the whites if they were applied there" (in Neumann 1957, p. 35).

In some places the importance of habeas corpus has been reaffirmed through extensive use and jurisprudence. Courts in India have interpreted their authority to issue habeas corpus writs widely, so as to afford a range of remedies that go far beyond those available via the writ in other common-law countries.<sup>5</sup> In Brazil, the courts historically extended the ambit of the writ considerably beyond its original scope (Nadorff 1982, p. 299). The Inter-American Court of Human Rights in 1987 unanimously opined that under the American Convention on Human Rights state parties are prohibited from suspending habeas corpus, including during times of emergency. The United Nations Working Group on Arbitrary Detention has described habeas corpus as "the best remedy" against abuse of powers to arrest and detain (1994, p. 17). Contemporary jurist and philosopher Larry May has argued that habeas corpus should under international law be a right from which no government is permitted to derogate.<sup>6</sup> And proposals for a system of world habeas corpus have been on the table for several decades.<sup>7</sup>

Others have been less enthusiastic, pointing out that the image of habeas corpus as a bulwark of liberty is exaggerated.<sup>8</sup> Rights experts have acknowledged that while habeas corpus is in principle the most powerful tool to address certain types of abuses, in practice it disappoints.<sup>9</sup> At times of emergency the writ is invariably suspended, as the new constitution of Myanmar permits.<sup>10</sup> Where it is not suspended, under authoritarian regimes it has not proven effective at securing the release of illegally detained persons. And as its efficacy depends upon the extent to which other laws authorize and delimit arrest and custody, where those laws allow for

custodial orders that ordinary citizens might consider repugnant, if the law has been properly applied then the writ is still liable to fail applicants. This was often the case in Burma, before the demise of habeas corpus along with the independent judiciary, to which this chapter now turns.

## THE RISE AND FALL OF HABEAS CORPUS IN BURMA

At independence in 1948, there were two ways to apply for habeas corpus in Burma. One was via the writ jurisdiction of the Supreme Court, established under the new constitution, which guaranteed all persons the right to approach the court directly for relief. The other way was via the appellate criminal jurisdiction of the High Court, under section 491 of the Criminal Procedure Code, which permitted applications “in the nature of habeas corpus”.<sup>11</sup>

In the two years immediately after independence, when government authorities used emergency powers to combat myriad insurgencies and related violence, habeas corpus was according to Maung Maung—later chief justice and architect of the so-called people’s justice system — “the most popularly invoked remedy” (Maung Maung 1961, p. 99). The courts interpreted their role liberally. Justice E Maung in the definitive 1948 G.N. Banerji ruling described the authority of the Supreme Court in issuing habeas corpus writs to be “whole and unimpaired in extent but shorn of antiquated technicalities in procedure” (pp. 203–204). In 1950, as chief justice, he stressed in the Tinsa Maw Naing case that, “The personal liberty of a citizen, guaranteed to him by the Constitution, is not lightly to be interfered with and the conditions and circumstances under which the legislature allows such interference must be clearly satisfied and present” (p. 37). He and other senior judges ruled to release many detainees on various grounds, including that orders for arrest had been improperly prepared or implemented, that indefinitely detaining someone was illegal, and that police or prison officers were without grounds to justify arrest, be it of an alleged insurgent sympathizer or notorious criminal. On the other hand, they did not order to release detainees in cases where procedure had been followed and the person’s confinement justified, even when the law under which they had been detained had been written so as to reduce judicial oversight of custodial powers, as in the U Ba Yi case.

