



ASIAN LEGAL RESOURCE CENTRE

AN NGO WITH GENERAL CONSULTATIVE STATUS WITH THE ECOSOC OF THE UN
19 Floor, Go-Up Commercial Building, 998 Canton Road, Kowloon, Hong Kong
Tel:+(852)2698-6339 . Fax: +(852) 2698-6367 . E-mail: alrc@alrc.net . Web: www.alrc.net

Submission by the Asian Legal Resource Centre to the Human Rights Council's Universal Periodic Review concerning human rights and rule of law in Myanmar

Annexe

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I. INTRODUCTORY NOTE

1. This document is an annexe to the submission of the Asian Legal Resource Centre pursuant to Human Rights Council resolution 5/1, which provides for civil society to participate in the Universal Periodic Review process of United Nations Member States' human rights obligations and commitments, on the human rights and rule of law situation in Myanmar. For convenience, it has been organized according to the same headings as the original document to which it is annexed.

II. METHODS

2. Pertinent documentation from the Asian Legal Resource Centre during the four-year period under review:

- a. Submissions on Myanmar to the Human Rights Council (all available at www.alrc.net):
 - i. The absence of minimum conditions for elections (A/HRC/14/NGO/40, 25 May 2010)
 - ii. The limitations of the global human rights movement - a case study from Myanmar (A/HRC/14/NGO/39, 25 May 2010)
 - iii. Torture of detainees in Myanmar (A/HRC/13/NGO/56, 23 February 2010)
 - iv. Effects of endemic corruption in Myanmar's courts on rights of citizens (A/HRC/13/NGO/55, 23 February 2010)
 - v. Institutionalized denial of fundamental rights and the 2008 Constitution of Myanmar (A/HRC/12/NGO/21, 7 September 2009)
 - vi. Non-application of law and the cases arising from September 2007 in Myanmar (A/HRC/10/NGO/38, 25 February 2009)
 - vii. Targeting of defence lawyers in Myanmar (A/HRC/10/NGO/37, 25 February 2009)
 - viii. Political psychosis, legal dementia and systemic abuses of human rights (A/HRC/7/NGO/39, 22 February 2008)
 - ix. Utter lawlessness in the aftermath of September 2007 (A/HRC/7/NGO/38, 22 February 2008)
 - x. International community is failing the people of Myanmar again (A/HRC/6/NGO/18, 31 August 2007)

- xi. Violent crime caused by the un-rule of law in Myanmar (A/HRC/4/NGO/66, 7 March 2007)
- xii. Myanmar's degraded judiciary and a system of injustice (A/HRC/4/NGO/65, 7 March 2007)
- b. Publications (all available at www.article2.org)
 - i. "Burma's cheap muscle", in Special Edition: Use of Police Powers for Profit, *article 2*, vol. 8, no. 1, March 2009
 - ii. Special Edition: Saffron Revolution Imprisoned, Law Demented, *article 2*, vol. 7, no. 3, September 2008
 - iii. Special Report—Burma, Political Psychosis & Legal Dementia, *article 2*, vol. 6, no. 5-6, October-December 2007

III. BACKGROUND

- 3. Timeline of key events concerning normative and institutional framework for the rule of law in Myanmar:
 - 1947 Constitution of the Union of Burma passed
 - 1948 Independence; new Supreme Court established
 - 1958 First military coup; caretaker government detains thousands of alleged political and economic criminals; hundreds transported to remote island prison outside of judicial oversight; minimal judicial interference in work of military-headed government
 - 1960 Return to civilian rule
 - 1962 Second military coup; constitution suspended; chief justice imprisoned; Supreme Court and High Court merged; Special Criminal Courts set up to try cases outside of ordinary legal system
 - 1965 Appellate bench set up to hear cases of Special Criminal Courts
 - 1968 Former chief justice released from prison
 - 1972 Professional judiciary abolished; system of courts with lay jurors established under control of executive councils at various levels
 - 1974 Constitution of the Socialist Republic of the Union of Burma passed; apex court abolished; supreme judicial body established as a council of parliamentarians under control of single party imposition of Martial Law and convening of military tribunals to try protestors
 - 1988 Third military coup; constitution suspended; professional judiciary re-established under military executive control; re-establishing of Supreme Court; imposition of Martial Law and convening of military tribunals to try protestors
 - 2000 Judiciary Law passed
 - 2008 Constitution of the Republic of the Union of Myanmar passed

IV. FRAMEWORK

A. The Normative Framework

[Text where in bold is for the purpose of highlighting salient parts of legislation and jurisprudence as adverted in the main submission.]

4. Key procedural rights under laws currently in effect:
 - a. Procedural guarantees of fair trial: Judiciary Law, 2000, section 2—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...
 - b. Procedural defence against arbitrary detention: Criminal Procedure Code, 1898, section 61—No police-officer shall 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].
 - c. Procedural defence against torture:
 - i. Evidence Act, 1872, sections 24–26—A confession made by an accused person is **irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise** having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him... **No confession made to a police-officer, shall be proved as against a person accused of any offence against him... No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.**
 - ii. Criminal Procedure Code, sections 162, 164(1)—**No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed** by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, **or any part of such statement or record, be used as evidence** (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made... Any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the President of the Union may, if he is not a police-officer, record any statement or confession made to him in the course of an investigation under this Chapter...

5. Examples of jurisprudence defeating procedural rights:
 - a. Reversed burden of proof: *Maung Maung Kyi v. Union of Myanmar*, [1991 BLR (SC) 103] Two brothers accused police in Yangon of torture in order to extract from one of them a confession over the stabbing murder of his aunt. According to the brother of the accused, when he visited him in the lockup he had a swollen face and had difficulty walking, and claimed to have been assaulted; however, the court rejected the allegation on the basis that when the accused was brought to give a confession after four days there were no signs of torture, and neither of the two lodged a separate formal complaint alleging the abuse. It also reasoned that as the material evidence corresponded to the contents of the confession then this suggested the reliability of the latter; even though had the police in fact tortured the accused and instructed him on how to confess then this would have ensured correspondence of facts in their accounts.
 - b. Admittance of inadmissible confession: *Union of Myanmar v. U Ye Naung and One* [1991 (MLR) Special 63] the full bench of the Supreme Court (Chief Justice U Aung Toe presiding) broke with both statute and all prior precedent by ruling that a confession obtained from military intelligence personnel without any judicial oversight was admissible in court 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 again reversed the burden of proof, 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.
 - c. In the *U Ko Kyi* case [MLR (2005) SC 20] the Supreme Court considered the appeal of a person who had been convicted in a verdict relying on *Ye Naung*, from a testimony concerning alleged transactions in illicit drugs where the confession had again been made before military intelligence. In that case Justice Tin Aye found in favour of the accused but did not challenge the reasoning in *Ye Naung* but rather acquitted on the basis that whereas in *Ye Naung* a number of confessions linked the accused to the alleged crime in the latter case there was only a single confession of a co-accused, which he considered was insufficient to secure the conviction. *Ye Naung* has also been used to secure the convictions of prisoners of conscience who had been held and tortured in military intelligence custody in order to extract confessions that were subsequently used as evidence in court. The Asian Legal Resource Centre has documented a number of these cases in detail but has not included them here as they date before the four-year period under review.
6. Examples of legislation that either directly curtail or are manipulated to curtail human rights, with accompanying examples of their application from the period under review (additional and updated details on all cases below can be made available to the Council upon request):

- a. Electronic Transactions Law, section 33: Whoever commits any of the following acts by using electronic transactions technology shall, on conviction be punished with imprisonment for a term which may extend from a minimum of 7 years to a maximum of 15 years and may also be liable to a fine: (a) doing **any act detrimental to the security of the State or prevalence of law and order or community peace and tranquillity or national solidarity or national economy or national culture.**

Case: Ngwe Soe Linn, 28, a resident of Ward 22, South Dagon Township, Yangon, was convicted of this charge and another and sentenced to 13 years in prison on 27 January 2010 in Yangon Western District Court Criminal Case Nos. 79 & 80/2009, Judge U Myint San (Deputy District Judge) presiding, heard inside Insein Prison, the charges based on an allegation that the accused had allegedly recorded and sent illegal video footage to a news agency abroad.

