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The Everyday Emergency: Between the Constitution and the Code of Criminal Procedure in Myanmar

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Introduction

The morning was hot, the traffic crowded. I arrived by taxi at Bo Sein Hman sports ground in Tamwe Township, Yangon. The rally was due to start at 8:30 am, and the sports ground was already crammed full of people when I arrived. They must have arrived very early as people were already sitting on the ground, huddled close together. The crowd was a mixed group of people, young and old and in-between, with the odd journalist and foreigner here and there. I wondered if members of the Special Investigation Branch were also here, probably.

The sports ground sloped down to one end where a large platform had been erected. The crowd all faced the large platform, and behind the platform was an enormous sign several metres high proclaiming the reason for the demonstration: the National League for Democracy (NLD) and the 88 Generation had joined forces to call on the government to amend section 436 of the Constitution. Section 436 contains the amendment procedure to change the 2008 Constitution. This has to be one of the most constitutionally literate people in the world, I thought to myself. In how many other countries would this many people actually know or care about the amendment provision of their Constitution?

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The gates to the ground had already been closed by the time I arrived, so people spilled out onto the surrounding sideways and footpaths, peering through the iron fence. To the left of the grounds a number of small food stalls had popped up. The food vendors were clustered near some card tables where people handed out NLD pamphlets and fliers, and encouraged people to sign the petition to amend the Constitution. Many people in the crowd proudly displayed their political allegiance by wearing NLD paraphernalia - t-shirts, headbands, and arm bands. Just two years ago this was unthinkable. At the road to the back of the grounds, some people had climbed trees while others stood on the back of a ute parked on the road, in an attempt to get the best view of the stage. To the right side of the stage, there was a particularly large group of people, as that spot offered the closest and most unobstructed view of the stage. Some young NLD volunteers who wore security badges formed a human chain in an attempt to keep people off the road and keep the traffic flowing around the crowd. The traffic crawled by slowly but patiently, car fumes choking the early air morning.

On stage sat the Lady, Daw Aung San Suu Kyi, member of parliament and chairperson of the NLD. To her left, sat U Tin Oo, founder of the NLD, and Min Ko Naing, 88 Generation leader. All three had been political prisoners for their pro-democracy activities during the post-1988 military period. While Daw Aung San Suu Kyi was clearly the favourite, the crowd listened with the same rapture and level of respect for all speakers. I wondered how many rallies this was now for Daw Aung San Suu Kyi – from the weekly talks that she gave outside her gate in the early 1990s, to the talks she gave around the country when released from country arrest, particularly since 2010.

One of the most unusual aspects of the rally was the silence that prevailed when the speeches were being made. The atmosphere was surreal. There were thousands of people around me, and yet I could not see anyone talking or whispering to each other, nor was anyone on their phone. Some media reports later estimated the event to have drawn a crowd as big as 20,000 people. Even though it was still early morning, the heat was oppressive and stifling, yet few people moved. All eyes were glued to the stage, as if their lives depended on the words of the speakers. At times when one of the speakers made a particularly impassioned plea on the necessity of constitutional amendment, the crowd would cheer and applaud, but then it would inevitably fall respectfully silent again. It was perhaps the most orderly and controlled rally that I have ever been to.

The demonstrations that took place across Myanmar from May to July 2014 focused on constitutional amendment, although it also attracted the threat of a state of emergency. The constitutional rally that I attended in May 2014 refused to conform to government expectations. Leading up to this event, the Union Election Commission had even issued a written warning to Daw Aung San Suu Kyi to the effect that she must be careful not to breach section 6 of the Political Parties Registration No 2/2010, which requires registered political parties to safeguard the Constitution.² This was not the first rally that the NLD had held that specifically focused on the amendment provision, section 436 of the Constitution. But the government nevertheless tried to make an analogy between the anti-government protests in Thailand, which had led to the declaration of a state of emergency earlier in the year and then martial law, and the constitutional rallies planned by the NLD and the 88 Generation. These references to developments in Thailand were used to engender a sense of instability and fear that a state of emergency might be declared and allow the military to take control. The threat that a constitutional state of emergency may be declared continues to hover over the post-2011 reform process.

The constitutional power to declare a state of emergency and the conditions under which it can be used continues to challenge the legitimacy of governments around the world. A state of emergency is generally understood as a decision made in response to an exceptional circumstance that may suspend some individual rights and may affect the functions of one or more of the branches of government—the executive, legislature and judiciary. In other words, to abolish the distinction between these powers.³ It must usually be a real time of crisis, such as if civil conflict occurs, if a war breaks out, or in the event of a major natural disaster.

