Preface

The constitution is a political as well as a legal framework, the main role of which is to protect the rights of people while restricting the powers of government. In producing such a document, which will become the supreme law of the land, a country's current political and legal background take on great significance.

The third publication of Legal Issues on Burma focuses largely on constitutional issues, including the history of the constitution making processes of Burma, with the aim of informing the international community. This edition also examines the judicial system of Burma, looking particularly at the independence of Burma’s judiciary as well as the numerous unfair aspects of the trial of 18 foreigners. A number of recent statements of the Committee Representing the People's Parliament (CRPP) are also reproduced, including those dealing with the CRPP's recommendations to Parliament that various laws be adopted or repealed, with the reasons for these recommendations.

In relation to the constitutional issues, it is apparent that a new constitution laying down foundations for the establishment of peace, freedom and justice for all people in Burma cannot emerge as long as current conditions prevail. People’s participation is severely restricted, political parties are not allowed to function and thousands of political prisoners are still behind bars. Human rights violations are commonplace such as arbitrary arrest under unjust laws, inhumane torture in prisons and extra-judicial killings.

The military junta, the SPDC, has refused the call of the opposition National League for Democracy (NLD), led by Daw Aung San Suu Kyi, to convene a People's Assembly to exercise State power, including drawing up a new constitution. On the one hand the SPDC has arrested over 200 elected NLD Members of Parliament and forced hundreds of NLD members to resign from the party. On the other hand the SPDC is attempting to finalise its constitution, being drafted through its National Convention. The great majority of delegates to the National Convention were hand-picked by the SPDC. If the SPDC is able to present its constitution as a legal document, a new election will be held and a so-called civilian government formed in accordance with that constitution. In doing this the junta will be able to negate the results of the 1990 election and achieve legitimacy to rule the country indefinitely. This is the only major political strategy of the SPDC, which will kill two birds with one stone. This has become a life and death matter for all people inside Burma, as well as for the SPDC.
Drafting a Constitution in Burma:  
A Struggle for Participatory Process

By Burma Lawyers' Council

Following the nation-wide demonstration in August-September 1988, the Burmese army on September 18 staged a coup, assumed all power and installed a military junta named the "State Law and Order Restoration Council" (SLORC), now known as the State Peace and Development Council (SPDC). The elections were held in May 1990 to form the Pyithu Hluttaw, (People's Assembly) that normally exercises legislative power and forms the government. This is according to Burmese constitutional conventions and supported by the 1989 Election Law under which the 1990 elections were conducted.

Following the electoral victory of the opposition party, the National League for Democracy (NLD) led by Nobel Peace Prize winner Daw Aung San Suu Kyi, the military junta issued Order 1/90 to justify their refusal to recognise the election result. Order No. 1/90 stated that the duty of the elected representatives is to firstly draft a new constitution, before the People's Assembly could be convened.

The military junta's constitution drafting process

In mid 1992, the SLORC announced their plan to convene a National Convention, or Constituent Assembly, to lay down guidelines and basic principles for a new constitution. The National Convention held its first session on 9 January 1993. Sessions of the National Convention have been postponed several times. After almost six years, the National Convention still has not completed its work.

The Formation of the National Convention

More than 600 of the 702 delegates to the National Convention were chosen by the SLORC. Even though their Order 1/90 specifies the duty of elected representatives as being to draft the constitution, only 99 elected representatives were entitled to take part in the National Convention; the remainder represented seven other categories of representatives, such as workers, peasants, government servants, leaders of political
parties (no matter elected or not), intellectuals, army personnel and respected politicians. All non-elected representatives were SLORC nominees.

Principles laid down by the National Convention

SLORC unilaterally declared that the National Convention was convened to achieve six aims, with the primary stipulation that the Tatmadaw (army) would take the leading role in national politics in the future. Freedom of speech of the delegates to the National Convention was strictly prohibited by order and through the military intelligence officers monitoring of all sessions. Through the initiation of a constitution drafting process under its strict control, the military junta has embarked on a process designed to entrench the army's leading role in national politics. In short, the constitutional model the Burmese military junta is planning to impose on Burmese society is almost identical to the Indonesia model of the previous Suharto regime. Many believed that the Burmese military has sought the advice of the Suharto regime to guide their machinations in national politics.

The question of the legality of the National Convention

The National Convention is highly controversial and arguably illegal: it is evident that the military junta has no political mandate or legitimacy to convene it. This became clear after the NLD withdrew from what many have called the "shady manoeuvrings" of the regime. Today, only 15 of the 485 representatives elected in the 1990 election participate in the National Convention.

Many international commentators including the United Nations through its annual General Assembly, have openly pointed out that the SLORC's National Convention is not the proper body to draft the state constitution. Additionally the principles being laid down by the National Convention do not meet the will of the people and the needs of Burma's diverse ethnic groups.

The NLD's Constitution drafting process

Since the election campaign in early 1990, the NLD has clearly expressed its views on the future constitution of Burma. The NLD has also made it clear that the basic principle for a lasting state constitution is that a constitution could only be adopted by a genuine participatory and national reconciliation convention.

After winning the 1990 general election, the NLD adopted a temporary constitution (a slightly modified 1947 constitution) to facilitate the transfer of power from the SLORC. On the eve of the NLD's meeting where they declared their constitutional intentions, the SLORC issued Declaration No. 1/90. That Order also states that the military, which held power under martial law, was not bound by any constitution, and would hold power until it ensures that a sufficiently strong constitution is in place.
The NLD party congress in May 1996 again confirmed that the NLD would draft a state constitution in consultation with the people, while continuing to boycott the National Convention. The SLORC angrily responded, because the NLD plan directly challenged the legality of the National Convention. The SLORC issued law No. 5/96, prohibiting any body from writing or discussing a state constitution, or from criticising the National Convention, with a five to twenty year imprisonment penalty.

---

**NCUB Constitution Drafting Process**

The National Council of the Union of Burma (NCUB), an opposition alliance formed in the liberated areas outside the military junta's control, is now working actively on drafting a democratic constitution.

The NCUB is preparing for the future by entering into free and frank discussions about constitutional matters. The NCUB has organised four international seminars and several local seminars on its proposed draft constitution. Representatives of the different ethnic and political organisations have attended all seminars.

The NCUB has made it clear that their draft constitution is designed to stimulate debate and learning and is one model that could be presented to a constituent assembly, and the people of Burma when Burma achieves democracy.

---

**Points to Compare with Constitution Drafting Processes in the Philippines and Thailand**

With constitution drafting generally, the control of the process and the final text of the constitution are mutually interdependent. The Philippines and Thailand have proved that they moved along the right path in constitution drafting. The Burmese people may be able to learn from their experiences about how important the drafting process is.

Generally, there are two types of selection methods for the drafters of the constitution: bottom-up and top-down. If the drafters are chosen to represent the will of the governed, the selection process can be said to be bottom-up. If the drafters represent the will of those who are in power, the selection method is top-down. There have been enough examples to know that those who pay special attention to the will of the people are those chosen by the bottom-up method.

Most of the members of the Thai Constitution Drafting Assembly (CDA) were chosen by this method. Despite criticisms that the appointing power would influence the work of the Constitution Commission, the members drafting the 1987 Philippines constitution were selected by a bottom up method. Throughout the constitution drafting process, the Constitution Commission took into account the will of the people.

It is clear that the SLORC's drafter-selection method is absolutely top-down, since the
delegates to the National Convention have no right nor opportunity to reflect the will of the people in their deliberations.

All forces in Thai society, including the opposition and ruling parties, worked together to draft a constitution. This is the ideal situation so that upon its completion the people feel ownership of the document. However, as a result of the illegitimacy of the SLORC's National Convention, different political forces in Burmese society are now involved in drafting two other constitutions—the NLD and the NCUB.

Law No. 5/96 as stated above, prohibits any citizen or political party, including the NLD, from drafting a constitution outside the National Convention. Therefore the duty of Burmese citizens in the formation of the state constitution is merely to be silent. The Burmese people greatly desire their participation similar to that of the people in the Philippines and in the Thai constitution drafting process. The ability to debate, agree and disagree over the various articles, to argue about clauses and explanations of the Thai Constitution Drafting Assembly (CDA) and so on has had an enormous effect on the contents of the final draft.

For the Burmese experience the most instructive part of the Thai constitutional process is the way in which the constitution is approved. The process to approve the Thai constitution was clearly announced. If the Thai parliament failed to approve the draft, the people had the opportunity to do so in a referendum. This is the process that the Burmese people have been asking for. At present the Burmese process is very secret, and no one knows how a constitution will be approved.

In Thailand, the CDA, representing the will of the people, intended to achieve political reform through the constitution. Therefore, there are many provisions that restrict the behaviour of politicians. Some governing politicians publicly expressed their opposition to the draft, but they finally approved it due to intense pressure from the people desiring democratic rule.

If the constitution had gone to a popular referendum, many are saying that there would have been conflict between politicians and the people. Some academics warned that all key players in Thai politics should be careful to avoid confrontation like that of Black May 92. Thai people still remember their experiences during the constitutional crisis in 1991-92.

The present Philippines constitution was approved at a time when the country was not under repressive rule. If Burma's constitution is to be approved, a properly authorised constitutional assembly alone or a people's referendum must approve it.

Although the SLORC has not passed a constitution, the principles that have been laid down by the National Convention clearly demonstrate that only a person with a military background can be president. That criterion reflects the absolute domination of the military. Burmese people might be interested to learn how the Thai people, during Black May 1992 events, responded when Gen. Suchinda Kraprayoon seized the
position of Prime Minister without being elected.

An important consideration is whether the legislature alone should be allowed to make amendments to the constitution. We cannot assume that the present Thai legislature sincerely approved the constitution; it approved the constitution because it was afraid of the pressure from a people suffering in an economic crisis. The way the Thai constitution was approved, therefore, was influenced by people's participation.