- b. Immigration (Emergency Provisions) Act, 1947, section 13(1): Whoever **enters or attempts to enter the Union** of Burma or whoever after legal entry remains or attempts to remain in the Union of Burma **in contravention of any of the provisions of this Act or the rules made there under** or any of the conditions set out in any permit or visa shall be liable on summary conviction to imprisonment for a term [which may extend from a minimum of six months to a maximum of five years or with fine of a minimum of K. 1500 or with both].

Case: Aung Htun Myint (a.k.a. Aung Aung), 30, a freelancer with Seven Day News journal, residing in Ward 22, South Dagon Township, Yangon was sentenced to three years' imprisonment (Criminal Case No. 226/2008, Hmawbi Township Court, Judge Daw Amar [Special] presiding) on 27 August 2008 because he went to document voting in the May 2008 constitutional referendum. The police initially accused him of illegally taking footage of the voting and of damage in the area as a result of Cyclone Nargis. They took him to the township police station and then sent him to district security at around 5pm, who held him for around two days before returning him to the township police. The police subsequently accused him of illegally travelling to Thailand in January 2008 for video training. In court, the police presented the video cameras and other items that Aung Htun Myint had in his possession at time of arrest as the only material evidence. They said that it had emerged during interrogation that he had gone to Thailand illegally, but could give no details of the supposed offence.

- c. Official Secrets Act, 1923, section 3(1): If **any person for any purpose prejudicial to the safety or interests of the State—(a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place;** or... (c) **obtains, collects, records or publishes or communicates** to any other person any secret official code or password, or **any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy;** he shall be punishable with imprisonment for a term which may extend, where

the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of [the State] or in relation to any secret official code, to fourteen years and in other cases to three years.

Case: Ko Zaw Htay, 43, residing in Setyone Ward, Aunglan Township, Magwe Division, was sentenced to 10 years in jail on 23 January 2009 (Criminal Case No. 53/2008, Magwe District Court, Judge U Soe Win presiding) because he allegedly took and sent abroad video footage of land that the armed forces had confiscated from local farmers, who had lodged a complaint with the International Labour Organisation representative in Myanmar. The army arbitrarily detained Zaw Htay inside its compound from October 29, along with three villagers, and all four were allegedly tortured. Two were released and the remaining two were again allegedly tortured at the police station in Aunglan and forced to make confessions. They were only produced and charged before a judge on 11 December 2008, over six weeks after first being detained.

- d. Organization Law, 1988, sections 3(c), 5, 6 and 7: Organizations that are not permitted shall not form or continue to exist and pursue activities... **The following organizations shall not be formed, and if already formed shall not function and shall not continue to exist:** (a) Organizations that are not permitted to register under The Political Parties Registration Law, 1988 or if permitted to register, the registration[s] of which have been cancelled by the Multi-party Democracy General Elections Commission; (b) **Organizations that attempt, instigate, incite, abet or commit acts that may in any way disrupt law and order, peace and tranquility, or safe and secure communications;** (c) **Organizations that attempt, instigate, incite, abet or commit acts that may [affect] or disrupt the regularity of state machinery...** Any person found guilty of committing an offence under Section 3 Sub section (c) or Section 5 shall be punished with imprisonment for a term which may extend to five years... Any person found guilty of being a member of, or aiding and abetting or using the paraphernalia of organizations that are not permitted to form or not permitted to continue in existence and provided in Section 3 Sub section (c) or that are not permitted to form as provided in Section 5 shall be punished with imprisonment for a term which may extend to three years.

Case: Ko Ko Gyi (a.k.a. Thein Than Htun) and 12 others were charged after they were apprehended in October 2008 in connection with the September 2007 protests under the Organizations Law and section 505(b) of the Penal Code (Criminal Case No. 52/2008; Yangon Southern District Court, District Judge U Htay Win, and Deputy District Judge U Win Myint presiding). The prosecution alleged that they had set up a new organization for which they had not obtained approval. The purported evidence was that the accused had participated in religious and cultural events, and had marched on the road after the government suddenly multiplied fuel prices in August 2007.

Notwithstanding, the court found all of the accused guilty and imprisoned them from nine to 11 years each.

- e. Penal Code, section 124A: Whoever **by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards [the Government established by law for the Union or for the constituent units thereof,]** shall be punished with transportation for life or a shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Case: Police arrested 34-year-old Ko Thiha on the night of 7 September 2007 south of Mandalay, near the town of Wundwin, over some allegedly inflammatory publications. They brought him to the Mandalay District Court (although by law it should have been initiated in the local township court) and charged him under sections 124A/505(b) of the Penal Code. The trial was held at a special court inside the Mandalay Prison. Thiha did not have a lawyer to represent him, even though he was entitled to have one as he was facing a life sentence. He was not able to call any witnesses or defend himself in court. The prosecution witnesses were not the ones present when Thiha was actually arrested. The police did not present any evidence to strongly support the charge of sedition and instead called another judge who briefly testified that Thiha had made a confession before him, which was presented as evidence. However, Thiha claims to have never seen that judge before the trial. The hearings were all completed in a single day, and on 17 September 2007 after only ten days of investigation and trial the presiding judge, Win Htay, sentenced Thiha to 22 years in prison.

- f. Penal Code, section 153A: Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, **promotes or attempts to promote feelings of enmity or hatred between different classes** of [persons resident in the Union] shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Case: Daw Win Mya Mya of Mandalay and four other persons were charged with promoting feelings of enmity and other offences and sentenced to between two and 13 years in prison (Criminal Case Nos. 605, 608, 609, 610/2008, Aungmyaytharsan Township Court, Assistant Judge Daw Baby presiding) on 24 October 2008 after they attended a political party event where speeches were given that the government's roadmap for political change would not result in democracy, and also as they had earlier met with foreign embassy officials and gave details about harassment by government personnel. Four separate cases were lodged against the accused even though they should have been combined into a single case against each as per the Criminal Procedure Code. The police lied to the court that they had arrested the five accused on 15 August 2008, when in fact Daw Win Mya Mya was taken into custody on 20 September 2007, and the other defendants in

September and October 2007. The police presented no evidence that any of the accused actually said anything at the assembly on September 7, let alone that it would violate the Penal Code, only that they attended it. They also claimed that they made recordings of the assembly on September 7 and of other meetings, but in court the investigating officer said that they had not retained the cassettes on which the recordings had been made and had only copies of typed transcripts, which they submitted to the court in violation of the Evidence Act (sections 62-67). The supposed confessions of the accused that were extracted from them during interrogation were also submitted to court in violation of the Evidence Act (sections 26, 159).

- g. Penal Code, section 186: Whoever **voluntarily obstructs any public servant in the discharge of his public functions** shall be punished with imprisonment of either description for a term which may extend to three months, or with fine... or with both.

Case: U Khin Maung Kyi, 45, resident of Panchangyaung Road, Ward 13, Hlaing Township, Yangon was detained by virtue of a pending one-year good-behaviour bond against him (Restriction & Bond Act 1961, Criminal Miscellaneous Case No. 143, order for one-year bond given on 25 August 2009) while on trial (Criminal Case No. 705/2009, Hlaing Township Court, Assistant Township Judge Win Swe presiding) for obstructing a public servant because he repeatedly telephoned on 2 and 3 August 2009 to complain about poor electricity supply. The case was ultimately dropped, but he spent over a month in police custody awaiting the hearings, and he had continued to be required to report to the police under the bond.

- h. Penal Code, section 189: Whoever holds out any **threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public function of such public servant**, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Case: U Aye Myint of Seyone Ward, Aunglan Township, Magwe Division; detained at Thayet Prison, Magwe; convicted in Criminal Case No. 428/09, Aunglan Township Court, Judge Win Myint presiding, sentenced to two years' imprisonment on 24 September 2009 after an argument between the accused and two forestry department officials.

