

Exploring the paradox of limitation clauses: how restrictions on basic freedoms in the 2008 Myanmar Constitution may strengthen human rights protections

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Myanmar's new Constitution contains provisions that ostensibly protect fundamental freedoms. These provisions have been criticised because they permit the government to limit freedoms for reasons such as 'national security' and 'public order'. After pointing out that such limitations are commonplace, this article explores whether the limitations may counterintuitively provide greater constitutional protection than if they were not there. The Constitution's limitation clauses, some of which are strikingly similar to those in international human rights instruments, arguably trigger internationally established parameters that in essence limit the limitations. The article examines the significance of these 'limits on limits' to the legal system of Myanmar, while keeping in mind that any practical impact of international standards on the country remains unrealistic for the near future.

Introduction

The military government of Myanmar (Burma)¹ has been roundly condemned as 'one of the world's worst violators of human rights' (Thirgood 2002; *USA Today* 2005; Guardian News and Media Limited 2010). Events over the past few years — such as the 2007 violent crackdown on protesting Buddhist monks, the 2008 constitutional referendum characterised by coercion and threats (Public International Law & Policy Group 2008, 23; *Los Angeles Times* 2008), and the 2009 renewal of opposition leader and Nobel Peace Prize winner Daw Aung San Suu Kyi's house arrest — have reinforced this reputation.

Over the next several months, two important events will occur that have the potential to affect the long-term future of human rights in Myanmar. First, in 2010 the military government will hold multi-party general elections (New Light of Myanmar 2009).

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1 Burma was renamed Myanmar by the current military leaders in 1989. Political opponents have not accepted the change. Here the names are used without political connotation. 'Burma' is used for periods prior to 1989 and 'Myanmar' for the period since. 'Burmese' is used for the country's citizens, for its language and as an adjective. 'Burman' is used for the majority ethnic group.

Second, when the new *Pyindaungsu Hluttaw* — the federal legislature chosen in those elections — convenes, the 2008 Constitution of the Republic of the Union of Myanmar (2008 Constitution) will officially come into effect (2008 Constitution, Art 441).

The 2008 Constitution, widely criticised as merely legitimising the current regime's grip on power (Human Rights Watch 2008b, 2; Aung Htoo and Benschopf 2008; Amnesty International 2008; Burma Lawyers' Council 2008, 48–49; Horsey 2009, 3; International Center for Transitional Justice 2009, 3), appears *at first glance* to provide sweeping protections for basic freedoms and individual liberties. Under the 2008 Constitution, the Burmese people will have the right to 'express and publish freely their convictions and opinions', 'assemble peacefully without arms and holding procession', 'form associations and organizations', 'develop their language, literature, culture they cherish, religion they profess, and customs', 'conduct business freely' and enjoy the 'freedom of conscience and the right to freely profess and practise religion' (2008 Constitution, Arts 354(a)–(d), 34, 370).²

Do these new constitutional freedoms signal the beginning of a remarkable change in the human rights situation in Myanmar? Hardly. A constitution, no matter how supportive of human rights, cannot alone transform a nation marred by a culture of human rights abuses, a subservient judiciary, a defence bar intimidated by threats of arrest (Radio Free Asia 2008), and a population accustomed to living in fear of its government (Skidmore 2004). In fact, a closer look at the 2008 Constitution reveals that the freedoms described above are an illusion: every freedom and right is subject to important restrictions. The government can, for instance, restrict the freedoms of expression and assembly for 'Union security' and 'morality'. Freedom of religion can be restrained for 'public order' or 'public health'. There are others. These restrictions, commonly called 'limitation clauses', carve out important exceptions that enable a government to limit the enjoyment of fundamental freedoms. Analysts of the 2008 Constitution have uniformly denounced their use (Horsey 2009, 4; Aung Htoo 2008, 61–65).

Any hope for the impending protection of human rights in practice by Myanmar's government and judiciary is surely unrealistic. Nonetheless, this article examines whether there may be some benefit, at least at the theoretical level, to the limitation clauses. There is a paradox to these clauses: namely, they may actually strengthen human rights protections because they counterintuitively provide significant limits on government oppression. To explain, courts and human rights bodies around

2 This article relies on the official English translation of the 2008 Constitution. The official interpretation of the Constitution must be based on the Burmese text (2008 Constitution, Art 452).

the world that have interpreted limitation clauses similar to those used in the 2008 Constitution have developed parameters and tests that in essence create boundaries on governments that want to use the limitation clauses to justify overreaching. These parameters and tests have been aptly called 'limits on limits'.

In addition to examining the limitation clauses in the 2008 Constitution and the international parameters that restrain those limitations, this article addresses the significance of Myanmar's previous constitutions and its level of judicial independence to the limitation clauses and human rights provisions in the 2008 Constitution. The article also explores how the use of limitation clauses may preclude additional limitations and what might happen if there were no limitation clauses. Finally, the article attempts to realistically gauge the applicability of the internationally developed 'limits on limits' to the legal system of Myanmar.

Limitations on fundamental rights

Limitation clauses around the world

Nations have always recognised that rights are not without limitations. Even robust democracies allow the curtailing of freedoms in the interests of the public. In fact, limitation clauses in constitutions and human rights instruments are quite common (Steiner, Alston and Goodman 2008, 385).³

There are limitation clauses in the constitutions of countries in the regions near Myanmar, including India (Constitution of India 1949, Arts 19, 25), Thailand (Constitution of the Kingdom of Thailand 2007, Arts 37, 45, 63, 64) and Malaysia (Federal Constitution of Malaysia 1957, Arts 10, 11). The constitutions of nations more comparable to Myanmar in their authoritarian nature, such as China and the former Soviet Union, also have, or had, limitation clauses (Constitution of the People's Republic of China 1982, Arts 41, 51, 54; Constitution of the Union of Soviet Socialist Republics 1977, Art 39). Even Western democracies renowned for their broad individual freedoms, such as Spain and Canada, are no exception (Constitution of

3 There are two types of restrictions on fundamental rights: limitations and derogations (Greenberg et al 1993, 88). Limitations apply in any circumstance when a government determines that some public interest outweighs an individual's right (Office of the High Commissioner for Human Rights 2009, s 2.7). Derogations, on the other hand, only apply in exceptional emergency cases when there is a 'grave threat to the survival and security of a nation' (Steiner, Alston and Goodman 2008, 385). The 2008 Constitution contains both. This article only addresses limitations.

Spain 1978, Arts 16(1), 53(1); Canadian Charter of Rights and Freedoms 1982, ss 1, 33). These countries are just a random sampling; there are many others.

Well-known international human rights instruments such as the Universal Declaration of Human Rights (UDHR) also contain limitations. The UDHR's limitations, which are made for morality, public order and the general welfare in a democratic society (Art 29(2)), have been described as providing the 'prerequisites' for the realisation of rights and freedoms (Glendon 2004, para 18). The International Covenant on Civil and Political Rights (ICCPR — to which Myanmar is *not* a party) (Arts 18(3), 19(3), 21, 22(2)), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Arts 9(2), 10(2), 11(2)), the Charter of Fundamental Rights of the European Union (Art 52(1)), and other international and regional instruments contain similar limitations.

