

## ATTACKS ON JUSTICE—MYANMAR

### *Highlights*

The suspension of the Constitution has rendered the separation of powers ineffective, and left civil society with no legitimate means of challenging executive power. The judiciary is not independent of the government, and judges and lawyers are unable to perform their professional functions impartially for fear of reprisals, should they be identified as opponents of the regime. Due process and fair trial guarantees are ignored in practice. Procedures for arrest and detention are frequently violated, particularly where persons are arrested on political grounds. Security legislation provides for administrative detention for up to five years. Incommunicado detention, torture in custody and forced disappearances are still common.

### BACKGROUND

Myanmar remains under the military rule of the autocratic **State Peace and Development Council** (SPDC). There are serious concerns over the increased restrictions on freedom of association, information, expression and the press introduced after **30 May 2003**, when a tour of Upper Myanmar by the **National League for Democracy** (NLD) ended in a violent attack on NLD leaders **Daw Aung San Suu Kyi** and **U Tin Oo**. At least four people were killed but there has been no official independent inquiry into claims of higher numbers. Fifty were injured in the confrontation between NLD members and at least 5,000 protesters demonstrating against the tour. Numerous NLD members were arrested during or after the event. Suu Kyi and U Tin Oo escaped unharmed but were later detained by the SPDC in “protective custody” at an undisclosed location (See the **August 2004** statement of **United Nations Special Rapporteur on the situation of human rights in Myanmar**, <http://www.ibiblio.org/obl/docs/GA2004-SRM-en.pdf>).

In **August 2003**, the SPDC announced a **seven-step road map** towards democratic transition including plans to reconvene the **National Convention** for the purpose of drafting and adopting a new *Constitution* through a **national referendum**, and the establishment of elected legislative bodies under the Constitution. However, the road map included a guarantee of a permanent role for the military in Myanmar’s government, which has been roundly criticised. The **United Nations Special Rapporteur on the situation of human rights in Myanmar** noted in **August 2004** that the road map must be implemented with the full participation of all parties including the NLD, other political parties and ethnic minority groups. He urged the government to unconditionally release Suu Kyi and all remaining political prisoners, and also strongly advised the SPDC to resume dialogue with the NLD and other political forces.

On **17 May 2004**, the **National Convention** opened without the participation of the NLD which chose to boycott it as the SPDC refused to release its leaders, Suu Kyi and U Tin Oo from house arrest so that they could attend. The **United Nationalities**

**Alliance** also boycotted the convention. A total 1,076 representatives, most of whom were selected by the military junta, attended the event. They included spokespeople from ethnic groups who have entered into ceasefire agreements with the SPDC (<http://www.burmaproject.org/>). Since **2003**, there have also been calls for the repeal of *Order 5/96*, a law prohibiting involvement in constitutional debate or discussion.

Serious human rights violations continue at the hands of the government including the forced relocation of ethnic minorities (<http://hrw.org/wr2k3/asia2.html>), forced religious conversions (<http://hrw.org/wr2k3/asia2.html>), forced labour (<http://hrw.org/wr2k3/asia2.html>), recruitment of child soldiers (<http://hrw.org/english/docs/2004/06/04/burma8734.htm>), and the systematic rape of women and girls by the military (<http://hrw.org/wr2k3/asia2.html>). Local human rights organizations remain prohibited by the SPDC and must operate from abroad. Citizens having contact with international human rights organizations risk arrest and detention, and may be sentenced to death if their conduct is considered to constitute high treason.

No new legislation has been introduced to combat terrorism but the government has imposed additional sanctions against the Muslim minority such as travel restrictions, following international press reports alleging their connections with the Al Qaeda terrorist network.

## JUDICIARY

Pursuant to Section 2(a) of the *Judiciary Law* (No. 5/2000, [http://www.blc-burma.org/html/Myanmar%20Law/lr\\_e\\_ml00\\_05.html](http://www.blc-burma.org/html/Myanmar%20Law/lr_e_ml00_05.html)), justice is required to be administered independently and in accordance with the law. However, since **1988** when the Constitution was suspended by the military junta, the separation of powers has been fundamentally undermined. There is no Ministry of Law or Justice, and the court system is effectively under the control of the **Ministry of Home Affairs**. There is an **Office of the Attorney-General** and a law supporting this office, but it too suffers from direct SPDC control. The introduction of a new *Judiciary Law* in **June 2000** weakens judicial independence further by placing additional restrictions on due process and the right to a fair trial.