This constitutional power can be thought of as consisting of several parts. The first is the conditions of use, that is, when, how, by whom and for how long a state of emergency can be declared. The second is its institutional impact on the branches of government and the

² Ko Htwe, ‘Suu Kyi rebuked for challenge to military’, *Democratic Voice of Burma*, 27 May 2014, available at: <http://english.dvb.no/>; San Yamin Aung ‘NLD, 88 Generation Provoking Public Disorder: USDP Lawmaker’ *The Irrawaddy*, 27 May 2014, available at: www.theirrawaddy.com.

³ Giorgio Agamben (2005) *State of Exception*. Translated by Kevin Attell. University of Chicago Press, p 7.

military. The legislature may act as a check on the process by which an emergency is declared. The courts may have the authority to review the legality of a declaration of emergency. Yet more often one or all three of the governance branches may be disbanded or disempowered. The third concern is the individual impact, that is, how an emergency affects the rights and freedoms of individual citizens. A state of emergency may result in partial, or complete, suspension of the rights and freedoms of individuals. It may allow the military and the police to impose restrictions on the rights of citizens in order to contain the emergency and restore order as quickly as possible. International law insists that a state of emergency can only affect those rights that are derogable, such as freedom of movement (for example by imposing a night curfew), it cannot affect non-derogable rights such as the right to life, the right to be free from slavery and the right to be free from torture. In reality, the exercise of emergency powers pays little heed to these principles.

While debates on states of emergency emphasize the constitutional nature of these powers, I seek to shift attention to the dependency of constitutional power in contexts like Myanmar. The power to declare a state of emergency in the 2008 Constitution of Myanmar is extensive and far-reaching, yet I argue that the more immediate, everyday threat is the routine and pervasive use of section 144 of the Code of Criminal Procedure. I consider how this source of colonial judicial power to address a situation of social unrest by a section 144 order has been co-opted by the executive to generate a perpetual sense of the ‘everyday emergency’. This will be illustrated with reference to administrative responses to the anti-India violence of the 1930s in colonial Burma, and the anti-Muslim violence since 2012 in Myanmar. This demonstrates that section 144 of the Code of Criminal Procedure constitutes the most real, immediate power of executive officials, which precedes any exercise of constitutional power.

Executive Appropriation of Emergency Power

The legal system of Myanmar was primarily inherited from British India, and the Code of Criminal Procedure (Burma Code, Vol VIII) introduced in July 1898 by British colonial authorities was no exception. Colonial British authorities at times exercised their power to enact new laws to respond to specific instances of emergency, such as the Saya San rebellion

of the 1930s.⁴ Yet more often they drew on a provision in the general criminal law to respond to situations of social conflict. This is the case with Section 144 of the Code of Criminal Procedure, which falls under Chapter XI entitled ‘Temporary Orders in Urgent Cases of Nuisance or Apprehended Danger’. Originally conceived as a judicial power, it has been appropriated by the executive, and a section 144 order is a precursor to the exercise of constitutional power.

On its face, section 144(1) concerns the power of a judge to respond to a threat to public order. Section 144(1) states that any magistrate may make a written order to:

direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray.

Such an order may be against one individual or applicable to the public generally. While the magistrate does not have to serve a notice on the person concerned in due time, the magistrate does have to give the person an opportunity for a hearing in order to explain their behavior. An order made under this section is only valid for up to 60 days, unless it is a situation that presents ‘danger to human life, health or safety, or a likelihood of a riot or an affray’, in which case the President can extend the order beyond 60 days. The importance of the legal text, however, lies not in what it says but how it is understood and acted upon. The courts during the early colonial period were one forum where discussion over the meaning of section 144 took place.

Between late 1890s and early 1900s, less than a handful of cases were brought before the colonial courts on the use of section 144, though these cases provide some insight into how

⁴ See Maitrii Aung-Thwin, ‘Discourses of Emergency in Colonial and Post-colonial Burma’, in Victor V. Ramraj and Arun K. Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge: Cambridge University Press, 2009) pp 187-212.

this power was understood. In *Queen-Empress v Nga Shwe Maung*,⁵ a case was brought before the court because there had been a failure to comply with the order of a magistrate to remove a dead body out of town (no other details of this mysterious dead body are provided). As it was near the new moon, the magistrate feared that the dead body would be seized by a crowd and taken outside the town in a manner that would disturb peace and require him to exercise power under section 144. In commenting on section 144, the judge noted that ‘The powers conferred by section 144, Code of Criminal Procedure, are intended for the maintenance of the law and not for the purpose of making the law’. This clarified that section 144 gives a magistrate the power to issue an order for stability and social control, but not to exercise legislative power.