Human rights provisions and limitation clauses in constitutions, charters, declarations and covenants, though, are just one factor in determining the actual protection of human rights in practice. Although protections on paper may be similar, an anti-government protestor in Bangkok will clearly have a different experience from one in Yangon. Despite constitutional guarantees and limitation clauses that are not so fundamentally different, the extent to which citizens in Western democracies enjoy freedoms is obviously different from that of their counterparts in authoritarian nations (Luryi 1982; Ching 2010). The primary problem is that, in countries such as China, 'these rights exist only in theory, not in practice' (Ching 2010; Svennsson 2002, 315–16). In the former Soviet Union, for instance, a bill of rights was adopted in its 1936 Constitution at the height of Stalin's reign of terror and, under its 1977 Constitution, laws on the books were undermined by discretionary powers of officials (Osakwe 1981–82, 250, 285). As this article explores the interplay between international limitation clauses and those in the 2008 Myanmar Constitution, one should keep in mind that in Myanmar, at least for the foreseeable future, human rights might exist in theory (and this point is debatable) but do not exist in practice.

Limitation clauses on the freedoms of religion, expression, assembly and association in the 2008 Myanmar Constitution

The 2008 Myanmar Constitution, needless to say, was created in a drastically different environment from that of the UDHR, ICCPR and most other constitutions around the world. Arising from a process tainted by fraud, intimidation, exclusion and coercion, the 2008 Constitution's legitimacy has been undermined ever since the military regime, after seeing that it had overwhelmingly lost to its pro-democracy opponents, decided to ignore the results of a 1990 popular election. Instead of fulfilling its promise of a new parliament, the regime created a National Convention to draft a new constitution

(Human Rights Watch 2008a, 3). During the drafting process, the military repeatedly prohibited free and open participation, sometimes even arresting critics (Human Rights Watch 2008a, 4; Amnesty International 2009, 238).⁴ On the day of the National Referendum to approve the Constitution, some ballots were pre-marked 'yes', voters arriving at the polls were instructed to vote 'yes', and threats were made to fail students, cut off electricity or fire civil servants if they voted against the Constitution (Public International Law & Policy Group 2008). To no-one's surprise, the regime reported a voter turnout of 99 per cent and an approval rate of 92.4 per cent (BBC News 2008).

The tactics used by the military during the drafting and approval process demonstrate its reliance on suppression of individual rights to meet its objectives. Surely, the military regime was following this pattern when it included limitation clauses in the 2008 Constitution, intending the clauses to be used as tools of control. However, the striking similarity between those limitation clauses and the clauses in international human rights instruments creates a compelling argument that the Myanmar clauses should be similarly interpreted. The article will now look at some of the 2008 Constitution's provisions to illustrate the similarities.

Freedom of religion in the 2008 Myanmar Constitution

34. Every citizen is equally entitled to freedom of conscience and the right to freely profess and practise religion subject to public order, morality or health and to the other provisions of this Constitution.

The limitation here for 'public order, morality or health' is very similar to the limitations allowed concerning freedom of religion in the ICCPR.

2008 Myanmar Constitution, Art 34	ICCPR, Art 18(3) (Religion)
Subject to public order, morality or health and to the other provisions of this Constitution	May be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others

Freedoms of expression, assembly and association in the 2008 Myanmar Constitution

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, community peace and

⁴ Jeremy Sarkin has observed that no matter how democratic the 2008 Constitution is, it will not be respected if the process of its creation is not also democratic (Sarkin 2001, 48).

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.

Article 354's limitation for Union security, law and order, community peace and tranquillity or public order and morality is similar to those for freedoms of assembly, expression and association in the ICCPR.

2008 Myanmar Constitution, Art 354	ICCPR, Art 21 (Assembly)	ICCPR, Art 19(3) (Expression)	ICCPR, Art 22 (Association)
If not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquillity or public order and morality	Imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (<i>ordre public</i>), the protection of public health or morals or the protection of the rights and freedoms of others	As are provided by law and are necessary: (a) For respect of the rights or reputations of others; and (b) For the protection of national security or of public order (<i>ordre public</i>), or of public health or morals.	Other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (<i>ordre public</i>), the protection of public health or morals or the protection of the rights and freedoms of others

A careful reader will of course notice that the limitations are not identical in every respect, and in fact arguments can be made that the differences are consequential (Human Rights Watch 2008b, 47–48). But the similarity in language to the ICCPR is important. Under normal circumstances, similar words in legal documents from different parts of the world would not necessarily be given the same meaning, particularly when the documents have different histories, objectives and motivations. In this case, however, where the terms used in the 2008 Myanmar Constitution may have originated from the ICCPR's limitation clauses (Human Rights Watch 2008b, 47),⁵ the clauses are similarly situated in the context of human rights protections, and international interpretations of the limitation

5 This is speculative. No source was found that could shed light on where the limitations came from. They could have just as well come from a previous Myanmar constitution, a domestic law or another country's constitution, or a combination of those.

clauses abound and are for the most part uniform, a different interpretive model may be necessary.

The legal context: constitutional experiences and judicial independence in Myanmar

Human rights and judicial independence in the 1947 and 1974 Constitutions

Myanmar's previous constitutional experiences and loss of judicial independence trace the downward spiral of the nation's protection for fundamental freedoms. Under the 1947 Constitution of the Union of Burma (1947 Constitution), the country's first, citizens enjoyed broad constitutional freedoms protected by a formidable judiciary. Like the 2008 Constitution, the 1947 Constitution enumerated fundamental rights and limitations. It provided for freedoms of expression, association and assembly, subject to law, public order and morality (1947 Constitution, Arts 17(i)–(iii)). Freedoms of conscience and religion were 'subject to public order, morality or health and to the other provisions of this Chapter' (1947 Constitution, Art 20). The 1947 Constitution also prohibited discrimination against minority or linguistic groups for admission to state educational institutions (1947 Constitution, Art 22). The limitations clauses in the 1947 Constitution have been characterised as 'merely ... standard provision[s] that also [appear] in the Universal Declaration of Human Rights' (Thirgood 2002). An observer to the drafting of the 1947 Constitution explained that the limitation clauses were necessary because of the unique 'law and order situation' facing the country (Rau 1948, 291).

The big difference between the 1947 era and subsequent periods was the independence of the judiciary. The framers of the 1947 Constitution intended to create a judiciary with independence equal to that of the British judiciary (Christian 1951–52, 48). Judges were constitutionally required to be independent and their salaries, rights and privileges could not be decreased (1947 Constitution, Arts 141, 144). In practice, the Supreme Court 'played a significant role in defending basic human rights' (Burma Lawyers' Council 2004, 7) and 'construed the fundamental rights in the Constitution very liberally' (Thirgood 2002), striking down executive orders that violated the Constitution (Myint Zan 2000, 13–14).