The constitution should be amended in the same way it was approved. Some Thai politicians who oppose this new constitution publicly said that they would amend the constitution later, in the legislature. It is very likely that the politicians will cut out some provisions that promote the rights of the citizens while restricting those of the politicians. The CDA, with the support of the people, worked hard for these provisions. Therefore, if the constitution is to be amended by the legislature, the amendment should have the people's approval.

The present Philippine constitution prohibits the president from running for re-election for a second-term. President Fidel Ramos' attempt to alter that provision was thwarted by a people's campaign under the leadership of former President Aquino. President Ramos' attempt to amend the constitution was not in conformity with what the drafters had intended.

We should not forget that some of the provisions, especially provisions relating to making amendments to the constitution, are part of the drafting process. Therefore, any constitution amendment process should give special consideration to how the constitution was first drafted and approved. If the Filipino people really want to restrict the presidential re-election, the constitution should not allow the governing authority alone to amend that provision. Such an amendment should have to be approved by the people.

The People of Burma can learn valuable lessons from others' constitution drafting processes. As unsatisfactory as the constitutional development in Burma currently is, the people of Burma can be heartened from the Philippines experience concerning how the 1987 constitution replaced the 1973 constitution. In addition, the people can gain many insights from Thailand's recent constitutional history, particularly that of the past six years.

If the people are aware of the Thai experience, they can use this knowledge to help them further their aim of achieving a democratic constitution. Equally instructive is for the people of Burma to be aware of the deficiencies in those two countries' constitution drafting processes.

For those concerned about ensuring participatory processes the most salient characteristics gleaned from examining the constitution drafting processes of the Philippines and Thailand are as follows:

1. The method of bottom-up and not top-down is desired.
2. All forces, particularly political forces, should work together, so the process has to be inclusive.
3. People's participation has to be paramount at all steps in the process.
4. The final approval process has to ensure equity and fairness and no interest group should be given special privileges.
5. People should be the final arbiter of any constitutional change or amendment.

It is exciting to know that two of our neighbours have been able to move from military and authoritarian rule to constitutional and democratic governance, with of course some upheaval and loss of life, but that the people were the instruments of change in both countries.

Let us hope that these examples can inspire us to work even more effectively to wrest the changes in our country.
As the peoples and leaders of Burma approach the task of writing a third constitution, a good place to begin is by asking the question, why did the previous constitutions fail to unite the indigenous ethnic minorities and the government in peaceful viable polity. At the heart of the problem is the question which vexed the founding fathers—how to construct a union in which people who formerly were separated could be joined together so as to benefit from unity while remaining nominally autonomous in their own areas on matters of political rule, economy and culture.

Probably the clearest and most direct statement on the question was made by the AFPFL—the nationalist party which led the nation to independence—just before Aung San went to England to discuss Burma's future with the British Prime Minister.

Our policy in regard to the Frontier Areas of Burma will be to seek cordial relations with the peoples of these areas with a view to the formation of a union or a federation of Burma formed by the willing consent of all the races inhabiting the whole of Burma. Although we shall be willing at all times to assist by financial and other means in the welfare and development of the Frontier Areas, it is not our intention to impose on the races inhabiting these areas any form of union which they themselves do not desire and should such union or federation be formed, it will be our policy to leave to the States such autonomy as they may need for the control and management of their own internal affairs. At the time when the constituent assembly is to be elected for Burma it will be our policy to invite the people of the Frontier Areas to join in the work of such assembly under conditions as may be mutually agreed upon in order that should the races of the frontier areas so desire, these areas would be able to march with Burma proper to full autonomy.

Speaking on the eve of the Second Panglong Conference, Aung San said that, "the affairs of the Frontier Areas are the concern of the peoples of those
areas. If they declare they want the same right and privileges as ourselves, they will get them.”

And, at the Conference, he said further that,
"the Hill Peoples would be allowed to administer their own areas in any way they pleased and the Burmese would not interfere in their internal administration”.

Finally, he promised the participants equality with the Burmese by saying, "If Burma receives one kyat, you will also get one Kyat" In sum, the AFPFL and its leader, Aung San, answered the question posed by promising equality and autonomy in a federal union based on the principle of unity in diversity.

For such a union, Aung San argued the architects must be pragmatic; adopt principles and tailor institution to their needs, not slavishly copy any existing model of federalism in existence at the time." Anything we have tried to utilize from modern constitutions of the world, we have selected…and thoroughly adopted to suit Burma's aspirations and Burmese genius. " Sadly, the end-product, which Aung San did not live to see, did not turn out as he had hoped. Instead of unity, it created disunity; for as U Chan Htoon, the Union Attorney General in 1952, succinctly described it in an argument before the Supreme Court, the Union of Burma was federal in theory and unitary in practice.

It might be helpful to review some of the less well-known events leading up to the writing of the first constitution. First, it should be remembered that Aung San and the AFPFL were at the forefront of bringing the Frontier Areas into the anticipated union of Burma. On January 1, 1947, on the eve of Aung San's departure for London and his meeting with the British Prime Minister, Clement Attlee, the AFPFL released a new Frontier Areas policy statement which called for simultaneous freedom for Burma proper and the Frontier Areas; it also called for the immediate appointment of a representative from the Frontier Areas on the Executive Council to advise on local problems and the inclusion of the Karen States at the Constituent Assembly, where they could decide whether or not join the Burma federation.

Unfortunately, Aung San never raised the question of adding representatives of the Frontier Areas to the Burma delegation, since the invitation was extended only to Aung San and the Executive Council. The Shans, as the largest ethnic group and most politically advanced in the Frontier Areas with experience in dealing directly with the British since the formation of the Federal Council to Shan Chiefs in 1922, made their desires to participate in the discussions known, but neither the Burma delegation nor the British sought to react positively their request.

The agreement reached between the Burman and British leaders, at the conclusion the London meeting, were seen as decisions taken over the heads of the Shans and were resented by many of their leaders. But the Burman leaders saw them differently; they were seen as important concessions by the British to allow greater contact between Ministerial Burma and the Frontier Areas and acceptance of the AFPFL demands made on the eve of the meeting. The Aung San - Attlee Agreement concluded that
1. both parties wanted to see early unification between the two areas with the free consent of the concerned inhabitants and
2. the peoples of the Frontier Areas should, in respect of subjects of common interest, be closely associated with the Government of Burma in a manner acceptable to both parties.

To realize the latter objective, it called for

1. free intercourse without interference between the peoples of the two areas;
2. a meeting between the leaders of the two groups, where the peoples of the Frontier Areas should be asked to express their views upon the form of association with the Government of Burma which they considered acceptable during the transition period;
3. the Frontier Areas either should appoint a small group to advise the Governor on Frontier Areas Affairs and to have close liaison with the Executive Council or appoint one Frontier Area representative as Executive Counsellor in charge of Frontier Affairs, or some other method.

The Agreement also said that following the meeting, either at Panglong or elsewhere, the British and Burma governments will decide the best way to associate the two areas in accordance with the expressed views of the peoples of the Frontier Areas. Finally, a committee of Inquiry should be formed to take testimony from peoples of the Frontier Areas in order to gather their views on the future association.

The Panglong conference (Feb. 7-12, 1947) and Agreement are the watershed of Burma-Frontier Area relations. The Shans and Kachins met on the eve before the Conference and drew up a five-point resolution which called for equal rights and privileges with the Burmans; political autonomy in their states if the Frontier Areas join the Executive Council; not to be bound by the Aung San-Attlee Agreement and the right of secession from the proposed federation after Burma received its independence. On the next day, the Chins delegation arrived, met with the first two, gave its approval to the five point resolution and then added two more, which the others accepted. The Chins proposed that the Kachin and Chin States have the same privileges to draw on the central revenues as the Shan State already enjoyed and that the Burma government agreed to supplement any local financial deficit. Its second proposal was that the frontier peoples form a supreme executive council of the united hill peoples to decide on future policies between Ministerial Burma and their areas. As the conference drew to a close an agreement was entered into between the two group. Among other things, it called for a representative of the hill peoples to be appointed as a Counsellor to the Governor to deal with the Frontier Areas; the Counsellor to be appointed to the Executive Council, without portfolio, and the Frontier Areas to be within the authority of the Executive Council. It also called for the appointment of two Deputy Counsellors to represent races of which the Counsellor was not a member. The addition of a Frontier Areas Counsellor was barred from interference with internal autonomy of the separate administrations in the Frontier Areas; the leaders restated
that full autonomy in internal administration for the Frontier Areas was accepted in principle. The agreement left to the Constituent Assembly the responsibility to demarcate and establish a Kachin State within a unified Burma. It also mandated that the principle that "citizens of the Frontier Areas shall enjoy rights and privileges which are regarded as fundamental in democratic countries."

Following the close of the Conference, the Governor appointed Sao Samhtun, Sawbwa of Mongpawn (Shan State) as the Frontier Area Counsellor, Sima Suwa Sinwa Nawng (Kachin State) and Vum Ko Hau (Chin Hill) as the two Deputy Counsellors.

Despite the breadth and importance of the Panglong Conference and Agreement, they did not settle all major problems with the peoples of the Frontier Areas. The Karen neither participated nor approved its outcome. Also many of the smaller minority groups were not present and did not give their approval. Part of the omission was made up when the Frontier Areas Inquiry took place and all minority groups were given a chance to testify. Following the hearings, the Inquiry Committee recommended that:

1. The Frontier Areas be given representation at the Constituent Assembly; it did not recommend normal election procedures for electing delegates because there was no time to compile election lists, campaign and vote. Thus, there was uneven representation at the Constituent Assembly with some minority delegates named because of their class status, while others were chosen by various means.
2. The Inquiry Commission recommended that the Areas be given 45 delegates who would have equal status with the delegates from Burma proper in deliberations and committee assignments.
3. It further recommended that participation in the Constituent Assembly did not automatically commit the frontier peoples to accept federation proper. Finally,
4. It recommended that no decision regarding state government taken by the Constituent Assembly should be considered passed unless a majority of the frontier delegates join in support of the proposal.