After the 1958 constitutional coup, things began to change. Applicants continued to file for habeas corpus in cases of alleged wrongful arrest and



custody.<sup>12</sup> However, the courts were given fewer opportunities to exercise their authority than under civilian government. The military and police promptly rounded up hundreds of political opponents and other perceived threats and sent them, without warning, to a prison camp on a remote island. They were held in barbaric conditions and without any means for effective judicial inquiries.<sup>13</sup>

With the military takeover of 1962, although writs were not formally abolished and the statutory allowance for habeas corpus as a form of criminal appeal remained, there was no longer an independent superior court to receive petitions. None of the hundreds or perhaps thousands of persons detained without charge or placed under protective custody successfully challenged the orders against them.<sup>14</sup> A new parallel system of army-controlled special courts heard cases that would have been most likely to give rise to complaints of unlawful confinement. Illegal arrest and imprisonment ceased to be an issue with which the judicial system was practically concerned. The last reported petition for habeas corpus that the apex court entertained was that of U Aung Nyunt in 1965, and it was not a complaint against custody at all but one against an order prohibiting movement into a special frontier area.

There was no reference to writs in the 1974 constitution, and since then the only explicit writ-equivalent petition entertained has been for review of lower courts' proceedings on the ground of errors in law (U Min Lwin Oo 2004, p. 58). The 1975 Law Safeguarding Citizens' Rights was supposed to offer an alternative avenue for complaints of unlawful custody and other abuses, but as it was unaccompanied by any procedural guarantees, complaints were either delayed or ignored.<sup>15</sup> In 1976 the *Working People's Daily* carried a front-page article on a request for release from the central jail of a father and son whom military intelligence had arrested without charge in 1964. The apex court finally ordered that they be freed some seventeen months after it received the request, and then after the public prosecutor had repeatedly caused the case to be postponed, only to report that he had nothing special to say. In another case of this sort, an army battalion held an alleged insurgent without charge for around three years before a new commander discovered him and sent him up for trial. The judge found him guilty and sentenced him to imprisonment. Although his illegal confinement was acknowledged in court, the judge did not deduct it from the sentence, as it was not officially time served.<sup>16</sup> And during the 1988 protests when families of detained students applied to the chief

justice for their release, he in turn just handed the documents over to the attorney general's office, where they were put on file.<sup>17</sup>

The sabotage of Burma's criminal justice system in the 1960s and 1970s is revisited daily in the denial of rudimentary rights to detainees in Myanmar today. At no time in recent years was the absence of judicial remedies for persons in custody more blatant than in the aftermath of the September 2007 protests, when state media acknowledged that thousands of people were being detained and released after questioning — often after signing promissory documents with no basis in law — entirely outside of the system. That the government did not declare either a state of emergency or martial law to allow for this wholesale departure from ordinary legal procedure was immaterial; the families and friends of detainees had no ways to approach the courts. Judges did nothing when lawyers for persons accused of being protest organizers brought to their notice that their clients had been illegally detained. The investigating officer in one case admitted on record that two accused had been held in the central prison for over three months without charge. He denied that the imprisonment was unlawful because, he said, remand had been obtained for the pair in other related cases, but when defence counsel asked him to provide details he was unable to do so. The court did not take up the matter.

Lacking judicial avenues to have their grievances heard, citizens instead make complaints direct to the agencies responsible for wrongdoing. Some people complain because conflicts with local authorities have forced them to go higher up, others for want of alternatives. The family of a man who disappeared from army custody in April 2007 lodged a formal complaint about his disappearance with senior commanders and government ministries. According to them, an army unit had come to the victim's fishery in Kyauk Kyi during early 2006 and demanded money. The disappeared person had not been able to give it at the time but apparently had persuaded the soldiers that he would do so after he sold his fish; however, the unit came again shortly thereafter and took him with them. The family searched various facilities and located him at the regional strategic command headquarters, where they were told that if they paid the money immediately then he would be released. But before they could collect the amount required, they learned that another unit had taken him to carry supplies in a remote area. Over a year later, they lodged their complaint with the help of a human-rights defender, who submitted a



copy to the International Labour Office in Yangon. There is only one matching complaint for the period concerned in the office's anonymous public register of cases. It is recorded as closed, with comments that, "Government denied portering and alleged victim to be an insurgent who was captured but subsequently escaped."<sup>18</sup>

Could the return of habeas corpus make any difference for this family or other persons in similar situations? The remainder of this chapter is taken up with that question. What are some of the obstacles that applicants are likely to face? How do they compare with those in other places where writs have been sought before authoritarian governments? And what do these indicate about the incongruities of Myanmar's new constitution?