Following the military coup d'état in 1962, democratic institutions that protected human rights were dismantled and judicial independence was revoked (Thirgood 2002; Myint Zan 2000, 18). Like the 2008 Constitution, the 1974 Constitution of the Socialist Republic of the Union of Burma (1974 Constitution) was carefully drafted to ensure that power remained in the hands of the military (Thirgood 2002). No longer

could citizens turn to the courts for protection from an overreaching government (Myint Zan 2000, 19). The power to interpret the Constitution and the country's laws was taken away from the judiciary (1974 Constitution, Arts 200(b)–(c), 201, 202(f)). Judges were primarily political appointees without legal qualifications and, in contrast to the post-1947 period, justices on the top court were members of and subservient to the legislature (Myint Zan 2000, 20, 22). After 1962, the independence of the judiciary 'wither[ed] and die[d]' (Myint Zan 2000, 16–17).

Although rights provisions remained in the 1974 Constitution, the limitation clauses grew much more extensive and were directly tied to the protection of the Socialist government that began ruling in 1962. The enjoyment of freedom of speech could not be contrary to the interests of socialism (1974 Constitution, Art 157) and the right to hold property was subject to the framework of the socialist economic system (1974 Constitution, Art 161). The rights to use one's language and literature and follow one's culture and religion were subject to national solidarity, the union and solidarity of the national races, national security and the socialist social order (1974 Constitution, Art 153). A sweeping limitation clause provided that the exercise of all constitutional rights and freedoms could not undermine the sovereignty and security of the state, the essence of the socialist system, the unity and solidarity of the national races, public peace and tranquillity and public morality (1974 Constitution, Art 166). These limitation clauses, combined with the lack of an independent judiciary, rendered the rights meaningless and unenforceable (Thirgood 2002).

A brief comparison of limitation clauses and judicial independence in the three constitutions

While it is not possible to draw a perfect comparison between the 2008 Constitution and either the 1947 or the 1962 Constitution, it is clear from Myanmar's previous constitutional experiences that the combination of strong human rights provisions on paper and a robust, independent judiciary in practice is critical to the protection of fundamental freedoms.⁶ All three constitutions provide nominal protection for fundamental freedoms. As discussed above, however, the limitation clauses differed significantly between the 1947 and 1974 Constitutions; the limitation clauses in the 2008 Constitution appear to lie somewhere between the two. On one hand, the 2008 clauses are not explicitly tied to supporting a specific governmental agenda (although such an agenda is laid out in Ch I of the 2008 Constitution and to some extent citizens are bound to it by the duties of Ch VIII), as the 1974 clauses were for socialism. On the

6 These are, of course, not the only crucial issues to furthering human rights. Khin Maung Win argues that the need for the 2008 Constitution to address longstanding political issues used to justify human rights abuses is perhaps at least as important (Khin Maung Win 2001).

other hand, the 2008 limitation clauses are more numerous and broader than those in the 1947 Constitution and at times parallel those in the 1974 Constitution.

Like the limitation clauses, the provisions related to judicial independence in the 2008 Constitution similarly appear to fall somewhere between the prior two constitutions. Myint Zan has observed that the National Convention Draft Constitution provisions regarding appointment and removal of judges and minimum qualifications more closely resemble the 1947 Constitution than the 1974 Constitution (Myint Zan 2000, 30–33). The creation of a Constitutional Tribunal is unique to the 2008 Constitution, which at least on paper delegates the power of judicial review and constitutional interpretation to the judicial branch (2008 Constitution, Art 322). Myint Zan suggests that some of the provisions in the Draft Constitution perhaps were an ‘improvement’ over the 1974 Constitution, but rhetoric of an independent judiciary remains ‘illusory and deceptive’ (Myint Zan 2000, 36–37). The Burma Lawyers’ Council has expressed concern over the 2008 Constitution’s provisions allotting the power of judicial appointments and removals to the President, the ability for the President to change the number of judges, the lack of safeguards ensuring judicial independence, and the short tenure (five years) of the judges on the Constitutional Tribunal (Burma Lawyers’ Council 2009, 64–66).⁷ It concludes that ‘the Constitution ensures that after the 2010 elections the judiciary will remain under the control of the military-dominated ruling party’ (Burma Lawyers’ Council 2009, 64–65).

Judicial independence in practice

The current environment becomes fully analogous to the post-1962 era when turning to the independence of the judiciary in practice. Since the change in regime in 1988, the practical notion of an independent judiciary has been a farce: ‘In practice, ... judicial proceedings are anything but independent; judges in Myanmar are under specific instructions from the military, have no security of tenure, and face dismissal for any purported exercise of judicial independence’ (Burma Lawyers’ Council 2004, 15). Police and army interests guide judges in their decisions (Taylor 2009, 453), while defense lawyers have been jailed for defending political activists (Macan-Markar 2009). One judge reportedly admitted to a defendant’s family that he had no power over the outcome of the case because he had to follow orders from military intelligence (Venkateswaran 1996, 29). The overwhelming opinion is that today, on the ground in Myanmar, there is no independent judiciary or rule of law (US Department of State

7 To qualify as a member of the Constitutional Tribunal, one must have a ‘security outlook’ (2008 Constitution, Art 333). This provision could also be used to disqualify nominees who lean towards protecting individual liberties at the expense of national security.

2010; *Democratic Voice of Burma* 2009; Venkateswaran 1996, 6; Burma Lawyers' Council and Global Justice Center 2008; Quintana 2008, 21; Thirgood 2002).⁸

The absence of lawyers, judges, law officers and judicial personnel trained in the importance of judicial independence adds another practical impediment to the development of an independent judiciary under the 2008 Constitution (Myint Zan 2000, 34–35, 38). The courts and other government law offices are 'staffed by persons who at best are untalented and disinterested, and at worst incompetent and ignorant' (Asia Human Rights Commission 2006). The lawyers' bar and associations, the Bar Council that oversees attorney admissions, and the Attorney General's Office are all controlled by the regime (Burma Lawyers' Council 2004, 20). The 'mass production' of inadequately educated law students inside Myanmar compounds the problem (Myint Zan 2008, 51).