The witnesses before the Inquiry Committee revealed the deep misgivings and fears of many of them. The Chin witnesses could not convince the Committee whether or not they wanted statehood in the proposed federation or amalgamation of their areas with Burma proper. Much of the confusion turned on the terminology which was not ever precise and, at times, was misleading. The word union, for instance, was used to mean amalgamation most of the time, and federation to mean the creation of a federal state. However, the two were used interchangeably and this led to misunderstanding.

The witnesses before the Inquiry Committee revealed the deep misgivings and fears of many of them. The Chin witnesses could not convince the Committee whether or not they wanted statehood in the proposed federation or amalgamation of their areas with Burma proper. Much of the confusion turned on the terminology which was not ever precise and, at times, was misleading. The word union, for instance, was used to mean amalgamation most of the time, and federation to mean the creation of a federal state. However, the two were used interchangeably and this led to misunderstanding.

The Panglong Agreement must be read in conjunction with the Frontier Areas Committee of Inquiry in order to sample the varied positions taken by the leaders at one level and the witnesses at another. Clearly, it left much unsaid about the future story.

____________________

Nominally, the right of secession was given to all states in the Union (Art.201). But it did not apply to Burma proper because that State was governed by the national government and the two were inseparable.
It is against this background that the state arrangement in the 1947 constitution must be seen.

The 1947 constitution did not create a federal structure as that term is generally understood. It created a union of unequal states. They differed in several important ways. They had unequal representation in the upper chamber of the parliament Chamber of Nationalities--which in federal constitutions the world over recognized equality between states in the union. Also state members to the upper house were selected differently; in one case they were named; in another the seats were reserved for members of a social class and still in other they were elected at large from the general population of the states.

Nominally, the right of secession was given to all states in the Union (Art.201). But it did not apply to Burma proper because that State was governed by the national government and the two were inseparable. The constitution permitted the Shan and Karenni States the right of secession under conditions outlined in the constitution, but the Karen, Kachin and the Chin Special Division were individually denied the right.

The legislative bodies in the several States and the Special Division were the State Councils. Membership in the State Council was derived from election or appointment to one of the two chambers of the parliament at the national level. So long as an individual held his seat in the national parliament, he automatically was a member of his State council. And so long as he remained a member of the national parliament he could not be removed from his seat in the State council, no matter what the people there wanted. In the Shan and Karenni State, the members were drawn from a particular social class, while in the Kachin State, they were divided between representatives drawn from two different ethnic groups. In the Karen and Chin Special Division they were elected generally for the state population.

The Head of each of the states gained his office by being selected by the Union Prime Minister to fill the office in his cabinet of Minister from his state. As such he automatically was named the head of his state, again whether or not the people in his state wanted him. In short, he served at the pleasure of the Prime Minister and could be removed only by that official.

Initially, there was no separate judiciary in the several states. The federal judiciary served in the states as well as in the union. Although a State Courts Law was passed, it never was fully implemented.

While states had some taxing power, all were dependent upon the Union Government to provide a large portion of the funds to pay for the administering of the state and providing some of its services. The states had the right to use local languages at the local level and the schools in the states used local languages for instruction through the fourth standard, all education above that was conducted in Burmese and English. But this put local students at a disadvantage as they moved to higher levels of education.
where they had to compete with Burman students who learned the language both at home and in the first grades of school.

These are just some of the ways the states were under the influence and control of the Union Government. And in these ways, the political system was more unitary than federal.

The system began to experience strains and general criticism almost from the birth of the independent Union. Civil war, invasion and insurgency raged though much of the nation but lasted longer in the Frontier Areas and gave the national army a direct role in governing at the expense of local officials. Also, as differences developed between the leaders of the governing party in Rangoon and the emerging opposition in the several states, federal interference in local affairs became major issues, especially in the Karen and Kachin States as the Prime Minister named Heads of States from his supporters rather than selecting a representative of the majority in the state. These and other problems created tension between the states and the national government; when, in 1958, a crisis arose in the national governing party, it had direct effect upon the states. During the next few years, insurgency expanded in the state as the local citizens sought to express their dissatisfaction and to try and bring change. As fears rose in Rangoon that the Shan State might try to invoke its right to secede, the military used this growing concern as an excuse to overthrow the government and replace it with a new and different one with itself holding all power.

The failure of the constitution in the initial period to bring unity and harmony to Burma can be traced to many things; it resulted, in part, from the lack of trust on the party of the national leaders in their counterparts in the states; the national leaders feared that if the central government did not exercise close control, the states might fall behind Burma proper and national unity might collapse. It also resulted from the adoption of principles which were tried and tested in existing federal states and they fell short when put to the test when applied to Burma. While it can be argued that the effort to find and adapt new and unique ideas to the particular situation in Burma which were not slavish copies of those in existence elsewhere in the world, as Aung San suggested in the period before independence, meant that the system that was constructed did not serve the people well. It divided rather than unified the nation.

After twelve years of military dictatorship (1962-1974) where all power was concentrated in Rangoon and an administrative dictatorship replaced the democratic centralized system of the founding fathers, the military oversaw the writing of a new constitution and the transfer of power to a single political party it created and through which its members continued to rule.

The army constructed an elaborate process which it lead to include the people in the drafting of the constitution; but it did not allow any independent voices to be raised. It carefully orchestrated the process through three drafts and a national referendum, which allowed the people no choice in acceptance or rejection.
Under the Burma Socialist Program Party constitution, there was no federalism. The state was unitary with nominal subdivisions to create the illusion of some kind of division of areas. In place of the State Councils and the previous system of local governments, the military institutionalized a hierarchy of Councils which were linked to the government in Rangoon. Under the principle of local autonomy under central leadership, the soldier-authors described their handiwork as the State of Burma "being organized hierarchically into people's councils at the three levels below the national government …each having equal power and status with another at the same level along Socialist Democratic principles and each serving as a local organ of power with wide self-management power." But with all power located in the Pyithu hluttaw and controlled through a single party operating throughout the nation on the basis of centralism, the State was unitary and not federal as its name, Socialist Republic of the union of Burma, implied.

Under the new constitution, the people had no absolute rights; all rights were conditioned by the goals of the state. While the basic document said that every one had the right of freedom of thought and religion, the state could enact laws restricting them in the interest of the working people and law and order. The second constitution created a constitutional dictatorship where the promises made to the people at large and the minorities in particular by Aung San and the founding fathers were totally set aside and forgotten as the military and its puppet, the Burma Socialist Program Party, worked to mold the State in the image of the East European Republics together with some aspects of the political system of the People's Republic of China. The constitution failed for it too did not grant real autonomy and political control in the states. The continuing civil war and rebellions together with forced labor, and the growing exodus of more than 100,000 peoples to escape the brutality of the military, together with the eruption of demonstrations and resistance in the heart land offer proof that the second constitution and the new absolute dictatorship of the military is far worse than its predecessor at creating national unity.

What lessons can be learned from the past? I think several.

1. There were commitments made by Aung San and the founding fathers of modern Burma that all the people would be treated equally; that the minorities would enjoy autonomy and self-rule in their own areas and that together the Burmans and the minorities would build a peaceful and harmonious state on the basis of national unity. Those promises are still remembered by the peoples in the Frontier Areas and they continue to hope that a government will rise in Rangoon which will honor them. Until that is done, the future of Burma is no brighter than its past.

2. The Burmans, too were promised a democratic form of government with protection of their human and civil rights. Whatever they had until March 2, 1961, they lost and they, too, look forward to their restoration.
3. The people of Burma gave their overwhelming support to the NLD in the 1990 election and expected that it would form a government and lead a new parliament in peacefully transforming Burma from a military dictatorship to a democracy; and they expected that the new government would oversee the writing of a new constitution which would be based on principles expressed by Aung San and the men and women who shared his vision of a free, harmonious and peaceful Burma. The effort of SPDC/SLORC to usurp their right and, once again, write a constitution which will keep the military in power and deny the people the right to rule is not more acceptable now than it was in 1974. And if the military goes ahead with their plans to write the new constitution, they will not heal the nation and end civil war.

4. The future state of Burma must be based on an agreement of how to share power. What exactly is the power of the national government and of the several state governments? This applies of all aspects of life-political, military, economic, social and cultural. These are questions which need serious thought, discussion and debate so that the nation can arrive at a consensus which all or at least a majority will accept.

5. In addition to establishing a viable state, the authors of new constitution must be prepared to discuss and resolve the right of the several states to tax and spend so that their government will be able to carry out programs the people desire. Unless they are granted the right to do these things, they will not be able to create viable and financially sound states. They will be forced as under the 1947 constitution to look to Rangoon both for permission to spend, approval of their expenditures and interference from the national government on things that properly belong to the states. The states must be linked with each other; must be able to talk with each other.

6. There must be an end to internal war in Burma. War was outlawed as an instrument of national policy in the 1947 constitution (Art. 211). But that applied only to international affairs. In the future the constitution must proscribe the right of the military to interfere with government and usurp its powers. The constitution must be explicit: there must be civilian supremacy between police and military power with the former responsible for maintaining internal order and the latter to protect the borders from invasion. There must be freedom of speech, assembly and the right to choose the nation’s leaders through secret ballot. There also must be the rule of law, where an independent judiciary will decide cases free of all interference by political or military personnel.

For half a century, Burman has been at war with itself. It will never find peace until the people elect a government they respect and trust. It is for this reason that writing a new constitution, which the people will uphold and defend, is the most important task facing the nation: Only when such a law is in place and the people and their leaders respect and uphold it, will the nation be able to turn to the questions of economic and social development and take their place in the family of nations.
The Pyidaungzu, Federalism and Burman Elites: A Brief Analysis

By Chao-Tzang Yawngwae

Federalism is not quite understood in Burma. In fact, it would not be wrong to say it is grossly misunderstood by -- among many others -- the Burman population segment, or at least by its armed elites (or elites in uniform).

To armed Burman elites, Federalism is synonymous with the destruction or the disintegration of the Union. The Burman-dominated military led by General Ne Win introduced and entrenched this idea when they usurped power in 1962.