- i. Penal Code, section 294: Whoever to the annoyance of others (a) does **any obscene act in any public place**, or (b) sings, recites or utters any obscene songs, ballad or words in or near any public place shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Case: Ma Sandar, 38, of Kyundaw Ward, Twente, Yangon, Criminal Case No. 117/2008, Twente Township Court, Judge Aye Ko Ko (Special) presiding, convicted to one year's imprisonment under this

section and one month under section 353 for allegedly abusing police officers and local officials against whom she had earlier brought complaints of corruption. Shortly after release from imprisonment in 2009 she had another concocted case brought against her, together with her husband, on exactly the same charges which went before the same judge. She is currently again imprisoned (Criminal Case No. 651/2009, Twante Township Court, verdict given on 7 May 2010).

- j. Penal Code, section 295A: Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of [persons dent in the Union] by words, either spoken or written, or by visible representations, **insults or attempts to insult the religion or the religious beliefs of that class**, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Case: U Sandadhika, a.k.a. Nyi Nyi Lwin/ Nyi Nyi San, 36, monk of the Daysunpar Temple, Laygyunmandaing Monastery, Bago, was accused of insulting religion by allegedly planning to immolate himself in protest at the latest order to keep Daw Aung San Suu Kyi under house arrest (Criminal Case No. 507/09, Bahan Township Court, Judge Daw Toe Toe Yein [Special] presiding). Three men in an unmarked vehicle allegedly picked him up from near where the hearings were taking place on 11 August 2009 and took him to the Yangon North District Police Headquarters, where he was allegedly assaulted with a bamboo rod, causing injuries including a hernia. Sandadhika denied the allegations against him and the police admitted in court that they have no material evidence to prove the allegation. Nonetheless he was convicted and sentenced to two years' imprisonment.

- k. Penal Code section 332: Whoever **voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or order that person or any other public servant from discharging his duty as such public servant**, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Case: Kyaw Win of Shwenant-thar Road, Bahan Township, Yangon and 13 others, in Criminal Case No. 265/2008; Yankin Township Court, Judge Htay Htay (Special) presiding; convicted on 24 November 2008 to three years' imprisonment each under this section and three months each under section 294 for their part in the September 2007 monk-led demonstrations.

- l. Penal Code, section 505: Whoever makes, publishes or circulates any statement, rumour or report— ... (b) with **intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity...** shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Case: Aung Aung Oo, 31, resident of Myinpyaingwin Road West, Tamwe Kyi Ward (B), Tamwe Township, Yangon and three others were arrested for allegedly putting up stickers of Daw Aung San Suu Kyi in public places, charged and sentenced to two years' imprisonment in Criminal Case No. 442/09, Bahan Township Court, Judge Khin Maung Htay (Special) presiding. The police allegedly only took possession of the stickers at the places of residence of the accused persons, not anywhere in public as required for the alleged offence. The men have since reportedly been convicted of a variety of other offences.

- m. Printers and Publishers Registration Law, 1962, sections 17 and 20 (unofficial translation): Any person who **sets up a printing enterprise or publishing business before first registering** it according to the provisions in section 6 shall be sentenced to [imprisonment for a term which may extend from a minimum of 1 year to a maximum of 7 years or fine which may extend from a minimum of 3,000 kyats to a maximum of 30,000 kyats or both]... Any person who **fails to comply with or who contravenes a byelaw enacted under this law** or an instruction issued by a person authorised under this law shall be sentenced to a term of [imprisonment for a term which may extend from a minimum of 1 year to a maximum of 7 years or fine which may extend from a minimum of 3,000 kyats to a maximum of 30,000 kyats or both].

Case: Pyi Phyoe Hlaing, (a.k.a. Athay Lay, Maung Win), resident of Sanchaung Township, Yangon and Ne Lin Aung (a.k.a. Lin Lin) were convicted of a range of offences (Criminal Case Nos. 99-102/08, Sanchaung Township Court, Judge Win Myint [Special] presiding) on 11 November 2008 and sentenced to 24 and 22 years respectively, because of alleged involvement in the September 2007 protests. They were both charged twice under the Printers and Publishers Law and were sentenced to the maximum seven years for each offence, totalling 14 years under the law, even though the charges should have been compounded as per provisions in the Criminal Procedure Code. The oral and material evidence against the accused was, as recorded in court, obtained from the interrogations and searches of the bureau of military intelligence, not the police, who merely submitted the case in the closed court where the accused were tried.

- n. Television and Video Law, 1996, sections 32(b), 36: Whoever commits one of the following acts shall, on conviction, be punished with imprisonment for a term which may extend to 3 years or with fine which may extend to kyats 100,000 or with both. In addition, the property which relate directly to the offence shall also be confiscated:- ... **copying, distributing, hiring or exhibiting the video tape that has no video censor certificate** and small-sized video censor certificate with the permitted serial number with the exception of cases exempted under this Law... Whoever **fails to abide by an order or directive issued by the Ministry of Information or Video Censor Board** or the Video Business Supervisory Central Committee under this Law shall, on conviction, be punished with imprisonment for a

term which may extend to 6 months or with fine which may extend to kyats 50,000 or with both.

Case: Ko Than Htun, 40, resident of Ward 5, Nyaungdone, Ayeyarwady Division, was convicted under the Television and Video Law (Criminal Case No. 319/2007, Nyaungdone Township Court, Judge Daw Saw Nwet Nwet Win presiding) as well as section 505(b) for having been allegedly found on 20 March 2007 in possession of copies of a VCD showing footage of the extraordinarily opulent wedding of the daughter of Senior General Than Shwe. On April 25 Than Htun was sentenced to four and a half years' imprisonment.

- o. Tuition Law, 1984, section 23 (unofficial translation): Whoever is held to have violated any of the provisions in sections 14(a)(b)(c), 15, 19, 20 [Opening of **unregistered tuition is prohibited**; engagement of an unlicensed tuition teacher is prohibited] or 21 shall be sentenced to three years' imprisonment and shall be fined thirty thousand kyat.

Case: Police and local officials arrested Ko Min Min (a.k.a. La Min Htun) on 10 July 2007 and charged him under the Tuition Law after he organised a talk on human rights at his house on Bogyoke Road, Thayetdaw Ward, Pyay, Bago Division, which was attended by about 20 persons. Min Min had earlier been licenced to hold tuition classes there but had stopped some time before and gone to work as a tutor elsewhere. He had removed the signboard advertising the premises and was clearly no longer engaged in teaching students there. He and defence witnesses testified to this effect in court, but on 30 July 2007 Judge U Khin Maung Win sentenced him to three years and fined 30,000 Kyat.

- p. Unlawful Associations Act, 1908, section 17(1): **Whoever is a member of an unlawful association, or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association or in any way assists the operations of any such association**, shall be punished with imprisonment for a term [which shall not be less than two years and more than three years and shall also be liable to fine]

Case: Ko Thurein Aung, 32, and five others were convicted under the Unlawful Associations Act, Penal Code section 124A, and Immigration (Emergency Provisions) Act, 1947, section 13(1), for having organized a seminar on workers' rights on 1 May 2007. They were detained at the Kyaikkasan interrogation camp and cases opened against them in the Yangon Western District Court (Criminal Case Nos. 82-84/2007, conducted within Insein Prison, from 16 July 2007, Judge Aye Lwin presiding). Their lawyers withdrew in protest at the handling of the case on 4 August 2007 and on 7 September 2007 the accused were sentenced to 28 years' imprisonment.

7. Extracts, Constitution of the Republic of the Union of Myanmar, 2008

[Note: The Asian Legal Resource Centre has in a couple of places added its interpretation of the meaning in the original Burmese-language text in brackets after the official text.]

11. (a) The three branches of sovereign power namely, legislative power, executive power and judicial power are separated, **to the extent possible**, and exert reciprocal control, check and balance among themselves.

...

20. (b) The Defence Services has the right to **independently administer and adjudicate all affairs** of the armed forces.

...

(f) The Defence Services is **mainly responsible for safeguarding the Constitution**. [The Armed Forces has the primary responsibility to safeguard the Constitution.]

