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Rule of Law for Human Rights in the Asean Region: A Base-line Study



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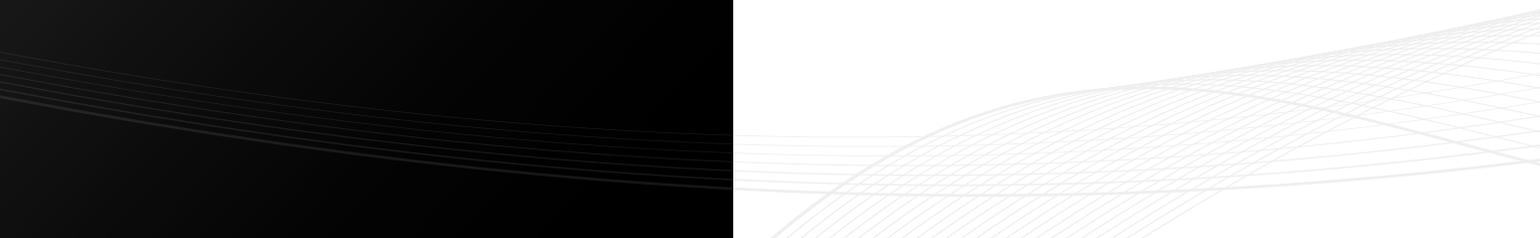
The Asia Foundation



The Republic of The Union of Myanmar



Myanmar



Snapshot Box

Formal Name	Republic of the Union of Myanmar
Capital City	Nay Pyi Taw
Independence	4 January 1948
Historical background	<p>Parts of Burma (as it was then called) became a British colony after the 1824-1826 first Anglo-Burmese war and the second Anglo-Burmese war of 1852. The whole country was annexed into the British Indian Empire on 1 January 1886. It achieved self-governance in 1937 and gained full independence on 4 January 1948. The country was under military and one-party rule from 1962 to 1988 under General Ne Win. There was a massive uprising against the then one-party Government from the period of March to September 1988 and the State Law and Order Restoration Council (later name was changed to State Peace and Development Council) took over power after crushing the uprising.</p> <p>In the elections held in 1990, the main opposition party the National League for Democracy (NLD) won a landslide victory. However, the military council refused to hand over power and continues to govern the country.</p> <p>In 2008 <i>Constitution</i> was adopted by 'referendum' and 'elections' were held on 7 November 2010 in which the Union Solidarity and Development Party supported by the military council won over 75 percent of the seats in both Houses of the Legislature. (See below Overview)</p>
Size	676,578 sq km
Land Boundaries	Total: 5,876 km; Border countries: Bangladesh 193 km, China 2,185 km, India 1,463 km, Laos 235 km, Thailand 1,800 km
Population	Around 54 million
Demography	0-14 years: 25.3% (male 6,193,263/female 5,990,658) 15-64 years: 69.3% (male 16,510,648/female 16,828,462) 65 years and over: 5.4% (male 1,121,412/female 1,493,298) (2010 est.)
Ethnic Groups	Burman 68%, Shan 9%, Karen 7%, Rakhine 4%, Chinese 3%, Indian 2%, Mon 2%, other 5%
Languages	Burmese (official) minority ethnic groups have their own languages
Religion	Buddhist 89%, Christian 4% (Baptist 3%, Roman Catholic 1%), Muslim 4%, animist 1%, other 2%
Education and literacy	Educational Expenditure: 1.2% of GDP (2001) Literacy definition: age 15 and over can read and write: total population: 89.9%; male: 93.9%; female: 86.4% (2006 estimates)
Gross Domestic Product (GDP)	US\$60.07 billion (2010 est.)

Government Overview

Executive Branch:

- Chief of state: President Thein Sein; Vice Presidents: Sai Mouk Kham & Tin Aung Myint Oo (all of whom took office in 30 March 2011, following their election on 3 February 2011).
- Head of government: Prime Minister Thein Sein (since 24 October 2007 formally relinquished that role when he takes over as President, on 30 March 2011). Under the 2008 Constitution, the President is both the Head of State and Head of Government and there is no post of Prime Minister.
- Cabinet: Cabinet is appointed by the president and confirmed by the *Pyidaungsu Hluttaw*, the joint Two Houses of the Legislature.
- Elections: The 2008 Constitution stipulates elections every five years. After the November 2010 elections, U Thein Sein was elected president by the *Pyidaungsu Hluttaw* (Two Houses of the Legislature in Joint Sitting) in February 2011 from among three vice presidents; the Upper house, the lower house, and military members of the Legislature each nominate one vice president (the president serves a five-year term and can be re-elected once).
- Legislative Branch: The legislature is bicameral, and consists of *Amyotha Hluttaw* ('the House of Nationalities') (224 seats, 168 directly elected and 56 appointed by the military; members serve five-year terms) and *Pyithu Hluttaw* ('the House of Representatives') (440 seats, 330 directly elected and 110 appointed by the military; members serve five-year terms). Elections were last held on 7 November 2010 in which the Union Solidarity and Development Party supported by the junta won over 75 percent of the seats.
- Judicial Branch: The President appoints and the *Pyidaungsu Hluttaw* (joint Houses of Legislature) approves the Chief Justice and six other Judges of the Supreme Court. There are also courts in the States, Regions, Self-Administered Zones, District Courts and other Courts. The jurisdiction of the Supreme Court does not cover and does not affect the powers of the separate Constitutional Tribunal and the Courts-Martial.
- Human Rights Issues: Draconian laws and practices are being used to prosecute political activists; immunity and impunity for the military even for major human rights violations; externally and internally displaced persons; arbitrary arrests, detention as well as arbitrary and excessive sentences; torture and mistreatment of some prisoners; severe lack of basic freedoms of speech and assembly lack of possibility of redress even for major human rights violations.

Membership in International Organisations and Human Rights Treaties ratified

- Convention on the Elimination of All Forms of Discrimination against Women (Accession 22 July 1997)
- United Nations Convention against Transnational Organised Crime (Ratification 30 March 2004)
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (Accession 30 March 2004)
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime (Accession 30 March 2004)
- Convention on the Rights of the Child (Accession 15 July 1991)
- Freedom of Association and Protection of the Right to Organise Convention (Ratification 4 March 1955)
- Convention concerning Forced or Compulsory Labour (Ratification 4 March 1955)
- Convention on the Prevention and Punishment of the Crime of Genocide (Ratification 14 March 1956)
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Accession 25 August 1992)
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Accession 25 August 1992)
- Geneva Convention relative to the Treatment of Prisoners of War (Accession 25 August 1992)
- Geneva Convention relative to the Protection of Civilians in Times of War (Accession 25 August 1992)
- International Convention for the Suppression of Terrorist Bombing (Accession 12 November 2001)
- International Convention for the Suppression of the Financing of Terrorism (Signed 12 November 2001)
- International Convention for the Suppression of Unlawful Seizure of Aircraft (Ratification 22 May 1996)
- Convention on the Privileges and Immunities of the United Nations (Accession 25 January 1955)

Overview

The Union of Burma gained independence from Great Britain on 4 January 1948. Several months before independence the Constituent Assembly met and adopted a Constitution for the Union of Burma on 24 September 1947 (*'the 1947 Constitution'*). It came into force at the time of independence. The Constitution stipulated a bi-cameral Parliamentary system where the Prime Minister is the Head of government and the President as the Head of State. In general constitutional parlance the system of governance under the *1947 Constitution* can be described as Parliamentary in that it is the Prime Minister rather than the President who exercises executive power and the leader of the majority party which holds the plurality of seats in the Lower House becomes the Prime Minister. In this regard multiparty elections under the *1947 Constitution* were held in the years 1951-52, 1956 and 1960 in which the Anti Fascist People's Freedom League (AFPFL) formed the government. Hence under the *1947 Constitution* it is a 'Parliamentary system' and not a 'Presidential system'.

The *1947 Constitution* also provided for an independent judiciary. There were two apex courts namely the Supreme Court and High Court of Burma and they have operated with independence and integrity striking down at times the excessive action of the executive arm of the government.ⁱ

On 2 March 1962, a group of Army officers led by the then Chief of Staff the late General Ne Win took power in a military coup from the democratically-elected government of the late Prime Minister U Nu. The President, the Chief Justice, the Prime Minister and Cabinet ministers together with many other important leaders were arrested. A 17 member Revolutionary Council was formed with General Ne Win as Chairman. Later, a Revolutionary government was also formed with General Ne Win as Prime Minister. General Ne Win also took the Portfolios of Defence, Home Affairs, Finance and National Planning.

On 30 March 1962 the Supreme Court and High Courts of Burma established under the *1947 Constitution* were abolished by a decree of the Revolutionary Council. The Revolutionary Council did not formally abolish or suspend the *1947 Constitution* but with the formal abolition of the Parliament and the abolition of the two apex courts, most

of the legal and political institutions established by the *1947 Constitution* effectively came to an end.

From March 1962 to March 1974 Burma did not have a Constitution and the Revolutionary Council ruled by decrees ('Orders', 'laws')ⁱⁱ which were announced on radio and newspapers and most of which contain the statement 'This order shall come into force immediately'. On 25 September 1971, a 97-member State Constitution Drafting Commission was formed with then Brigadier San Yu, a member of the Revolutionary Council as its Chairman.ⁱⁱⁱ The drafting of what was to become the *1974 Constitution* took over two years and the Constitution was put through a referendum between 15 to 31 December 1973. It was announced that 90.19% of those who voted in the national referendum voted in favour of adopting the Constitution. On 3 January 1974 the Revolutionary Council declared the 'New State Constitution' adopted.^{iv}

The *1974 Constitution* is radically different from its predecessor. Its preamble states that due to 'defects in the old [1947] Constitution and the ill effects of capitalistic parliamentary democracy [t]he cause of Socialism came under near eclipse'.^v Article 11 of the *1974 Constitution* states that 'The State shall adopt a single-party system'. The Burma Socialist Programme Party is the sole political party and it shall lead the State'. The *1974 Constitution* merely 'constitutionalises' the *de facto* situation. On 23 March 1964 the Revolutionary Council promulgated the *Law Protecting National Unity*^{vi} in which all political parties except the Burma Socialist Programme Party were abolished and the assets of the political parties were seized.