In another case, *Nga Po Hmi v Mi Shwe Tha*,⁶ the court was asked to pass an order that the applicant, Mi Shwe Tha, should retain possession of the land in dispute, and that the defendant Po Hmi should not disturb her right. The sub-divisional magistrate of Shwebo agreed with the applicant and acted under section 144 to pass such an order. It was held that under section 144, a magistrate can proceed to pass an order when one of the parties to a case is found to be in possession of the land. But the court distinguished between section 144 and section 145, following Indian precedent, and noted that section 144 was intended to apply only in situations of grave emergency. Apparently this land dispute constituted a grave emergency.

Aside from reported court cases, the use of section 144 is illustrated in greater detail in the report of the Riot Inquiry Committee of 1939.⁷ In mid-1938, serious anti-Indian riots broke out in several areas across Myanmar. The initial source of the riots was the circulation of book that criticised Buddhism by Shwe Hpi, a Muslim. The book was first published in 1931, although it was not until the late 1930s that it became cause for concern and disagreement with it can be seen as the culmination of broader anti-Indian sentiment.⁸ From Rangoon, the riots, violence and looting spread across Myanmar. In September 1938, the Riot Inquiry Committee (‘the Committee’) was established to document and investigate the causes

⁵ *Queen-Empress v Nga Shwe Maung* (1894) UBR 183.

⁶ *Nga Po Hmi v Mi Shwe Tha* (1917) UBR 17.

⁷ *Final Report of the Riot Inquiry Committee*. Rangoon: Supdt, Government Printing and Stationary, Burma, 1939.

⁸ John Cady, *A History of Modern Burma* (Cornell University Press, 1956), pp 393-398.

of the violence. The findings contained in the Report of the Riot Inquiry Committee reveal that the judicial power contained in section 144 has been appropriated by executive officers. That is, this state of exception is marked by the confusion of executive and judicial powers.⁹

The Committee lists at least nine instances when section 144 was exercised. There were several different government officials who were responsible for invoking section 144. While some were judges, such as the Subdivisional Magistrate of Paukkaung, Prome District, in some instances the Subdivisional Magistrate was also the Subdivisional Officer, such as in Magwe Township. In other instances it was not a judge, but the Deputy Commissioner, such as the Deputy Commissioner of Myaungmya District and the Deputy Commissioner of Shwebo. It did not go unnoticed by the Committee that officers who had no power to make section 144 orders had taken on this power.

In most of these cases, section 144 had been invoked by the magistrate or Deputy Commissioner in response to violence, a mass demonstration or an act that might inflame social unrest. For example, on 29 July 1938, in Wakema, Myaungmya District, the Deputy Commissioner banned a demonstration because the protestors carried a photo of a *pongyi* from a newspaper that was thought to be inflammatory.¹⁰ On the same day in Paungde, Prome District, a group of former students were banned from holding a protest against Maung Shwe Hpi's book. The protest was banned because of the risk to the population of 1,500 Indians in that area at the time.¹¹ Even in the area of Taungdwingyi, Magwe Division, which was said to have as few as 300 Indian residents, attempts to hold a demonstration against the book were also stopped using a section 144 order.¹²

The orders issued under section 144 were not only to prevent the immediate demonstrations from going ahead, but also to prohibit more than five people from gathering together. For example, on 1 August 1938, after a protest by 250 people in Pakokku turned violent, an order under section 144 was issued to prevent gatherings of more than five

⁹ In contrast, Agamben argues that a distinguishing feature of the state of exception is the confusion between legislative and executive power: Agamben n X above at 38.

¹⁰ *Final Report*, n 5 above at 46.

¹¹ *ibid* at 89.