## THE RETURN OF HABEAS CORPUS TO MYANMAR?

Who could apply for habeas corpus and why would they bother? The cartoon constitution barring the entrance to the new developed nation suggests the existence of at least two general categories of plausible applicants: those on the outside of the gateway, aiming to demonstrate that its return is a fraud; and those on the inside, hoping that it is not.

The first category includes those detained for political reasons, or other reasons of special concern to the state or senior state officials, over whose cases the courts have no real authority. Applicants from this category and their legal counsel might apply for habeas corpus to demonstrate that it is a sham rather than in hope of obtaining relief. They could include the chairman and general secretary of the Shan Nationalities League for Democracy, Hkun Htun Oo and Sai Nyunt Lwin, jailed since 2005 and convicted of — among other things — high treason and sedition, but whose trial and imprisonment the UN Working Group on Arbitrary Detention in 2008 opined is arbitrary. They could also include the family members of 35 political detainees who in October 2008 lodged a complaint with the chief justice over the authorities' refusal to grant them access to the trials of their relatives going on inside the central prison. Given that the order to conduct the trials in this manner itself came from the chief justice, the complaint was evidently framed to make a point rather than in a belief that he would reverse the order.<sup>19</sup> And they could include persons detained because of conflict with senior officials or persons close to senior officials, such as businesspeople and other government personnel embroiled in financial or personal disputes.

One advantage of lodging petitions for these applicants would be that their complaints could at least be formally recorded, or they could say that they tried and failed to set down the details of alleged abuses. A writ petition is a formal accusation that obliges an official response. An applicant's affidavit carries weight that other paperwork does not. The evidence needed to lodge a request also makes for a more detailed and accurate narrative than might otherwise be the case. In this way the judiciary is used as a record-keeper: if not a bulwark against the denial of human rights then at least one against the denial of historical fact. In Chile under the Pinochet regime, the vigorous filing of requests for writs had the effect of ensuring that something of the personal details of each illegally abducted and detained person is known to this day, even though in the period of dictatorship the Supreme Court only accepted thirty out of almost 9,000 petitions filed (Hilbink 2007, p. 115). The body of cases also served to make the forced disappearance of some persons more difficult (Fruhling 1983, p. 524).

But in Myanmar the value of habeas corpus for public advocacy is reduced by the lack of scope for publicity around court cases. Local news journals and civic groups do their best to create some space for coverage, but it remains painfully small in comparison even to most other countries across the region. The work of the courts goes virtually unreported in state media: during the 2009 trial of democracy-party leader Aung San Suu Kyi, which was a notable exception to this pattern, writers for the state newspaper demonstrated unfamiliarity with legal terms, using them awkwardly and inconsistently. There are no domestic or international rights groups operating in the country with the capacity or mandate to document and report on most of the types of cases that could be taken up in requests for habeas corpus in this first category. There are as yet no independent professional bodies to train members and lobby on issues of special concern. In the absence of these, the efficacy of the writ for advocacy is greatly diminished. This is already a problem for lawyers and others who are fighting cases behind closed doors and without means to communicate directly with large parts of the populace, other than via short-wave radio broadcasts from abroad. Whereas ultimately the writ is about bringing into the open that which is ordinarily shut away, without the means to communicate about the rights of detainees and abuses of these rights, habeas corpus is ineffectual. It remains to be seen whether or not after 2010 anticipated changes in government allow for more space to

communicate than exists at present — as some analysts predict — but for the time being the domestic media for the most part must persist with writing between the lines rather than on them.