There is no separation of powers under the *1974 Constitution*. It can best be described as 'socialist Constitution' in that (for example) under the *1974 Constitution* the judges in the top judicial body with its 'socialist sounding' name 'Council of People's Justices' were members of the unicameral one Party Legislature (*Pyithu Hluttaw*)^{vii} and reports to it.^{viii}

The *1974 Constitution* effectively came to an end with the military takeover by the State Law and Restoration Council on 18 September 1988. A week earlier, in response to the sustained and nation-wide demonstrations against the Burma Socialist Programme Party government, the

unicameral one-party *Pyithu Hluttaw* in 'overcoming the Constitution' (the term used in its resolution) decided to hold multiparty elections on 11 September 1988 in 'no less than thirty days and no more than 90 days'.^x On the day of its takeover, the new military junta the State Law and Order Restoration Council announced the abolition of all organs of State power that were formed under the *1974 Constitution*.^x Like its predecessor the Revolutionary Council 26 years earlier the State Law and Order Restoration Council (SLORC) did not formally either abolish, annul or suspend the *1974 Constitution* though it can be stated that the *1974 Constitution* like its 1947 predecessor came to an end some time after September 1988. On the day of its takeover the SLORC also announced the abolition of the *1964 Law Protecting National Unity* which had abolished all other political parties except the Burma Socialist Programme Party.

The SLORC announced that multi-party elections would be held soon after the restoration of political stability. On 27 May 1990 'multi-party democracy general elections' were held. Ninety three political parties participated in the elections out of which the main opposition party the National League for Democracy (NLD) won nearly 60% of the votes cast and 81% of the seats in the National Assembly. This Assembly was never convened. SLORC Chief, Senior General Saw Maung announced that there was no Constitution and that until a 'firm Constitution' was in place, the SLORC would retain power. This was notwithstanding his earlier announcement in a speech on Armed Forces day 1989 that after the 'elections the *Tatmadaw* will hand over the power to the party that wins the election and would return to the barracks'.^{xi}

On 23 June 1992, there was a meeting with political parties to facilitate the drafting of a new Constitution and it was announced that a 'National Convention' would draft the principles to govern the new Constitution. The first session of the National Convention was held on 9 January 1993 and it adjourned the same day. Even before the Convention, the SLORC laid down 'six basic principles' to be included in the new Constitution. Among the six principles are that 'the *Tatmadaw* (Armed Forces) to be able to participate in the national political leadership role of the future State'.^{xii}

The drafting of the Constitution took 15 years and 4 months, starting from the first session of the mainly SLROC-picked 'National Convention'^{xiii} up to the time the *2008 Constitution* was declared 'adopted' by the State Peace and Development Council on 29 May 2008.^{xiv} The *2008 Constitution* was, like the *1974 Constitution*, adopted through a 'national referendum' with 92.48% of the voters' approving the new Constitution'.^{xv} Just as there were strong criticisms of the 'national referendum' leading to the 'adoption' of the *1974 Constitution*^{xvi} there were numerous criticisms of the 'referendum' that 'adopted' the *2008 Constitution*. The *2008 Constitution* can be considered praetorian in that the military looms large and dominant and is unique in modern constitutional history.^{xvii}

On 7 November 2010, 'multiparty elections' were once again held. The word 'elections' is used advisedly. Before the elections, five restrictive, draconian laws were 'promulgated' by the ruling State Peace and Development Council.^{xviii} The unsurprising result was that the government's Union Solidarity and Development Party 'won' more than 75% of the seats in the both the *Amyotha Hluttaw* and the *Pyithu Hluttaw*.^{xix} The first session of the military-dominated legislature was called on 31 January 2011. In the third week of March 2011, the President, two Vice-Presidents, the Chairperson^{xx} of the Constitutional Tribunal and its members, the Chief Justice, the Attorney-General, the Auditor-General, Chairman^{xxi} and members of the Union Election Commission were recommend by the 'elected President' for 'approval' by the *Pyidaungsu Hluttaw*. All of them as well as members of the 'Union government' were sworn in and took office on 30 March 2011.

Due to the fact that the *2008 Constitution* has only recently come into force, reference will be made to the *2008 Constitution* as well as the pre-*2008 Constitutions*^{xxii} state structure,^{xxiii} laws,^{xxiv} policies and practices.

A. Espousal of the Rule of Law Concept by Burmese (Myanmar) authorities

The most recent statement on what the ruling regime regards as the *rule of law* can be seen in a report what then-Prime Minister General Thein Sein^{xxxv} said in September 2009 in the Government-run *New Light of Myanmar*:

Prime Minister General Thein Sein said administrative bodies at various levels need to constantly know about the State policies and objectives. It is necessary to strive for the emergence of a peaceful, modern and developed nation by upholding Our Three Main National Causes as it is a national policy forever so long as the State exists. To do so, the rule of law is important. At a time when the State is in its important state, constant measures are to be taken to ensure the rule of law in order to thwart any disturbances. In this regard, high civil administrative capability is the main factor and that will contribute much towards community peace and stability. So, to ensure high administrative capability and the rule of law, the strength of ward and village peace and development councils is needed, said the Prime Minister.^{xxxvi}

And again:

Prime Minister General Thein Sein said that [the] legislative, executive and judicial pillars are of paramount importance for a nation, and nation-building endeavours have to be carried out through the practice of the three main pillars. Out of the three branches, the judicial pillar is indispensable like the legislative and executive pillars, and the law is a rule or discipline of a nation. It is incumbent upon the administrative body to supervise the rule or discipline for each citizen to abide by, he noted. Therefore, the law staff and judicial staff play a pivotal role in the process of building a nation. In adopting, assessing and translating laws, bylaws, procedures and orders, law officers are required to do so in accordance with the basic principles upholding Our Three Main National Causes non-disintegration of the Union, non-disintegration of national solidarity and perpetuation of sovereignty.^{xxxvii}

There is no mention at all—nor does there exist in practice for the past several decades – of the State being ‘accountable to law and the need for independent adjudication as well as adherence to international human rights and norms’.²⁸

1. The Government and its Officials and Agents are Accountable under the Law

From 1988 to 30 March 2011, Burma is formally ruled by a group of military officers and by a military Council, named the State Peace and Development Council. When the current session of the Legislature ends its meeting at the end of March 2011^{xxxix} the *2008 Constitution* can be considered as fully operational. In the pre-*2008 Constitution* period, the Government and its officials and agents were not accountable under the law. The State Law and Order Restoration Council (SLORC) and the State Peace and Development Council (SPDC) came to power through a military takeover after brutally crushing a people’s uprising. Even though SLORC announced that existing laws are to be continued to be in force until they are formally repealed^{xxx} it was stated by General Saw Maung, then Chairman of the SLORC that it rules by martial law, which ‘no law at all’.^{xxxi} The SLORC and later its successor, the SPDC’s power to make, repeal, amend or for that matter by pass laws is unrestricted. It is not limited by any Constitution, Statutes, administrative conventions or laws. Moreover, even after the *2008 Constitution* becomes fully operational, it has been explicitly stated in the Constitution itself that

All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and State Peace and Development Council or actions, rights and responsibilities of the State Law and Order Restoration Council shall devolve on the Republic of the Union of Myanmar.^{xxxii}

The actions of both SLORC and SPDC are accorded immunity under the Constitution, thus making them ‘unaccountable’ in law. The second sentence of Section 445 of the Constitution specifically states:

No proceeding shall be instituted against the said [State Law and Order Restoration and State Peace and Development] Councils in respect of any act done in the execution of their respective duties.^{xxxiii}

Given its track record, it is highly unlikely that the 'new judiciary' constituted under the *2008 Constitution* will accept any 'challenge' regarding the validity, scope or application of this 'immunity' clause. Apart from Section 445, there are other provisions in the *2008 Constitution* which making the military 'unaccountable' – at least not in the ordinary sense of 'accountability'. For example under Chapter 1 'Basic Principles of the Union', Section 20 (b) states 'The Defence Services has the right to independently administer and adjudicate all affairs of the armed forces'. Section 319 states that '... the Courts martial shall be constituted in accord with the Constitution and the other law [sic] and shall adjudicate Defence Services personnel'. The fact that all matters concerning Defence Services does not fall within the purview of the civilian courts – including the Supreme Court^{xxxiv} and the Constitutional Tribunal^{xxxv} – strongly suggests that Defence Forces personnel and their 'activities' will not be subject to the ordinary process of the law. In any case, even if they were subject to the jurisdiction of the civilian courts, these courts are extremely unlikely to consider let alone adjudicate any challenge to military's 'unaccountability'.

The *2008 Constitution* contains elements of 'accountability' in the loose sense of the word. There are provisions concerning impeachment of the President,^{xxxvi} Vice-Presidents,^{xxxvii} Union Ministers,^{xxxviii} Attorney-General,^{xxxix} Chief Justice and Judges of the Supreme Court,^{xl} Chairperson of Constitutional tribunal and members of the Constitutional tribunal.^{xli} Theoretically these provisions can be considered as an improvement over the pre-*2008 Constitution* situation where all members of the 'Legislature' the ruling military Councils and the ruling government and the Ministers in the government^{xlii} are not 'accountable' in law and in fact even in theory.^{xliii}

Even so, there are no impeachment provisions for the Commander-in-Chief of the Armed Forces. This 'lacunae' makes both the Commander-in-Chief and the Armed Forces 'unimpeachable' even in theory and denude the significance of the constitutional provisions' regarding 'accountability'. Moreover since the 'President-elect',^{xliv}

two Vice-Presidents elect, etc were former members of the Union Solidarity and Development Party which 'won' over 75% of the 'seats' in the two Legislatures, the possibility of impeaching the top members of the government exists only in theory rather than in practice. Furthermore, Sections 418 to 420 of the *2008 Constitution* contains provisions concerning the formal takeover of power in cases of emergency by the Commander in Chief of the Armed Forces. These provisions entrench the position of the military and immunise them from any suit and gives a virtual *carte blanche* to the Armed Forces.

