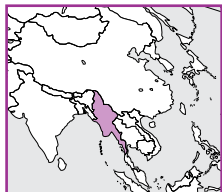


No development without justice: denouncing the democratic farce



Against the backdrop of no rule of law, Burma was recently ranked the 5th worst in the world regarding economic freedom. The 2008 Constitution and the general elections scheduled for 2010 will only perpetuate military rule and stagnation. Transparent, fair and accountable institutions are necessary for development, which cannot coexist with rampant human rights abuses, corruption and political oppression. The United Nations Security Council should establish a Commission of Inquiry to investigate crimes in the country.

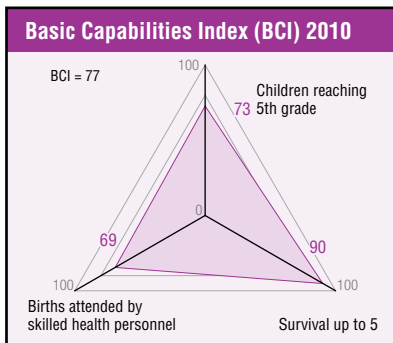
Burma Lawyers' Council

The military regime, through the State Peace and Development Council (SPDC), has been devastating Burma's population by means of rampant human rights abuses and pervasive criminality since 1988. The SPDC has paired these abuses with impunity, creating a system in which there is no accountability for perpetrators of even the most vicious crimes. Criminality and impunity are facilitated by a judiciary that is subservient to the will of the leaders and bends the nation's laws to preserve and enhance the Junta's power.

Against this background, the nation's economy has regressed to the point where it was recently placed in 5th to last position in a ranking of economic freedom.¹ Internationally, the economy is regarded as corrupt and severely mismanaged.² Burma is also ranked 138 out of 182 countries in the 2009 UNDP Human Development Index, indicating a severe lack of economic and social development.³ Advances in economic development can only occur when the current climate of criminality and oppression ends and perpetrators are brought to justice.

No transparency, no development

The general lack of trust in the SPDC and its governance has significant effects on Burma's economic development. Foreign businesses are reluctant to operate in a nation where disputes will be settled by a judiciary partial to the Government and where the State does not fully respect individual property rights. In some cases foreign businesses are shut down. The Economic Enterprises Law reserves many sectors of the economy – such as banking, insurance, telecommunications, extraction of specified resources and teak harvesting – for the State, giving the SPDC exclusive control over them.⁴



A good example of the SPDC's rampant corruption and disrespect of property rights is the Yaung Chi Oo case, which concerns a joint venture between a Singapore-based company and the Ministry of Industry to reopen Mandalay Brewery. Mandalay Beer became a recognized brand name, but before the end of the five-year agreement a dispute arose. Although the Ministry was required to refer the dispute to arbitration, the SPDC seized the factory and all the assets, subverting the legal process laid down by its own law. The bank accounts of the partner were frozen and its owners were threatened with arrest for alleged misappropriation of funds. When the parties went to court, the judge ignored the Singapore company's arguments and unjustifiably used its broad discretion under the law to rule in favour of the Government.⁵

The Burmese Foreign Investment Law (FIL) guarantees that no foreign company shall be nationalized during the permitted period of investment. The FIL also contains a section that allows the SPDC to terminate a contract before it expires.⁶ As demonstrated in the Yaung Chi Oo case, the regime and its courts can manipulate these regulations in order to nationalize a company when advantageous to the Government.

To a large extent, a successful market economy depends on the trust the market participants have in the legal system to uphold their rights and fairly adjudicate their disputes. There must be an efficient, just and affordable judicial mechanism to resolve disputes, including those involving governments. This is clearly not the case in Burma. Without institutions to protect private property rights, foreign

businesses will be deterred from engaging with the Burmese economy.