21. (a) Every citizen shall enjoy the right of equality, the right of liberty and the right of justice, as prescribed in this Constitution.

(b) No citizen shall be placed in custody for more than 24 hours without the permission of a Court.

(c) Every citizen is responsible for public peace and tranquility and prevalence of law and order.

(d) Necessary law shall be enacted to make citizens' freedoms, rights, benefits, responsibilities and restrictions effective, steadfast and complete.

...

96. The Pyidaungsu Hluttaw [parliament] shall have the right to enact laws for the entire or any part of the Union related to matters prescribed in Schedule One of the Union Legislative List.

...

353. Nothing shall, **except in accord with existing laws**, be detrimental to the life and personal freedom of any person.

354. Every citizen shall be at liberty in the exercise of the following rights, **if not contrary to the laws, enacted for Union security, prevalence of law and order [rule of law], community peace and tranquility or public order and morality**:

(a) to express and publish freely their convictions and opinions;

(b) to assemble peacefully without arms and holding procession;

(c) to form associations and organizations;

(d) to develop their language, literature, culture they cherish, religion they profess, and customs without prejudice to the relations between one national race and another or among national races and to other faiths.

355. Every citizen shall have the right to settle and reside in any place within the Republic of the Union of Myanmar **according to law**.

356. The Union shall protect **according to law** movable and immovable properties of every citizen that are lawfully acquired.

357. The Union shall protect the privacy and security of home, property, correspondence and other communications of citizens **under the law subject to the provisions of this Constitution.**

358. The Union prohibits the enslaving and trafficking in persons.

359. The Union prohibits forced labor **except hard labor as a punishment for crime duly convicted and duties assigned by the Union in accord with the law in the interest of the public.**

...

365. Every citizen shall, **in accord with the law**, have the right to freely develop literature, culture, arts, customs and traditions they cherish. In the process, **they shall avoid any act detrimental to national solidarity.** Moreover, any particular action which might adversely affect the interests of one or several other national races shall be taken only after coordinating with and obtaining the settlement of those affected.

...

376. No person shall, **except matters on precautionary measures taken for the security of the Union or prevalence of law and order [rule of law], peace and tranquility in accord with the law in the interest of the public, or the matters permitted according to an existing law**, be held in custody for more than 24 hours without the remand of a competent magistrate.

...

382. In order to carry out their duties fully and to maintain the discipline by the Defence Forces personnel or members of the armed forces responsible to carry out peace and security, **the rights given in this Chapter shall be restricted or revoked through enactment to law.**

...

417. If there arises or if there is sufficient reason for a state of emergency to arise that may disintegrate the Union or disintegrate national solidarity or that may cause the loss of sovereignty, due to acts **or attempts** to take over the sovereignty of the Union by insurgency, violence and wrongful forcible means, the President may, after co-ordinating with the National Defence and Security Council, promulgate an ordinance and declare a state of emergency. In the said ordinance, it shall be stated that the area where the state of emergency in operation is the entire Nation and the specified duration is one year from the day of promulgation.

418. (a) In the matter concerning the declaration of the state of emergency according to Section 417, the President shall declare **the transferring of legislative, executive and judicial powers of the Union to the Commander-in-Chief of the Defence Services** to enable him to carry out necessary measures to speedily restore its original situation in the Union...

419. The Commander-in-Chief of the Defence Services to whom the sovereign power has been transferred **shall have the right to exercise the powers of legislature, executive and judiciary.** The Commander-in-Chief of the Defence Services may exercise the legislative power either by

himself or by a body including him. **The executive power and the judicial power may be transferred to and exercised by an appropriate body that has been formed or a suitable person.**

420. The Commander-in-Chief of the Defence Services may, during the duration of the declaration of a state of emergency, **restrict or suspend as required, one or more fundamental rights of the citizens in the required area.**

...

SCHEDULE ONE: Union Legislative List (Refer to Section 96)

1. Union Defence and Security Sector

...

(f) Stability, peace and tranquility of the Union and **prevalence of law and order [rule of law]**; and

(g) Police force.

B. The Institutional Framework

8. Policing and prosecution

a. Arbitrary detention:

- i. 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.
- ii. Khin Moe Aye (a.k.a. Moe Moe) and Kyaw Soe were detained on 16 December 2007 and brought to the Insein Central Prison where US dollars were found in their possession. The police charged them under section 24(1) of the Foreign Exchange Regulation Act, 1947 having received the case from military intelligence, with prison officers as witnesses and the persons responsible for the search and seizure of the dollars. The alleged offence was not uncovered until the accused were already in custody and inside the prison premises. The items of evidence were recovered by the prisons officers, not by the police, and were illegally kept in the prison rather than at a police station. There were no independent civilian witnesses to the search and seizure as required by law. The two accused were held illegally and without remand from date of arrest until 26 March 2008 when they were finally brought before a judge inside the prison, a fact that the investigating officer admitted under cross-examination before the court.
- iii. Nyi Nyi Aung, 25; resident of Lepugan Village, Pale Township, Sagaing Division, and four others were taken into custody on different days in January 2009 for allegedly setting up an illegal organization but the police did not bring cases against them to court until April 24 (section 6, Organisation Law 1988, Hlaing Township Court, Yangon, Criminal Case No. 356/2009; Judge Win Swe presiding; hearings

began in May 2009) during which time the defendants were kept in illegal custody at the Aungthapyay Interrogation Camp. The police records did not give details of the exact day on which the inquiries against them commenced, and also falsely recorded the date of arrest of all accused as April 10; however, this contradicted the search warrants, which were dated January 26, 28 and 29.

- iv. Sein Hlaing (53, male; trader, residing at Kyaiklat Road, Linlundaung Ward, Sanchaung Township, Yangon) and two other persons were also arbitrarily detained at the Aungthapyay camp after their arrest on 6 March 2009, before their eventual charge under the Unlawful Associations Act (Criminal Case No. 432/2009, Sanchaung Township Court, Judge Tin Swe Win [Special] presiding) for allegedly receiving money illegally from abroad. The accused alleged that from 13 March to 12 May the police held them illegally at the interrogation facility in Mayangone Township. When asked about this in court the police first refused to reveal where interrogations had been held on the ground that it is a secret, and then said that he didn't know where the accused were held. They were transferred to Insein Central Prison on 13 May 2009. The case against them opened on 26 August 2009. The charge was finally lodged only on 10 September 2009. At no time in the period from 6 March to 26 August was there a judicial order to allow for their detention: a fact that the police in court did not deny but could not explain. The accused also testified in court that during their six months in arbitrary detention they were tortured; however the allegations went unanswered by the police, other than that they submitted evidence from the interrogations of the accused as proof of the alleged crime in violation of the Evidence Act.

b. Torture:

- i. Dr. Wint Thu and eight others were arrested and accused over their involvement in a prayer campaign for the release of political prisoners, and of having had contact with groups abroad that the state has designated unlawful. They were allegedly held incommunicado until their trials in December 2009 (Mandalay District Court, Criminal Case Nos. 192, 196, 197, 211, 212 & 213/09 and others, Judge Moe Myint presiding, trial conducted inside Ohboe Prison) and tortured. Officers allegedly forced Than Htaik Aung to stand with toothpicks inserted into his heels, to drink putrid drain water, and allegedly also came into his cell and urinated; and, allegedly forced U Nandawuntha, a monk, to stand throughout two days of interrogation and then forced him to kneel on sharp gravel while an officer jumped up and down on his calves—if he didn't give the answers that they wanted then they hit him on the head with a wooden rod. Dr. Wint Thu and Ko Myo Han were also both allegedly forced to stand throughout interrogations of two and four nights respectively. Four officers at the Aungthapyay interrogation facility in Yangon Division allegedly dripped candle wax onto the genitalia of co-accused Wei Hypoe, splashed him with boiling water and tied him to metal bars, then assaulted him with bamboo rods. They also applied a stinging substance to his open wounds. In a related case, Special Branch officers allegedly injected a detainee from

Nyaung-U by the name of Ko Zaw Zaw with an unknown substance during interrogation. All of the victims were sentenced to long jail terms at a closed court inside a prison. Their convictions were based upon confessions that the police obtained through the use of torture.