The *2008 Constitution* also significantly entrenches, constitutionalises and perpetuates very restrictive methods or modes of governance and military rule. The 'fundamental law' perpetuates military rule and any attempt to change it must 'accord with the rule and procedure set forth in the fundamental law'. This amendment procedure does not accord with any prevailing understanding of the Rule of Law. For example Section 6 (f) of the *2008 Constitution* states that the 'Union's consistent objectives' includes 'enabling the Defence Services to be able to participate in the National political leadership role of the State'.^{xlv} Section 20 (b) further states that '[t]he Defence Services has the right to independently administer and adjudicate all affairs of the armed forces' and Sections 420 to Sections 432 of the *2008 Constitution* which stipulates the takeover of power by the Commander in Chief of the Defence Services can only be changed only 'with prior approval of more than 75% of all representatives of the *Pyidaungsu Hluttaw*, after which in a nation-wide referendum only with the votes of more than half of those who are eligible to vote'.^{xlvi}

Provisions such as those 'enabling the Defence Services to participate in the National political leadership role of the State'^{xlvii} are very difficult to amend, while the formal 'transferring of the legislative, executive and judicial powers of the Union to the Commander-in-Chief of the Defence Services to enable him to carry out measures to speedily restore its original situation in the Union'^{xlviii} can take place quite easily through the issuing of emergency decrees. While the issuance of 'emergency decrees' would be in accordance with the provisions of the Constitution and would not formally amount to 'waiving of certain provisions of the Constitution', it is evident that these provisions are problematic and do not adhere to the rule of law concept.

Neither the 1962 military coup that ended parliamentary democracy in Burma nor the 1988 military takeover was authorised, stated or was inferable from the then existing Constitutions. Even though both the 1962 and 1988 military takeovers were extra-constitutional, they effectively abolished the pre-existing Charters. To 'rectify' this for future military takeovers a priori, the *2008 Constitution* formally authorises a 'Constitutional military takeover'.^{xix} The Constitution formally authorises not only the issuance of an Emergency 'Ordinance' by the President – who would in any case be a military person or possess a military 'vision' – but also the transfer of executive, legislative and judicial powers to the Commander-in-Chief of the Defence Services. There is thus prior constitutional approval of a military takeover albeit in times of 'emergency' and 'hedged' with qualifications. These praetorian provisions are indeed 'unique' among ASEAN Constitutions if not in the world. They do not conform to issues of accountability at least as far as certain top military officials and actions of the military as a whole are concerned. The officials and its agents are not accountable under the law; instead the law at least implicitly authorises and 'empowers' non-accountability.

2. Laws and procedure for arrest, detention and punishment are publicly available, lawful and not arbitrary; and preserve the fundamental rights to physical integrity, liberty and security of persons, and procedural fairness in law

Laws and procedures for arrest, detention and punishment are found in the Penal Code and Criminal Procedure Code. Some of these laws are very similar if not identical to those other former British colonies in ASEAN like Malaysia and Singapore. British colonial legislationⁱ and criminal 'laws' and decrees passed by various military councils – including the Revolutionary Councilⁱⁱ, State Law and Order Restoration Council (SLORC)ⁱⁱⁱ, State Peace and Development Council (SPDC)ⁱⁱⁱ and the Burma Socialist Programme Party government formed under the *1974 Constitution* – are used to justify any unlawful arrests or instances of deprivation of liberties.^{iv}

Laws Affecting Deprivation of Liberty being 'lawful' and not 'arbitrary'

The 1975 Law Protecting the State from Hostile Subversive Elements^v authorises 'arbitrary' detention, if necessary incommunicado, for up to 5 years.^{vi} This Law has been used indiscriminately and arbitrarily mainly against opponents of the government including Daw Aung San Suu Kyi. Moreover this law has been used to extend the detention of opponents of the government and to extend the detention of those whose sentences had already been completed. The first 'stint' of detention of Burmese opposition student leader Min Ko Naing from March 1989 to November 2004 should have expired in 1999 but the detention was extended under Article 10(a) of the this legislation.^{vii}

The Public Availability of the Laws

The Penal Code and The Criminal Procedure Code are publicly available in the sense that they are published in Statute books and in the 12-volume Burma Code.^{viii} Colonial era and pre-independence laws such as 1908 Unlawful Association Act, the 1947 Public Order (Preservation Act) are published in English and 'available' in the Burma Code. The 1975 Law Protecting the State from Hostile, Subversive Elements (in Burmese language) was published in a booklet at the time of its promulgation and may be available in certain government bookshops and old book shops.

The decrees (laws) made by the SLORC and SPDC are published in the government-controlled newspapers the day after they are announced. At the end of the first session of , the Legislature (*Pyidaungsu Hluttaw*) on 30 March 2011 it did not enact new laws, but when it does so it will be published and gazetted and '[t]he law shall come into operation on the day of such promulgation unless the contrary intention is expressed'.^{ix}

However there are reports that at least one recent law promulgated by the SPDC was not made public. The online Irrawaddy magazine reported that on 17 January 2011 (just before the *Pyidaungsu Hluttaw* was called into session on 31 January 2011) a law was passed and 'confidentially distributed among government officials on February 11 [2011] 'which gives the military Chief [Commander in Chief] absolute power and discretion in the use of unlimited 'special funds' that are not included in the country's defense budget'.^x The article also states one of the law's provisions include: '*The Tatmadaw* [armed

forces] commander-in-chief has the authority to use Special Funding in the local currency or foreign currency while providing for the non-disintegration of the Union; the non-disintegration of national solidarity; and the perpetuation of national sovereignty'. The Irrawaddy also reported that the law's stipulation that 'for the spending of the Special Funding [sic] no person or organisation can question, propose or audit'.^{bxi} If this law was passed 'confidentially' and without publication then -unlike the other laws which though draconian had at least been published – this law would fall short of basic international standards of laws. There is no web site for any of the laws passed by the ruling military Councils.

The Laws (and Practices) Concerning Arrest, Detention and Punishment preserve the Rights, to Physical Integrity, Liberty and Security of Persons and Procedural Fairness in Laws

Laws authorising detention without the detained person being informed of the specific charges (except the vague statement that his or her actions affect or potentially affect 'national security') have already been mentioned. The Special Rapporteur on the *Situation of Human Rights in Myanmar* states:

... many trials were conducted behind closed doors, within prison compounds, without legal representation, without the presence or knowledge of prisoners' family members, without proof of evidence or with defective evidence, and pursuant to arbitrary decisions of the judges^{bxi}

There are also detailed NGO reports^{bxi} which meticulously document detailed case names, names of Courts, protagonists including name of judges and officials which indicate that regardless of what the laws state, the prevailing practices concerning 'arrest, detention and punishment' in many cases do not 'preserve the rights to physical integrity, liberty and security of persons and procedural fairness' in laws.^{bxi}

There are 'in the laws' procedural guarantees regarding fair trials. These include Article 2 of the *2000 Judiciary Law*,^{bxi} procedural defence against arbitrary detention^{bxi}, procedural defence against torture^{bxi} but the actual

practices including judicial decisions not only does not conform to these laws and procedures but also violates the essence of these provisions. For example, in *Union of Myanmar v. U Ye Naung and One*^{bxi} the full bench of the Supreme Court (Chief Justice U Aung Toe presiding) ruled that a confession obtained from military intelligence personnel without any judicial oversight was admissible in the absence of evidence from the defendant that it was not obtained through any of the means prohibited under section 24 of the *Evidence Act*. The court reversed the burden of proof by calling on the accused to present evidence that military intelligence had forced them to confess in a process that went on entirely without judicial oversight'.^{bxi}

A few political activists have been sentenced to inordinately long prison sentences. For example the Khun Htun Oo, Chairman of the Shan National League for Democracy, was sentenced to 93 years imprisonment^{bxi} and activist Min Ko Naing to 65 years imprisonment.^{bxi} These are only two instances of many. In response to the statements that there are about '2200 political prisoners in Myanmar'^{bxi} in the January 2011 United Nations Human Rights Council working group on the Universal Periodic Review's tenth session, Myanmar's representative replied that " "political prisoners" and "prisoners of conscience" are in prison because they had breached the prevailing laws and not because of their political belief."^{bxi}

Arbitrary Detentions

A 2007 United Nations report noted that the military had dispersed demonstrations, peacefully initiated by Buddhist monks, firing indiscriminately into the crowds, killing and injuring a significant number of persons.^{bxi} The authorities involved in these violations have not been held to account. Given the political, legal and judicial realities on the ground they continue to 'enjoy' immunity. In events and court cases which occurred before the Saffron Revolution also there were many instances of arbitrary detentions cited with the names of court cases and arbitrary decisions given by the courts. The details of the cases need not be mentioned here since they are mentioned in United Nations documents.^{bxi}

The Use of Torture

In its presentation to the United Nations Human Rights Council in relation to the Universal Periodic Review in January 2011 the Myanmar delegation stated that 'torture is a grave crime and the Constitution prohibits torture or cruel, inhuman or degrading punishment'.^{lxvii} Yet, the United Nations General Assembly has in the years 2008, 2009 and 2010 expressed its concerns among others at the 'continuing practice' of arbitrary detentions as well torture and cruel, inhuman and degrading treatment and have also called upon the government to allow a full and independent investigation into all reports of human rights violations and to bring to justice those responsible'.^{lxviii}

Timely and Effective Remedies before a Competent Court for Violations of Fundamental Human Rights

The judiciary is not independent of the executive arm, especially in political cases. The government has vehemently denied many violations of fundamental rights^{lxviii} notwithstanding numerous documents adduced to the contrary, including by the United Nations General Assembly,^{lxix} Presidential statements of the United Nations Security Council,^{lxx} various reports of United Nations Rapporteurs^{lxxi} There are no 'competent courts' where 'remedies' can be sought for violations of fundamental human rights. The Asian Legal Resource Centre gives examples of cases where redress was sought for violations of rights and where instead of receiving remedies the redress-seekers themselves were penalised or prosecuted.^{lxxii}

The Five Writs under the 2008 Constitution: No 'Great Expectations'

From the time of the SLORC takeover up till the adoption and coming into force of the *2008 Constitution*, there is no effective remedy for fundamental violation of human rights or more specifically for detentions which are arbitrary, and which do not preserve the physical integrity and security of the person.