¹² *ibid* at 99.

people.¹³ In other areas section 144 was used to enforce a specific curfew on public gatherings. For example, on 9 August 1938, an order to prohibit gatherings of more than four people between 7pm and 6am was issued in Kanbalu Township. The same order, which was in force for 30 days, also went as far as to note that ‘All persons are informed that I [the officer] have already given orders to the police to shoot at any person disobeying these orders’. This was also the case in Shwebo, where the District Magistrate issued an order under section 144 that stated: ‘All persons are hereby warned that orders have been given to the police to shoot any person found looting or killing’.¹⁴ This clearly went far beyond the remit of power envisioned by section 144, and the Committee questioned whether the directions for police to shoot anyone found in breach of the order was a justifiable and legal response to a breach of section 144.¹⁵

The Committee admitted that section 144 was ‘most imperfectly understood...in some cases it was used too freely. In other cases it was used too late’ and that there was ‘a good deal of vagueness as to what it means’.¹⁶ The Committee appears to attribute its misuse to a lack of knowledge and a misuse of discretionary power. The law itself was also to blame, it was too vague, too difficult to understand. In order to clarify the understanding and use of section 144, the Committee went on to provide its own interpretation of section 144. In this regard the Committee noted that:

Section 144 of the Criminal Procedure Code is a section designed to make it possible to issue temporary orders in urgent cases of nuisance or apprehended danger. It is without a doubt a very useful section which gives power to a magistrate of requisite degree to meet emergencies of just that kind threatening the public tranquillity which Burma has in many different ways been only too familiar in the past few months...

When an order under section 144 of the Criminal Procedure Code is made and a breach of it occurs, the penalty of such breach is in terms provided by section 188 of the Penal Code which says that anyone who knows that, by such order, he is directed

¹³ *ibid* at 133.

¹⁴ *ibid* at 145 -146.

¹⁵ *ibid* at 267.

¹⁶ *ibid* at 267.

to abstain from any act and disobeys such direction, shall, in certain circumstances, be liable to certain penalties... six months in prison or a fine up to thousand rupees.¹⁷

This reference to the utility or usefulness of a section 144 order indicates the power it placed in the hands of judges. Power that the executive wanted for itself. The Committee stressed the fact that this power was only to be used by a magistrate, and that some colonial authorities had clearly ignored this fact in their attempts to respond to the riots. The Committee blamed its misuse on the deficiencies in the knowledge of junior and senior civil officers. It recommended that a manual be written in order to promote a common understanding among officers and the police force.¹⁸ The attractiveness of a legal handbook, a complete guide to the law, a one-stop explanation, remains a core feature of legal practise in Myanmar today.

Perhaps one of the most striking findings of the Committee's report was its assessment that the general perception of section 144 was that it was thought to amount to the introduction of martial law.¹⁹ Yet in keeping with the English usage of the term, the reference to 'martial law' is vague and undefined.²⁰ Here the ideas of a temporary judicial order in cases of mere 'nuisance' and full military control become blurred. Many of these features – the power of a judge being appropriated by executive officers, the power being misused to authorise shooting on sight, and the power amounting to martial law in the minds of the people – continue to exist in the way that section 144 is used today. Section 144 contributed to a sense of emergency in the everyday, making the emergency a daily affair, and displacing the pre-eminence of constitutional norms.

From Executive Order to a Constitutional State of Emergency

Successive regimes in Myanmar have worked to consolidate and expand administrative power. Under the previous 1947 Constitution of Burma,²¹ an emergency was narrowly defined as a threat to the security of the country, such as war, internal disturbance or 'grave economic emergency' (s 94). The President had the power to declare an emergency. No time

¹⁷ *ibid* at 267.

¹⁸ *ibid* at 245-26.

¹⁹ *ibid* at 147.

²⁰ Agamben, *State of Exception*, n X above at 18.

²¹ For a discussion of emergencies prior to independence, see Maitrii Aung-Thwin, "Discourses of Emergency in Colonial and Post-Colonial Burma", n 2 above at pp 187-212.

limit was specified, although a declaration of emergency was deemed to have expired after six months if it was not approved by both Chambers of Parliament. The parliamentary period was a time of turmoil as the Rangoon government fought against numerous ethnic-based armies. The government did not hesitate to declare martial law, for example, in 1952, martial law was declared in two thirds of the subdivisions in Shan State.²²

The socialist and military era (1962-2011) saw increasing resort to section 144 as an everyday tool of instability. In 1974 student protests over the refusal of the socialist regime to offer a state burial to U Thant, the former Secretary General of the United Nations (1961-71), was met with brutal force and a section 144 order.²³ On 12 December 1974, no less than four different announcements of military administration and emergency featured on the front page of *The Guardian* newspaper. The publicity – both orally and in print - of section 144 orders was a routine occurrence in the 1970s and 1980s. A section 144 order was issued for a period of one month, preventing any forms of gathering or protest in Rangoon.²⁴ At the same time, a state of emergency under section 76 of the Constitution was issued. The 1974 socialist Constitution allowed for a declaration of emergency in a situation that threatened the security of the state. The Council of State, filled with members of the Burma Socialist Program Party, held this power to declare an emergency. The 1974 Constitution did not specify any time limitation, or any other limits on this power. Yet the use of a section 144 order remained pre-eminent, with the constitutional emergency power an occasional adjunct.