The second category of persons who might apply for habeas corpus includes a wide variety of subtypes, among them applicants who feel they have nothing to lose and applicants who for one reason or another cannot or do not choose to negotiate through the usual channels. The former subtype includes the family of the Kyauk Kyi fisherman, who having exhausted all prior available avenues may be prepared to try any new ones, knowing that his life is probably already lost. The latter subtype includes a group of residents in New Dagon who, during March 2007, made a complaint against ward officials and police and fire brigade personnel for allegedly illegally arresting and detaining nine persons whom the officers claimed were residing in the area without having been registered, although the complainants maintained that the detainees had already been put onto the household lists after some earlier delays caused by tardy ward officials. In this case, like others of its type involving complaints to higher levels, a dispute between the residents and the local authorities that led to the arrests also forced the unsatisfied inhabitants to seek the involvement of people further up the administrative hierarchy.

One common experience in countries where citizens have sought habeas corpus during times of repressive government is that authorities accused of having — or having had — people in their custody simply deny it. A few admit that they had the person, but that they let him go afterwards and do not know what happened to him next. In areas affected by civil war or occupied by various armed groups, the alleged perpetrators may acknowledge that they had the person but say — as in the Kyauk Kyi disappearance case — that he was an insurgent or sympathizer; that he escaped or was killed in an encounter. Outright disavowal of responsibility is easy, and often difficult to prove false. Because of the requirement that the applicant show grounds for the court to consider issuing a writ, if no evidence can be produced then the court will usually reject the request outright.<sup>20</sup> The courts in Burma during earlier decades sided with government officials where the matter rested on the mere say-so of the applicant against that of the respondent.<sup>21</sup> And in present-day Myanmar where lawyers accuse police in court of keeping detainees in illegal custody, the officers also simply deny knowledge of wrongdoing.<sup>22</sup>

In times of authoritarianism, requests for habeas corpus may have the perverse effect of encouraging judges and prosecutors to collude with

police and soldiers. The methods used to frustrate applicants can be subtle or crude. Courts and their personnel can erect all sorts of barriers to cause delays without appearing to deviate from normal practice. In Sri Lanka, where people lodged at least 2,755 separate writ petitions for victims of forced disappearances in three provinces from 1989 to 1997, it took around seven years for the courts to hand down their orders (Presidential Commission 1997, ch. 10). This was in part because the system was overburdened and delays were the norm, but also because officers would fail to appear in court on appointed dates and judges would accommodatingly set new dates for them to fail to turn up again. Nor did lawyers feel obliged to serve their clients properly or keep them informed of proceedings. Not only did people disappear, but so too did files on them. Families never learned of the outcomes of their cases. Staff at the attorney general's office appeared for police and soldiers responding to habeas corpus petitions — as they did in Burma when the writ was in effect during earlier decades, and as they will in cases arising under the new constitution. Some coached the respondents on how to contribute to delays and submit false or misleading evidence. In this way they developed conspiratorial relationships with police officers and later on when they needed favours of the police the latter would help them in return.<sup>23</sup> When judges finally handed down their orders, many rejected petitioners' requests on spurious grounds of questionable legality.

Where advocacy and record-keeping through habeas corpus is aimed at incremental change but does not lead to any tangible benefits for the victims and families of detained or disappeared persons, it can even have a corrosive effect. In Sri Lanka, the presidential commissions of inquiry into disappearances paid special heed to the filing of the thousands of petitions for habeas corpus writs and the reasons for their failure in protecting the rights of citizens; however, they did not result in criminal cases against alleged perpetrators, and the families of disappeared persons at best received no more than paltry compensation. Most accused continued serving in official posts, many in higher posts, despite attempts to bring them to justice. The cumulative effect of all the work on these cases, while putting down the basic facts for posterity, has been to demoralize and exhaust people whom it was supposed to benefit.<sup>24</sup> People become frustrated and lose hope after years of trying to obtain justice, further diminishing the standing of the judiciary as a whole. Habeas corpus in Myanmar ultimately could have the same sort of detrimental rather than beneficial effects on a society that is already profoundly demoralized.

