

Burma's rulers will continue to lean heavily on the judiciary to impose their vision of a "discipline-flourishing democracy"

After decades of military rule, many Burmese are no longer aware that their country had one of the most progressive judicial systems in the region after independence in 1948. Judges had secure salaries and could only be removed for misbehavior or incapacity. The courts were not afraid to challenge the executive, and the Supreme Court proclaimed that the 1947 Constitution should be interpreted in a "liberal and comprehensive spirit." Even at the height of insurgencies against Rangoon in the late 1940s, the Supreme Court ordered police to release men who had been detained illegally.

The slide from a judiciary with integrity to its present role as defender of the military began when the late Gen Ne Win seized power and imprisoned Chief Justice Myint Thein for six years—longer than he imprisoned former Prime Minister U Nu. When Ne Win drafted the 1974 Constitution, he removed any remaining separation between the judiciary and the government. He packed the Council of People's Justice, which replaced the Supreme Court, with members of the Burma Socialist Programme Party. The Constitution required the court to "protect the socialist system" rather than the rights of Burmese citizens.

Although the military revived the Supreme Court in 1988, Human Rights Watch maintains that judges still "serve at the whim of the SPDC and must follow the directives of the military."

As the world observed this past summer during Aung San Suu Kyi's trial, judges will silence defense attorneys and refuse to allow witnesses to testify. They take orders from military intelligence to manipulate proceedings against political dissidents, such as the 300 democracy activists who were given lengthy prison sentences by the courts at Insein Prison last November. In commercial litigation, judges are known to auction off decisions to the highest bidder.

The 2008 Constitution will not significantly improve Burma's corrupted judicial system. The Constitution separates the judiciary from the rest of government only "to the extent possible." It allows the president or the Hluttaw, the Burmese parliament, to impeach justices for crimes as well as for vague offenses like "misconduct" and "inefficient discharge of duties." Furthermore, the Constitution only requires the support of a quarter of members from either chamber of the Hluttaw to initiate impeachment proceedings, so military members in parliament alone could threaten judges with impeachment unless they agreed to the military's agenda.

The 2008 Constitution also created a new Constitutional Tribunal to interpret and decide cases concerning constitutional law. This new body will be no more independent than other courts. Appointed proportionally by the president and the speakers of the two Hluttaw chambers, its nine justices serve for five years, ensuring compliance to military wishes by those who wish to be reappointed. An additional twist is that several government officials, including the president and speakers of the Hluttaw, can directly request the tribunal to rule on any part of the Constitution.

The National Convention never publicly explained why it established the Constitutional Tribunal. During genuine political transitions, such a court might demonstrate a commitment to democracy. For example, during South Africa's transition from apartheid in the early 1990s, the African National Congress agreed to a strong constitutional court in order to reassure white Afrikaner and Zulu minorities that they would be treated fairly. In Burma's case, however, where the court is controlled by a military that continues persecution of dissidents and ethnic minorities, suggesting that the Constitutional Tribunal is part of a commitment to democracy and or a guarantee to protect minority rights seems implausible.

From British colonialism through parliamentary democracy to socialism and military rule, Burma has accumulated many obsolete and contradictory laws that may not accord with the 2008 Constitution. Other developing countries have found it easier to rely on courts to determine the validity of older laws rather than review the entire legal code. Under Suharto, for example, Indonesia established administrative courts to remove older regulations that conflicted with laws parliament passed to attract foreign investment. Likewise, the Constitutional Tribunal's more likely role after the elections will involve removing old laws that conflict with the new Constitution.

The Constitutional Tribunal will also decide cases between Burma's political factions after the elections. The 2008 Constitution creates several centers of power, such as the president, the speakers of the Hluttaw, the commander in chief and the military members of the Hluttaw, the chief justice, and chief ministers of states and regions. Burma's senior generals are known to be competing for influence and patronage, so even if the Tatmadaw's allies control all these posts, disagreements will likely arise over the new Constitution. Rather than split the leadership, these officials can refer constitutional disputes to the Constitutional Tribunal, thereby resolving them peacefully and maintaining unity.

Finally, Burma's Constitutional Tribunal will help the Union government control local officials and

ethnic minority groups who might be difficult to supervise directly. In neighboring China, for example, where Beijing lacks the resources to closely monitor distant provincial governments, the central government has relied upon citizens to bring lawsuits in courts to punish wayward local officials who violate national laws.

Given Burma's ethnic diversity, some form of federalism seems inevitable. Indeed, the new Constitution establishes a federal system in all but name. State and regional Hluttaws can regulate local commerce, agriculture, and cultural rights.

On the other hand, the military considers the very idea of "federalism" anathema, fearing it would lead to national disintegration. Thus the Constitutional Tribunal, which is controlled by the Union, can strike down any law passed by a state or regional Hluttaw if it infringes upon the interests of the central government or the military.

Burma's judicial system has fallen a long way, from being an ardent protector of constitutional rights to a rubber stamp protecting military elites.

The National Convention designed the Constitutional Tribunal to serve as an important, if underappreciated, part of the military's plan to maintain its influence. The court is likely to revise Burma's older laws, resolve disputes between politicians, and prevent the emergence of robust federalism. In short, the Constitutional Tribunal will act as a "hidden hand" to ensure that Burma remains a "discipline-flourishing democracy."

*Arnold Corso (pseudonym) is a legal expert who has worked with human rights organizations in Southeast Asia.*