- ii. The Asian Legal Resource Centre at the end of September 2009 received details of a case concerning two young male victims who were tortured at an urban police station over an alleged robbery. Neither of them was taken before a judge. According to the first: "I was interrogated by eight police for three days. They said to give back what I had robbed. They covered my face with a sarong and then four or five of them assaulted me. They hit me on the cheeks and punched me in the face. They hit me with batons over a hundred times on my ankles, finger and elbow joints, shoulder blades and head. They made me stand on my tip-toes then put something with sharp points under my feet and made me hold a pose like I was riding a motorcycle, for about two hours. They prodded my back with a baton. During this time they were drunk." He added that his wife paid the police the equivalent of around USD100 so that they would not torture him. His companion also said that, "I was detained and interrogated for two days. While interrogating me they hit my cheeks and pressed a piece of bamboo on my shins and ran it up and down. They kept my wristwatch." The techniques described in this case are advanced methods of routine torturers. The motorcycle and rolling bamboo are particularly familiar methods in the documentation of military intelligence and Special Branch. However, the torturers in this case were police in an ordinary suburban station.
- c. Deaths in custody:
 - i. Ko Naing Oo (a.k.a. Ko Ye Naing Oo), 36, labourer, married with two children, residing in Ward 2, North Okkalapa Township, Yangon was allegedly beaten to death by personnel of the Ward 2 Peace & Development Council in the township on 18 March 2007 after a dispute with his in-laws. His younger brother alleged that he saw Naing Oo lying dead with cuts on the left side of his head, at the base of the skull and above the temple; bruises on his left leg and blood coming from his mouth, among other injuries. It was also obvious that the body had been moved after he died. The body was sent to hospital for a post mortem. The doctor handling the case promised to give a true post mortem report; however, the family did not later receive any information about it. Meanwhile, the family obtained the necessary documents from the hospital and police to collect Naing Oo's body for cremation and went to take it at 2:30pm on March 21. It was then that they found out that three accused in the case had already brought a car at 10am that morning and already taken the body to the crematorium. The family lodged a complaint over the death and the matter went into the local court. But the family was not informed when a hearing into the case was held on April 11, or that another would be on April 26. This is despite the fact that Naing Oo's younger brother should have been called as a witness. Meanwhile, local police reportedly warned Naing Oo's father that if he tried to sue over his son's death then he would lose his job as an import-export officer on the Yangon docks.

On March 29 a local news journal also reported on the case and apparently on instructions of the authorities said that the autopsy had found that Naing Oo had died from natural causes while “sleeping soundly” at the council office where he had been brought for being drunk and disorderly.

- ii. Maung Chan Kun (a.k.a. Maung Myint Thein), 20, of Dawnachan Ward, Pantanaw Township, Ayeyarwady Division, married to Ma Chan Nyein Khaing, of Ma-Ubin Township, Ayeyarwady Division, was detained in Pantanaw police lockup on 11 January 2007 after he had registered with the local council as a guest staying in the locality. The next morning a police officer came to the house and told Chan Nyein Khaing that her husband was in the Pantanaw Township Hospital. When she went to the hospital she found her husband lying dead upon a wooden bed frame in the cleaning room. There were injuries all over his body, including an approximately one-inch-long hole at the back of the head from which blood emerged when his relatives moved his body to take it for autopsy, as no orderlies were available. There was also bruising from his neck to the backs of his ears, and on his face, sides and forearms. There was swelling on his right side. Radio journalists who contacted the Pantanaw police station from abroad were told that Chan Kun was arrested because he had escaped from an army prison labour camp run by Light Infantry Battalion 304 in Thaton. The police said that after he was brought to the station they had intended to send him to the Ma-Ubin Prison, but before that he had started to show symptoms of malaria so he was sent to the hospital. They denied that he was tortured or that he was chained while in hospital. On January 14, Chan Nyein Khaing lodged complaints with the national and division council chairmen, home affairs minister and police chief. However, she was denied an attempt to lodge a complaint in court. On February 5 a post-mortem inquest was held at the Pantanaw Township Court. In the findings of the court, Chan Kun had been brought to the lockup at 2am and transferred to the hospital at 8:30am after looking unwell, and died from malaria at 11:45am. The judge closed the inquiry.
- iii. Maung Lin Lin Naing, 18, a small trader, resident of Oatphoe village, Waingkyi tract, Phadoe, Kyauktaga Township, Bago Division was allegedly killed in the custody of police stationed at Phadoe, Kyauktaga on 4-5 January 2007 after a local storekeeper accused him of theft. According to the police record, at 4pm the next day, February 9, Lin Lin Naing was found hanged in the Phadoe police lock up; the police also showed concerned persons a photograph of the young man hanging from some discarded clothing. At 7pm on February 10, without having informed the family, the police hired four persons to dispose of the body. The family of Lin Lin Naing together with their local council official went to ask the police how the young man had died and where they could find the remains, but they did not get any answers. On February 17 they were forced to hold the religious ceremony for his death without a body. A human rights defender helping the family has said that they had been warned by the police and

Phadoe local officials that they would be “shut up” if they tried to complain about the death. Nonetheless, the family lodged a complaint with the Minister of Home Affairs, who oversees the police force. It is not known if he took any action on the case or not.

- iv. Ko Aung Khaing Htun (a.k.a. Balashin), 31, a fisherman residing in Ward 9, Seingone, Patheingyi Town, Ayeyarwady, was allegedly beaten to death by members of the Ward 1 Peace and Development Council (PDC), Kunchan, Patheingyi on 19 June 2009 after they had held him and another fisherman in exchange for money for their release. They had released the other man so that he could collect the money, but by the time that he came back on June 20 they said that Aung Khaing Htun had already left. On June 21, his family received news that his bruised and bloodied body had been recovered from a roadside. The police detained a number of persons, including local officials, over the killing, but at last report that the Asian Legal Resource Centre received, only a couple of petty officials had been charged with murder.
- d. Coerced signing of documents with no basis in law: Following the September 2007 protests, many persons were released from custody after signing “pledges” not to recommit undefined offences that had no legal basis whatsoever. For example, Khin Sanda Win, 23, was detained by unidentified men in plain clothes on 29 September 2007 outside the Pansodan Department Store in Kyauktada Township, Yangon. They tied her hands behind her back and took her to the town hall where she was put together with ten men who were unknown to her and then they were each photographed with various weapons, including knives, slingshots and pellets. Then they were allegedly forced to sign confessions that the weapons had been found in their bags. Khin Sanda Win was sent to the special interrogation centre at Kyaikkasan and she was kept there without charge, warrant or otherwise until October 7, when she was transferred to the central prison and held there, again without charge, warrant or any other legal order until October 25, when she was sent to the Hlaing Township Peace and Development Council office where in the presence of the council chairman and her parents she was told to sign a pledge that she would not take part in any anti-state activities, after which she was released; however, as the pledge had no legal validity, on 1 November 2007 two police officers came to Khin Sanda Win’s house and informed her that she would be charged with having illegal arms. When Khin Sanda Win went to court the next day, the charge that the court put against her was not as the police had indicated but instead acting “to endanger human life or the personal safety of others” under sections 336/511 of the Penal Code. When her lawyer applied for bail, the amount set was vastly in excess of the legal maximum, and thereafter Assistant Judge U Thaung Lwin (First Class) (Kyauktada Township Court) unilaterally revoked bail without giving a reason. Appeals to higher-level courts were unsuccessful and she served a term for the offence before being released.
- e. Duplicated and multiplied charges:

- i. U Kyaw Min, a.k.a. Md. Shamsul Anwarul Haque, 58, a graduate of the Rangoon Institute of Economics and Rangoon Institute of Education, former Lettauik Township Education Officer and headmaster of Basic Education Middle School, elected member of parliament for Buthidaung Township (National Democratic Party for Human Rights), constituency no. 1, had his appeals to the Supreme Court against his 47 years' imprisonment and 17 years' imprisonment for every member of his immediate family (his wife, son and two daughters) for allegedly violating the 1982 Citizenship Law dismissed without a hearing (3 May 2006, Judge U Khin Maung Aye presiding; 23 August 2006, Special Appeal Nos. 177-181/2006, heard by Judges Dr. Tin Aung Aye and U Chit Lwin presiding). The entirely political case was a consequence of Kyaw Min joining with other elected members of parliament to call for the elected legislature to be allowed to sit, and also because he met with representatives of the International Labour Organisation visiting Yangon. In order to penalize U Kyaw Min far beyond the maximum set down in the Citizenship Law, the police lodged four identical separate cases for each of four members of the family, even though the offence was the same and under law they should have been lodged as a single case. All four were brought against Kyaw Min, even though there is nothing in the section of law under which they were charged to penalize someone giving false information concerning someone else, i.e. for his family members. The police also lodged a separate case against each under the 1950 Emergency Provisions Act that in lying about their identities the family had "spread false news", even though the section was completely irrelevant to the case, but for which they each received a seven-year penalty.
 - ii. Kyaw Htun Lin (a.k.a. Ko Latt); resident of Kyaukpadaung Township, Mandalay Division and two other persons were sentenced to 19 to 55 years in prison on 23 December 2009 likewise through the duplication and multiplication of charges after they were accused of attending training programmes on children's rights in Thailand and receiving money from abroad for work in Myanmar (Immigration [Emergency Provisions] Act and Unlawful Associations Act, Criminal Case Nos. 201-207, 209 & 214/09, Mandalay District Court, Deputy District Judge Ohn Myint presiding, trial conducted inside Ohboe Prison, Mandalay). The alleged offences were tried in as many separate cases as possible so as to multiply the number of years' imprisonment, rather than compounded in accordance with the Criminal Procedure Code. The defendants were also allegedly tortured during interrogation, the cases were held outside the jurisdictions where the charges were first laid, and the accused did not have opportunities to hire lawyers, except when they were giving their own testimonies; therefore, the prosecution witnesses were not cross-examined. Requests for leave to appeal were rejected in the divisional court on 16 February 2010.
9. Court processes and trial
- a. Closed trial:

- i. U Tin Min Htut (a.k.a.) Tin Htut, residing at Yuzana Building, Yetashei New Road, Yetashei Ward, Bahan Township, Yangon and U Nyi Pu, residing in Yahaingkwint Village, Gwa Township, Rakhine State, both elected members of parliament, were sentenced on 9 February 2009 in a closed trial to 27 years in prison each for writing a letter to the United Nations on 21 July 2008 that was signed by 92 MPs, in which they criticised the government's programme for political change and also critiqued the UN's approach to the situation in Myanmar. Both of the accused was detained arbitrarily: police arrested U Nyi Pu around 2am on 11 August 2008 and U Tin Min Htut in the afternoon of 12 August 2008 whereupon they were both sent to the Aungthapyay Interrogation Camp until the end of September when they were transferred to Insein Central Prison. They were not brought to court until February 2009, in violation of the Criminal Procedure Code, section 61, making them subject to arbitrary and illegal detention for around six months each. They were charged under section 4 of what is popularly known as the Anti-Subversion Law (The Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Opposition), 1996; as well as section 33(a) of the Electronic Transactions Law and section 505(b) of the Penal Code (Criminal Case Nos. 138 & 140/09, Yangon West District Court [Special Court]). Neither of the accused was represented by a lawyer, even though they signed a Power of Attorney for a Supreme Court advocate to represent them and he came to the location of the trial to conduct the defence, but he also was not allowed inside.
- ii. Ma Eint Khaing Oo, 24, resident of Ward 46, North Dagon Township and Kyaw Kyaw Thant, 29, resident of Pauktawwa Ward, Insein Township, both reporters, were imprisoned after they took a group of cyclone victims to the ICRC and UNDP buildings in Yangon on 10 June 2008 to request relief. They were both charged under section 505(b), Penal Code, and Kyaw Kyaw Thant was also charged with an immigration offence. They were tried in a closed court (Criminal Case Nos. 760 and 949/08, Tamwe Township Court, Judge Daw Than Than [Special] presiding). In the court the two journalists denied the charges and said that they had only been trying to help people left homeless after the disaster. Even the prosecution witnesses gave evidence that supported the defendants' account. Notwithstanding, the judge in a verdict that contained no reasoning convicted them both on 14 November 2008; however, after intensive international pressure, including from the Special Procedures, the two were among prisoners released in September 2009.

- b. Procedurally-incorrect cases:
- i. The case against democracy party leader Daw Aung San Suu Kyi to keep her under house arrest throughout 2009 and 2010—Yangon Northern District Court, Judges U Thaung Nyunt (Northern District Judge) and U Nyi Nyi Soe (Western District Judge) presiding; Criminal Case No. 47/2009, charged under section 22 of the Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts (No. 3/1975; known as the State Protection Law) with violating an order set down under that law—was indicative of the procedural incoherence in so many cases in Myanmar courts. The case was heard unlawfully outside of the district where the alleged offence occurred, and with judges from two different districts hearing it, for which there is no provision in law.
 - ii. At the other end of the spectrum of cases in Myanmar, the owner of a fabric shop in 2007 accused two teenage girls in his employment of stealing money. He lodged the case with the township police but they failed to take it up. He then went to the district police and allegedly paid them to lodge a case against the girls under section 380 of the Penal Code (theft in a building). When the case was brought to the township court the judge failed to correctly ascertain the ages of the girls as required by law. In fact, at the time of being produced one of the accused was under 16 and should have been tried in a juvenile court [Child Law 1993, sections 2(a), 37(f)]. At the end of 2009, the girls were still being held in adult remand, apparently under the influence of the complainant and the case has remained pending. While under investigation, the girls also were allegedly tortured, the police squeezing their fingers and bending them back until they reached stress points in order to extract confessions.
 - iii. In a similar case, two children were among six persons sentenced to a year in prison on 31 August 2009 for illegal gambling because the judge did not make proper inquiries (Criminal Case No. 133/2009, Daik-U Township Court, Judge Aye Myint [Special] presiding). The judge was reportedly informed that the girls were aged less than 16 but he failed to verify this fact because the police gave falsified documentary evidence and paid the prosecutor who handled the case 30,000 Kyat to try all the accused as adults.
 - iv. Ma Thanda, married with three children, resident of Einme Township, Ayeyarwady Division, was charged with a range of offences and sentenced on 25 October 2007 to 28 years in prison after she went to visit her husband in Thailand during April 2007 (Penal Code section 124A; participating in an illegal organisation, Unlawful Association Act, Immigration [Emergency Provisions] Act, in Yangon Western District Court, Criminal Case Nos. 93, 94 & 95/07, Deputy District Judge Myint Soe presiding). The case consisted of multiple violations of criminal procedure, including that: the section 124A charge could only be laid with written approval of the Ministry of Home Affairs but none was obtained; the Yangon court did not have jurisdiction as there was no order to transfer the case there from the area where the offences

allegedly occurred; Ma Thanda was not able to hire a lawyer or call witnesses, and the case was in a closed court