Ethnic rights and limitation clauses

The spotlight in Myanmar is often on political rights, such as the rights of expression and association, yet some scholars contend that ethnic rights is the most important issue facing Myanmar, far more important than economic policy or representative government (Steinberg 2001, 181–82; Matthews 2001, 2). In one of the world's most ethnically diverse countries, sociopolitical life since independence has been heavily influenced by continuing conflicts between ethnic nationalities⁹ and governments dominated by the Burman majority (Schroeder, Lianpianga and Thankornsakul nd, 1; Lall 2009, 3). Mistreatment of and discrimination against ethnic nationalities predate independence (Kigpen 2010). Efforts by ethnic nationalities to seek constitutional amendments, greater autonomy and even independence have led to ethnic armed rebellions and increased militarisation by the regime (Sai Kham Mong 2007, 257; Lall 2009, 4). Displacement of ethnic peoples as part of counterinsurgency campaigns and infrastructure expansion has contributed to the repression (Smith A 2005, 284). In the 1990s, the government of Myanmar launched a 'cultural homogenization campaign' under which some teachers of ethnic languages, literatures and cultures were arrested (Callahan 2003, 171–72). Ethnic issues are directly connected to human rights violations (Khin Maung Win 2001) and '[t]he complexity of Burma's ethnic conflicts and their resolution is central to the development of a stable society in light of the 2008 referendum and the 2010 elections' (Lall 2009, 5). In the 1947 Constitution,

8 A more accommodating opinion is held by Nyo Nyo Thinn, who opines that '[j]udicial independence at the moment is relatively modest' (Nyo Nyo Thinn 2006, 398).

9 Burmese usually use the term 'ethnic nationalities' to refer to ethnic populations other than the Burman majority. Internationally, the terms 'ethnic minorities' and 'ethnic groups' are often used.

discrimination based on race was prohibited (Art 13) and state educational institutions could not discriminate based on race, language, religion or minority status (Art 22). There were no limitation clauses in these Articles, although the rights were often ignored (Steinberg 2010, 53). Moreover, despite promises of power sharing and equal rights, ethnic leaders complained that the 1947 Constitution resulted in a semi-federal or unitary state (Kay Latt 2009). A detailed analysis of ethnic rights is outside the scope of this article, but in connection with limitation clauses, in the 1974 Constitution the rights of language, literature, culture and religion were supposedly guaranteed but were all subject to national solidarity, the union and solidarity of the national races, national security and the socialist social order (Art 153). Minority languages virtually disappeared from school curricula, while publication of books and newspapers in minority languages nearly ceased (Smith M 2002, 25–26). In the 2008 Constitution, the right to develop ethnic languages, literature, culture and customs is subject to a whole host of restrictions, including Union security, prevalence of law and order, community peace and tranquillity, national solidarity and public order and morality (Arts 354, 365). The ethnic cultural rights in the 2008 Constitution therefore appear to have much in common with the 1974 Constitution.¹⁰

This is the environment into which the 2008 Constitution will shortly emerge, and it leaves little hope that the Constitution will have any practical impact for the victims suffering from abuses or the lawyers representing them. Realistically, considering the status of freedoms and rights on the ground level, the 2008 Constitution will not be able to strengthen human rights except perhaps at the theoretical level. Constitutional provisions and theoretical legal analyses mean little if they are not implementable in practice: ‘Hypothetical legal systems do not achieve concrete results’ (Watson 1979, 640).¹¹ Two factors in particular, nonetheless, make human rights critiques of the 2008 Constitution worthwhile. First, while Myanmar certainly lags behind most other nations in narrowing the gap between enumerating rights on paper and protecting rights in practice, in the past several decades the universal culture of human rights has affected every government, without exception (Lauren 2003, 3). Undeniably, international human rights law is developing at a breathtaking pace. And while enforcement of human rights remains elusive, the global community no longer

10 In the ICCPR there are no limitation clauses in the Article enumerating cultural and linguistic rights (Art 27), but all rights are subject to the general limitations in Art 5.

11 Interestingly, the visions embodied in the US Declaration of Independence, Constitution and Bill of Rights and in the French Declaration of the Rights of Man and Citizen were not deeply rooted in practice (Lauren 2003, 32).

silently ignores systematic abuses (Lauren 2003, 3). This sea change may not have broken through the regime's defences yet, but it surely will at some point. Second, a critical interpretation of human rights limitation clauses contributes to a broader constitutional analysis in which the words chosen and ratified by the regime are used to challenge governmental misuse of the Constitution. To fail to closely examine the 2008 Constitution for language that can be used to strengthen human rights because of short-term negligible impact is not an option, for it is through the accumulation of such critical analyses that the Constitution can perhaps become something more than a document that entrenches the status quo.

Parameters on limitation clauses

This article will now turn to the parameters that have developed on the human rights limitation clauses. Limitation clauses are not a blank check for governments to arbitrarily restrict basic freedoms. Rather, in their application and interpretation of these clauses, courts, human rights bodies and scholars have developed important definitions and tests with which a government must comply to invoke the limitations, in essence creating the 'limits on limits'.

General principles

Several general principles have been formulated regarding the interpretation and application of limitation clauses. To begin, freedoms are to be interpreted broadly and restrictions narrowly (Coliver et al 1999, 23). Terms used in limitation clauses are not to be interpreted loosely (Human Rights Watch 2001, 3). The limitation must be subordinated to the freedom. Like a doctor trying to preserve the organ from which he or she is delicately carving away a tumour, the limitation clause must only be used to restrict freedom to the extent necessary to preserve whatever value is being protected, while keeping the underlying right intact and healthy.

Additionally, the supporter of the restriction bears the burden of proof and must provide specific evidence to demonstrate its necessity and legality (Coliver et al 1999, 27–28). A restriction cannot jeopardise the freedom itself, and thus the proponent must show the restriction's compatibility with the freedom (Türk and Joinet 1992, 5, 7).

If the restriction grants discretionary powers to government authorities, it must clearly describe the scope of discretion and provide sufficient safeguards against abuse (Türk and Joinet 1992, 8). Limitations in national laws that are worded too vaguely or broadly may jeopardise the underlying rights (Türk and Joinet

1992, 8).¹² The Inter-American Commission on Human Rights criticised Nicaragua's laws restricting freedom of expression because they vaguely prohibited statements that 'in any way damage or compromise the economic stability of the nation' or 'harm the national defense', and included the catch-all phrase 'etc.' (Inter-American Commission on Human Rights 1981b, paras 6, 11).¹³

In 1984, 31 international law experts convened to formulate a uniform interpretation of the limitation clauses called the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) (Lawson 1996, 256). These Principles are sometimes considered an authoritative source by the committees that supervise the implementation of the ICCPR (Van Boven 2000, 357–58). In addition to the general parameters described above, the general interpretive principles of the Siracusa Principles include that limitations may not be applied arbitrarily (Art I(A)(7)), every limitation must be subject to challenge (Art I(A)(8)), and the government must use the least restrictive means necessary when implementing a limitation (Art I(A)(11)).

The three-part test

A three-part test has been developed to determine the legality of limitation clauses. The Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana, has invoked the test when addressing the limitation clauses in the 2008 Myanmar Constitution:

... according to the international obligations of Myanmar, exception clauses in the new Constitution which may limit the enjoyment of human rights for reasons of State security, public order, prevalence of law, community peace, morality or any other reason, shall (a) be defined by law; (b) be imposed for one or more specific legitimate purposes; and (c) be necessary for one or more of these purposes in a democratic society, including proportionality. Any limitation which does not follow these requirements and jeopardizes the essence of the right with vague, broad and/or sweeping formulas, would contravene the principles of legality and international human rights law. [Quintana 2008, 7–8.]