After the 1988 democracy uprising, the military issued numerous orders declaring martial law in parts of the country and issuing curfews and restrictions on public gatherings.²⁵ In another historic moment, during the uprising of monks in 2007 (often referred to as the Saffron

²² Josef Silverstein (1958) 'Politics in the Shan State: The Question of Secession from the Union of Burma' 18(1) *The Journal of Asian Studies* 43-57.

²³ An excellent overview of this event is contained in Andrew Selth (1989) *Death of a Hero: The U Thant Disturbances in Burma, December 1974*. Nathan: Griffith University.

²⁴ *The Guardian*, 12 December 1974, Vol XIX, No 285. I am grateful to Andrew Selth for sharing this reference.

²⁵ See in particular in the 1989 and 1990 compilation of laws and orders by the Attorney General's Office [in Burmese].

Revolution), a section 144 order was issued to prohibit public assembly in parts of Yangon.²⁶ Cheesman observes that there was much less publicity given to the issuing of section 144 orders during this time,²⁷ although there was still occasional mention in the government-run media. This only heightened the confusion over section 144.

The ambiguity over what section 144 does or is capable of doing is even more pronounced in English-language media and scholarship that rely on English-language reports issued by the military regime. Section 144 has an elastic quality and has taken on many meanings. Reference section 144 knows no creative bounds. Sometimes the reference will be to the ‘Emergency Act section 144’, ‘section 144 of the Martial Law, or ‘section 144 of the Penal Code’ (the Penal Code is separate from the Code of Criminal Procedure).²⁸ All of these references are incorrect. These variants clearly demonstrate that foreign media and scholarship has fallen for this ambiguity over section 144. This level of obscurity is both a source of mystery and power for section 144 and those who wield it. The use of section 144 continues and has been used in a wide range of situations, particularly in response to protests over land and human rights violations such as the Letpadaung copper mine dispute,²⁹ and also in response to violent conflict.

Given there was no constitution from 1988 to 2011, section 144 became the proxy for constitutional emergency powers. One pattern that emerged from 1988 in particular is the use of section 144 by the General Administration Department. The General Administration Department was formed by the State Law and Order Restoration Council as a division of the Ministry of Home Affairs. It provided the administrative backbone for the country and exist at many levels of government. It is based on a similar design to that of the Security and

²⁶ *New Light of Myanmar*, ‘Of the persons detained for questioning for holding assemblies in violation of section 144, 692 have been released on pledge’, 5 October 2007, Vol XV, No 172, p 16.

²⁷ Nick Cheesman (2015) *Opposing the Rule of Law: How Myanmar’s Courts Make Law and Order*. Cambridge University Press, p 199-201.

²⁸ Examples are too numerous to cite; some that have been repeated in scholarship include: Richard Horsey (2007) ‘The Dramatic Events of 2007 in Myanmar’ in Monique Skidmore and Trevor Wilson (ed) *Dictatorship, Disorder and Decline in Myanmar*. ANU Press. p 27; Emel Zerrouk (2012) ‘Development Forced Land Grabs and Resistance in Reforming Myanmar’, in S Price and J Singer (eds) *Global Implications of Development, Disaster and Climate Change*. Routledge.

²⁹ Asian Human Rights Commission, ‘Continued use of military-issued instructions denies rights’, 5 November 2012, available at: <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-222-2012>.

Administrative Councils during the Ne Win era (1962-1988).³⁰ Since 2011, it has morphed to form the nucleus of the Region and State Government offices, yet it remains under the control of the Ministry of Home Affairs. It has a causal chain of links to the military, because the Minister of Home Affairs is one of three ministers appointed by the Commander-in-Chief, according to the Constitution.

The pervasive reach of the General Administration Department stretches down to the local level, and it takes responsibility for an incredibly broad range of issues. Among its role is the enforcement of laws, licencing and control over permit schemes, land registration, taxation, and other local general administration matters.³¹ It appears to have close relations to all government departments, and with the police and the courts. Its office is often located in close proximity to the courts, and it has a self-proclaimed 'judicial role'. Clearly one aspect of this judicial role is the authority to exercise judicial power under section 144 to declare a curfew and restrictions on freedom of movement in the event of an emergency. This is evident in the response of the General Administration Department to the anti-Muslim riots between 2012 and 2014.