Even if judges and government lawyers try to perform their tasks conscientiously, the perpetrators of abuses in authoritarian settings have many opportunities to thwart the system, with or without inside help. They can botch or manipulate inquiries to ensure that when instructed to locate and bring a person to a hearing, or explain what has happened to them, they conceal more facts than they reveal. In places where the work of the police is militarized and a variety of other groups have quasi-policing duties — as is the case in Myanmar — a number of agencies may be involved in holding a detainee. Sorting out whether they were last in the hands of the army, police or a vigilante group may be all but impossible. Police or other officers may re-arrest people whom the courts order to be released, as happened frequently in Nepal from about 1999 to 2004, where sometimes the same police who brought a person to court effected her re-arrest as soon as she emerged from the premises. In Sri Lanka, security forces resorted to abducting people from their houses at night rather than bothering to re-arrest them. Some lawyers, witnesses and family members who insisted on lodging requests for writs suffered the same fate. Judges too can be put in harm's way and, even where not in fear of their lives, they may risk their jobs or chances of being promoted and, at very least, their reputations if they are repeatedly humiliated when their orders for release of detainees are ignored or ridiculed through these sorts of practices.

Among the material and technical obstacles to the return of habeas corpus to Myanmar, some are common to other countries and others are not. Under the new constitution, only the Supreme Court can issue writs, which means that applicants or their counsel must use time and money simply to lodge a petition, let alone to get it heard. In a country where most detained people do not have access to attorneys there is no prospect of more than a tiny percentage of the total number of plausible applicants approaching the court.<sup>25</sup> On top of this, there is no longer any practice of filing for writs. Lawyers don't know what habeas corpus is. There is no continuity with the habits of earlier periods as in parts of South Asia where legal traditions were kept alive even in the worst times, and where courts retained formal authority over other parts of state, even if they couldn't exercise it. The technicalities of reintroducing the use of writs to Myanmar at present remain a mystery, and will have to be sorted out, through issuance of directives and administrative rearrangements, before applicants are able to approach the court at all.

Attempts to use the writ could backfire on individual applicants, their lawyers and supporters, as well as society as a whole. Persons who accuse

state officers of wrongdoing in Myanmar — and people helping them — are targeted through counter-complaints, not only in high-profile cases but in ordinary ones too.<sup>26</sup> Lawyers assisting applicants are easy prey for vindictive officials, as their licences can be suspended or revoked on any number of spurious grounds.<sup>27</sup> And there is the risk that the Supreme Court could respond to habeas corpus requests with regressive orders that formally endorse the arrogating of policing powers by the army or otherwise authorize state officers to do as they please.<sup>28</sup> The constitution has itself opened the way for rulings of this nature through its deliberate ambiguity on the statutory limit of twenty-four hours before a detainee is brought to court, which it reaffirms but qualifies, excluding “matters on precautionary measures taken for the security of the Union or prevalence of law and order [rule of law], peace and tranquility in accord with the law in the interest of the public”.<sup>29</sup>

But if certain types of applicants might fail for these and other reasons, how might others succeed? The somewhat counterintuitive answer to that question goes to the incongruity of Myanmar’s legal and political arrangements, an incongruity which has in turn been written into its new constitution.