12 In addition to national laws restricting human rights, penalties imposed on the individuals who allegedly violate these laws must also abide by international parameters (Türk and Joinet 1992, 17).

13 Myanmar's notorious Burma Immigration (Emergency Provisions) Act and Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts (State Protection Act) are remarkably similar to the criticised Nicaraguan laws (Emergency Provisions Act 1947, ss 5(h), 5(j); State Protection Act 1975, Art 7). Needless to say, the opinions of the Inter-American Commission on Human Rights have no legal applicability to Myanmar.

This three-part test has been accepted in all of the primary human rights treaties and declarations (Coliver et al 1999, 23). Some legal experts believe that the test's criteria are 'universal in nature' (Türk and Joinet 1992, 12–13) and 'in all circumstances condition the lawfulness and legitimacy of interferences with the effective exercise of human rights' (Svensson-McCarthy 1998, 190). In fact, the United Nations Human Rights Committee now applies part (c) of the test, 'democratic necessity', even to the ICCPR limitation clauses that lack this language (Coliver et al 1999, 27).

Part (a) of the three-part test: 'defined by law'

A restriction on a fundamental freedom must be defined in a national law (Svensson-McCarthy 1998, 65). 'Law' includes constitutions, statutes and common law (Türk and Joinet 1992, 14). An administrative practice, even if approved by the legislature, is insufficient (Türk and Joinet 1992, 14). It is not enough that the restriction merely complies with domestic law; it must also contain basic rule of law standards, such as clarity, accessibility, precision, foreseeability and certainty, to prevent arbitrary action by public officials and give guidance to individuals about how to comply with the law (Türk and Joinet 1992, 14–15; Svensson-McCarthy 1998, 65, 75; Coliver et al 1999, 24; Siracusa Principles, Arts I(B)(15)–(18)). Furthermore, limitations must be of general application — that is, not aimed at a specific person or group (Svensson-McCarthy 1998, 58). The first part of the test has been described as a 'legally binding minimum standard of protection which should be applicable *at all times*' (Svensson-McCarthy 1998, 93, emphasis in original).

In connection with part (a) of the test, a highly criticised aspect of the limitation clauses in the 2008 Myanmar Constitution is that they at times make rights subject to 'existing laws', which would ostensibly include the oppressive Emergency Provisions Act and State Protection Act (2008 Constitution, Arts 353, 372, 376; Aung Htoo 2008, 65; Ghai 2008, 13–15). Arguably, however, Myanmar's oppressive 'laws' may not actually qualify as laws that can restrict basic rights because they do not protect human rights and were not passed by an elected legislature. The Inter-American Court on Human Rights has concluded, for instance, that laws that are neither conducive to the protection of human rights nor intended to improve the 'general socio-economic and political environment' are not laws that can restrict rights and freedoms (*The Word 'Laws'*, 1986). The court further explained that laws that limit rights must be passed by an elected legislature:

In order to guarantee human rights, it is therefore essential that state actions affecting basic rights not be left to the discretion of the government but, rather, that they be surrounded by a set of guarantees designed to ensure that the inviolable attributes of the individual not be impaired. Perhaps the most important of these guarantees is that restrictions to basic rights

only be established by a law passed by the Legislature in accordance with the Constitution. Such a procedure not only clothes these acts with the assent of the people through its representatives, but also allows minority groups to express their disagreement, propose different initiatives, participate in the shaping of the political will, or influence public opinion so as to prevent the majority from acting arbitrarily. [*The Word 'Laws'*, at [21]–[22].]

The opinions of the Inter-American Court of Human Rights of course have no legal application to Myanmar, yet they may be instructive as to the direction of the evolution of international human rights standards. And even though Burmese judges have ignored and will continue to disregard international standards, by these evolving standards, Myanmar's existing oppressive laws are arguably not 'laws' that can validly be used to restrict freedoms under the 2008 Constitution.

Part (b) of the three-part test: 'imposed for a legitimate purpose'

'Imposed for a specific legitimate purpose' means that the limitation must genuinely be directed to achieving some legitimate aim (Coliver et al 1999, 26). The limitation must also pursue reasons of general interest and cannot stray from the purpose for which it has been established (*The Word 'Laws'*, at [18]). Courts rarely conclude that restrictions are not made for a legitimate purpose (Mendel 2003, 3).

Part (c) of the three-part test: 'necessary in a democratic society'

Limitations on human rights can only be invoked if they are 'necessary in a democratic society'. 'Necessary' has been interpreted to mean an 'imperative need' (Türk and Joinet 1992, 15). It does not simply mean reasonable, desirable, or what a government thinks is necessary in its brand of democracy (Coliver et al 1999, 26, 28).¹⁴ The limitation must respond to a clearly established and pressing social need, both in general and in the individual case (Office of the High Commissioner for Human Rights 2009, s 2.7).

The term 'in a democratic society' requires that a limitation respect proportionality, rule of law and human rights (Türk and Joinet 1992, 15). During the drafting of the UDHR, the delegations appeared to agree that the basic criterion of a democratic society is that it genuinely reflects the will of the people and respects the human rights in the UDHR, and the principles and purposes of the United Nations Charter (Svensson-McCarthy 1998, 101). Also

14 The democracy envisioned by the drafters of the 2008 Constitution has its own brand: 'a genuine, disciplined, multi-party democratic system' (2008 Constitution, Art 6(d), emphasis added).

critical to a democratic society are periodic, genuine elections characterised by universal and equal voting rights and almost uninhibited enjoyment of the freedoms of assembly and expression (Svensson-McCarthy 1998, 101, 145). A democratic society is also characterised by protections for the views of minorities and 'constant and genuine openness, discussion and criticism of all relevant issues of public interest' (Svensson-McCarthy 1998, 146). It has been argued furthermore that it is 'beyond any doubt' that the concept is intended to control the interpretation and application of human rights laws at 'the universal level' (Svensson-McCarthy 1998, 145).

A crucial aspect of 'necessary in a democratic society' is proportionality. The reasons for a restriction must be pertinent and sufficient, and the public's interest in having the restriction must outweigh the individual's interest in exercising the freedom (Türk and Joinet 1992, 16). The British Judicial Committee of the Privy Council and the Canadian Attorney General have formulated a proportionality test with three components: (1) the restriction must be rationally connected to the objective; (2) the least intrusive means must be chosen to achieve the government's objective; and (3) the effects of the ban must not be so severe as to outweigh the government's pressing and substantial objective (*Irwin Toy Ltd v Quebec*, 1989; *Freitas v Permanent Secretary*, 1998).

Parameters on specific limitation clauses

As well as the three-part test, additional parameters have developed for specific limitations.

National security

Section 354 of the 2008 Myanmar Constitution permits restrictions of the freedoms of expression, assembly, culture and association if their exercise contravenes laws enacted for 'Union security'.