Between May and October 2012, a serious outbreak of violence occurred in Rakhine State primarily committed by Buddhists against Muslims. It is estimated that hundreds of people were killed and tens of thousands of people were displaced; most of these were the Rohingya in northern Rakhine State. As a result, the power under section 144 was used by the General Administration Department in several areas. On 8 June 2012, an order under section 144 was issued in Maungdaw Township by the General Administration Department.³² The order noted that houses had been looted, vandalised and burned, and 'people' injured. These people were mostly Muslim, although the order fails to specify this. It therefore stipulates that a curfew was necessary from 6 am to 6 pm, and it bans gatherings of five or more people. The order

³⁰ H Nixon, C Joelene, Kyi Pyar Chit Saw, Thet Aung Lynn, and M Arnold, *State and Region Governments in Myanmar*, (The Asia Foundation and MDRI-CESD, 2013), pp 31-35. Informants also told me that the Security and Administrative Councils exercised section 144 orders, and no doubt further research would find evidence of this.

³¹ Kyi Pyar Chit Saw and M Arnold, *Administering the State: An Overview of the General Administration Department* (Asia Foundation and MDRI, 2014).

³² Maungdaw Township General Administration Department, Code of Criminal Procedure Section 144, Curfew Order No. 1/2012, 8 June 2012 [in Burmese].

specifically mentions that no gatherings were to take place in mosques or schools, although it did not also mention Buddhist temples, despite the fact that most of the perpetrators of the violence were Buddhist. In late 2014, the order and curfew limits still appeared to be in operation, regardless of the written 60 day time limit contained in section 144.³³ A similar order was imposed in Buthedaung Township, also in northern Rakhine State. Section 144, it seems, no longer respects temporal bounds.

Another example occurred two days later on 10 June 2012 when an order was issued under section 144 by an officer of the Sittwe Township General Administration Department.³⁴ In the interest of public safety and the rule of law, the order declared a curfew from 6 pm until 6 am, and prohibited gatherings of more than five people. Barricades and barbed wire were set up at some mosques, keeping both Muslims and other intruders out. The order specifically mentioned that people were not allowed to congregate at mosques; no mention was made of monasteries. The order did not specify a time limit, but rather claimed to be operative until another order was issued.

In 2013, as the anti Muslim violence spread to towns across Myanmar, numerous curfew orders under section 144 were imposed. In March 2013, violence against Muslims occurred in the township of Meiktila, Mandalay Division. This led to deaths, property damage, and the displacement of several thousand people, and the violence spread to nearby townships. Again, section 144 of the Code of Criminal Procedure was used to prohibit public gatherings and impose a curfew in Meiktila.³⁵ Section 144 was also used in February in Maubin Township, Ayeyarwady Region; in March in Bago Region; in May in Lashio, Shan State, and Okkan Township, Yangon Region; and September in Thandwe Township, Rakhine State.³⁶

³³ Mizzime, Curfew Extended in Troubled Maungdaw, 13 December 2014.

³⁴ Sittwe Township General Administration Department, Order under Code of Criminal Procedure Section 144, 10 June 2012 [in Burmese].

³⁵ As the unrest continued to spread, section 144 was also used in several townships in Pegu Division; *Democratic Voice of Burma* (DVB), “Two more Burma towns under curfew as violence spreads” 28 March 2013, see: www.dvb.no.

³⁶ Data for 2013 is taken from Burma News International, *Deciphering Myanmar’s Peace Process: A Reference Guide* (2014), available at: www.bnionline.net.

Then in July 2014, the violence reached Mandalay. On 2 July 2014, an order under section 144 was made in relation to six townships in Mandalay Division.³⁷ The order introduced a curfew from 9 pm to 5 am, and prohibited more than five people from gathering or demonstrating. It also prohibited the carrying of any form of weapon or item that could be used to light a fire. The order stated that these conditions were necessary in order to protect the community and maintain stability. The order was given by the Administrator of Mandalay Division General Administration Department. Several hundred people were detained for breaching the curfew, which was later lifted on 11 August.

The response of Township Administrators, from the General Administration Department, to the anti-Muslim violence between 2012 and 2014 has therefore been one of appropriating judicial power under section 144. As the most immediate and flexible response of executive power, section 144 in effect empowers the chain of General Administration Department-Ministry of Home Affairs-military authority.