Section 3 of the **2000 Judiciary Law** establishes the **Supreme Court** which is composed of a **chief justice, two deputy chief justices, and between seven and 12 other judges**. Supreme Court judges are appointed by the military regime (SPDC). Under Section 13 of the *Law*, the Supreme Court then selects judges for appointment to the lower courts, subject to approval of the SPDC. The *Judiciary Law* does not contain provisions that guarantee security of tenure, or protect judges from arbitrary removal. Judges do not enjoy internal independence, and professional secrecy is undermined by continual surveillance by the **Military Intelligence Service**. There is widespread public perception that corruption is endemic in the judiciary and that judges are forced to rely on the executive to retain their positions.

Section 7 of the *Judiciary Law* provides that appeals from decisions of the Supreme Court may be heard by the **Special Appellate Bench**, a panel of three judges including the Chief Justice and one of the two deputies. However, in practice, the

appellate jurisdiction of the courts has been replaced by a system of **executive revision of decisions** (see <http://www.blc-burma.org/pdf/liob/liob18.pdf>). This executive practice is contrary to the principle of open justice protected by Section 2(e) of the *Judiciary Law* (see <http://www.blc-burma.org/pdf/liob/liob18.pdf>). Court orders are not delivered publicly, and judges require authorization from the state's intelligence organizations to inform the family and the legal counsel representing an accused person of the sentence passed.

In addition, the law authorizes members of the executive to take on judicial powers. Section 401 of the *Criminal Procedure Code* empowers the **President** to remit or suspend the whole or any part of a person's sentence for the punishment of a criminal offence upon certain conditions, and to re-arrest the person if he or she, "in the opinion of the President", does not comply with those conditions. Therefore, while the executive has the power to order clemency, it also has the power to demand re-arrest.

The outcomes of court cases are regularly manipulated by the **SPDC**, particularly where the parties are suspected of involvement in political activities. Press conferences given by the SPDC prior to the trial of political detainees can improperly prejudice the outcome of the cases and threaten judicial impartiality, violating Article 2 of the *UN Basic Principles on the Independence of Judges* ([http://www.unhchr.ch/html/menu3/b/h\\_comp50.htm](http://www.unhchr.ch/html/menu3/b/h_comp50.htm)).

## THE LEGAL PROFESSION

Lawyers do not enjoy effective freedom to perform their professional functions, and there are reported instances of the military revoking a lawyer's licence on suspicion of his involvement in politics. Manipulation of trial procedures by the military and the threat of repercussions have prevented lawyers from strenuously defending their clients in criminal cases. While defence attorneys are permitted to call and cross-examine witnesses, their role is limited to striking a deal with the judge to obtain a lenient sentence for their client. In addition, lawyers who are not prepared to participate in the corrupt court system by paying bribes risk prosecution under the *Contempt of Court Act* for their alleged improper attitude towards the judges (see <http://www.blc-burma.org/pdf/liob/liob18.pdf>).

The activities of individual lawyers and professional associations continue to be suppressed by the military junta, and the formation of self-governing collectives, prohibited by the *Unlawful Associations Act of 1908*, has been strictly policed. This broad piece of legislation authorizes the **head of state** to declare any association to be unlawful without requiring an evidentiary basis. Further, *Law 6/88* relating to "Forming of Organisations" requires the **Home Ministry** to give prior permission for the establishment of organizations (see <http://www.blc-burma.org/pdf/liob/liob18.pdf>).

The members of the **Bar Council**, the body supervising the admission of advocates, are selected by the **SPDC** and make decisions in accordance with the SPDC's directives. This means that admission is dependent on political allegiance rather than merit. Since **1989**, the **Bar Council** has not operated as an independent professional

association but instead has been staffed by government officials and supervised by the **Attorney-General** who is appointed by the military regime. Despite not being representative of the profession, membership of the Bar Council is compulsory for all practising lawyers pursuant to the Bar Council Act (*India Act 38/26*).

Lawyers also suffer persecution as a consequence of being identified with their clients' causes, and lawyer-client confidentiality is not respected in cases concerning political issues.

## PROSECUTORS

The prosecution is not independent in practice, and operates under the direction of the SPDC and **Military Intelligence Service** which also conducts investigations in political cases. The **2001 Attorney-General Law** provides that it is the duty of the **Attorney-General** to appear in criminal matters on behalf of the state. The Attorney-General has broad powers in relation to criminal proceedings including the power to withdraw any charge against any accused or any criminal case from the court system (see [http://www.blc-burma.org/html/Myanmar%20Law/lr\\_e\\_ml01\\_01.html](http://www.blc-burma.org/html/Myanmar%20Law/lr_e_ml01_01.html)).