## A HOSTILE ENVIRONMENT

To understand how some applicants for habeas corpus under the new constitution might succeed in their complaints, we need to distinguish more clearly between the type of authoritarian legality in Myanmar as against that in recent periods in Sri Lanka or Nepal. To do this we must draw a line, with Otto Kirchheimer (1961, pp. 18–19), between a judiciary seeking its own adjustments and answers to the pressures of the times and one that has been integrated with the goals and objectives of the political authorities. During periods of dictatorship, judiciaries in South Asia have been coerced into making compromises with executive authorities, but have retained a degree of autonomy. After the overthrow of Nepal’s absolute monarchy, the Supreme Court brought forward hundreds of habeas corpus requests that it had kept pending indefinitely. It issued the wide-ranging and unprecedented Rabindra Prasad Dhakal ruling on a batch of eighty-three cases in which it roundly condemned the government for the incidence of enforced disappearances and the failure to investigate, and directed it to pass a law to criminalize the offence in accordance with international standards and establish a special inquiry body with a view



to prosecuting perpetrators, as well as compensating families of victims. By contrast, the Supreme Court of Myanmar today is altogether subordinate to and integrated with other parts of the state. To imagine that it can adopt proceedings devoted to resolving a dispute between the individual and the state of the likes of habeas corpus is, to paraphrase Mirjan Damaöka, to smuggle ideological assumptions into a hostile environment. "The state interest" in this type of setting, he writes, "is lexically superior, indeed supreme, rather than placed on the same plane with individual interests wherein the two could be 'balanced' " (1986, p. 86).

In this setting, where the courts have an administrative rather than a judicial function, certain types of cases could be successful because of the need to comply with policy dictates rather than enforce law. For instance, Myanmar has joined international instruments concerning children's and women's rights and has sought to demonstrate commitment to these categories of rights. There is a lot written on them in professional journals and texts, and some attorneys are specializing in cases where women and children are the victims of abuse. Official groups and international agencies are helping to make space for debate and reportage on abuses of women and children that does not exist for lots of other issues. And in many cases of illegal confinement involving women and children, especially teenage girls brought to the towns and cities for employment, the perpetrators are private citizens rather than state officers, or the latter acting in a private capacity. These types of cases, if coming within the ambit of habeas corpus as an extraordinary remedy could succeed for administrative rather than judicial reasons.

The success of a few habeas corpus petitions, resulting in the release of detainees, could mislead well-intended outside agencies and serve as propaganda to raise money for in-country projects, as is already being done on issues like human trafficking and child soldiers. The government of Myanmar could seize on cautiously optimistic reports from international bodies keen to identify any change as a sign of some progress so as to impress faraway experts that it is sincerely promoting the rule of law and upholding judicial independence, just as the government of Argentina did during the 1970s even as its military was abducting, torturing and killing tens of thousands (Osiel 1995, p. 485). For some years officials from Myanmar's courts and its attorney general's office have sought to convince counterparts at meetings in other parts of Asia and further abroad that their country too shares in the common-law heritage and its values.

Reintroducing the writ may be one useful way for them to boost these claims in attempts to enhance not only their own credibility but also that of the new constitution, without much risk of actually achieving anything.

Finally, any habeas corpus petition without special policy interest to the state or senior officialdom could also succeed through the simple expedient of money given to judges, prosecutors and police. Anecdotally, the criminal-justice system in Myanmar is extremely corrupt. At present, virtually every stage in the criminal process, including arrest, filing of charges, granting of bail and hearing of an ordinary criminal case — both in the court of first instance and upon appeal — can be accompanied with payment of money to secure a desired result or at least mitigate the consequences of an undesirable one. Perhaps the prospect of further profit through brokerage and manipulating of the system, rather than any sense of justice or professional responsibility, will be the greatest motivator for lawyers interested to learn how to revive the ancient practice of writ petitions in Myanmar through the terms of the new constitution, however incongruous they may be.

## CONCLUSION

Where the role of the courts is to assist in a state programme, rather than check executive power, policy directives can be implemented through the judiciary in the same way as through the administrative bureaucracy. By contrast, systems like those in Sri Lanka or Nepal may be defective and compromised but judges in them do still adjudicate more according to the terms of law than according to the dictates of executive officers. Ironically, a corrupted policy-implementing judicial system like that in Myanmar can be mistaken for an efficient system in contrast to its functionally separate counterparts, because its efficiency derives from the carrying out of orders and urgency to make money through the exercise of authority, not from integrity or professionalism of the sort that courts in other countries struggle to achieve, however imperfectly and half-heartedly.