'Union security', more commonly known as 'national security', is a common pretext for restraining freedoms, even when the threat is minor. Under international standards, however, there must be a grave threat to validly invoke national security. Restrictions are only appropriate when they are necessary to protect the country's political independence or territorial integrity against force or threat of force (Coliver et al 1999, 19; Beyani 2000, 28). The threat must be immediate and violent (Human Rights Watch 2001, 3). National security cannot be used as a pretext to create vague or arbitrary limitations, or to limit rights in the face of merely local or isolated threats to law and order (Jayawickrama 2002, 193–94).

The use of the limiting adjective 'national' makes its invocation proper only 'if the interest of the *whole* nation is at stake' (Svensson-McCarthy 1998, 164, emphasis added). Thus, restricting human rights as a ploy to preserve political power for a government, a regime, or one political party is improper (Svensson-McCarthy 1998, 164; Jayawickrama 2002, 194). Similarly, riots or other disturbances, and revolutionary movements that do not threaten the life of the entire nation, are not suitable reasons to invoke national security (Jayawickrama 2002, 194).

In 1995, a group of experts in international law, national security, and human rights formulated the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles, see Article 19 1995). The drafters aimed to codify existing standards for the scope of restrictions on freedom of expression and freedom of information to 'discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms' (Article 19 1995, Preamble; Mendel 2003, 7). The UN Special Rapporteur on Freedom of Opinion and Expression and the UN Human Rights Council have repeatedly endorsed or referenced the Principles (Article 19 1995, 4).

In addition to the parameters described above, the Principles provide that a restrictive law must contain safeguards against abuse, including full, effective and independent judicial review (Prin 1.1(b)); the government must have a legitimate national security interest and be able to demonstrate its effect (Prin 1.2); the restriction must be the least restrictive possible (Prin 1.3);¹⁵ and a restriction may not involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status (Prin 4). Peaceful expression, including criticism of government policies or officials, cannot be restricted (Prin 7). Illegitimate grounds include protecting the government from embarrassment or entrenching a particular ideology (Mendel 2003, 9).

Public order

Sections 34 and 354 of the 2008 Myanmar Constitution permit limitations to the freedoms of religion, expression, assembly, culture and association based on 'public order'.

'Public order' is not merely the maintenance of ordinary law and order. It implies something greater: the preservation of 'public peace, safety and tranquility, an absence

15 As of 1994, this principle has been applied by the Inter-American Court on Human Rights and the US Supreme Court, but not by the European Court of Human Rights and the UN Human Rights Committee (Coliver et al 1994, 30).

of violence and public disorder' (Jayawickrama 2002, 195).¹⁶ Arbitrarily stopping someone to check for identification cannot be justified as preserving public order (Jayawickrama 2002, 195). A restriction based on public order can only be used in extremely serious circumstances, in a time of real threat (Inter-American Commission on Human Rights 1981a). Furthermore, limitations must be proportionate to the need required to maintain order (Beyani 2000, 26).

Public morality

Sections 34 and 354 of the 2008 Myanmar Constitution permit limitations to the freedoms of religion, expression, assembly, culture and association based on 'public morality'.

'Public morality' is necessarily a subjective term that evolves over time and differs from place to place. It is accepted that the moral standards of one country should not be imposed on another. Some discretion must be given to national authorities to determine whether certain actions are necessary to protect public morals (*Hertzberg v Finland*, 1979, at [10.3]).

Despite the subjectivity of morality, limitations on fundamental freedoms to protect public morals are not exclusively a domestic matter to be decided by local governments (*Toonen v Australia*, 1994, at [8.6]).

Within every society, but particularly multicultural and multi-religious ones such as Myanmar, people have different moral standards. Government limitations on rights must take these differences into consideration and should not be applied so as to promote intolerance or prejudice (Opsahl J in *Herzberg v Finland*, Appendix). Minority views, especially those that offend the majority, are worthy of particular protections (Opsahl J in *Herzberg v Finland*, Appendix). The Siracusa Principles require that governments demonstrate that the limitation 'is essential to the maintenance of respect for fundamental values of the community' (Siracusa Principles, Art I(B)(27)).

Public health

Section 34 of the 2008 Myanmar Constitution permits limitations to freedom of religion based on 'public health'.

16 'Public order' is a narrower concept than the French *ordre public*. The latter term, which is frequently combined with the former term in the ICCPR, implies public policy, while public order is closer to 'the prevention of disorder'.

'Public health' covers the health of the community as a whole and of individuals, and includes mental as well as physical wellbeing (Jayawickrama 2002, 199). A limitation to protect public health must be based on a serious threat to the health of the population or the individuals within it (Human Rights Watch 2001, 3). Limitations for public health must meet the general guidelines of the Siracusa Principles (World Health Organization 2006, 35). The Siracusa Principles additionally require that measures to protect public health be 'specifically aimed at preventing disease or injury or providing care for the sick and injured' (Siracusa Principles, Art I(B)(25)).

In 2007, the World Health Organization sanctioned the limiting of an individual's human rights if the individual wilfully refused treatment for tuberculosis and as a result was a danger to the public (World Health Organization 2007). The WHO emphasised, nevertheless, that limiting freedoms would be a last resort to be used only after all efforts at voluntary isolation failed.

The limitations for 'national security', 'public order', 'public morality', 'public health' and other reasons cannot be viewed in isolation. Rather, they have become part of a larger body of standards that does not leave human rights restrictions to the unfettered discretion of governments. The parameters on limitation clauses, as a whole, clearly pose a considerable legal restraint on a government intent on limiting fundamental freedoms.

Express limitation clauses may preclude additional limitations without a constitutional amendment

Perhaps equally important as the developed parameters is the fact that when limitation clauses accompany grants of human rights, they preclude a government from resorting to other, omitted limitations. This is to say, by expressing specific limitations in the 2008 Constitution, the Myanmar government should theoretically be precluded from restricting fundamental freedoms on the basis of other, unnamed limitations, or expanding the current limitations, sans a constitutional amendment.

The principle that only specified limitations can be applied is well-established (Hegarty and Leonard 1999, 39; Human Rights Watch 2001, 4; Siracusa Principles, Pt I(A)(1); Jayawickrama 2002, 184). The maxim *expressio unius est exclusio alterius* ('the expression of one thing is the exclusion of another') permits a presumption that drafters of a law would have referred to something expressly if they intended to include it (Graham 2001, 104). *Expressio unius* has been applied to constitutions (Zines 2008, 16; Endlich 2008, 750). The presumption is particularly strong when other provisions in the law refer to things omitted in the provision at issue (Graham 2001, 106–07). Thus, for instance, if 'public health' is used in one constitutional

provision but not another, the presumption that it was not intended to be used in both is heightened.