The coup-makers declared that they had to seize power to save the Union, that the Union was endangered by the federalist demands or aspiration of, in particular, Shan sawbwas (Chaofas or ruling princes). They alleged that Shan princes, by advocating federalism, were plotting hand-in-glove with foreign power to destroy the Union.

Quite a few Burmans -- some elements of the urban elite segment -- swallowed this falsehood, and were glad for the coup, until the military shot at and coldly killed or wounded several hundred Rangoon University students on July 7th, 1962 (barely four months after the coup).

The charges levelled by the military that the Shan-led proposal for federalism was aimed at destroying the Union betrays the military's total ignorance of what the term "Union" -- Pyidaungzu (in Burmese) -- means.

As a matter of fact, in Burmese, the meaning is crystal clear: namely, that the "Pyidaungzu" (the Union or the Union of Burma) is a collection of many countries, with the strong implication that they are equal and co-independent.

Moreover, the notion advanced by the military and swallowed whole by some Burman elite elements that federalism equals the disintegration of the Myanmar Pyidaungzu also ignores the Panglong Accord and Spirit. Successive military regimes and rulers -- from Ne Win to Saw Maung, to Than Shwe, Khin Nyunt, Maung Aye, etc. -- have extolled the Panglong Accord and the Panglong Spirit and have celebrated, year after year, after year, the signing of the Accord as "Union Day" (Pyidaungzu Ne).
Such being the case, the military’s equation of federalism with the destruction of the Union is either total ignorant rubbish, or merely a ploy to mislead the Burman populace, to justify their unlawful act.

The meaning of Panglong is clear, made clear by U Aung San (formerly Bogyoke) and leaders of the ruling AFPFL (Anti-Fascist People's Freedom League) party. The meaning is none other than that the Shan, Kachin, Chin and other nationalities agreed -- jointly and unitedly -- to wrest independence from the British. Here again, the implication is that the Pyidaungzu (the Union) that came into being in 1948 is made up of co-independent and equal states.

The principle of co-independence and equality (or vice versa) of member states is precisely what is at the the core of Federalism. In other words, Federalism and Union (Pyidaungzu) are one and the same word. Federalism is the Union, and the Union (Pyidaungzu) is Federalism.

To say, therefore, that Federalism equals the disintegration of the Pyidaungzu (the Union) is not only illogical and uninformed, but dim witted.

Since 1988, democratic Burman leaders, forces, groups, including parliamentarians have come to accept Federalism, the establishment of a democratic, Federal Union, as the ultimate goal of the people and the country.

Nonetheless, there is still much to be done. It does seem that Burman leaders and cadres (or some of them) in the democratic movement itself, have agreed to Federalism without sincerely accepting the principle of co-independence and equality of all member/constituent states and ethnic segments. Some do not even try to understand what they have committed themselves to.

Quite a few Burman leaders (and cadres, etc.) in the democracy movement still believe that the restoration of the 1947 Constitution or such an arrangement is adequate. They seem to think that the 1947 Constitution is a federal constitution, that it expresses the Panglong Spirit.

In truth, the 1947 Constitution contravenes the Panglong Spirit. The principle contravention is the setting up of one state -- the Burma State or Burma Proper -- as the Mother State (Pyi Ma, in Burmese).

What this means is that the Burma State, as the Pyi Ma or Mother State, was the central power to which other member states of the Union were, or have to be, subordinated to. Clearly, such an arrangement is colonial in nature. And equally clear is the fact that the 1947 Constitution does not in any way, shape, or form fits in with the Panglong Spirit. A return to the 1947 Constitution or a similar kind of arrangement is therefore not adequate.

An important area or issue that Burman leaders (and cadres, etc.) in the democracy movement must look into, if they understand at all the meaning of the term "Union" in the Burmese language -- Pyidaungzu -- is the need to establish the Burma State as one state, one among other member or constituent states (and equal to them, not superior.
In other words, in a Pyidaungzu, the status of the Burma State (and by extension, the status/power of the Burman elites) will not be different from that of, say, the Shan or the Chin State or Shan and Chin leaders and elites.

In a Pyidaungzu, all member states will have equal power and equal autonomy, and all will have equal voice and power vis-a-vis the federal center (the federal legislature and government and associated federal agencies and bureaucracies).

In a real Pyidaungzu (Union) the federal center represents and act on behalf of all member/constituent states on the basis of equality, regardless of the size or population of any member/constituent state.

Moreover, in a real Pyidaungzu, the real well-being of the people and as well developmental programs and projects, etc., are in the hands of the member/constituent states. As such, real power to get things done, to do things, and so on, lies with the governments and legislatures of the member/constituent states. They do not lie in the hands of the federal government, not directly.

The function of the federal government, bureaucracies, agencies, etc., is to serve its member/constituent states, or coordinate among them, not to command or control them. Such being so, Burman elites and leaders -- if they love their people, the Burmans, must focus their attention and energy on the Burma State and its government, as must nationalities' elites and leaders on their respective states and governments. (NOTE: Can it be said that Burman leaders and elites do not love the Burmans, that they are in love with power, with the idea of being "national" leaders, without possessing, however, the qualification to match their ambition or aspiration?).

Burman elites and leaders must therefore re-orient themselves to serving their own Burman people, to develop them, improve their lives, etc., instead of aspiring to be great "national" leaders, big bosses, and big brothers of the alleged "more backward" areas and ethnic groups. The aspiration to be big brothers, big bosses -- overlooking one's own ethnic group -- is an expression of a colonial mentality. Colonialism and the Pyidaungzu concept are like oil and water. They are not compatible, and directly contradict each other.

If Burman elites and leaders are serious about the Pyidaungzu, the Panglong Accord, the Panglong Spirit, national harmony and so on, they -- like nationalities’ elites and leaders -- should get down to studying and understanding the nuts and bolts of federalism, the nature of federal parliament and government, the rights and powers (executive, legislative, and others) vested in constituent/member states, and the relation between the two levels of governance and administration.

A question that is crucial for the future well-being and prosperity of the country and for the stability and strength of the Pyidaungzu therefore is: Are the Burman elites and

---

The notion advanced by the military and swallowed whole by some Burman elite elements that federalism equals the disintegration of the Myanmar Pyidaungzu also ignores the Panglong Accord and Spirit.
leaders (cadres, etc.) ready to love and serve their ethnic compatriots, the Burman, more than their personal ambition, the ambition to be "national" leaders? Or putting it differently, can they resist the temptation to exploit their own ethnic group, the Burman, in order to boost their personal ambition?

In other words, the cardinal question is: are the Burman elites and leaders (and cadres, etc.) ready build the Pyidaungzu, or are they interested only in obtaining power, status, and wealth for themselves by exploiting their own Burman compatriots?
In 1997 the destinies of Burma and other South-east Asia countries became intertwined when Burma became a member of the Association of South-east Asian Nations (ASEAN). In terms of inter-State solidarity, this was welcomed by the governments of the region. However, in terms of democracy, human rights and the constitutional process, it was a decidedly paradoxical affair.

The paradox emanates from the fact that Burma is still governed by junta rule, a direct contradiction with aspirations of democracy. It is rife with human rights violations, a shameful travesty of international norms. It is replete with oppression and a manipulative process whereby the junta is seeking to finalise a new so-called national Constitution which flies in the face of popular participation in the constitution-drafting process.

The world may need to be reminded that the junta stole the elections from the people in 1990. It was the democratic groups that won those elections. Yet, they saw themselves deprived of the fruits of their labour. The elections themselves were preceded by massive persecution of the proponents of democracy with widespread repression in 1988. To this may be added the longstanding armed conflict between the junta and ethnic groups in Burma, such groups have been seeking self-determination since the end of Second World War. As a result, there are hundreds of thousands of internally displaced persons in Burma and a multitude of those who have crossed borders in search of safe refuge elsewhere. Thailand itself is a temporary home to over 100,000 Burmese refugees.

Face to face with South-east Asia, one of the most intriguing developments is the economic mess which has gained momentum since 1997. The economic growl of the so-called tigers has become the anaemic miaow of the Siamese cat. Millions of persons are now out of work, poverty is on the rise, the real sector is in the doldrums, migrants are being expelled, and the debt situation is gargantuan. Yet, behind the bane, there is the boon; there is a blessing in disguise.

It is a time for reform and restructuring. Without the economic maelstrom, those tigers would not be reforming their financial systems which have all too often been plagued by lack of transparency and a pervasive presence of cronynism. A major lesson from the crisis is that that economic maelstrom will not subside unless there is also political reform. Those countries which are democratic are emerging more rapidly than those
countries beset with authoritarian or undemocratic regimes. Aptly, it is the economic chaos which is the key factor pressing for political reform. In such context, it is timely to take stock of existing Constitutions and the constitution-making process.

It is worth remembering that not so long ago, most South-east Asia countries were colonised by outside powers. The Constitutions which were born at the time of the independence of these countries in the post-Second World War era tended to be a contract between the colonisers and elites who negotiated independence for their countries. They were not essentially a social contract between the State and its peoples whereby the State, particularly the Governments, would undertake to abide by the rights of the various peoples populating the land. Several of these Constitutions failed to reflect the rights of minorities and indigenous communities, thereby recognising a kind of "majoritarian absolutism". Other Constitutions were evolved by authoritarian regimes seeking to perpetuate their power without a popular base, whether among the majority or the minority. These tended to be a stranglehold exerted by various cliques to destroy or limit people-based participation.

Burma and Thailand personify those experiences poignantly. Burma's first Constitution of 1947 failed to settle the issue of the rights of ethnic communities, and this was a key factor in the escalation of armed conflicts between those groups and the Government. In 1974 another Constitution in Burma emerged after a coup d'etat staged by the military. It was obvious that such a document would be an instrument of authoritarianism. By comparison, until the 1997 Constitution of Thailand (its sixteenth), most of the previous Constitutions of Thailand had been written by military elements and their friends responsible for over 20 coups and failed coups in the country.