This is the real incongruity of habeas corpus as an element in the 2008 Constitution of Myanmar. Habeas corpus is premised on the idea that courts have the power to compel soldiers, police and other officials to follow their orders. In Myanmar, where the judiciary is a proxy for the executive, judges have this power only where they have the approval and backing of higher executive authorities. Whereas in certain authoritarian

settings the courts have retained nominal legal power over other parts of government but have been unable or unwilling to exercise it at certain times because of extenuating circumstances, in Myanmar the problem is much more basic. Myanmar's courts don't have effective authority over other parts of government at all. Their capacity to review the activities of state agencies and agents is limited to what the executive permits them. Under these circumstances, not only is the reintroducing of habeas corpus a figment but so too is any constitutional commitment to protect the individual, because all such legal commitments are delimited by higher administrative imperatives. Only where legal and administrative objectives coincide can the former prevail.

The incongruity of habeas corpus in the new constitution percolates throughout the charter's contents, and through the extant state institutions that will be responsible for establishing new institutions in accordance with its terms following general elections. Where the armed forces rather than the judiciary have responsibility to safeguard the constitution and uphold the rule of law, statements of citizens' rights are perverse. Where the state has subordinated legality to policy and detached policy from any coherent ideology, no amount of technical or procedural rearranging can effect significant change. Because the new constitution is a vague expression that is not binding on its guardian, ultimately it contains no guarantees, whether for a political detainee, an ordinary under-trial accused or anyone else.

## Notes

1. Richard Horsey (2008, p. 4) correctly points out that analysis of the charter that assumes either the commander or his institution will faithfully adhere to its terms "overstates both the legal competence and procedural rigidity of the military".
2. Constitution 2008, sections 296(a)(i) and 378(a)(i). The apex court had this authority under section 25(2) of the 1947 Constitution, but not under the one of 1974.
3. Constitution 2008, section 11(a). In any event, the placing of guardianship over the charter in the hands of the armed forces itself negates the concept of judicial independence. Speeches of senior officers, too, routinely reinforce the message that the judiciary, police and administrative bureaucracy are functionally united. On 13 May 2009, for instance, the New Light of Myanmar (p. 9) reported Prime Minister General Thein Sein as reminding judges that,

- "The administrative and judicial systems cannot operate separately but need to be in harmony to be able to protect public interests."
4. The writ is not discretionary, meaning that it should be issued by right, and unlike other writs cannot be denied simply on the basis that an alternative remedy exists. However, the law on the extent to which the writ can be entertained by right varies markedly according to jurisdiction.
  5. In *Mohd. Ikram Hussain* the Supreme Court held that in matters of habeas corpus every procedure is open to a court to make inquiries unless they are expressly prohibited. In *T.V. Eachara Varier* the Kerala High Court held against the police and state government and demanded that they produce evidence of what happened to a young disappeared detainee even though the authorities denied ever having held him in custody. Justice Subramonian Poti stated that "so long as it is the duty of this court to protect the freedom of a citizen and his immunity from illegal detention we cannot decline to exercise our jurisdiction merely because a dispute has arisen on the issue of detention" (para. 14).
  6. May 2008. Thanks to Larry May for reading and commenting upon a draft of this paper that I presented to the 2009 Myanmar/Burma Update conference.
  7. See, for instance, Kutner 1962.
  8. See for instance, Clark and McCoy 2000, ch. 2.
  9. See, for instance, United Nations Commission on Human Rights 1992, para. 202.
  10. Constitution, 2008, sections 296(b), 379. The 1947 Constitution in its section 25(3) made the same provision, which the government applied in certain times and places prior to 1962, but not nationwide.
  11. The section remains on the code to the present day but has not been used since the mid-1960s and is a narrower provision than that provided under the former constitution; hence, in this paper I refer to the formal "return" of habeas corpus through the new constitution.
  12. Director of Information 1960, p. 60. For a reported case from the same year, see Lim Lyam Hwat.
  13. For a detailed recount of a former detainee, see Ko Ko Lay 1960, who records that some detainees were taken to the island in error, among them juveniles, small traders and at least one unfortunate who had the same name as a notorious criminal. Meaningful legal and political challenges to the camp were not launched until late 1959; the authorities closed it the following year. The island was again used to hold prisoners from 1968–70.
  14. Myint Zan 2000, p. 19. For a short account of a meeting with a detained former minister, see Singh 2001, pp. 140–41.
  15. Under the law, a citizen whose rights had been infringed could report to the "concerned authorities" or their superiors, who were then duty-bound to investigate promptly and take further action where the grievance was found to