Section 296 of the *2008 Constitution* states:

The Supreme Court of the Union:

- (a) has the power to issue the following writs:
 - (i) Writ of Habeas Corpus
 - (ii) Writ of Mandamus
 - (iii) Writ of Prohibition
 - (iv) Writ of Quo Warranto
 - (v) Writ of Certiorari
- (b) The applications to issues writs shall be suspended in the areas where the state of emergency is declared.

The Supreme Court's power to issue writs is mentioned in Article 25 of the now long defunct *1947 Constitution*. With the 1962 military takeover, the 'right to move the Supreme Court for the enforcement of any rights conferred by this Chapter [Chapter II of the *1947 Constitution* entitled 'Fundamental Rights'] is hereby guaranteed'^{lxxiii} fell into desuetude. In early March 1962 when the Chief Justice of the Union^{lxxiv} was himself detained and when at least one other former Supreme Court justice^{lxxv} was also in detention without charge or trial and these detentions were made without any reference to any law. The Supreme and High Court of Burma were abolished by a decree of the Revolutionary Council. Hence from 1962 onwards there has been no case before any court where a detainee was released by the courts.

The *2008 Constitution* 'comes into operation on the first day the *Pyidaungsu Hluttaw* is convened'^{lxxvi} and a 7-member Supreme Court was formed and judges were sworn in on 30 March 2011. Will political detainees – which according to one source totals 2076 persons^{lxxvii} – be able to invoke any of the above writs in the new Supreme Court?

Since the former Supreme Court (from the period September 1988 to March 2011) has been constituted by a decree of SLORC and by the *2000 Judiciary Law*^{lxxviii} and *not* under the *2008 Constitution*, it is arguable that it will have neither jurisdiction nor power to issue writs. Under the *2008 Constitution*, the 'Supreme Court', whose members, including Chief Justice U Aung Toe, were appointed by the military Councils. Five judges out of the

then six member Supreme Court were 'permitted to retire' on the same day by the SPDC. Secondly, attempts by the opposition National League for Democracy to 'challenge' before some of the laws issued by the SPDC regarding the de-registration of the National League for Democracy were rejected out of hand.^{lxxxix} The non-independence of the judiciary has for more than a few decades now a very marked feature of the unchanged military rule. Any significant break with this and re-assertion of judicial independence in the mode and function of the late Burmese Supreme Court of the 1940s and 1950s is not foreseeable in the future.

3. The Process by which the Laws are Enacted and Enforced is Accessible, Fair, Efficient, and Equally Applied.

By the end of March 2011, when the first session of the *Pyidaungsu Hluttaw* ended it did not make any new laws under the 2008 Constitution.^{xc} Since no actual laws were enacted under the 2008 Constitution as yet this section deals primarily with the pre-2008 Constitution mechanisms and practices of enacting laws.

There were no controls in relation to the two military Councils enacting laws. Laws issued by the SLORC and SPDC were signed by the Chairmen of the Councils and announced in newspapers. Later, they would be published in booklets and are generally available in some government book shops or in a few private bookshops. Quite a few laws issued by the military Councils have come under heavy criticism^{xcii} and cannot be said to be 'fair' or 'equally applied'. Many of the laws enacted by the two military Councils are substantively and substantially unfair.^{xciii} Since most of the laws are announced (sometimes in gist) on radio and television and published the next day in all government controlled newspapers^{xciiii} it can be said to be 'accessible'.^{xciv}

The fact that these laws are not 'equally' applied can also be seen in the concrete examples given by various organisations such as those of the Special Rapporteur on the Situation of Human Rights in Myanmar.^{xcv} The Asian Legal Resource Centre's submission to the UN Human Rights Council Universal Periodic Review discusses the unequal, indeed arbitrary application of the law under various headings such as the police force in Myanmar

not functioning 'as a discrete professional civilian force but as a paramilitary and intelligence agency under the command of the armed forces' and that 'the routine arbitrary arrest and detention; common use of torture and other forms of cruel and inhuman treatment, and frequent deaths in custody; coerced signing of documents that have no basis in law; baseless and duplicated charges; and fabricated cases'.^{xcvi}

The Legislature is controlled by the government's party (Union Solidarity Development Party) with over 75% of the members of Legislature from that party.^{xcvii} In addition in both Houses of the Legislature, the *Pyithu Hluttaw*^{xcviii} and *Amyotha Hluttaw*^{xcix} there are 25% of military representations directly appointed by the Commander-in-Chief of the Defence Forces.

There are strict and cumbersome rules not only for submission of bills but even to asking of questions in the Legislature.^c In mid-March 2011 the 'opposition' party, the National Democratic Force (NDF)^{ci} floated the idea of proposing a Bill to give a general amnesty to political prisoners.^{cii} This 'idea' or proposal did not proceed beyond the 'proposal' in the meeting of the two Houses of Legislature which ended on 30 March 2011. Furthermore, none of the few opposition members in the Legislature has talked even informally of 'modifying' some provision of laws including those issued by the military Councils. In the very unlikely event that such an idea is mooted, it is very difficult to even reach the 'proposal' stage.^{ciiii} Hence in the foreseeable future laws are unlikely to be enacted and enforced in an accessible and fair manner.

From September 1988 to the first session of the *Pyidaungsu Hluttaw* formed under the 2008 Constitution there were no legislative proceedings. To the extent that the calling into session of the two Houses of the Legislature can be called 'legislative proceedings' it can be said to meet the criteria for 'timely notice'. Since in the pre-2008 Constitution period there were no legislative proceedings the issue of whether there were timely notice and are 'open to the public' is answered in the negative. The proceedings of both Houses of the Legislature are also not open to the public. The 2008 Constitution states that 'The proceedings and the records of the *Pyidaungsu Hluttaw* shall be published. However, the proceedings and the records prohibited by any law or the resolution of the *Pyidaungsu Hluttaw* shall not be published'^{civ}

4. Justice is Administered by Competent, Impartial and Independent Judiciary and Justice Institutions

In many cases, especially those involving political dissidents who 'breach the prevailing laws'^{cv} the judiciary is, at all levels, neither impartial nor independent.^{cv} As for competence, comparing the law reports of the apex Burmese Courts^{cvi} of the first year of independence in 1948 and the fiftieth year of independence in 1998, it has been noted that there has been a deterioration in terms of the academic and professional qualifications of the judges, the format of law reporting and quality of the judgments of the two apex Courts that operate after independence fifty years apart.^{cvi}

Are prosecutors, judges and judicial officers appointed, re-appointed, promoted, assigned, disciplined and dismissed in a manner that fosters both independence and accountability?

From September 1988 to January 2011 the Supreme Court Judges were appointed by the military Councils and also are 'permitted to retire' based on the whims of the military Councils. The SPDC also appoints lower Court judges after 'coordinating' with the Supreme Court. Given that the executive has explicitly directed that judges follow State policy, and the manner in which judges are appointed and dismissed, there is no independence and impartiality in the judicial branch.

Are judicial proceedings conducted in an impartial manner and free of improper influence by public officials or private corporations?

In the earlier sections and main subsections this issue has already been addressed. There is no independence of the judiciary and the executive authorities and the military have influenced the outcome of the decisions.

The Theoretical 'Guarantee' of Defence and Targeting of Defence Lawyers

The right of defence but not necessarily by legal counsel is provided in the 2000 *Judiciary Law*. Section 2(f) 'guarantee[s] in all cases the right of defence and the right of appeal under the law'. Section 375 of the 2008

Constitution also states that '[a]n accused shall have the right of defence in accord with the law'. These provisions 'guarantee' or 'promise' of the right of defence becomes denuded of all meaning when one studies realities on the ground. The Asian Legal Resource Centre documents several cases in which defence lawyers were targeted through wrongful and arbitrary use among others of the 1880 *Legal Practitioners Act*, the 1926 *Contempt of Courts Act*.^{cix} These defence lawyers were targeted because they were involved in defending 'persons accused in political cases'.^{cx}

Public Access to Judicial Proceedings

As this report is being written a contemporaneous news item citing a decision by the Myanmar Supreme Court^{cx} stated that:

Burma's Supreme Court has ruled that it is not the responsibility of judges to decide who can attend court hearings held inside prisons, a move described by legal experts as 'astounding'. The ruling came as a result of an appeal filed by Phyo Wei Aung, who is facing murder charges over the series of grenade attacks in Rangoon during the *Thingyan* festival last year. He had appealed to judges to allow his family to attend the trial, but was denied by Insein prison authorities. Judges and legal experts were then unable to overturn the decision. The Hong Kong-based Asia Human Rights Commission (AHRC) said that the trial further highlights serious problems with the justice system in Burma.

Whereas a judge in a courtroom outside a prison in Burma may not conduct a trial fairly, at least she has nominal authority over the premises: by contrast, her counterpart inside a prison does not even have this.

He is in an Alice in Wonderland scenario, perched in a courtroom over which he has no control, deciding on a case in which a decision has already been made: a non-judge occupying a non-courtroom in a non-trial.

It added in a statement that the decision showed 'just how far logic has departed' from Burma's judicial system and 'underscores the extent to which the judiciary in Burma has abdicated its authority in favour of the security services'.

That sentiment was echoed by David Mathieson, Burma analyst at Human Rights Watch, who told *DVB* that 'this is another example that the courts in Burma serve the military junta, not the people or justice.'^{cxii}

Brief Survey of 2008 Constitution Provisions Concerning the Judiciary: More of the Same or Marginal Improvement?

As stated earlier, there are provisions concerning the Judiciary in the *2008 Constitution*.^{cxiii} Only certain Sections in the Constitution mainly concerning the Supreme Court and the Constitutional Tribunal will be briefly commented on in addressing the competency, impartiality and independence of the judiciary and justice institutions.