Myanmar's Constitutional Provisions on Emergency

The use of section 144 orders and its relative power can be contrasted with the constitutional provisions on a state of emergency. While the 2008 Constitution contains extensive detail and teeth in its coverage of emergency powers, in practise it remains dependent on section 144.

Under the 2008 Constitution, the power to declare a state of emergency is dealt with at length in Chapter XI.³⁸ The 2008 Constitution of Myanmar takes a detailed approach and provides for three definitions or types of situations in which an emergency can arise. In all three types of emergency, it is the President of Myanmar who is vested with the power to declare a state of emergency, although only after he or she confers with the National Defence and Security Council ('the Council'). The Council consists of eleven members, including members of parliament, although a majority of the Council are military officers. The power therefore rests in the hands of the President (who is not directly elected) and the military. There is no role for the parliament in the initial decision to declare an emergency. The President has exercised

³⁷ Mandalay District General Administration Department, Order under Code of Criminal Procedure Section 144, 3 July 2014 [in Burmese].

³⁸ These provisions are mirrored in the Law on the Union Level Government No 15/2010 (ss 83-98).

his wide powers to declare a state of emergency three times since the Constitution came into effect in 2011.

When Administrative Bodies Fail: Type 1 Emergency

In a type one emergency situation, an emergency is when a local administrative body at the State, Region or Self-Administered Zone level is unable to fulfil its administrative duties (ss 40(a), 410). This type of emergency appears to allow the Union government wide discretion to take control in any situation where a local government is not seen to be meeting its duties. It allows the President to exercise the executive and legislative power of the Region or State, essentially overriding the powers of local governments (s 411). There is no guarantee for human rights in a state of emergency, as the President has ultimate power to limit or suspend any right (s 414(b)). A type one emergency requires the President to specify the duration, although the default is 60 days because any declaration requires the approval of the *Hluttaw* within this time,

Further, the constitutional writs are deemed to be suspended if an emergency is declared, and the right of a citizen to obtain ‘redress by due process of law for grievances entitled under the law’, does not apply in an emergency.³⁹ This is particularly concerning because not even *habeas corpus*, the right to challenge an illegal detention, is available. There is no room for legal action to be taken against any deemed ‘legitimate’ decisions or actions made during an emergency (s 432). This implies that if action is not ‘legitimate’, it may be possible to bring a challenge to court. There is silence on whether a declaration of a state of emergency itself could be open to challenge in a court. This is a reflection of the broader subservience of the courts to the executive under the 2008 Constitution. A type one emergency under the 2008 Constitution has not yet been exercised in Myanmar.

Protecting the Public: Type 2 Emergency

A type two emergency has many similarities to a type one emergency, except that the definition is not related to the failure of administrative bodies, but to a situation that ‘endangers lives, shelter or property of the public’. This type of emergency appears to have two stages (ss 40(b), 412, 413(a)). In the first stage, the Defence Services can assist local

³⁹ Constitution of Myanmar 2008, ss 296(b), 381(c). These provisions are similar to ss 25 and 27 of the 1947 Constitution.

administrative bodies. In the second stage, the President can declare a ‘military administrative order’, which has the effect of conferring executive and judicial power on the Commander-in-Chief of the Defence Services (s 413). The effect of a type two emergency on human rights is the same as for a type one emergency; the President has ultimate power to ‘restrict or suspend’ any right (s 414(b)). Type two emergencies, like type one, also require the President to specify the time period, although the default is 60 days because any declaration requires the approval of the *Hluttaw* within this time.

This was the type of emergency that was declared in 2012 in Rakhine State, and in Meiktila District in 2013. On 10 June 2012, this power was first exercised by the President who declared a state of emergency in Rakhine State.⁴⁰ Violence against Muslims spread across the country, leading to a humanitarian crisis and widespread displacement.⁴¹ In the following year, severe conflict against Muslims in Meiktila broke out and led to an emergency administrative response. On 22 March 2013, the President exercised his powers to declare a state of emergency in four townships in Meiktila District, although no time limit was specified.⁴²

On 20 May 2013, a special session of the Union Parliament was held to debate the extension of the declaration of the state of emergency in Meiktila. There are no legislative checks on the initial act of declaring an emergency, although the *Hluttaw* is required to approve an extension of a state of emergency within 60 days. No grounds are specified as to the conditions that must be fulfilled to extend an emergency. The key debate that emerged was how long the extension should last. The issue was whether it should remain open-ended as the President had proposed, or whether it should be subject to a 60-day time limit. The majority voted in favour of a 60-day time limit, which indicates that some USDP members voted against the proposal of the President. Yet the subsequent extension of the state of

⁴⁰ Ordinance 1/2012, Declaration of Emergency, 2012. [in Burmese]

⁴¹ See generally Alistair Cook (2016) ‘The Global and Regional Dynamics of Humanitarian Aid in Rakhine State’, in Melissa Crouch (ed) *Islam and the State in Myanmar: Muslim Buddhist Relations and the Politics of Belonging*. Oxford University Press.