Yet, the tide is coming. Thailand's latest Constitution has been lauded generally as a participatory Constitution due to the drafting process which involved many members of the community and public hearings throughout the country prior to its adoption. It has a concrete section on rights and freedoms, while establishing many innovative checks and balances against undemocratic government. These include a Constitutional Court, a national Counter Corruption Commission, a national Electoral Commission and a national Human Rights Commission.

In addition, there are more guarantees for transparency, such as the obligation of cabinet ministers and their families to reveal their assets before and after taking office. The Thai public has been astounded by the wealth so far revealed (in the billions), and one newspaper has printed such wealth appropriately under the heading "The Millionaire's Club". Interestingly, many politicians' spouses are twice as rich as the politicians themselves, and often they pay no tax at all!

However, there is a bottom-line underlying the process of evolving this new Constitution for Thailand. Were it not for the economic whirlpool, the new

*The world may need to be reminded that the junta stole the elections from the people in 1990. It was the democratic groups that won those elections. Yet, they saw themselves deprived of the fruits of their labour.*
Constitution might not have been born. It was this magnetic mess which mobilised the public to seek the passage of the new Constitution as a political cure for economic ills, granted that those ills were greatly the consequence of the nexus between political misdeeds and economic mishaps. Those politicians who had previously rejected this Constitution ultimately yielded to its adoption as they did not want to be seen as countering the public sentiment or losing their credibility.

Current conditions in Burma are, of course, very different. Given the iron stamp rule of the junta, it is highly unlikely that the junta will consult the public genuinely about the possibility of a new Constitution in Burma. Whatever draft of a new Constitution it has under wraps is likely to prolong its rule and protect its impunity, while incorporating various obstacles to prevent the leaders of the democratic groups from attaining power.

For these reasons, one can and should welcome the draft of a new Constitution prepared by the democratic groups under the umbrella of the National Council of the Union of Burma. This is a constructive alternative voice based upon these tenets:

- commitment to a multi-party democratic system;
- guarantee of basic rights and freedoms;
- direct applicability of international human rights standards;
- due process of law and access to justice;
- federalism based upon respect for different ethnic groups;
- elected people's assembly;
- independent courts and a national Human Rights Commission;
- restrictions imposed on declaration of a state of emergency.

The Burmese scenario raises a variety of interlinked concerns for the birth, reform and implementation of national Constitutions in South-east Asia including the following:

(i) **Legitimacy**

The legitimate entry point for the preparation of a Constitution is the involvement of the broad mass of the population and its representatives. The junta or an unelected government is evidently illegitimate as a proponent or drafter of a national Constitution. Yet, such shameless travesty persists in South-east Asia.

(ii) **Democratic Rule of law**

This implies the need for multi-party systems, free and fair elections, Government by means of the elected representatives of the people, equality before the law, constitutional guarantees for the protection of individuals and groups.

(iii) **Process Orientation**

The process of drafting a Constitution should be very open and participatory. The process of bringing together people from all walks of life is often as important as the ultimate written text of the Constitution as it is a means of empowering and mobilising the community to feel that the Constitution belongs to them rather than being an instrument superimposed from the top.

(iv) **Human Rights**

Most Constitutions have a section on rights. However, many Constitutions in the
South-east Asia region refer to the rights of citizens or nationals rather than the rights of all persons on their territory. From the angle of human rights, it is important to reinforce the principle of non-discrimination advocating the rights of all persons rather than only the rights of citizens or nationals. In terms of human rights, it is international standards which must prevail over those national standards which are lower than the former.

(v) *Fair Constraints on Rights*

The constraints imposed on human rights are often in the form of duties or restrictions on the basis of national security or public order. Although in international law, some constraints are acceptable, they need to be fair, and these are to be measured from the angle of whether they are permissible in a democratic society. The criterion has to be what is allowed or restricted in a democracy rather than in an autocracy.

(vi) *Pluralism*

This calls into play the concerns of the plurality of peoples and communities in the country. It counters the "majoritarian absolutism" noted earlier and requires the consultation and inclusion of minorities, indigenous peoples and other groups within the territory, coupled with guarantees for their rights.

(vii) *Justiciability*

This implies that individuals and groups should be able to invoke directly in the courts the various rights and freedoms stated in the Constitution to test the validity of laws, policies and programmes linked with the Government and to seek their nullification if necessary.

(viii) *Good Governance*

This is rapidly becoming a key principle for measuring how power is exercised whether in the public or private sphere. It is inherently linked with the need for transparency and accountability (at least) of the machinery and personnel of Government, with remedies against dishonesty and redress for grievances.

(ix) *Check and Balances*

Most Constitutions refer to the various organs of Government and administration such as executive, parliamentary and judicial branches. They need to be based upon checks and balances against abuse of power. On one front, it is important to keep the military in the barracks. On another front, although there is usually a call for independence of the judiciary, this is incomplete; an honest and transparent judiciary is still an aspiration rather than a reality in many countries. Other mechanisms should be evolved to be more accessible to the people. These include national human rights commissions, ombudsmen, and administrative courts. These formal entities should also be balanced with non-formal entities such as non-governmental organisations, community leaders and the mass media so that they can act as watchdogs to monitor the formal instruments of Government.

(x) *Subsidiarity with Responsibility*

This refers, in particular, to the need to provide for decentralisation with responsibility. Many matters are best planned and implemented at the local levels,
and the localities should thus enjoy the subsidiary power to control and manage local resources. However, the localities should also be under a responsibility to be open and accountable to the electorate.

(xii) Complementary Legislation

Inevitably, the Constitution in most countries tends to provide a broad framework which needs to be supported by subsequent laws providing more details for operations. In some countries, the latter are known as organic laws. They may also be linked with delegated legislation giving powers to various authorities to evolve a sub-set of rules and regulations particularly for the administration of government. It is imperative that these subsequent laws be consistent with the spirit of the Constitution and the community should be on guard against the powers-that-be that sometimes seek to dilute the substance of the Constitution by means of other laws. However, by contrast, one may note that in those cases where the Constitution is itself undemocratic, the saving grace may be to bypass the Constitution by evolving other laws such as a Criminal Code or Criminal Procedure Code which is more in keeping with international standards than the Constitution intends to be. The ultimate test is complementarity of the national Constitution and other laws when tested against international standards.

(xii) Popular Participation

This is axiomatic and need to be integrated and mainstreamed into all laws, policies, programmes and practices. While much related to national elections and Government, it also pertains to other walks of life, including the localities, communities and families. It demands more public hearings prior to decision-making concerning actions which may affect the livelihood of communities. It calls for more public inquiries and remedies if there are infringements of people’s interests. It is interrelated with particular attention for vulnerable groups, including women, children, the elderly and those with disabilities.

These yardsticks are essential for the evolution of all Constitutions. They are particularly pertinent today to the Constitution-making process and democratisation of South-east Asia precisely because the region is still faced with vestiges of undemocratic rule and antiquated Constitutions and/or those superimposed by vested interests. As this year is the 50th anniversary of the Universal Declaration of Human Rights, that great global Charter of our rights adopted by the United Nations half a century ago, it is time to turn over a new leaf. The tree of life ultimately depends upon democracy, human rights, people-based sustainable development, peaceful prevention and settlement of disputes, and environmental protection. The greener pastures will only grow with the cross-fertilisation of people-based solidarity.

*Vitit Muntarbhorn is a Professor at the Faculty of Law, Chulalongkorn. He was formerly UN Special Rapporteur on the Sale of Children. This article is based on the keynote speech which he delivered at the Seminar on the Democratisation, Peace and Economic Development and Burma’s Future, held in Bangkok (5-6 June, 1998).
Convening the People's Assembly:  
A Legal Analysis

By Burma Lawyers' Council

According to Burma's two supposedly superseded constitutions, that of 1947 and 1974, the Pyithu Hluttaw (the People's Assembly) is the body charged with exercising State power. The 1989 Pyithu Hluttaw Election Law (called the Election Law), under which the 1990 elections were conducted, also provides that the duty of representatives elected in accordance with the Election Law is to form the Pyithu Hluttaw (Section 3).

The ruling military junta, the people of Burma and the international community acknowledged without qualification that the May 1990 general election was free, fair and lawful. It then follows that those representatives elected by the people in the 1990 election have the lawful right to form a Pyithu Hluttaw that exercises legislative power and appoints a government in accordance with the legal norms of Burma.

Order No. 1/90 entitled “Convening the People's Assembly”

Before the elections, the ruling military junta gave public undertakings, verbal and written, that they would transfer power to the elected representatives who would also prepare a new constitution. The military junta said unequivocally that this was not the business of the military junta. The ruling military understood that the People’s Assembly had to be convened without a constitution. All the military junta had to do was to transfer power to the elected representatives.

In an attempt to delay the transfer of power, the SLORC military junta issued Order No. 1/90 that defined the duty of the elected people's representatives as being to draft a constitution. The SLORC provided in paragraph 12 of Order No.1/90 that the People's Assembly would be convened in accordance with Section 3 of the Election Law. There were no grounds for the SLORC/SPDC to deny the convening of the People's Assembly.
People's Assembly needed to draft and adopt constitution

Some work has been done in the proceedings of the National Convention. But those proceedings were themselves flawed by the unrepresentative character of the Convention and its other features relating to its mandate and restrictive procedures.

Judge Rajsoomer Lallah

The National Convention's stated aim was to lay down basic principles, not detailed provisions, for the new constitution that will be drafted and adopted by the Pyithu Hluttaw or People's Assembly. The National Convention itself has no right either to draft or to adopt the constitution. Judge Rajsoomer Lallah, UN Special Rapporteur on Burma, in his 1996 report to the UN General Assembly, recommended that the drafting and adoption of a new constitution be left with the People's Assembly that has the people's mandate. He also stated that making detailed provisions is outside the power of the National Convention, as its duty is to lay down only basic guidelines for the constitution. His comments reinforce the fact that only the People's Assembly has this power. Only 15 of the 485 elected people's representatives continue to participate in the National Convention. SLORC/SPDC can continue to obfuscate, but the fact that it is the right of the elected people's representatives to draft a constitution, restated in SLORC Order No. 1/90, is unalterable.