Another rule of construction is that enumeration strengthens a general rule but exceptions weaken it (*Glascott v Bragg*, 1901, quoted in Zimmerman 1917; petitioner in *North America Chemical Co v Dexter*, 1918, quoted in Federal Reporter 1919; petitioner in *Ex parte Milligan*, 1866, quoted in Wallace 1867, 75).¹⁷ '[I]t is a universal rule of construction, founded in the clearest reason, that general words in any instrument or statute are strengthened by exceptions, and weakened by enumeration' (*Sharpless v Mayor of Philadelphia*, 1853, quoted in Hall 1913). In other words, if the 2008 Myanmar Constitution had listed the circumstances when the right of expression could be enjoyed, the right would be weakened to comprise only those circumstances; on the other hand, because the Constitution instead lists exceptions, the right is strengthened because it encompasses everything outside those exceptions.

Furthermore, changes to the limitation clauses, in theory, could only be done by constitutional amendment. Some omissions and obscurities in constitutions do not require a constitutional amendment, but instead can be changed by the legislature or interpreted by the judiciary. These include matters not plainly outside the competence of the legislature (which would then be filled in by a statute) and matters included in the constitution whose meanings are obscure (in which case the judiciary or legislature would interpret the terms) (Bryce 1905, 65). In contrast, matters that cannot be deemed to have been left to the legislature or other government organ because they are too important can only be altered by constitutional amendment (Bryce 1905, 65). Adding or expanding limitations on fundamental freedoms, *when express limitations already exist*, certainly fits this latter category. The curtailing of fundamental rights guaranteed in a constitution that already elaborates the circumstances when those rights can be limited should not be left to a fickle legislature or unaccountable judiciary, but rather should be made only pursuant to the additional safeguards and strict requirements of a constitutional amendment. From a practical perspective, so long as the military regime retains power over the Burmese government, it will surely force the judiciary to interpret the limitation clauses in an expansive manner so as to include all government actions, even those that do not fall into the enumerated limitations. Just because the government does it, however, does not mean that it is acceptable, nor does it mean that it will not have political ramifications, both domestically and internationally. Until today, though, there have been few consequences for violating rule of law principles in Myanmar.

17 The author was only able to locate old US cases referencing this rule. There is no reason why it should not be equally applicable today and in countries other than the US.

Expanding the limitation clauses in the 2008 Myanmar Constitution through constitutional amendment is not easy. An amendment to Art 34 regarding the freedom of religion can only be made if (a) at least 20 per cent of the *Pyindaungsu Hluttaw* representatives — the federal legislature — agree to submit the amendment; (b) more than 75 per cent of representatives approve; and (c) more than half of the people eligible to vote approve in a nationwide referendum (2008 Constitution, Arts 435, 436(a)). An amendment to the limitations on freedoms of expression, association and assembly require steps (a) and (b) (2008 Constitution, Art 436(b)).

An absence of limitation clauses could make fundamental freedoms susceptible to interpretation by a controlled judiciary

It is tempting to think that if there were no limitation clauses in rights provisions, those rights would then be completely unrestricted and unrestrictable. If the 2008 Myanmar Constitution had been drafted differently, however, such that there were no limitation clauses, the *expressio unius* maxim would no longer apply and limitations would be susceptible to a pro-government interpretation by a coerced or obliging judiciary. Without express limitations, the case for applying international parameters to limit government oppression is likely weakened. In fact, an alternative constitution drafted by the National Council of the Union of Burma, a coalition of democratic groups in exile, has been criticised for lacking limitation clauses, in part because 'a limitations clause safeguards rights from undue limitation, particularly by the government' (Sarkin 2001, 63).

The US judiciary is a prominent example of a judiciary inferring limitations on rights when none is expressed in the Constitution. The US judiciary and the Burmese judiciary are like night and day with respect to their power to review executive actions and interpret the constitution, yet it is precisely because the US judiciary is so well-regarded that the Burmese judiciary's inference of limitations on rights could be perceived as legitimate. There are no limitations on the freedoms of speech, religion, press and assembly in the text of the First Amendment to the US Constitution (1787, First Am). But while some US Supreme Court justices have resisted (Ball 1996, 115), the court has developed a number of limitations on the First Amendment freedoms (*Miller v California*, 1973; *Brandenburg v Ohio*, 1969; *New York Times Co v Sullivan*, 1964; *Reynolds v United States*, 1878; *Employment Division v Smith*, 1990). This is not to say that these limitations are unwarranted; rather, it is clear that when limitations are not included in constitutional rights provisions, courts will create them as deemed necessary. With a Burmese judiciary firmly under the control of the regime, there is little question that a Burmese court would apply and interpret the 2008 Constitution in a manner that favours the government.

Using foreign or international law to interpret the 2008 Myanmar Constitution

The use of foreign and international law to interpret domestic laws remains highly controversial (Baker 2006; Zubaty 2007). Applying Western concepts of human rights to Asian countries has been viewed with particular scepticism (Donnelly 2003, 107). The plain truth is that none of the conventions, declarations, opinions of courts, decisions of tribunals, and views of UN bodies and officials, commissions and scholars cited above are binding on Myanmar.

Some contend that the Universal Declaration of Human Rights is a binding legal document, and thus would bind Myanmar as a member of the UN (Posey and Dutfield 1996, 121; Mendel 2003, 2; Quintana 2008, 6). At least in 1997, however, the position that the UDHR is customary international law was 'probably not supported by a majority of international legal scholars' (Joyner 1997, 149–50). Some have also argued or observed that aspects of the ICCPR are customary international law, and thus binding on countries that have not signed it (Oraá 1996, 150–53; International Bar Association nd; Liu 2007, 294; Nanda 1976, 36). As noted above, some have extended this argument to assert that the interpretations of the ICCPR's limitation clauses — that is, the parameters, such as the three-part test invoked by Special Rapporteur Quintana — have become universally applicable.

But there are powerful arguments against equating human rights law, particularly the parameters on limitation clauses, with binding customary international law. State sovereignty remains a significant hurdle for the application of international human rights concepts to domestic problems (UN Charter Art 2(7); Watson 1979, 610). Moreover, customary law is not created until state practice actually reflects the law. In other words, a legal principle without implementation cannot be considered customary law: 'Because custom is based on state practice, it cannot be used to modify state practice ... The idea of using custom as a means of setting up something from what is already in existence is thus an absurdity' (Watson 1983–84, 233).¹⁸ Thus, without on-the-ground practice to back it up, there can be no customary law.

On the other hand, there is no way to easily determine when a declaration becomes customary international law or when a treaty becomes universally binding (Quaye 1991, 61). How widespread state practice must be to create customary law is also unclear (Goldsmith and Posner 2005, 24). Courts and scholars increasingly ignore the state practice requirement; for instance, some recognise the customary international law prohibition against torture while acknowledging that torture is widespread

18 Watson's views, even when made in 1999, have been criticised as failing to accommodate evolutionary change in international human rights (Magnarella 2004, 74).

(Goldsmith and Posner 2005, 24). Clearly, customary law must be evidenced by widespread acceptance, but it is measured not only by what states do, but also by what they say (Malanczuk 1997, 42–43).¹⁹ Additionally, international law has dramatically shifted since 1945, away from coordination of sovereign states towards a cooperative international legal community, and away from treating individuals as mere objects of state regulations (Malanczuk 1997, 30–31).