- be genuine or take other steps as necessary to redress the grievance and inform the complainant of the outcome. I have not been able to find any cases deliberated under this law in the law reports.
16. Information provided by a professional intimate with the case, March 2009. In other cases cited in this paper where no specific reference is given, the details have been drawn from relevant documents.
  17. Maung Maung 1999, pp. 47, 61. According to Maung Maung, when Ne Win asked the attorney general if arrested students had been brought before the courts within twenty-four hours as required by law, the latter "could only mumble that he couldn't say" (p. 48).
  18. International Labour Organization 2009, p. 29. The ILO appears to have waited around two years for this reply; in a March 2009 report the case was still recorded as "open", with "further government information awaited".
  19. In court daily diaries for these cases where defence attorneys applied to have the hearings held in the open, the trial judges invoked Supreme Court Order No. 16/2008 as the basis for holding the trials inside the central prison.
  20. In the Kodippilage Seetha case the Court of Appeal, Sri Lanka, went so far as to say that not only did the burden to prove an enforced disappearance lie with the petitioner for a writ of habeas corpus, but that the standard required was proof beyond reasonable doubt (p. 234). The jurisprudence on the standard of proof in Sri Lanka has been inconsistent. At other times the courts have issued writs on prima facie evidence.
  21. See, for example, the Mrs. G. Latt case.
  22. In cases where persons have allegedly been illegally detained and these facts have come to the notice of the courts in which they have been tried, police have replied that as they have been assigned only to investigate they know nothing about arrangements for keeping the accused in custody.
  23. Thanks to Basil Fernando for these observations and for his comments on an early draft of this chapter.
  24. See the stories in Asian Legal Resource Centre 2004.
  25. During visits to two prisons in 2008 a United Nations expert who spoke at random with detainees did not meet anyone who had been represented in court, and according to him many prisoners did not even know the meaning of the word "lawyer". Quintana 2009, pp. 6–7.
  26. In the disappearance case from Kyauk Kyi, the ILO register further records: "Any connection between the facilitator[s] subsequent imprisonment and this case was denied." International Labour Organization 2009, p. 29.
  27. In May 2009 two prominent rights lawyers had their licences revoked following four months' imprisonment for contempt of court because they had presented documents withdrawing their powers of attorney citing the reason given by their clients for no longer requiring counsel as that they "no longer trust the judiciary".

28. This happened in the U Ye Naung case, in which the court found that there was no reason why a confession to a military intelligence officer should not also be admissible as evidence, although the finding contradicts all prior law and precedent.
29. Constitution, 2008, section 376. The English version of the constitution uses “prevalence of law and order” where in the original text the expression is “rule of law”. On the ambiguities of rule-of-law language in Myanmar, see Cheesman 2009. The statutory requirement of 24-hour detention in section 61 of the Criminal Procedure Code is that, “No police officer shall detain in custody a person arrested without a warrant for a longer period than... twenty four hours” excluding time taken for transporting the detainee to the police station and court, unless the police officer obtains an order from a judge under section 167.

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