Actions taken to prevent the convening of the People's Assembly: Question of legality

On several occasions SLORC/SPDC has made it clear that they exercise state power under martial law. This was explicitly stated in Order No. 1/90, where the SLORC declared that the military junta alone exercises all state powers - specifically legislative, executive and judicial.

In early August 1998, the military junta forbade many elected people's representatives, mostly NLD members, from travelling. They invoked the 1961 Restriction and Bond Act in an attempt to deter the MPs from participating in the People's Assembly. This law has been misappropriated by the SPDC for their own political purposes. Restriction of travel of the people's representatives is unlawful. In a report issued in late May 1998, the All Burma Student's Democratic Front (ABSDF) reported that up to 66 people's representatives have been dismissed, up to 42 were under detention and more than 46 had been forced to resign. Almost all are NLD members.

SLORC/SPDC allege that the action taken against the elected MPs results from their criminal activity, but all the matters arise out of the members' lawful participation in the political process.
In August-September of 1998 when the NLD challenged the SPDC to facilitate the convening of the People's Assembly, the SPDC responded with threats and the detention of over two hundred elected representatives. Many were arrested without charge, or trial. Some went to gaol and others were held at 'guest houses'.

The above actions were also based on laws that imported retrospectivity. One such law is the Law Amending the Pyithu Hluttaw Election Law (Amending Election Law). Although promulgated on 10 July 1991 (26 months after the original Election Law was adopted) its stated purpose is to give retrospective effect to the changes. Section 2 states "This law shall be deemed to have come into force with effect from 31 May, 1989, the date on which the Pyithu Hluttaw Election Law was enacted". It was conceived as a way of the military junta appearing to do things legally and designed "lawfully" to force elected MPs to resign their elected positions. Many of those who have been the target of such action are banned from standing in any election in future. Such action is totally against the UN recognised human rights standards that guarantee political rights of everybody especially the 1976 International Covenant on Civil and Political Rights.

It is the legal right of those elected as people's representatives to convene the People's Assembly as mandated by the people in the 1990 elections. Those who prevent the people's representatives from carrying out the wishes of the people thus condemn themselves in the eyes of the world.

Despite the lapse of nine years since the 1990 elections, the terms of office of the Members of Parliament (MPs) have not yet commenced. Their terms will only commence when the first session of the People's Assembly is convened according to Burmese legal norms. Burma's MPs remain "MPs-elect" who have the responsibility of implementing the people's mandate including the drafting and approving of a State constitution.

**Authority by coercion and authority by recognition of the people**

Authority by coercion exists in Burma under the military rulers. Authority by coercion cannot constitute a legitimate authority and it will cease to exist when the people denounce it as illegitimate. A good illustration of this can be found in the Philippines during the People Power movement of 1986. The Filipino people refused to recognise the claim of Ferdinand Marcos, who used coercive means to rule the country as President. The Filipino people shifted their recognition to Mrs. Corazon C. Aquino who led a provisional government. The people of the Philippines recognised Mrs. Aquino's provisional government as their government. Mrs. Aquino enjoyed legitimate authority in Philippines as the people recognised it as legitimate. Marcos and his
administration were accordingly overthrown.

Burmese people must similarly make the decision about which authority - the SPDC or an emergency session of the People's Assembly - is legitimate.
Firstly we pray that the citizens of Burma are well and prosperous. We send our greetings that you are filled with integrity.

The military authority, who seized power, pledged in its Notification No. 1/88 that it was bound by four great responsibilities. The fourth of these responsibilities was "To hold a multiparty general election".

The military authorities, in the absence of a Constitution, enacted the Pyithu Hluttaw Election Law and the Pyithu Hluttaw Election Rules. These laws remain in force and have not been superseded by any other law.

The Pyithu Hluttaw Election Law provides:

Section 2(a),
"Hluttaw means the Pyithu Hluttaw [i.e., People's Parliament]".

Section 2(d),
"Election means multiparty democratic general election". This provision indicates that the representatives to the People's Parliament are to be elected by the people.

Section 2(f),
"Hluttaw representative means a person who has been elected to the Hluttaw".

Section 3,
"The Hluttaw shall be formed with the Hluttaw representatives who have been elected in accordance with this Law from the Hluttaw constituencies". This provision indicates that the Hluttaw representatives are to immediately convene the People's Parliament following the general elections.

The above provisions amount to promises to the people and are binding on the military authorities. These laws were accepted in good faith and relied upon by the people, the election candidates and political parties.
As a result, 2209 candidates from 93 political parties, including the National League for Democracy, and a further 87 independent candidates contested the May 1990 general elections. Representatives to the People's Parliament were elected by the people according to the principle of "Sovereignty flows from the people" and were authorised by the people to govern the country on their behalf.

Over eight years have now passed since the general elections were held and the military authorities have failed to comply with their own laws and promises. This failure is an insult and ignores the will of the people. It amounts to a black mark in the political history of Burma. The will of the people must be respected for the peace, stability and prosperity of the country.

The United Nations General Assembly has on many occasions noted that there has been no progress in the implementation of the 1990 election result. As a member of the United Nations, Burma is obliged to abide by the election result.

There can be no harm in convening the People's Parliament. It can only benefit the country. The convening of the People's Parliament will be an honour for the people and bring integrity to the country.

The National League for Democracy competed in the 1990 general elections and received the overwhelming support of the people. It has a responsibility to the nation to convene the People's Parliament. For eight years the NLD has informed the military authorities of its responsibilities to the people within a framework of national reconciliation and the peace and stability of the country. The NLD is seeking to overcome the general hardships of the people through peaceful political means and not by the use of arms.

Political parties, elected representatives to the People's Parliament and the people are waiting for the convening of the People's Parliament according to Pyithu Hluttaw Election Law. The assumption of the administration of the country by representatives to the People's Parliament will re-establish the principle of democratic governance.

The main responsibility of the People's Parliament is to enact laws for the benefit of the country and the people.

A general election is an expression of the will of the people. The military authorities must respect the will of the people by complying with the laws they have made.

The people entrusted their representatives to the People's Parliament, from the NLD and other political parties, to convene the People's Parliament. Each representative must accept and implement this responsibility. Likewise, the people should support the representatives they have elected to govern the country on their behalf.

The National League for Democracy believes that the dignity of the nation is dependent upon the convening of the People's Parliament in accordance with democratic principles in the near future.

The National League for Democracy appeals to all nationalities, classes, professionals and people to support its elected representatives to the People's Parliament and for the
convening of the People's Parliament with persistence, courage, good intention and love.

Rangoon
August 18, 1998
The Committee Representing the People's Parliament held a meeting on 28 September 1998 and made the following decisions.

The Committee Representing the People's Parliament agreed to recommend that the Parliament adopt the following laws:

- Political Parties Registration Law (State Law and Order Restoration Council Law No. 4/88).
- Associations Law (State Law and Order Restoration Council Law No. 6/88).
- With the exception of the rulings which do not conform to democratic rules of procedure, the Pyithu Hluttaw Election Law (State Law and Order Restoration Council Law No. 14/89).

The Committee Representing the People's Parliament agreed to recommend that the People's Parliament ratify Burma's signing of the Convention on the Rights of the Child, which was passed by the United Nations General Assembly on 20 November 1989.

The Committee Representing the People's Parliament recommends that the People's Parliament repeal the following laws:

- The 1950 Emergency Provisions Act, including section 5. The law is excessively cited and illegally used to persecute the people, particularly the politicians.
- The Law Protecting the State from the dangers of Subversive Elements, which revolves around section 10, an article used to illegally persecute the people, particularly the politicians.

The Committee Representing the People's Parliament agrees to review and revise, if necessary, the existing laws so that they adequately safeguard the security and stability of the nation without encroaching upon the basic rights of the people.
The Committee Representing the People's Parliament agreed to submit the following laws to the People's Parliament to be reviewed and considered for revision:

- The Pyithu Hluttaw Election Law and Rules,
- Laws regulating regional democratic administration,
- The Citizen's Rights Protection Law.
- The Universities Act.
- Sections 8 and 12 of the Village Act concerning the conscription of people for forced labour purposes.

Statement No. 3 – 2 October 1998

To inform the people, Sections 8 and 12 of The Village Act, as referred to in the Statement no. 2 dated 28 September 1998, are reproduced below:

Section (8)
The General Duties of the Chairman and Members of the Village Council

The Council Chairman and each member of the Council shall be bound to perform the following public duties, namely:

- To investigate every offence respecting which he is required by section 7 to communicate information.
- To search for and arrest any person whom he has reason to believe to have been concerned in the commission or attempted commission of any such offence, and to recover, if possible, any property taken by any such person.
- To arrest any person found lurking within the limits of the village tract who cannot give a satisfactory account of himself.
- To forward, as soon as may be, to the nearest police-station any person arrested by him or made over to his custody, together with any weapon or other article likely to be useful as evidence.
- To resist any unlawful attack made upon any village within the village tract.
- To take such measures and to execute such works for the protection of the villages within his tract and for keeping open the communications between them and for the maintenance of the water supply as the Township Council may direct.
- To collect and furnish, upon receipt of payment for the same at such rates as the Township Council may fix, guides, messengers, porters, supplies of food, carriage and means of transport for any troops or police posted in or near or marching through the village tract or for any servant of the Government travelling on duty; provided that no Council Chairman or member shall requisition for personal service any resident of such village-tract who is not of the labouring class and accustomed to do such work as may be required.
- xxxxxxxx
- To assist the Land Committee in collecting land revenue and other money due
to the Government from residents of the village-tract or persons holding land therein.

- If so ordered, and in accordance with such rules as may be made in this behalf, to register all birth and deaths which take place within the village-tract, and any other vital statistics which may be prescribed by such rules.