## ACCESS TO JUSTICE

Section 2(f) of the **2000 Judiciary Law** provides that the “right of defence” is guaranteed in all cases. This is underscored by Section 340 of the *Code of Criminal Procedure* which affords the same protection. However, in practice, many detainees are unable to seek legal advice until charges are brought against them, if at all, and are held incommunicado until a sentence is passed, particularly where their prosecution is politically motivated. This is contrary to Principle 7 of the *UN Basic Principles on the Role of Lawyers* ([http://www.unhchr.ch/html/menu3/b/h\\_comp44.htm](http://www.unhchr.ch/html/menu3/b/h_comp44.htm)) which provides that “governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer and in any case not later than forty-eight hours from the time of arrest or detention.” Even in circumstances where detainees are permitted to contact a lawyer, widespread poverty and the absence of an effective legal aid system renders this right meaningless in practice. It is common for suspects and detainees to receive no information concerning the charges against them or the legal provisions under which they are brought.

Procedures for arrest and detention contained in the *Criminal Procedure Code* are frequently not followed in practice, particularly where persons are arrested on political grounds. Political prisoners are routinely held for periods longer than 24 hours without a warrant or special order from a magistrate, and do not have the opportunity to challenge the lawfulness of their detention before a court (<http://www.web.amnesty.org/library/Index/ENGSA160192003?open&of=ENG-MMR>).

The government continues to exercise its power under Article 10A of the **1975 State Protection Law** to place anyone deemed a threat to state security in administrative detention for up to five years, without charge or trial or judicial appeal. This

provision has been used to imprison political opponents of the military junta. Reportedly **Suu Kyi**, opposition political leader, was jailed in **May 2003** under this provision.

(<http://www.web.amnesty.org/library/Index/ENGSA160192003?open&of=ENG-MMR>).

During and after interrogation, political suspects are usually not allowed to contact their families or friends, obtain access to a lawyer or to medical aid. Between **January and July 2003**, there were reportedly over 1,300 political prisoners in Myanmar, including those arrested in connection with the violent attack on NLD opposition leaders on **30 May 2003**, (<http://www.web.amnesty.org/library/Index/ENGSA160192003?open&of=ENG-MMR>).

International non-governmental organizations have raised concerns based on reports received from persons charged with political offences. Their concerns include the lack of an independent judiciary, inability of defendants to call and question witnesses, denial of the right to counsel and opportunity to prepare an adequate defence, and the denial of the right to appeal. The conduct of trials *in camera* has been criticized, particularly as the right to public hearing is provided for in Chapter II of the *Judiciary Law (Judicial Principles)* promulgated by the SPDC on **27 June 2000**. There are also reported instances of suspects being denied the right to a trial, and imprisoned on the basis of an oral sentence passed by the military at the time of arrest (<http://www.web.amnesty.org/library/Index/ENGSA160192003?open&of=ENG-MMR>).

While torture is prohibited by Articles 330 and 331 of the *Penal Code* and by laws governing the conduct of the police force, it is still used as a means of punishing detainees, or as a form of harassment or intimidation during the investigation of criminal offences including the interrogation process.

Although military tribunals with special summary powers were abolished in **1992** by the revocation of *Orders 1/89* and *2/89*, criminal trials in Myanmar still do not comply with recognized fair trial procedures and international standards of fairness. There are concerns that many prisoners of conscience released since **January 2001** have not been released unconditionally, and may be re-arrested without warrant and forced to serve the unexpired portion of their sentences (<http://www.web.amnesty.org/library/Index/ENGSA160192003?open&of=ENG-MMR>).

### Cases

Deficiencies in the Myanmar trial process are evident from the case of nine defendants charged and sentenced to death in **November 2003**. The defendants were charged with high treason for conspiring with opposition groups in exile to overthrow the state. In **March 2004**, the International Labour Organisation (ILO) received information that three of the nine defendants sentenced to death were convicted in part because of contact or exchange of information with the ILO. After meeting two of the detainees in the **Insein** Prison, the ILO's representatives concluded that the case was not investigated or prosecuted in a systematic or credible way, and that the detainees had been prevented from effectively exercising their right to appeal by the authorities.

In a press release, the **Burma Lawyer's Council** (BLC) denounced the proceeding as a political trial and identified a number of procedural irregularities. It noted that the complaints were not properly investigated by police before being brought to trial, that the defendants were not given proper access to evidence and were generally denied equality of arms, that the proceedings were held *in camera*, and the convictions based entirely on statements produced by the **Military Intelligence Service** which were accepted unquestioningly by the presiding judge. A special court held inside the **Insein Prison** handed down the sentences.

Following international outrage, the sentences were commuted by the **Supreme Court** on **15 May 2004**. The defendants received a three-year prison term for their association with the ILO, and death sentences were commuted to life imprisonment.

#### **LEGAL REFORMS DURING THE PERIOD**

There were no relevant legal reforms during this period.