Under the *2008 Constitution*, the President must 'submit the nomination of the person suitable to be appointed as Chief Justice of the Union to the *Pyidaungsu Hluttaw* and seek its approval'.^{cxiv} But the following 'caveat' follows immediately:

The *Pyidaungsu Hluttaw* shall have no right to refuse the person nominated by the President for the appointment of Chief Justice of the Union and Judges of the Supreme Court of the Union unless it can clearly be proved that the persons do not meet the qualifications for the post prescribed in Section 301.^{cxv}

The 'requirement' to seek the approval of the *Pyidaungsu Hluttaw* is a mere formality as are all appointments at Union level by the President including the Ministers in the Government,^{cxvi} the Attorney-General,^{cxvii} Auditor-General,^{cxviii} and Chairperson and members of the Constitutional Tribunal.^{cxix} The *2008 Constitution* further enables both the President and representatives of the *Amyotha Hluttaw* and the *Pyithu Hluttaw* to impeach the Chief Justice and Supreme Court Judges,^{cxx} in effect making Presidential 'control' of the Supreme Court Judges even firmer.

Under the *2000 Judiciary Law* there is no explicit or implicit security of tenure for the Chief Justice or Supreme Court Judges. Supreme Court judges are 'permitted to retire' and five (out of six) Supreme Court judges were 'retired' on a single day in 1998.^{cxxi} Additionally, at least for the Chief Justice (under the pre-*2008 Constitution* arrangements) who was appointed on 27 September 1988^{cxix} there is no compulsory retirement age. Hence Chief Justice U Aung Toe, who is 85 years old, remains Chief Justice for more than 22½ years. Only in March 30, 2011 he was required to relinquish the role with the appointment of the new Chief Justice Tun Tun Oo.

In contrast, the *2008 Constitution* requires that a judge be impeached and either on the initiative of the President or of the members of either the *Pyithu Hluttaw* or the *Amyotha Hluttaw* and only after a successful impeachment can they be removed from office.^{cxiii} Moreover, in comparison with the pre-*2008 Constitution* period there appears to be security of tenure until the compulsory retirement age of seventy.^{cxiv} Section 303 of the *2008 Constitution* states that:

The Chief Justice of the Union and Judges of the Supreme Court of the Union shall hold office up to the age of 70 years unless one of the following occurs

- (a) resignation on his own volition
- (b) being impeached in accord [sic] with the provisions under the Constitution and removed from office;
- (c) being found to be unable to continue to serve due to permanent disability caused either by physical or mental defect according to the findings of the medical board formed by law
- (d) death

This is in contrast to the 'Term [sic] of the Constitutional Tribunal' which 'is the same as that of the *Pyidaungsu Hluttaw* being five years'.^{cxv} with the proviso that 'the ongoing [sic] Constitutional Tribunal of the Union, on expiry of its term, shall continue its functions till the President forms a new Tribunal under the Constitution'.^{cxvi}

The process of impeachment and removal of the Chief Justice and Supreme Court may seem cumbersome but it should be noted that in the *Pyidaungsu Hluttaw* 25% of its members are military appointees and more than 75% of both *Hluttaws* are members of the Union Solidarity and Development Party. It is therefore quite likely that once the President initiates an impeachment against the Chief Justice or Supreme Court judges could be removed from office. And according to the *2008 Constitution* there is no ground for redress in the Constitutional Tribunal.

The Constitutional tribunal has no jurisdiction in interpreting the immunity clause dealing with actions of members of the Defence Forces.^{cxxvii} Moreover Section 322 of the *2008 Constitution* lists the 'functions and duties of the Constitutional Tribunal' in seven different sub-sections^{cxxviii} and even though it is mentioned in Article 322 (a) that the Constitutional Tribunal's jurisdiction include interpreting the provisions under the Constitution the scope and application of certain Constitutional provisions may be beyond the pale of the Constitutional Tribunal. This is so not merely because of the provisions concerning courts martial. It is also because: (a) the military has 'the right to independently administer and adjudicate all affairs of the armed forces;^{cxxix} (b) Courts Martial is a separate court from all the other Courts including the Supreme Court and the Constitutional Tribunal;^{cxix} and (c) '[i]n the adjudication of military justice ... the decision of the Defence Services Chief is final and conclusive.^{cxix}

Only 'the President, the Speaker of the *Pyidaungsu Hluttaw*, the Speaker of the *Pyithu Hluttaw*, the Speaker of the *Amyotha Hluttaw*, the Chief Justice of the Union, the Chairperson of the Union Election Commission, 'have the right to submit matters directly to obtain the interpretation, resolution and opinion of the Constitutional Tribunal of the Union'.^{cxix} These office bearers are unlikely to 'initiate'

any issue pertaining to the 'immunity' provisions contained in Section 445 of the *2008 Constitution*. Section 326 of the *2008 Constitution* states that 'the Chief Ministers of the Region or the State, the Speaker of Region or State *Hluttaw*, the Chairperson of the Self-Administered Division Leading Body or the Self-Administered Zone Leading Body, representatives numbering at least 10% of all the representatives of the *Pyithu Hluttaw* or the *Amyotha Hluttaw*' also have the right to submit matters to obtain the interpretation, resolution and opinion of the Constitutional Tribunal' but only 'in accord with the prescribed procedures'.^{cxix}

Hence the Constitutional Tribunal's existence need not bring any great hopes or expectations that independent, impartial judicial institutions would arise nor the principles of the rule of law to (in the words of the *2008 Constitution*) 'come into operation'.

Endnotes

- i. See for e.g. *Ma Ahmar v. The Commissioner of Police and One*, 1949 Burma Law Reports (BLR), Supreme Court (SC) 39 where the Supreme Court held that the mere distribution of leaflets of the Burma Communist Party about the 'murderer Thakin Nu [then Prime Minister] Fascist government' was no justification for detention under the *1947 Public Order Preservation Act*. The power of judicial review has been exercised which includes a landmark Supreme Court ruling which held that the President's action was ultra vires of an Act under which the President purported to act. See *Ah Kham v. U Shwe Phone*, 1952 BLR (SC) 222.
- ii. 'Decrees' issued by the Revolutionary Council which were announced on radio and published in news papers. The English version of the decrees would use the term 'laws' and the English language newspapers (only two, both of which owned and operated by the government) will often state that 'The Revolutionary Council promulgates new laws'.
- iii. See *The Working People's Daily* (Rangoon) 26 September 1971.
- iv. See *The Guardian* (Rangoon) 4 January 1974. The headline 'New State Constitution Adopted' is written in a red (colour) banner headline. The *1974 Constitution* was adopted on 3 January 1974 but it fully came into force on 2 March 1974 when the Revolutionary Council led by its Chairman U Ne Win handed over power to the one-party *Pyithu Hluttaw* and U Ne Win became the first President of the Socialist Republic of the Union of Burma.
- v. Third paragraph of the *1974 Constitution*. The English translation of the *1974 Constitution* can be found in AP Blaustein and GH Flanz, *Constitutions of the World* (Oceana Publication, New York, 1990). It is also accessible on line at www.blc-burma.org/pdf/Constitution/1974%20Constitution.pdf (accessed 3 February 2011).
- vi. See *The Guardian* (Rangoon), 24 March 1964 regarding the Law Protecting National Unity. On 18 September 1988 the State Law and Order Restoration Council which has taken over power abolished by decree (law) the 1964 law made by the Revolutionary Council.
- vii. The Burmese word *Pyithu Hluttaw* is used for the (lower House) of the legislature under the 1947 (Westminster-based) Constitution as well as under the current *2008 Constitution* even though under the 1947 Constitution the word 'Parliament' is used in Burmese transliteration fairly often during the 1948 to 1962 period. *Pyithu Hluttaw* is always used in place of 'Parliament' either in English or in Burmese transliteration to refer to the unicameral legislature during the period of the 1974 ('Socialist' one-party) Constitution. Under the *2008 Constitution*, the 'Lower' house is called *Pyithu Hluttaw* while the Upper House is called *Amyotha Hluttaw*. Joint-sittings of the two House of Legislature is called *Pyidaungsu Hluttaw* ('Union Legislature').
- viii. Article 34 and Article 104 of the 1974 Constitution, Article 104 in part states: 'The Council of People's Justices shall be responsible to the *Pyithu Hluttaw* and shall report to the *Pyithu Hluttaw* on the state of administration of justice.'
- ix. News items of the *Pyithu Hluttaw* resolution can be read in *The Working People's Daily* (Rangoon, Burma), 12 September 1988,
- x. State Law and Order Restoration Council Order No. 2 as reported in *The Working People's Daily*, 19 September 1988.
- xi. See the Burmese language newspaper *Loke Thar Pyi Thu Nazin*, 28 March 1989 where General Saw Maung's entire speech was reproduced.
- xii. For a contemporaneous report of the 'objectives' laid down by the then State Law and Order Restoration Council see Joint Committee on Foreign Affairs, Defence and Trade Submission on Myanmar by the Department of Foreign Affairs and Trade (1995).
- xiii. The news item of the first session of the National Convention being convened to be 'postponed' the next day can be seen in the 10 January 1993 issue of *The New Light of Myanmar*, 10 January 1993 issue.
- xiv. The English translation of the Preamble of the *2008 Constitution* states that 'The Constitution of the Republic of the Union of Myanmar' was adopted on the 'Twenty-Ninth Day of May 2008 A.D.)
- xv. For a contemporaneous report see *People's Daily* (Beijing), 'Myanmar formally announces ratification of new constitution draft' 31 May 2008, also accessed at <http://english.people.com.cn> (accessed 27 February 2011).