- To superintend and control and to take such measures as may be prescribed in any rules made in this behalf for:
  * The prevention of public nuisances.
  * The cure or prevention of the spreading of any contagious or infectious disease among human beings or domestic animals of any kind.
  * The prevention and extinction of fires.
  * The general sanitation of the village tract.
  * The regulation of the slaughter of horned cattle, ponies, sheep, goats and swine and the sale of the flesh thereof.

- To supply to the best of his ability any local information which any magistrate, police officer or any other officer of the Government or any officer of the army, naval or air forces may require.

- To disarm any person found in possession of any weapon of the kind mentioned in section 21A while proceeding to, returning from or being present at a pwe held in the village-tract.

- Generally to assist all officers of the Government in the execution of their public duties;

- Generally to adopt such measures and do such acts as the exigency of the village may require.

Every member of the Village Council shall be bound to perform such public duties similar to those imposed on the Council Chairman by sub-section (1) as may be imposed upon him by rules made on his behalf.

Every Council Chairman shall have power to arrest any person who commits an offence punishable under section 510 of the Penal Code.

Section 12 – Penalty on villagers for failure or refusal to fulfil such duties.

If any person residing in a village-tract refuses or neglects to perform any of the public duties imposed upon him by this Act or by any rule thereunder, he shall, in the absence of reasonable excuse, the burden of proving which shall lie upon him, be liable -

(1) **********
(2) By order of the Village Council, to a fine not exceeding ten kyats or to confinement for a term not exceeding 48 hours in such a place as the Chairman of the Township Council may appoint on his behalf, or to both, or
(3) On conviction by a magistrate, to a fine not exceeding fifty kyats, or to imprisonment for a term not exceeding one month, or to both.

Note: The Village Act was enacted in 1908 and applied by the colonial authorities. The Union Socialist Republic of Burma's State Council amended this law. The State Law and Order Restoration Council and the current State Peace and Development Council
Legal Issues On Burma Journal

continue to apply this law.

Analysis of Sections 8 and 12 of the Villages Act, as referred to in Statement No. 3

The Heading of Section 8 is "The General Duties of the Chairman and Members of the Village Council". However, the people do not elect the Council Chairman and members of the Village Council. Upon the establishment of a future regional democratic administrative system, all members of the Village council are to be elected by the people of the village.

Section 8(1)(a), refers to a duty "to investigate every offence respecting which he is required by section 7 to communicate information". However these "investigations" may be conducted in an improper manner. Therefore section 8(1)(a) should refer to a duty of "inquiry" and not to a duty of "investigation".

Section 8(1)(b), refers to a duty "to search for and arrest any person whom he has reason to believe to have been concerned in the commission or attempted commission of any such offence, and to recover, if possible, any property taken by any such person". The use of the words "reason to believe" is unsatisfactory and may lead to an abuse of power if there is no reasonable basis for holding such a belief.

Section 8(1)(c), refers to a duty "to arrest any person found lurking within the limits of the village tract who cannot give a satisfactory account of himself". This provision implies that such a person has been involved in the commission of criminal offences and is seeking refuge in village tract. Also, it is unclear as to whom the person must give a "satisfactory account of himself".

Section 8(1)(f), refers to certain duties "as the Township Council may direct". This phrase is too broad and the wide discretion of the authority must be limited. The Township Council is to be replaced by a democratically elected regional authority.

Section 8(1)(g) is to be repealed to end the forced labour of villagers.

The "Land Committee" referred to in section 8(1)(i) is to be elected by the people of the village.

Section 8(1)(k)(l) refers to "the prevention of public nuisances". This provision is subject to abuse by authorities and must be amended or repealed.

Section 8(1)(l) is unnecessary and should be repealed.

Section 8(n) refers to a duty "generally to assist all officers of the Government in the execution of their public duties". This provision is too vague and must be amended or repealed.

Section 8 sub-sections (2) and (3) will not be appropriate upon creation of a democratically elected regional authority.
Section 12 affects villager’s rights and is to be repealed.

Statement No. 4 – 13 October 1998

The word "mandate" politically has two meanings. The first meaning originates from the Latin word "mandare". It has the meaning of "a command from a superior to a subordinate ordering him how to act". The second originates from the French word "mandat" which means, "permission to govern according to declared policies, regarded as officially granted by the electorate to a particular party or a leader upon a decisive outcome of an election".

According to this second meaning, a mandate is given to a party by the electorate in multiparty democratic general elections, to implement the policies and programs it has announced prior to the elections.

In Burma, throughout the era of the Burma Socialist Program Party (BSPP), representatives to the People's Assembly were elected on behalf of the BSPP and were required to support the policies of the BSPP. If a representative was no longer required by the BSPP they would be forced to resign from the People's Assembly.

A mandate implies an obligation on a political party to implement its promises to the electorate, if elected to the People's Parliament.

The National League for Democracy (NLD) campaigned in the 1990 general elections on a platform to end the dictatorship by the military and to establish a democracy. The people elected NLD candidates in 392 out of the 485 seats in the People's Parliament and granted the NLD a clear mandate to implement its policies. The elected NLD members of the Peoples Assembly, being unable to personally attend the Peoples Parliament, authorised the Central Committee of the NLD to act on their behalf to pursue these policies.

The NLD's Central Committee, as authorised by the elected members of the People's Parliament, calls on the State Peace and Development Council to convene the People's Parliament. The NLD notes that Article 47 of the 1974 Constitution, which still applies, provides that "the State Council shall, at the request of 34% of the total number of the parliament's representatives, convene parliament at the earliest opportunity". A total of 251 representatives of the People's Parliament, which is over 34% of the total representation of the People's Parliament, have authorised the NLD's Central Committee to act on their behalf.

As the authorities do not respect and honour the law, the National League for Democracy must convene the People's Parliament. The State Peace and Development Council will be held responsible for its failure to convene the People's Parliament.
In Statement No. 2 dated 28 September 1998 the Committee Representing the People's Parliament Elected at the 1990 Multiparty General Election made the following announcement:

"The Committee Representing the People's Parliament agreed to submit the following laws to the People's Parliament to be reviewed and considered for revision: ... (c) The Citizens Rights Protection Law."

The Citizens Rights Protection Law was enacted during the era of the Burma Socialist Program Party.

Since the protection of the rights of citizens is the duty of every state and country, it is resolved that every citizen should enjoy the rights provided in the constitution and the existing laws.

The state has a duty to protect such legal benefiting rights. Apart from the Introduction, Section 1 of Chapter 1 and Sections 2 and 3 of Chapter 2 it is resolved to repeal all other provisions of The Citizens Rights Protection Law as they are no longer appropriate.

Laws that are fundamental to the protection of the rights of citizens and are necessary for the creation of a genuine democratic system are embodied in the following writs: (1) Habeas Corpus, (2) Mandamus, (3) Prohibition, (4) Quo Warranto, and (5) Certiorari. It is therefore resolved to present these writs to the People's Parliament for their inclusion into the law of Burma.

For a better understanding of these writs by the people, it is resolved to annex their meanings and an explanation to this statement.

Annexure - Writs

**Habeas Corpus**

Habeas Corpus is an order summoning an authority to appear before a judge or a court for the purpose of examining if the restraint of a person is in accordance with the law.

In other words, it allows for the investigation by a court of the alleged illegal detention or restraint of a person.

The main purpose of an application to the Supreme Court of the Union for a writ of habeas corpus is that it enables the court to order an authority responsible for the arrest and detention of a citizen to appear before the court and to explain why and under what provisions of the law the arrest and detention was made.
If the Supreme Court has original jurisdiction, a relative of a detained citizen may make the application for a writ of Habeas Corpus.

**Mandamus**

A writ of mandamus is an order that relates to the performance of legal duties and is issued to lower courts or to persons responsible for the performance of that duty.

In other words, it is the order given by the Supreme Court to an authority or to a lower court to perform a specific legal duty relating to public matters.

If the People's Parliament or a state or divisional parliament or other governmental body fails to perform a duty that is required by law, a citizen can make an application for the issue of such a writ.

**Prohibition**

A writ of prohibition is intended to apply to administrative bodies over which the Supreme Court has no jurisdiction or any individual that makes a decision or passes an order without the authority to do so and which adversely affects the rights of a citizen. The administrative body or individual are prohibited, by the writ, from implementing such orders.

The writ of prohibition prevents the abuse of power by a lower court. In other words, it is an application to prohibit and correct abuses of power that have already been committed.

**Quo Warranto**

The writ of Quo Warranto is an application to examine matters related to the appointment or election of a certain person to determine under which authority he or she is acting.

It is a procedure to protect an infringement of a citizen's rights by the correction of an abuse of power by a person in authority.

**Certiorari**

The writ of certiorari is an order calling for the transcript of a case in a lower court for its review by a superior court.

The Supreme Court has the power to call for the proceedings of any lower court and to examine if its ruling was in accordance with the law and to review and alter any wrong decision. A lower court may fail to exercise its jurisdiction or attempt to exceed its jurisdiction either through a loss of memory or a misinterpretation of the law. In such cases, the Supreme Court may issue a writ of certiorari.

In addition to the courts, other quasi-judicial bodies, government officials and
others who are empowered to act in matters affecting the rights of citizens must be subject to the supervisory jurisdiction of the Supreme Court. This is also exercised by way of the writ of certiorari.

Statement No 7 – 8 December 1998

1. The meeting of the Committee Representing People's Parliament held on the 8 December 1998 was attended by:

   U Aung Shwe                      Chairman (MP, Mayangone township No: 1, Rangoon Division)
   U Aye Thar Aung                Secretary (Representative of Shan National League for Democracy, Arakan League for Democracy, Mon National Democratic Front, Zome National Congress)
   U Than Tun                         Secretary (MP, Thaungthar township No: 2, Mandalay Division)

And the following members:

   U Tin Oo                             Deputy Chairman, National League for Democracy
   Daw Aung San Suu Kyi       General Secretary, National League for Democracy
   U Lwin                                MP, Thongwa township No: 1, Rangoon Division
   U Hla Pe                              MP, Moulmeingyun township No: 2, Irrawaddy Division
   U Soe Myint                        MP, South Okkalapa township No: 1, Rangoon Division
   U Lun Tin                           MP, Moulmein township No: 1, Mon State
   U Nyunt Wei                       MP, Taungoo township No: 2, Pegu Division

2. The committee passed the following resolutions:

   Resolution Number 1: Formation of parliamentary committees

   (Note: When parliament is convened, the membership of the committees is subject to appropriate review after consultation with the members through the Speaker of the House.) For the purpose of attending to affairs that are the responsibility of parliament, the chairman or secretary or both of these committees will function to the best of their ability. These committees will operate until such time as parliament is convened.