- c. Evidence-less and groundless cases:
- i. Ma Honey Oo, 21, was accused of having had contact with overseas radio stations to give out information at the time of the September 2007 protests, and having been involved in making a student union. She was taken into custody on 9 October 2007 but was not brought before the Yangon Eastern District Court until 20 December 2007. The police accused Honey Oo of having been involved in a student union, having talked to foreign media by telephone and of having participated in protests at the Yuzana Plaza and on the road from Mingalar Market to Natmauk on 25-6 September 2007. However, when pressed in court they could not produce any evidence to support any of their claims and on the contrary showed ignorance and confusion about the laws under which she had been brought. The investigating detective said that the information they had that Honey Oo was part of the group accused of having contact with overseas media was from a reliable source, but he could not divulge the source to the court and the source was not included among the list of witnesses in the case. He had no evidence to present to the court other than the supposed confession of the accused. Nor could he produce any photographs or other evidence that Honey Oo was in the protests as he had claimed in the charges against her, saying only that eyewitnesses had seen her.
 - ii. Win Maw, a.k.a. Maw Gyi, 46, was also arrested over the September 2007 protests, on 27 November 2007, and charged under various offences, starting with section 505(b) of the Penal Code (Mingalar-taungnyunt Township Court, Criminal Case No. 313/2008, Judge U Tin Latt [Special], presiding) because he had allegedly sent news by phone and email and took photographs for a media group abroad. The case opened against Win Maw on 28 March 2008 in a closed court, like other cases from the protests. The police “evidence” of the crime included legally-published books owned by Win Maw’s father and bearing his signature, some photos of democracy leader Daw Aung San Suu Kyi, and a computer hard disk, which itself—not its contents—was submitted as evidence. Also on the evidence list were 18 “political” texts the police admitted under cross-examination were actually just English learners.
 - iii. Phoe Htoke (a.k.a. Khin Maung Cho), a dried fish merchant, 47, residing in Yankin Township, Yangon, and two other men were convicted under the Television and Video Law and section 505(b), Penal Code (Criminal Case Nos. 1089, 1091/2008, Judge U Thein Swe [Special] and Assistant Judge San Mya Kyu [Special] presiding respectively, Kyimyindaing Township Court) and were sentenced to a total of five years each in two separate verdicts given on 8 December 2008. The police accused Phoe Htoke and Kan Myint of both travelling to Thailand where they met with members of unlawful associations, that after they came back they were involved in protests on 22 February 2007 at Theindawgyi Market in Papedan Township of Yangon and on

24 April 2007 at the Thingankyun Model Market, that they distributed unlawful fliers in the lead-up to the protests in September to encourage people to join in demonstrating, including on 8 and 15 September 2007 at Mingalar Market and Tamwe Market, and distributed VCDs of, among other things, a comedy troupe satirising the government and uncensored videos of lectures by monks. Despite the many allegations, they had no firm evidence. For instance, they could not show proof of the two men's involvement in the protest in February, despite having taken photographs of it. They could not give dates that the two accused had gone to Thailand. The lawyer handling the case for the defence on the video-related charge was himself forced to flee the country during the trial after being charged with obstructing the work of the court for making a request that the Minister for Information, who had named his clients in a press conference, appear as a witness.

- iv. Maung Nyo, 34, an English tuition teacher residing in East Thirihema Ward, Chan-aye-tharzan Township, Mandalay and Ma Thanda Htun, 27, a tour guide, residing in Mingalar-yenyunt Ward, Aungmyay-tharzan Township, Mandalay, were convicted of having travelled illegally to Thailand where they met with members of a group of Buddhist monks opposed to the government of Myanmar (Yangon Western District Court [Special Court], Deputy District Judge U Tin Htun presiding) and sentenced on 24 March 2010 to three years each under the Immigration (Emergency Provisions) Act and two years each under the Organisations Law. The police took the two accused into custody on 3 August 2009. But a case was not opened against them until 11 September 2009. During this time they were illegally detained at an interrogation centre where they were allegedly tortured to extract confessions. There was no evidence against either of the accused. The 11 prosecution witnesses in the closed trial consisted only of the police, a couple of low-ranking council officials and two witnesses to the search and seizure of property at time of arrest. There were no independent or credible witnesses to any crime. Also, witnesses that should have been called, namely, officials from the immigration office in Myawaddy, were not: instead they just sent documentary information, which is not acceptable as primary evidence because it denies the defence of the right to make a cross-examination. Also, as the two accused are residents of Mandalay and they allegedly committed the crimes at the border of Thailand, they were incorrectly brought to the central prison in Yangon for the trial without correct authorization (Criminal Procedure Code, sections 177, 178).
- v. Ma Hla Hla Win, 25, a resident of Shukhinthar Road, Thaketa Township, Yangon, was in 2009 sentenced in the Pakokku Township Court to a total of 27 years in jail for six charges connected to her allegedly taking illegal video footage and sending it abroad; a co-defendant, Maung Myint Naing, 32, resident of Daung-okyi village, Myaing town, was sentenced to 32 years. One of the charges brought against the two was under section 5(1) of the Control of Imports and Exports (Temporary) Act 1947 (Criminal Case No. 1763/09, Pakokku Township Court, Township Judge Aye Aye Mu [Special] presiding) for

which they both received seven years on 6 October 2009. This offence arose because the two of them had ridden on an illegally-imported motorcycle—an offence for which the pillion on the motorcycle, Hla Hla Win, had no liability but was nonetheless charged and convicted. On 29 April 2010 the Magwe District Court refused to entertain her appeal.

- d. Denial of defendants’ rights and targeting of defence lawyers:
 - i. Ko Phoe Phyu (a.k.a. U Yan Naing Aung), 30, resident of Thingangyun Township, Yangon, had his licence to practice law revoked under Legal Practitioners Act 1880, sections 12 and 13(f), because of conviction under section 6, Association Formation Law 6/1988 (Criminal Case No. 587/2009, Magwe Township Court); revocation order given in letter of 11 March 2010 from Judge Myint Aung, Yangon Divisional Court, on order of Supreme Court. The revocation was motivated by the lawyer’s defence of persons accused in political cases. He was not given an opportunity to mount a defence against disbarment.
 - ii. Two experienced Supreme Court advocates, U Aung Thein and U Khin Maung Shein, were in October 2008 representing three men and one woman in five cases lodged against them over the September 2007 protests (Criminal Case Nos. 307-311/2008 before Judge Daw Aye Myaing of the Hlaing Township Court, Yangon). The hearings were proceeding, like others from September 2007, in a special courtroom within the Insein Central Prison, apparently under an order from the Supreme Court. At the hearing on October 6 one of the four defendants informed the court that the defendants “no longer had faith in the judicial process” and that they would withdraw the power of attorney from the two lawyers at the next hearing. The judge instructed that the same be put to the court through the lawyers. U Aung Thein asked that the court record the same in its record and U Khin Maung Shein did likewise. It was clear from this procedure that the withdrawal of power of attorney was made through consultation of the clients with their advocates, in accordance with the clients’ wishes. On October 20 U Khin Maung Shein gave the submissions to withdraw power of attorney in the five cases to the four defendants. They read the documents thoroughly and each signed them. The two attorneys also had their signatures affixed. Then the documents were submitted to the court. At that time the judge said that the remark in paragraph 2 of the submissions to withdraw power of attorney that the defendants “no longer had faith in the judicial process” had not been made orally at the earlier hearing. Two of the defendants, Ko Htun Htun Oo and Ko Aung Kyaw Moe, both objected that they had said these words and they would again make a submission to the court to this effect. But Judge Daw Aye Myaing said that, “It is too late. Don’t speak.” The Hlaing Township Court then made an application to the Supreme Court under section 3 of the Contempt of Courts Act, 1926, that, contempt of court may be punished with imprisonment for a term that may extend to six months (Miscellaneous Criminal Application No. 99/2008, Daw Naw Than Than Aye applicant). On 6 November 2008 the Supreme Court

found the two advocates guilty of contempt of court and sentenced them to four months' imprisonment each without giving them any opportunity to defend themselves. After they were released in 2009, both of the lawyers were disbarred from practice, again without being given any opportunity to present their cases against disbarment.