- xvi. See Myint Zan, 'Law and Legal Culture, Constitutions and Constitutionalism in Burma' in Alice ES Tay (ed) *East Asia- Human Rights, Nation-Building, Trade*, pp. 236-29. For one among many others analyses of the 'referendum' that led to the adoption of the 2008 Constitution see, Donald M Seekins, 'Myanmar in 2008, Hardship Compounded' (2009) 49 (1) *Asian Survey* 166, pp. 169-170 and the sources cited therein.
- xvii. See Myint Zan, 'Myanmar (Burma) From Parliamentary System to Constitutionless and Constitutionalized One-Party and Military Rule' in Clauspeter Hill/Jorg Menzel (ed) *Constitutionalism in Southeast Asia*. pp. 191, 195 (especially at end note ii), 197, pp. 205-209.
- xviii. See for e.g. Aljazeera news report, 3 November 2010 'Restrictions Mar Myanmar Election', [http://english.aljazeera.net / vide/asiapacific/2010/2010113103512880770.html](http://english.aljazeera.net/vide/asiapacific/2010/2010113103512880770.html) (accessed 27 February 2011). See also 'Myanmar bars outsider from polls' (18 October 2010) (accessed 27 February 2011), 'Voting ends in Myanmar elections' (7 November 2010), (accessed 27 February 2011) at the same website.
- xix. The English translation of the 2008 Constitution does not translate these terms into English but transliterate them. *Amyotha Hluttaw* can be roughly and unofficially described as the 'Upper House' and *Pyithu Hluttaw* can be roughly and unofficially described as 'House of Representatives' or 'Lower House'. The formation of the *Pyithu Hluttaw* is mentioned in Article 109 of the 2008 Constitution, the formation of the *Amyotha Hluttaw* is mentioned in the Article 141 of the 2008 Constitution and the formation of the joint session of the *Amyotha Hluttaw* and the *Pyithu Hluttaw* called the *Pyidaungsu Hluttaw* ('Union Legislature') is stated in Article 74 of the 2008 Constitution.
- xx. Article 321 and 327 of the 2008 Constitution uses the term 'Chairperson' in relation to the Constitutional Tribunal of the Union.
- xxi. In contrast to the term used for the Constitutional Tribunal, Article 398 and Article 400 of the 2008 Constitution uses the term 'Chairman' in relation to the Union Election Commission
- xxii. The 2008 Constitution was adopted on 29 May 2008. Article 441 reads 'A nation-wide referendum held for adoption of this Constitution where more than half of the eligible voters voted, of which the majority of voters adopted this Constitution, shall come into operation throughout the Union from the day the first session of the *Pyidaungsu Hluttaw* is convened'. As such, the Constitution came into 'operation' on 31 January 2011 when the *Pyidaungsu Hluttaw* was convened.
- xxiii. Article 444(a) states that '[t]he government that exists on the day this Constitution comes into operation shall continue to discharge the respective duties until the emergence of the new Government formed and assigned duties [sic] in accord with this Constitution'.
- xxiv. Article 445 states that '[a]ll policy guidelines, laws, rules, regulations, notifications of the State Law and Order Restoration Council and State Peace and Development Council shall devolve on the Republic of the Union of Myanmar'. Article 446 states: 'Existing laws shall remain in operation in so far as they are not contrary to this Constitution until or unless they are repealed or amended by the *Pyidaungsu Hluttaw*'. Hence virtually all of the laws including the decrees ('laws') made by the State Law and Order Restoration Council and State Peace and Development Council will continue to be in force.
- xxv. Prime Minister General Thein Sein retired from the military and 'contested' the elections held in November 2010 from the Union Solidarity Development Party in which Senior General (head of the State Law and Order Restoration Council and State Peace and Development Council) since 23 April 1992 and still (even after relinquishing his role as the head of the military council which was abolished on 30 March 2001 is the Patron of the USDP. On 30 March 2011 with the formation of the 'new' government the State Peace and Development Council was abolished and also a new Commander in Chief of Defence Forces was also sworn into office. Hence Senior General Than Shwe can be stated to have retired from the posts of Chairman of the State Peace and Development Council and also from that of the Commander in Chief of the Defence Forces though he retained the post of Senior General and also Patron of the ruling Union Solidarity Development Party. On 4 February 2011 the combined session of the two Legislatures elected Prime Minister Thein Sein as President but in the third week of March 2011 he has still not formally taken up the position of President as yet and official government newspapers continue to refer to U Thein Sein (in early March 2011) as 'the elected President'. For example in the news item '12th- day regular session of First *PyidaungSu Hluttaw* held, Approval sought for appointment of Supreme Court Judges Persons Suitable to be appointed as members of the Union Election Commission nominated'(New Light of Myanmar, 7 February 2011) the term elected President was used.

- xxvi. *The New Light of Myanmar*, (English language newspaper), 15 September 2009, as reported in Asian Legal Resource Centre, Hong Kong, Diagnosing the Unrule of Law in Burma: A submission to the UN Human Rights Council Universal Periodic Review ('Diagnosing the Unrule of Law'), Part V, Role of the Judiciary as Enforcer of executive policy: official statements. Paragraph 10.
- xxvii. *The New Light of Myanmar*, 13 May 2009, as reported in 'Diagnosing the Unrule of Law'. *Ibid.* See also, Nick Cheesman, 'Thin Rule of Law or Unrule of Law in Myanmar' (2009/2010) / 82 (4) *Pacific Affairs* 507-613. (hereafter Nick Cheesman 'Thin Rule of Law').
- xxviii. See the statement of the 2003 report of the Special Rapporteur of the Situation of Human Rights in Myanmar, UN Document E/CN.4/2003/41, para. 58.
- xxix. See for e.g. 'Parliamentary Debate to be Concluded before April', *The Irrawaddy*, <http://www.irrawaddy.org/article.php?articleid=20890> (accessed 8 March 2011).
- xxx. SLORC Order No.6/1988 of 24 September 1988. The translation of the Order can be seen in 25 September 1988 issue of *The Working People's Daily* (Rangoon).
- xxxi. See 'Myanmar: 'No Law At All: Human Rights Violations under Military Rule', (1992); see also Article 19, *Burma: No Law At All* (1996).
- xxxii. Section 445 of *The Constitution of the Republic of the Union of Myanmar*. The English translation of the 2008 Constitution used the word 'Section' rather than 'Articles' in referring to the numbered provisions of the Constitution. The 1974 Constitution uses the term 'Articles' and the 1947 Constitution uses the word 'Sections'.
- xxxiii. *Ibid.*
- xxxiv. Section 294 of the 2008 Constitution states that 'In the Union, there shall be a Supreme Court of the Union. Without affecting the powers of the Constitutional Tribunal and the Courts-Martial the Supreme Court of the Union is the highest Court of the Union'.
- xxxv. Section 322 of the 2008 Constitution states the powers and function of the Constitutional Tribunal. It does not include adjudicating matters concerning the military personnel and matters concerning the military.
- xxxvi. Section 71 of the 2008 Constitution.
- xxxvii. *Ibid.* Under the 2008 Constitution there are two Vice Presidents.
- xxxviii. Section 233 of the 2008 Constitution.
- xxxix. Section 238 read with Section 233 of the 2008 Constitution.
- xl. Section 302 of the 2008 Constitution.
- xli. Section 334 read with Section 302 of the 2008 Constitution.
- xlii. Under the pre-2008 Constitution period and governmental structures the ruling military Councils the SLORC and SPDC can be considered as Legislatures since these Councils have 'promulgated', repealed, amended and at times merely 'ignored' or 'superseded' existing laws in their actions and practices, The government (the executive) in the pre-2008 Constitution period is different from that of the military Council and when new laws (decrees) are issued it is not the executive arm (the government) but the military Councils which issued these laws which would 'devolve' on the 'new' government formed on 30 March 2011 when the current session of the *Pyidaungsu Hluttaw* ended,.
- xliii. See references in above note xxxi.
- xliv. The official term used is 'elected President'
- xlv. This Section is embodied in Chapter I of the 2008 Constitution 'Basic Principles of the Union'.
- xlvi. Section 436 (a) of the 2008 Constitution.
- xlvii. Article 6 (a) of the 2008 Constitution.
- xlviii. Section 418 (a) of the 2008 Constitution
- xlx. See Sections 413,417, 418,419, 420 of the 2008 Constitution. Under Section 436 (a) all of these Sections can be amended only 'with the prior approval of more than seventy-five percent of all the representatives of the *Pyidaungsu Hluttaw*, after which in a nation-wide referendum only with the votes of more than half of those who are eligible to vote'.

- I. See for e.g. the late Dr. Maung Maung's justification of former Burmese leader U Ne Win's announcement on radio and television in what turned out to be his last public speech to the nation on 23 July 1988 that 'if the Army shoots it shoots to hit, it does not shoot into the sky' by reference to the Riot Manual of 1940, Dr. Maung Maung, *The 1988 Uprising in Burma*, (Yale University South East Asia Studies, p.90). See Myint Zan, 'Misremembrance of an Uprising' (2000) 4(2) *Newcastle Law Review* 101. p. 112.
- li. The name of the military Council which ruled Burma by decree from 2nd March 1962 to 2nd March 1974 and which issues of over one hundred laws by decree during the period. Article 199 of the now defunct 1974 Constitution of the Socialist Republic of the Union of Burma states 'All policy guidelines, laws, rules, notifications, proclamations measures, responsibilities and rights of the Revolutionary Council of the Union of Burma shall devolve on the Socialist Republic of the Union of Burma'. Compare the almost identical first sentence of Section 445 of the 2008 *Constitution*.
- lii. The SLORC also ruled the country by decrees by issuing laws from 18 September 1988 to 15 November 1997.
- liii. The SPDC ruled the country from 15 November 1997 and issued laws through decrees and as this Report is being written in the third week of March 2011 it is still formally in existence. Section 445 of the 2008 *Constitution* states: 'All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and the State Peace and Development Council or actions, rights and responsibilities of the State Law and Order Restoration Council and the State Peace and Development Council shall devolve on the Republic of the Union of Myanmar'.
- liv. For e.g., in the National Report submitted in accordance with paragraph 15 (a) to the annex to the Human Rights Council resolution 5/1 Myanmar A/HRC/WG.6/10/MMR/1 at paragraph 30, end notes xv and xvi the Code of Procedure section 423 (1) was referred to support the Myanmar government's contention that '[e]veryone convicted of the crime has the right to his conviction and sentence being reviewed by the higher tribunal according to law'.
- lv. The 1975 *Law Protecting the State from Hostile Subversive Elements* was not officially translated into English. An extensive commentary in English with translations of major provisions of the legislation can be found in P Gutter and BK Sen, 'Burma's State Protection Law[;] An Analysis of the Broadest Law in the World' (Burma Lawyer's Council, Bangkok 2001).
- lvi. Article 14 of *The Law Protecting the State from Hostile, Subversive Elements*. See also, P. Gutter and B.K. Sen, *Ibid*.
- lvii. See generally Gutter and Sen *Ibid*, p. 40.
- lviii. Most of the colonial laws as well as early post-independent laws are compiled in the 12-volume Burma Code. At least some of them are available only in the original English. Some immediate post-independent laws made by the then Burmese Parliament are in Burmese and English. In some cases, laws that are in Burmese are not officially translated into English. On the other hand at least a few colonial era laws were not officially translated into Burmese. The Penal Code based on the Indian Penal Code was translated into Burmese in the late 1940s or early 1950s and can with some difficulty be found and bought mainly in used book stores.
- lix. Section 107 of the 2008 *Constitution*.
- lx. Wai Moe, 'Than Shwe Grants Himself Power to Access Special Funds' www.irrawady.org/article.php?art_id=20878 (accessed 14 March 2011).
- lxi. *Ibid*.
- lxii. UN Document A/HRC/13/48, para 36.
- lxiii. See Asian Legal Resource Centre, Diagnosing the un-rule of law in Burma, above note xxvi.
- lxiv. *Ibid*.
- lxv. The administration of justice shall be based upon the following principles; '(e) dispensing justice in open court unless otherwise prohibited by law; (f) guaranteeing in all cases the right of defence and the right of appeal under the law'.
- lxvi. Criminal Procedure Code (1898) Section 61 'No police officer can detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to [the police-station, and from there to the Magistrate's Court].
- lxvii. 1872 Evidence Act, Section 24, Criminal Procedure Code Sections 162, 164 (1).