Transparent, fair and accountable institutions are necessary requirements for economic development, which cannot coexist with rampant human rights abuses, corruption and political oppression. Burma's development will only be fully realized once the judiciary is independent from the SPDC and all parties respect the rule of law. In addition to strong legal and judicial institutions, the country's economic health requires political institutions that provide access to information and accountability. Actually, there are no institutions of this sort.

Pseudo-democratic means to perpetuate the Junta

For decades the SPDC has mismanaged the country's economy. The 2008 Constitution and the general elections scheduled for 2010 will perpetuate the military rule and the corresponding economic stagnation. The Constitution includes problematic articles that will restrict opposition groups from participating in the elections and will grant impunity for the crimes of government officials.

Burma's 2008 Constitution is not a step forward for democracy but a bald attempt by the SPDC to remain in power. It was drafted by the military with no input from opposing political parties or other legal experts. The Constitution removes the military from civilian oversight, breaking a peremptory norm of international law and allowing the military to remain the most powerful institution in the country.⁷ Article 121 of the Constitution prevents many political opponents from running for office because as it prohibits those serving prison sentences from being elected to a parliamentary seat. Now, the SPDC is imprisoning over 2,000 political opponents – individuals who will thus be excluded.⁸ Additionally, the text of the document prohibits key opponents from running in the election. For example, article 59 prevents someone from holding the position of President if he/she is married to a foreigner. This provision excludes Aung San Suu Kyi, who is married to a British citizen, from becoming President. Under the Constitution, those authorized to run in

1 Heritage Foundation, "2010 Index of Economic Freedom: Burma." Available from: <www.heritage.org/Index/Country/Burma>.

2 See, for example, Transparency International, "Corruption Perceptions Index 2009." Available from: <www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table>.

3 UNDP, "Human Development Report 2009: Myanmar." Available from: <www.hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_MMR.html>.

4 State-Owned Economic Enterprises Law (SLORC Law No. 9/89), 1989.

5 BK Sen and Peter Gutter, "The Burmese Junta's Abuse of Investment Laws," *Legal Issues on Burma Journal* (August 2001).

6 *Ibid.*

7 *Id.*, art. 343 ("In the adjudication of Military Justice ... the decision of the Commander-in-Chief is final and conclusive").

8 Assistance Association of Political Prisoners Burma. Available from: <www.aappb.org>.

Sexual violence and rape as a weapon of war

Amid constant oppression and violence, women's status in Burma is worsening. Several grassroots organizations along the Thai-Burma border are documenting the rampant human rights abuses committed by members of the military. The crimes of the military junta span a wide range of offenses including unlawful killings, forced disappearances, rape, forced labor, and forced relocation, among many others. Each of these crimes is harmful to women but crimes of gender-based violence have perhaps the most profound impact on the status of women in Burma.

Members of the SPDC commit crimes of sexual violence with shocking regularity. The SPDC uses rape as a weapon of war, especially in its attacks on ethnic groups in the eastern part of the country.¹ The regime increased its attacks on ethnic groups over the past fifteen years – and these attacks include the systematic use of sexual violence.² Many women were gang raped by members of the military, who sometimes torture and/or murder their victims.³ Sexual violence is not a crime committed by a few random members of the military; it is a part of the SPDC's concerted strategy to attack ethnic and opposition groups.⁴ Those who commit such crimes are not brought to justice and impunity reigns in Burma.⁵ Because the Burmese courts are not independent from the military government victims of gender-based violence and other crimes have no recourse in the Burmese legal system. The culture of impunity that protects perpetrators of sexual violence allows such crimes to continue unabated.

The SPDC's rampant sexual violence and lack of accountability has not gone unnoticed in the international community. The United Nations Secretary General recently acknowledged that the SPDC is in breach of its obligations under United Nations Security Council Resolution 1820. And this resolution was designed specifically to protect women from sexual violence in situations of conflict.⁶ The Secretary General took note of the regime's widespread use of sexual violence against ethnic minority women in rural areas; the military's sexual harassment of unaccompanied women and girls; the legal system's inability or unwillingness to adjudicate crimes of sexual violence; and the pervasive impunity that shields perpetrators of gender-based violence from prosecution.