⁴² Ordinance No 1/2013 on a Declaration of a State of Emergency, 22 March 2013.

emergency was approved without any evidence from the military, police or local government as to what measures had been taken, or progress made, to restore order.⁴³

In 2015, the use of a section 144 order followed by a constitutional declaration of emergency was again evident in the response to fighting in Kokang Self-Administered Zone in Shan State, bordering China.⁴⁴

Military Takeover: Type 3 Emergency

A type three emergency is the most severe, and effectively gives total control to the Commander-in-Chief. In a type three emergency, an emergency can be declared on the grounds that a situation may lead to a break down of the state itself or a serious threat to the sovereignty of the state, such as insurgency (s 40(c)). Rather than specifying particular situations, such as war, aggression or serious internal disturbance, this third type of emergency provides for a very broad definition that could potentially be used to justify a response to any conflict that is perceived to threaten the interests of the quasi-civilian government. In such a situation, the powers of all three branches of government are conferred directly on the Commander-in-Chief (s 417). This includes the suspension of the parliament, and the dismissal of all members of parliament from office. The effect on the branches of government in this situation is therefore total, and potentially allows the Defence Services to act as a substitute without restraint. The Commander-in-Chief has the power to restrict any rights of individuals.⁴⁵ Type three is clearly the most serious form of emergency, as the state of emergency automatically lasts for an entire one year, although this has not been used to date.

Yet more powerful than these various kinds of constitutional states of emergency is the power of a section 144 order itself. Section 144 in effect has the potential to compel a constitutional emergency. There can be no constitutional emergency without there first being a section 144 order.

Conclusion

⁴³ On 20 July 2013, the state of emergency in Meiktila was official brought to an end by Presidential Order No 2 /2013 on Revocation of the Proclamation of the State of Emergency.

⁴⁴ Order 1/2015, Declaration of Emergency, 17 February 2015 [in Burmese].

⁴⁵ Constitution of Myanmar 2008, ss 414(b) and 420 respectively.

The 2014 constitutional rallies on amendment to the Constitution demonstrate how the existence of excessive emergency powers in the Constitution is used as a threat by the government. The risk that any form of political opposition could trigger a military-led state of emergency is real, as those who have lived through the socialist and military period in Myanmar would attest. Yet in practise these constitutional powers remain conditioned by section 144. There is no constitutional state of emergency unless there has first been a section 144 order.

The present use of emergency powers in Myanmar has been conditioned by the past expansion of administrative power. The use of section 144 orders in relation to the 1938 riots demonstrates that this judicial power has a long history of appropriation by executive officers. Normalised from the 1960s onwards, this practise continues today, as is evident in the responses to anti-Muslim violence. The General Administration Department is a relatively new actor, but building on past trends it has clearly appropriated judicial power for itself under section 144. This use of section 144 could be interpreted as a reflection on the judiciary and the reduced and subordinated nature of its powers. Section 144 in effect is a necessary precondition for a full constitutional state of emergency to be declared, as occurred in Rakhine State, Meiktila District and the Kokang Self-Administered Zone. This demonstrates a connection between the use of the Code of Criminal Procedure as an administrative power and the exercise of the constitutional powers of emergency. A state of emergency can potentially be re-enacted everyday in Myanmar. There is always some part of the country under a section 144 order, there is always an emergency that requires an executive response.

Section 144 has contributed to the culture of the ‘everyday emergency’, an emergency that targets Muslim minorities, ethnic groups fighting against the military and land rights activists, among others. It is the obscurity and infamy of section 144, rather than the elaborate Constitution, that secures its pre-eminence. This suggests that our understanding of the importance and use of constitutional law in Myanmar needs to shift to incorporate the broader colonial legal legacy and the ways this legal framework is reinterpreted by the executive to exert control over particular communities, and ultimately legitimise a perpetual sense of emergency.