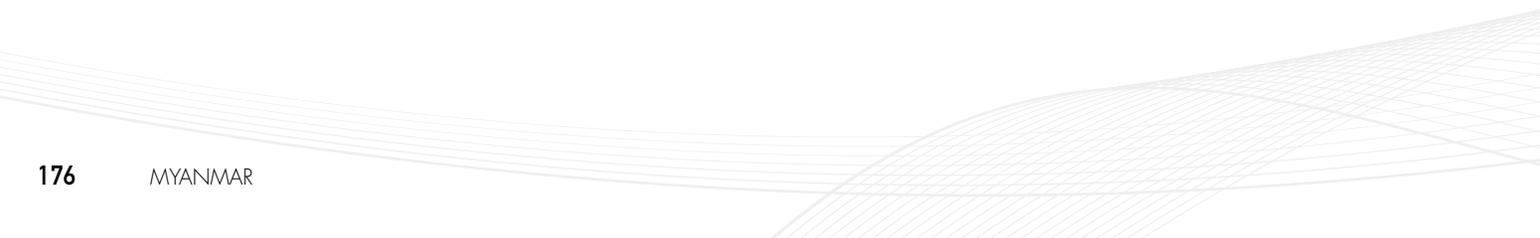
- lxviii. 1991 Myanmar Law Reports, (Special Bench) p.63. The ruling was written in Burmese. The Rapporteur cites from the Asian Legal Resource Centre submission to the Human Rights Council Universal Periodic Review.
- lxix. *Ibid.*
- lxx. See for e.g. Association for the Assistance of Political Prisoners (AAP), Political Prisoner Profile, AAP Case No. 055, <http://bbppn.net/wp-content/uploads/2008/03/KhuntHtun-Oo-11 July 200-pdf> (accessed 15 March 2011).
- lxxi. Amnesty International, 'Myanmar[;] Amnesty International submission to the UN Universal Periodic Review', Tenth Session of the UPR working Group, January 2011, p.4. ('Amnesty International Submission') Amnesty International also reported that '[t]wenty three members of the 88 Generation Students Group including Mie Mie and Nilar Thein' for peacefully taken part in the anti-government protests of August-September 2007' (*Ibid.*).for e.g. 'Ko Wild, 'Min Ko Naing bestowed Kwang Ju Human Rights award, Mizzima News, 24 April 2009, <http://www.mizzima.com/news/regional/2013min-ko-naing-bestowed-Kwang-Ju-human-rights-award> (accessed 15 March 2011). See also Amnesty International, 'Myanmar political prisoners still fighting for their rights behind bars' www.amnesty.org/en/news-and-updates/myanmar-political-prisoners-still-fighting-for-their-right-behind-bars (accessed 19 March 2011).
- lxxii. See for e.g. Amnesty International Submission above note lxxii, p.3, end note vi.
- lxxiii. United Nations General Assembly, Draft Report of the Working Group on Universal Periodic Review, Myanmar, UN Document, A/HRC/WG.6/10/L.7, (hereafter 'Draft Report of Working Group') paragraph 51.
- lxxiv. UN Document A/HRC/7/10/Add.1, paragraphs. 183–185.
- lxxv. See United Nations Working Group on Arbitrary Detention, Opinion No. 7/2008 on the case of Ko Than Htun and Ko Tin Htay Opinion No. 26/2008 on the case of Hkun Htun Oo, Sai Nyunt Lwin, Sai Hla Aung, Htun Nyo, Sai Myo Win Htun, Nyi Nyi Moe and Hso Ten; and, Opinion No. 44/2008 on the case of U Ohn Than, all in A/HRC/13/30/Add.1. See also, 'Diagnosing the Unrule of Law' above note xxvi at under Part B 'Institutional Framework' paragraphs ii to iv of the Report where details of the names, cases, courts and judges involved are mentioned.
- lxxvi. 'Draft Report of Working Group', above note lxxiv.
- lxxvii. A/RES/64/238, paragraph. 7. See also A/HRC/RES/13/25, paragraph 9. For only a small sample of provision of fairly detailed information of the use of torture or degrading treatment see 'Diagnosing Unrule of law' above note xxvi under the sub-heading 'Torture' as well as 'Deaths in Custody'.
- lxxviii. See for e.g. the Myanmar delegation statement at the Universal Periodic Review tenth session, 'Draft Report of Working Group' above note lxxiv at paragraphs 89-103.
- lxxix. Since 1991 until the year 2010 the United Nations General Assembly has passed resolutions expressing its concerns regarding 'The Situation in Myanmar'. All of these resolutions can be accessed at the United Nations web site www.un.org
- lxxx. See UN Document S/PRST/2007/37.
- lxxxi. See for e.g. The Special Rapporteur on the situation of human rights in Myanmar, Report of the Special Rapporteur on the situation of human rights in Myanmar, delivered to the General Assembly, U.N. Doc. A/61/369, ¶ 32 (Sept. 21, 2006) (hereinafter Myanmar Rapporteur 2006 I). Mr. Pinheiro was Special Rapporteur from 2000-2008) and Special Rapporteur Tomás Ojea Quintana, the UN's special rapporteur on the situation of human rights see UN Doc. A/HRC/13/48.
- lxxxii. 'Diagnosing the Unrule of Law' above note xxvi, under the heading 'Lack of Means of Redress and Counter Complaints Against Redress'.
- lxxxiii. Section 25 of the [defunct] 1947 Constitution. True to its guarantee in just over two years of independence in at least two cases the late Supreme Court exercised its prerogative to issue writs and the late Supreme Court directed the executive government to release detainees. See the 1949 Supreme Court decision of *Ma Ah Mar v. The Commissioner of Police and One* (above note i) and the decision in the year 1960 *Tinsa Maw Naing (Applicant) v. The Commissioner of Police, Rangoon and Another (Respondent)*, 1950 *Burma Law Reports*, (Supreme Court) 17. where the Supreme Court directed the executive government to release forthwith the detainee Bo Yan Naing who was the husband of the applicant who applied for habeas corpus to the Supreme Court that her husband be released which the Supreme Court duly ordered.
- lxxxiv. The late U Myint Thein, M.A. LL.B (Cambridge), LL.D (Honoris Causa) (Rangoon), Barrister-at-law (1900-1994).

- lxxxv. That Supreme Court Justice was the late Dr, E Maung, (1898-1977) who as acting Chief Justice of the Union, and in a decision written by him 'directed' the then executive government to release the detainee the late Bo Yan Naing in response to a habeas corpus application brought in by his wife Tinsa Maw Naing directed that Bo Yan Naing be released. See Tinsa Maw Naing case above note lxxxiii. In the case of detentions of the Chief Justice U Myint Thein, former Justice U E Maung, and Justice U Chan Htoon, they themselves were unable to avail themselves of any of the writs 'guaranteed' under the 1947 Constitution for these writs together with the 1947 Constitution has died soon after the March 1962 military coup which led to the detention of the Chief Justice and a former (as of March 1962) as well as serving Supreme Court Justice.
- lxxxvi. Section 441 of 2008 Constitution.
- lxxxvii. See the web site of the Assistance Association for Political Prisoners Burma (AAPPB) www.aappb.org (accessed 16 March 2011). The web site states and categorises the types political prisoners. AAPPB states that among the political prisoners were 254 monks, 12 members of Parliament (the 'Parliament' which was never held in the aftermath of the now cancelled 1990 elections), 275 students, 169 women, 397 NLD [National League for Democracy] members etc. Note however the Myanmar delegation's tart statement that in the UN Human Rights Council Universal Periodic Review that 'political prisoners' and 'prisoners of conscience' are in prison because they had breached their prevailing laws and not because of their political beliefs'.
- lxxxviii. The establishment, formation and members of the Supreme Court (first formed by the State Law and Order Restoration Council) in September 1988 and as of third week of March 2011 is still in existence is different from the 'Union Supreme Court' consisting of a Chief Justice and six other Judges nominated by the elected President U Thein Sein and approved by the *Pyidaungsu Hluttaw*.
- lxxxix. See for e.g. 'Supreme Court Rejects NLD Appeal to be Reinstated', Irrawaddy Web Site, www.irrawaddy.org/cartoon.php?art_id=20158 (accessed 17 March 2011).
- xc. See Sections 95 to 107 of the 2008 Constitution for procedures that need to be followed for the laws to be enacted by the *Pyidaungsu Hluttaw*.
- xci. Only a few laws whose contents and repressive provisions have been criticized and enacted by SLORC and SPDC would be mentioned here. They include but would not be limited to 1988 Association Formation Law, 1996 Anti Subversion Law, 1996 Television and Video Law, 2004 Electronic Transactions Laws, 2010 Military Conscription Law. The Electoral laws in relation to the 2010 elections have also come under criticism from a human rights law standpoint. See for e.g. Amnesty International, Myanmar's 2010 Elections: A Human Rights Perspective, Amnesty International Document ASA/16/007/2010.
- xcii. For example the 2010 Military Conscription Law, states that failure to report for military service could get three years in prison and those who intentionally avoid conscription through [faked] illnesses or inflicting injury on themselves could be imprisoned for up to five years, fined or both, according to the law'.
- xciii. All newspapers with the exception of the Myanmar Times newspapers (in English and Burmese which in any case is not published daily) are controlled by the government.
- xciv. See how ever the comments about the 'confidential' circulation only among top officials of 'Special Funding Law' see above notes lx to lxi.
- xcv. See UN Document A/HRC/13/48, para.13. See also A/HRC/10/19, paragraph 99.
- xcvi. 'Diagnosing the Unrule of Law', above note 26 Part B, The Institutional Framework, paragraph 12. The Annex of the Asian Legal Resource Centre also state actual cases which occurred in relation to 'closed trials', 'procedurally incorrect cases', 'evidenceless and groundless cases', 'denial of defendant's rights and targeting of defence lawyers', 'lack of means of redress and counter complaints against defendants'. (Annex of the Report).The submission can also be accessed at www.alrc.net
- xcvii. The Union Solidarity and Development Party won 129 seats out of the 168 elected (and 56 appointed military seats) in the *Amyotha Hluttaw* (consisting of 76.79% of the seats) and it won 259 (out of 330 elected) (consisting of 78.48% of seats) and 110 military appointed seats in the *Pyithu Hluttaw*. Source Xinhua news agency 'Myanmar election commission publishes election final results' <http://www.newsxinhuanet.com/english2010/world/2010-11/17/c-13611242.htm> (accessed 18 March 2011) hereafter Xinhua news report.
- xcviii. Section 109 (b) of the 2008 Constitution.
- xcix. Section 141 (b) of the 2008 Constitution.