In addition to sexual violence, the SPDC's war crimes and crimes against humanity have disproportionately affected women. Since 1996 the SPDC burned 3,500 villages in eastern Burma. The aftermath was compared by the Thailand Burma Border Consortium to the severe destruction which occurs in Darfur.⁷ The massive burning of homes and food has generated large numbers of displaced people. Women are especially harmed through forced displacement from their homes and they become more vulnerable to trafficking and dangerous work.

Source: *Putting gender economics at the forefront. 15 years after the IV World Conference on Women. Social Watch Occasional Papers 06.* February 2010. ■

1 See, e.g., Shan Women's Action Network, *License to Rape* (May 2002).

2 *Ibid.*

3 U.S. Campaign for Burma, People, Politics, Poverty. Available from: <www.uscampaignforburma.org/learn-about-burma/people-politics-poverty> (last visited 8 December 2009).

4 See Shan Women's Action Network, *supra* note 2.

5 *Ibid.*

6 United Nations Security Council, Report of the Secretary-General Pursuant to Security Council Resolution 1820, July 15, 2009, S/2009/362.

7 Thailand Burma Border Consortium, Press Release: "Rising Instability in Eastern Burma", 29 October 2009. Available from: <www.tbcc.org/announcements/2009-10-29-media-release.pdf>.

the elections will be members of the SPDC or those friendly to the current Government.

Most shockingly, the Constitution also includes an article that purports to grant amnesty to all SPDC perpetrators.⁹ The provision is written broadly and would enshrine impunity for the most heinous crimes, including crimes against humanity and war crimes. The amnesty article renders the entire Constitution invalid under international law. Granting perpetrators of serious crimes a blanket amnesty violates the Geneva Convention, customary international law and provisions of Security Council Resolutions 1325 and 1820, which prohibit impunity for sexual violence in conflict areas.

Strong institutions that protect the rule of law and an independent judiciary are essential for economic advances. These institutions must embody accountability, access to information and transparency. The 2008 Constitution represents a marked departure from the rule of law and will further denigrate the nation's judicial system. It will not provide any advancement in transparency, independence or accountability for the nation's legal or political institutions. It includes several articles that will hamper these requirements

for functional legal, judicial and political institutions. The Constitution will further the military rule that until now has destroyed institutional accountability, access to information and transparency.

For its part, the 2010 vote will sanctify the 2008 Constitution. After the elections, Burma's legal, judicial and political institutions will be too weak to effectively advance the nation's economy. Instead of pushing the country forward, the elections will entrench impunity, criminality and unfair political practices. The new Constitution will drive the country further into economic depression and isolation, while this year's elections will engrain a culture of criminality and militarization in the country.

Recommendations

Economic development is tied to strong institutions, good governance, and peace and security. The SPDC's constant repression of civil, political, economic, social and cultural rights has translated into minimal economic development over the past few decades.

The Burma Lawyers' Council makes the following recommendations concerning Burma's 2008 Constitution and the upcoming 2010 elections:

- In order to encourage significant economic development in Burma and real improvements in the quality of life, the SPDC must engage in inclusive constitutional review with all stakeholders, form an independent judiciary and establish respect for the rule of law.
- The Constitution must establish a political system that is accountable, provides access to information and is transparent.
- Because the 2008 Constitution as it is currently written violates peremptory norms of international law, the United Nations Security Council should declare it null and void. All States should refuse to recognize the Constitution and the results of any election based upon it.
- Because a partial judiciary and the impunity provision of the Constitution prevent domestic courts from effectively judging the SPDC's crimes, the UN Security Council should establish a Commission of Inquiry to investigate international crimes in Burma. ■

9 Constitution of the Republic of the Union of Myanmar (2008), art. 445 ("No proceedings shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.").