- e. Lack of means for redress and counter-complaints against complainants:
 - i. Thant Zin Oo, 37 and Ma Hla Hla Maw (a.k.a. Maw Kyi), 22 were imprisoned at Insein Central Prison in a case initiated by a corrections officer (Criminal Case No. 555/2008, Insein Township Court, Assistant Township Judge Daw Baby [Special], presiding) because they made a legitimate complaint about health and welfare of detainees after they went on 21 January 2008 to visit Thant Zin Oo's younger brother. In his letter to the police opening the case, the corrections officer gave the reason for legal action as that the prison officials had not authorised their visit for the purposes of writing such a letter and that they had recorded on the register their intent to come as simple visitors.
 - ii. U Than Lwin, 70, elected member of parliament (National League for Democracy), resident of Mattaya Township, Mandalay Division, was assaulted by an unidentified man who fled into an office of the government mass organization, the Union Solidarity and Development Association, in Mattaya Township on 15 June 2007. A complaint was lodged with the police, but thereafter the secretary of the township USDA filed a counter-complaint against nine persons, including the victim's son, two daughters and son-in-law on 26 June 2007 under Penal Code section 506 (criminal intimidation) and section 114 (abetment), because they had pursued the assailant to the outside of the office. The case against the nine was heard in the Mattaya Township Court from 24 July 2007 to 5 October 2007. Despite the fact that the entire prosecution case was based on hearsay, the judge found all of the accused guilty and on October 5 sentenced them from five to seven years in jail. U Than Lwin was himself taken from his house by police and officials at around midnight on 1 October 2007, without charge, in connection with the protests of September 2007. While incarcerated, he lost his eyesight due to the injuries he sustained because of the earlier assault and lack of medical treatment.
 - iii. On 17 April 2007 Ko Myint Naing and a colleague who had travelled to Hinthada Township, Ayeyarwady Division to conduct a human rights training session were assaulted by a group of men in plain clothes who were allegedly supervised by local police and council officials. Myint Naing had to be transferred to the Yangon General Hospital for cranial treatment. On April 23, the state-run newspapers ran articles against Myint Naing and his colleagues, whom they accused of going to stir up trouble and that villagers had insisted that "there were no incidents of human rights abuse" in their area, and that when the group had gone to Oatpone village, the villagers had tried to have them leave a confrontation had followed. On April 24 the authorities sent notices to Myint Naing and five others indicating that

they would be charged under section 505(b)(c) of the Penal Code. On May 2, Myint Naing lodged a criminal complaint in the Hinthada court against 12 officials for endangering life, criminal force, robbery, and aiding and abetting. The same day that he lodged his complaint the preliminary hearings in the two cases against him and the five others were heard in the same court. Judge Daw Myint Myint San ordered all six men to be kept in custody, including Myint Naing, who was still receiving treatment for the head injuries he suffered during the April assault. On June 8 the township court reviewed the police report about the April 18 incident and accepted Myint Naing's own complaint on just one relatively-minor charge of voluntarily causing hurt (a one-year jail term if found guilty), against six minor accused, only three of whom were petty officials. The judge did not call the accused police or others to court to conduct his own inquiries as he is empowered to do, but just followed the police findings. Unlike the six human rights defenders, the six accused in this case were all given bail. A request by Myint Naing's lawyer to have the local council chairman and police appear as witnesses in this trial was refused. Finally, the three civilians received minor penalties while the officials were acquitted. Meanwhile, on July 24 the court found the six accused rights defenders guilty: Myint Naing was sentenced to eight years, as he was a respondent to both criminal cases; the other five to four years each—they were released in September 2009; Myint Naing is still serving his sentence.

V. TWO MAJOR CONSTRAINTS

10. Role of the judiciary as enforcer of executive policy:

- a. Official statements:
 - i. New Light of Myanmar, 15 September 2009: 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.
 - ii. New Light of Myanmar, 12 May 2009: 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.

- iii. New Light of Myanmar, 13 May 2009: The Prime Minister spoke of the need for the judges to ensure prevalence of law and order [rule of law] and contribute their shares in the building of a new and modern nation **realizing the policy and tasks of the State...** The **judges are responsible for guarding against all kinds of dangers to national unity and development and public interests and passing appropriate sentences to those who do such harmful acts.** They will be able to contribute to “prevalence of law and order [rule of law], community peace and public interests” only if they decide in accordance with the law... The courts are required to use their judicial powers only in the interests of the people. For this objective to be achieved, the courts will have to cooperate with administrative personnel. **The administrative and judicial systems cannot operate separately but need to be in harmony** to be able to protect public interests.
- iv. New Light of Myanmar, 6 February 2007: [Prime Minister General Soe Win said that] the people must respect the law, and the law must protect the people as well. Moreover, **the conducting of judicial affairs must be in consistency with the State policies and existing laws. It is necessary to have political as well as judicial views.** An extensive use of law terms may confuse the people and ignoring the nature of law is a kind of extreme act. If needs arise to solve the issues of community peace and tranquillity, and to end misconduct, **the courts and local administrative bodies are to cooperate and coordinate [with] each other.** Peace and development councils at various levels are regional administrative bodies under the leadership of the State Peace and Development Council. Therefore, it is necessary to know the role of those administrative bodies.
- b. The administrative role of the judiciary was also acknowledged by the Supreme Court in a recent application brought to it by the National League for Democracy on 23 March 2010. The party submitted a miscellaneous civil application to the court under the Judiciary Law and the Specific Relief Act 1887. It asked the court to examine provisions of the new Political Parties Registration Law 2010 that prohibit convicted serving prisoners from establishing or participating in political parties. The NLD’s approach to the court was premised on the notion that the Supreme Court would at very least be able to entertain its plaint. But according to the NLD, the application did not even go before a judge. Instead it was returned by lunchtime on the same day with an official giving the reason that, “We do not have jurisdiction.” Subsequently, an attempt to approach the chief justice directly was also rebuffed.

11. Examples of corruption (the Asian Legal Resource Centre has records of these cases on file but here has removed all identifying details):
 - a. In 2007 a police special drug squad arrested a notorious dealer in possession of a small amount of amphetamines. The police nominated a defence lawyer for him: a common practice in which there is a 30 per cent kickback to the police station chief. After being hired, the lawyer went to meet with the judge and prosecutor handling the case. The judge explained to the lawyer that the problem was because of the notoriety of his client, there was local and official interest in the case and the judge could not just let the client off without risking accusations of corruption and losing face. So they arranged the case in a way that would get the client off, give the judge credibility and make everyone money. Payments were made both to the judge and the prosecutor. During the hearings, they deliberately botched the case. The judge admitted evidence that cast doubt on the allegations, and the prosecutor asked questions that supported the defence. Some prosecution witnesses were made hostile and their evidence recorded fully in the judgement. The judge convicted the accused, and public interest in the case ceased. The case was appealed to the district court. Here there were no public hearings and no knowledge of what was going on. The judge in the court of first instance had already contacted the judge in the higher court, and had given money to him. The higher court acquitted the accused, who moved to another locality after his release.
 - b. A government car driver a few years from retirement was in 2007 approached by a group of men, who asked to rent his house. The amount they offered was far above the market value. The occupant consulted with local government administrators whom he knew as friends. They advised him that the group apparently wanted the house for gambling, but that there was nothing to worry about and that he should do it. He rented the house and received a year's payment in advance. After two months a group of special vice squad police arrested the gang. The manager of the gambling operation used his contacts with the police to have the house owner pose as the key accused, securing bail for himself and his men. He told the owner that if he went along with the scheme then he wouldn't have to repay the year's rent, and that he would also get him released after a short time. He also threatened him that if he didn't cooperate then the gang would implicate his son. In the end, the house owner and two junior members of the gang faced court, with the owner in jail and the others on remand. In 2008 the court convicted the owner and freed the other two for lack of evidence. On appeal the elderly man was conditionally released, taking into account time served, but without his knowing the prosecutor appealed to a higher court and the original sentence was re-imposed; the police again arrested him and he is serving the remaining time. The gang has moved elsewhere.
 - c. The son of an army officer posted to a regional command in 2008 allegedly attempted to rape a classmate together with a companion. The family of the victim took the unusual step of strongly supporting her

complaint against the two accused. The case attracted local interest because of the status of the alleged perpetrator as a family member of the ruling military class. At first the charge against the two was attempted rape. They were held as VIP detainees in a room next to the police station chief's own office that the police normally use for playing cards and drinking. The army officer's son received bail on the basis of a supposed health problem that required medical treatment; his companion was held in remand, but in the same room as before. After preliminary hearings and payment of money, the judge ordered that the charge be altered to assault on a woman, which is a much lower offence for which bail is habitually given, and the second accused also was released. Finally both accused were acquitted of that charge on the benefit of the doubt, the judge implying that the victim had misled the two accused and at first consented to sex.