- c. See for e.g. Myo Thant, 'Some MPs not prepared to raise questions and make motions', www.mizima.com 14 March 2011 (accessed 18 March 2011).
- ci. The National Democratic Force (NDF) is a splinter group of the main (now officially dissolved) National League for Democracy (NLD) Party. The NDF broke with the NLD decided to and did contest the November 2010 elections. The NDF won 4 seats (out of a total of 224 elected and appointed seats in the *Amyotha Hluttaw* (consisting of 2.38% of the seats) and it won 12 seats out of 440 elected and appointed seats in the *Pyithu Hluttaw* (consisting of 3.64% of the seats in the *Pyithu Hluttaw*) (Source Xinhua news report at lxvii)).
- cii. 'NDF to Raise Reform Issues in Parliament', The Irrawaddy Web Site, www.irrawaddy.org/article.php?artid20732 (accessed 18 March 2011) (NDF to Raise Reform Issues'). See also Ko Htwe, 'No Amnesty for Prisoners' The Irrawaddy, www.irrawaddy.org/article.php?art_id=20995 (accessed 25 March 2011) where it was stated by the Home Minister (in relation to a proposal –note not a 'Bill'- for Amnesty for political prisoners made by a member of the *Pyithu Hluttaw*) that '[g]ranting amnesty for prisoners is not the concern of the *Hluttaw* or judiciary ... only the president has the grant a pardon and only on the advice of the National Defence and Security Council'. It could be briefly stated here that in ordinary legal parlance the issuing of Amnesty and the granting of pardons are not the same. Under Section 204 (a) of the 2008 *Constitution* 'the President has the power to grant a pardon' and under Section 204 (b) he also has the 'power to grant amnesty in accord with the recommendation of the National Defence and Security Council'. The point here is not to elaborate on these legal topics even vis-à-vis the Home Minister's statements but to state how difficult –legal, procedural, practical- it is for 'opposition' members of the Legislature to even 'propose' for topics in which the military and the government parties are not willing to entertain.
- ciii. 'According to parliamentary regulations, an MP must inform the House Speaker 10 days in advance if he or she wishes to raise a question, 15 days in advance for a proposal, and no less than 30 days to propose a new law. Other opposition leaders who did not take part in the elections are sceptical about the NDF approach since the parliament sessions in Naypyidaw are totally dominated by the military and its proxy Union Solidarity and Development Party (USDP). 'Questions and proposals must be tabled at least 10 days in advance, which means the USDP and military officers will have time for pre-emptive responses,' said Aye Thar Aung, an Arakan leader who is secretary of the Committee Representing the People's Parliament. 'Less than 20 percent of parliament is non-USDP and non-military,' he added. 'Therefore, we are faced with a situation where absolutely nothing may happen in Parliament.' As cited in 'NDF to Raise Reform Issues' *Ibid*.
- civ. Section 89 of the 2008 *Constitution*.
- cv. See above note lxviii.
- cvi. See United Nations *Special Rapporteur Report on the Situation of Human Rights in Myanmar* where it was specifically stated that there is a lack of independence of judiciary in the country and weak rule of law UN Document 'HRC/13/48, para. 13. See also A/HRC/10/19, paragraph 99. See also 'Diagnosing the Unrule of Law in Burma' above note xxvi.
- cvii. In 1948 the country was officially named as 'Burma' hence the use of the term 'Burmese' without reference to 'Myanmar'.
- cviii. See Myint Zan 'A Comparison of the First and Fiftieth Years of Independent Burma's Law Reports' (2004) 35 (2) *Victoria University of Wellington Law Review*, pp. 385-416.
- cix. See p.24-25 of 'Diagnosing the Unrule of Law' above note xxvi.
- cx. *Ibid*.
- cxii. As the decision of the Supreme Court was apparently given in February 2011, this decision was not given by the 'new' Supreme Court formed under the 2008 *Constitution* but was given the Supreme Court appointed by the State Peace and Development Council.
- cxiii. Joesph Allchin, 'Burma's snatches power from judges', www.dvb.no/news/burma-snatches-power-from-judges (accessed 19 March 2011).
- cxiiii. Section 18 and Section 19 of the 2008 *Constitution* and Chapter 6 concerning 'Judiciary' from Sections 293 to 336.
- cxv. Section 299 (c) (i) of the 2008 *Constitution*.
- cxvi. Some of the qualifications (for the Chief Justice of the Union) and Supreme Court judges of the Union as stated in Section 301

include '(a) [the person being] not younger than 50 years and not older than 70 years and (d) (i) who has served as a Judge as High Court of the Region and or State for at least five years; or who has served as a Judicial Officer or Law Officer [for] at least 10 years not lower than that of the Region or State level; or (iii) who has practiced as an Advocate for at least 20 years; or (iv) who is, in the opinion of the President, an eminent jurist; (e) loyal to the Union and its citizens (f) who is not a member of a political party; (g) who is not a *Hluttaw* representative.

- cxvi. Section 232 (d) of the *2008 Constitution*: 'The appointment of a person as a Union Minister nominated by the President shall not be refused by the *Pyidaungsu Hluttaw* unless it can clearly be proved that the person concerned does not meet the qualifications of the Union Minister'.
- cxvii. Section 237 (b) of the *2008 Constitution*.
- cxviii. Section 242 (b) of the *2008 Constitution*.
- cxix. Section 328 of the *2008 Constitution*.
- cxx. Section 302 (a) (b) and (c) of the *2008 Constitution*.
- cxxi. Sixtyfour judges including five Supreme Court justices were simultaneously 'permitted to retire'. The five senior judges were removed via Order No. A.0694(I) (15 November 1998), which simultaneously dealt with the foreign affairs minister, two deputy ministers and five members of the Civil Service Selection and Training board.
- cxixii. See *The Working People's Daily* (Rangoon, Burma), 28 September 1988 for the State Law and Order Restoration Council Order No. 5 (27 September 1988) forming the Supreme Court and appointing U Aung Toe as 'Chief Judge'. More than 22 years later as of third week of March 2011 U Aung Toe is still the Chief Justice – the longest tenure of all the Chief Justices or Head of Judiciary of Burma since Independence. U Aung Toe was to use a term (though not officially used in his case) 'permitted to retire' (at the age of 85) on 30 March 2011. U Aung Toe was a retired registrar of the Central Court of Justice (the nomenclature of the apex court formed under the *1974 Constitution*) when he was appointed by the State Law and Order Restoration Council as Chief Judge/Chief Justice of the Supreme Court. On 17 February 2011 both House of the Legislature 'approved' the nomination of (soon to be former Deputy Chief Justice) Tun Tun Oo to be the new Chief Justice. See, 'Eighth Day Regular Session of *Pydaungsu Hluttaw* held Approval sought for appointment of Union Chief Justice Person Suitable to be appointed as Union Election Commission Chairman Nominated' *New Light of Myanmar*, 18 February 2011, p.1 (also accessible at www.myanmar.com/newspaper/nlm/Feb18_o1.htm) (accessed 20 March 2011).
- cxixiii. Section 302 (a), (b) and (c) of the *2008 Constitution*.
- cxixiv. The age requirements (in addition to other requirements) are not only with regard to retirement. Section 301 (a) of the *2008 Constitution* states Chief Justice or a Supreme Court judge must not [be] younger than 50 years old and not older than 70 years'.
- cxixv. Section 335 of the *2008 Constitution*.
- cxixvi. *Ibid*.
- cxixvii. Even if it arguably involve constitutional issues if the constitutionality or otherwise of the actions and interpretation of Constitutional provisions and laws of affecting the military is involved under Article 20 (b) and 392 (b) of the *2008 Constitution* the Constitutional Tribunal may not have or may decline to exercise jurisdiction.
- cxixviii. Section 322 (a) to (g) of the *2008 Constitution*.
- cxixix. Section 20 (b) of the *2008 Constitution*.
- cxixxx. Section 293 of the *2008 Constitution*.
- cxixxxi. Section 343 of the *2008 Constitution*.
- cxixxxii. Section 325 of the *2008 Constitution*.
- cxixxxiii. Emphasis added.



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**HUMAN RIGHTS
RESOURCE CENTRE**

Human Rights Resource Centre

University of Indonesia

Depok Campus

(Guest House)

Depok 16424

Indonesia

Phone/Fax: (+62-21) 7866720

E-mail: info@hrrca.org

Website: www.hrrca.org