Nevertheless, despite the dramatic development of human rights concepts over the past several decades, it is indisputable that state practice in protecting rights has lagged far behind. The recent history of innumerable countries — perhaps almost all countries — reveals that ‘national security’, ‘public order’ and ‘morality’ have been used to justify rights restrictions outside the acceptable parameters described in this article. The current war against terrorism reminds us that even today, in practice, states go beyond the ‘limits on limits’ to do what they think is right for the collective or perhaps in their own political interests. In sum, there is little evidence that states are actually implementing, in a conscious manner, the ‘limits on limits’ standards described in the preceding sections of this article. Realistically, therefore, the parameters that have developed are not yet a reflection of state practice and thus are not customary law binding on Myanmar. Even if the parameters were applicable to Myanmar, either domestically or internationally, there is no internal mechanism at this time by which they could be implemented or by which non-compliance could be penalised.

Regardless of whether the parameters are binding, *should* they be used to interpret the 2008 Myanmar Constitution? Three generally accepted sources for interpretation of a constitution are the text of the constitution, the intentions of the drafters embodied in the historical record, and judicial precedents (Linder 2007). In the case of Myanmar, however, these three sources are either unhelpful or unavailable. The 2008 Myanmar Constitution does not define terms used in the limitation clauses. Furthermore, other than the Fundamental Principles and Detailed Basic Principles upon which the Constitution was based, which are unhelpful in interpreting the limitation clauses, there appears to be no available legislative history from the National Convention or Constitution Drafting Commission. And, even though Myanmar is a common law country (Burma Lawyers’ Council 2004, 3)²⁰ that supposedly considers its

19 Watson criticises reliance on government promises rather than raw data because of the disparity between the two (Watson 1983–84, 234).

20 One commentator has noted that Myanmar’s system is better characterised as a hybrid system in which common law principles are implanted into civil law statutes (Nyo Nyo Thinn 2006, 388). Another observed that recent legal history ‘demonstrates significant departure from the common law system’ (Southalan 2006, 20).

judicial decisions precedential, this author does not know of any Burmese judicial interpretations of the language used in the limitation clauses.²¹

Without domestic sources to guide interpretation, it makes sense to look elsewhere for guidance. When interpreting rights provisions in a constitution, a court may look to law outside its jurisdiction, including international human rights norms and practices (Jayawickrama 2002, 166). The Supreme Court of Zimbabwe, for instance, looked to other countries' practices and laws to determine whether whipping was inhuman or degrading punishment (*Neube v State*, 1989). South Africa's Constitution requires courts to interpret fundamental rights provisions with regard to public international law and permits a court to consider foreign law (Constitution of South Africa 1996, s 39(1)). In cases of doubt or ambiguity, or where an interpretation appears to conflict with the purpose of a bill of rights, international law 'appears to be not only helpful but also necessary' (Jayawickrama 2002, 167). The US Supreme Court, which is notoriously reluctant to use foreign or international law, has used it to interpret the meaning of the US Constitution (Zubaty 2007, 1414). Justices on the US Supreme Court have suggested that 'conclusions reached by other countries and by the international community should at times constitute persuasive authority' (Levin 2005, 20–21) and 'comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights' (Levin 2005, 19). Justice Breyer has described how the use of foreign and international laws are important when interpreting domestic laws, including constitutions, particularly in the area of human rights:

... we find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison. This change reflects the 'globalization' of human rights, a phrase that refers to the ever-stronger consensus (now near world-wide) as to the importance of protecting basic human rights, the embodiment of that consensus in legal documents, such as national constitutions and international treaties, and the related decision to enlist judges — i.e., independent judiciaries — as instruments to help make that protection effective in practice. Judges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances. [Breyer 2003.]²²

The case for using international law, at the very least as 'persuasive authority', when interpreting the 2008 Myanmar Constitution, is particularly compelling.

21 Judicial interpretations from Myanmar are difficult to obtain (Southalan 2006, 19). The author has not conducted a search.

22 Compare the opinions of Justice Scalia in the Scalia–Breyer debate on foreign law, 13 January 2005 (Free Republic 2005).

First, as noted above, there are no substantive domestic sources available to assist in interpreting the limitation clauses. Second, as observed by Justice Breyer, the globalisation of human rights has made national constitutions and international treaties important 'points of comparison' when the issue is protecting basic human rights, especially when similar legal phrases are used. Third, the limitation clauses in the 2008 Myanmar Constitution are similar enough to those used in international instruments that they compel similar interpretations.

Conclusion

To say that having limitation clauses is better than not having them is not the same as saying the limitation clauses in the 2008 Myanmar Constitution are perfect. Legal analysts have identified a number of areas ripe for abuse. Some rights are subject to 'law', which, analysts argue, 'renders them potentially meaningless' and 'at the mercy of the whims of the regime' (Aung Htoo 2008, 65; Burma Lawyers' Council 2008, 51; Ghai 2008, 13–15). The limitations have been criticised as too broad, leaving room for exploitation (Aung Htoo 2008, 60; Burma Lawyers' Council 2008, 50–51; Ghai 2008, 15). Human Rights Watch has drawn attention to the absence of the necessity principle (Human Rights Watch 2008b, 47–48). There is a number of other limitation clauses not discussed in this article that are vulnerable to misuse (2008 Constitution, Arts 34, 364, 360(b); Human Rights Watch 2008b, 48). These limitations and others clearly pose hazards for Burmese citizens wishing to lawfully exercise their rights.

The point remains, however, that all limitations on rights should be invoked only within the parameters established through international interpretation and application, even if they are not widely implemented in practice. This includes limitations that have different wording from the clauses commonly used in international human rights instruments, and includes past and future national laws. The standards that have begun to develop around the world give meaning to limitations on fundamental rights and protect against arbitrariness and capriciousness. Although some government discretion will always exist in the application of limitation clauses to individual cases, the overall framework in which limitation clauses are interpreted should not be subject to discretion:

... the international law of human rights provides a positive legal framework which strictly conditions the meaning of [the limitation clauses] *so as always to make their interpretation and application conducive to the effective protection of the rights concerned*. [Svensson-McCarthy 1998, 188, emphasis in original.]

The divide between theoretical legal possibilities and on-the-ground realities in Myanmar is enormous and, perhaps, unbridgeable. It would be challenging to

prevail on an argument seeking to apply parameters on limitation clauses in a court in Australia or England — in a Burmese court, it would be foolhardy to even raise the issue. But the merit of an argument, rather than the chances of prevailing, should determine whether the argument is examined and considered. While it will not happen in 2010, there will be a time when the Burmese judicial branch is more receptive to arguments based on the protection of fundamental freedoms. In the meantime, international legal interpretations, even though they may fall short of customary law, can be used strategically to show the international community and, perhaps more importantly, the people of Myanmar, the ongoing abuses of human rights limitations. ●

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