   (a) Committee for the Ethnic Nationalities Affairs
       U Aye Thar Aung                Chairman
       Daw Aung San Suu Kyi       Secretary
   
   When parliament is convened there will be consultation with MPs of the States and this committee will be reconstituted or other members included.

   (b) Committee for Finance/ Economy/ Commerce
Resolution Number 2:

In conformity with democratic principles the people in whom sovereign power resides, freely and fairly elected their representatives from the respective political parties. The removing, restraining, forcing resignations, holding in custody and imprisoning in jail of these people's representatives is vehemently condemned. We emphatically demand that they be released immediately and unconditionally for the observance of the rule of law.

Resolution Number 3:

In 1998, subsequent to the lawful request by the National League for Democracy and the political parties from the other ethnic groups for the convening of parliament the authorities who assumed state power commenced arresting, holding in custody, and imprisoning parliamentarians from all political parties. These operations amount to destroying the outcome of the free and fair multi-party democratic elections held in 1990. We vigorously disapprove and condemn these actions which makes a shameful precedent for any country. A very big misdeed.
Resolution Number 4:

In the matter of the convening of Parliament: It was resolved that the imprisonment of parliamentarians and others by the authorities and making it known that they would be released if and when the Committee representing People's Parliament is dissolved is tantamount to a crime wherein the imprisoned are being held as hostages.

Resolution Number 5:

The courage and sacrifices made by the men and women of all the political parties who are now being held and persecuted in devious ways are standing firm with persistence for democracy and human rights out of their personal convictions is deeply appreciated by this committee. They will be honoured and will have a place in the annals of our history.

Resolution Number 6:

The unanimous decision taken at the third committee of the 53rd General Assembly of the United Nations in relation to human rights situation in Burma is a great source of encouragement to us. Paragraph 8 and 9 are of special importance.

Paragraph 8.
Strongly urges the Government of Myanmar, taking into account its assurances given at various times, to take all necessary steps towards the restoration of democracy in accordance with the will of the people as expressed in the democratic elections held in 1990 and to ensure that political parties and non-governmental organisations can function freely, and in that context notes that the National League for Democracy recently established a committee to temporarily represent the Parliament;

Paragraph 9.
Also strongly urges the Government of Myanmar to take all appropriate measures to allow all citizens to participate freely in the political process, in accordance with the principles of the Universal Declaration of Human Rights, and to accelerate the process of transition to democracy, in particular through the transfer of power to democratically elected representatives.
The Government of Burma

The Trial of 18 Foreigners

By V Joel Greer et al

It made international headlines at the time – the arrest, detention and subsequent trial of 18 foreigners in Burma. The Eighteen, 6 Americans, 3 Thais, 3 Indonesians, 3 Malaysians, 2 Filipinos and 1 Australian were convicted of "undermining the security of the union" and sentenced to five years imprisonment. Their trial provides a unique insight into Burma's legal system after 36 years of military dictatorship.

They were detained, without any formal arrest, by Burmese authorities on 9th August 1998 in Rangoon, Burma's Capital City. Twelve of the Eighteen while distributing business card sized "Goodwill Messages" and the remaining 6 members at the airport while attempting to return to Bangkok. Without any formal or informal charges or explanation for their detention, the Eighteen were held for five days under varying conditions. The Americans were well treated, the Indonesians less so. Access to their embassies was denied until the third day.

Rumours of a proposed trial filtered through to the Eighteen. The Burmese authorities were considering charges under several laws, embassy officials suspected, such as the Printers' and Publishers' Act 1962 and the State Protection Law (Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts) 1975. But no further information was available.

Finally on the 6th day, without prior notice, the trial began. Without notice of the proposed charges, or the evidence to be presented by the prosecutor, the Eighteen were unaware of the case they would be required to answer. Despite a prison guard's earlier remark "don't get a lawyer - will slow down the process – we have hundreds of witnesses", they were never given the opportunity of requesting legal assistance. The suddenness of the trial ensured they were unable even to prepare their own defence.

The prosecutor announced, at Insein Special Division Court, that Joel Greer and 17 others (the case appeared to be named after, Joel Greer, the eldest American of the Eighteen and presumed "ring leader") were charged under section 5(j) of the Emergency Provisions Act 1950 which provides:
"Whoever does anything with … the … intent … to affect the morality or conduct of the public or a group of people in anyway that would undermine the security of the Union or the restoration of law and order shall be punished …"

The case against the Eighteen was outlined to the court. A brief summary of which, and all other addresses to the court, was translated into English. The interpreter, employed by Burma’s Foreign Ministry, was familiar to the Americans as she had sat in on and listened to all discussions between the Americans and their embassy officials.

The judge sat behind a large bench draped in red on an elevated platform in what appeared to the Eighteen to be more like a schoolroom than a courtroom (though enclosed with metal fencing). Reading the charge sheet provided by the Prosecutor and its annexed documents, and Judge asked the Eighteen for any opening remarks they might have. They had none.

The State's case, as presented to the court, totalled 6 witnesses – 3 police or security officers, 2 hotel staff and 1 local SPDC official. The SPDC official testified that a Goodwill Message was handed to him by one of the Eighteen. Twelve of the Eighteen were witnessed handing out similar messages. A total of about 8,000 Goodwill Messages were distributed across Rangoon. The hotel staff, who searched the rooms and luggage of the Eighteen, claimed that a letter on NLD letterhead was found in one of the rooms (a claim denied by the Eighteen).

Following the testimony of each witness the Eighteen were given the opportunity to question the witness. "Please read the message", the court was asked. It was read aloud:

"Goodwill message - We are your friends from around the world. We have not forgotten you. We support your hopes for human rights and democracy. 8888* – Don't forget – Don't give up"

Only 12 of the Eighteen were arrested while distributing these Goodwill Messages. No evidence was presented to the court in respect of the six members detained at the airport. Only nine of the Eighteen (the 6 Americans and 3 Thais) were actually identified in any way by witnesses during the trial. Nor was any evidence presented that these messages affected the "conduct of the public" in a way that would "undermine the security of the Union". The judge appeared to take judicial notice of these requirements (i.e. accepted these facts without the need for evidence).

The judge also read the documents attached to the prosecutor's charge sheet. These documents were never disclosed to the accused or formally admitted as evidence. However it is known they included a copy of the State run newspaper, "The New Light of Myanmar". This newspaper detailed the government's accusations against the Eighteen and displayed photographs of evidence not presented to court – such as the hollow-soled shoes allegedly used by the Eighteen to smuggle the Goodwill Messages into Burma. The judge took interest in The New Light of Myanmar and spent some
time scrutinising its contents during the trial. To the Eighteen it appeared that the New Light of Myanmar was one of the judge's primary source of information about the case.

The bundle of documents attached to the charge sheet also appeared to include about 40 affidavits of witnesses to be called during the trial. These witnesses were seated behind the courtroom. Only six witnesses actually testified. The evidence of over thirty additional witnesses was free from possible cross-examination by the Eighteen.

On completion of the State's case. The Eighteen were asked to plead, "Guilty or Not Guilty – I think you say" said the judge. The Eighteen were asked to plead as a group. Most remained silent – it is unclear if any words were spoken at all. Regardless the interpreter announced "Guilty" on their behalf.

With a dubious plea in hand the judge retired to consider the penalty. The decision appeared, to the Eighteen, to have been made before the trial commenced. The judge (there being no jury) made little effort to analyse the evidence and at no time questioned the manner in which the prosecutor was presenting the evidence. In political trials, penalties (and guilt) are predetermined by higher authorities (Human Rights Yearbook 1997-98: Burma; pg. 110). No discretion is left to the judge.

The Eighteen were sentenced to "five years imprisonment to be served at Insein Prison" where hundreds of Burma's political prisoners are currently detained.

The Eighteen were asked for any comments they may have, i.e. the appeal. Not to a higher court, but to the same judge. One of the Eighteen stood and appealed on their behalf. The judge took note of his comments and retired once again.

This time the "stage" was cleared and "Act Two", as one of the Eighteen described the scene, commenced. A new bench was set up now draped in white. Three new officials sat at the bench. One of the officials stood and announced that the Eighteen were to be pardoned. However, if the Eighteen were arrested a second time, the original sentence would be added to the new sentence. Each person was then asked to sign a statement in Burmese, without translation, (presumably on the conditions of their release) and flown out of Rangoon the next day.

In 8 hours the Eighteen were charged, tried, convicted and pardoned. Their experience provides a frightening example of the legal system faced by the people of Burma, whose trials are not scrutinised by foreign embassies and media. It demonstrates that there can be no rule of law without democracy.
An Urgent Need for Judicial Reform in Burma

By Burma Lawyers' Council

The fact that the Burmese military junta is ready to destroy the country's judicial system if necessary to prolong its hold on power has been confirmed again by the mass removal of Supreme Court judges on 14 November 1998. Burma's judicial system has posted its worst situation during the reign of the present military junta, the State Peace and Development Council (SPDC), formerly known as the State Law and Order Restoration Council (SLORC). The junta has been using the judicial system as a tool to protect its power and eliminate the democratic opposition movement.

"Legal warfare"

In fact, the recent reshuffle of Supreme Court judges is a direct effect of the "legal warfare" employed by the Committee Representing the People's Parliament ("Representative Committee") formed by the National League for Democracy (NLD) and alliance parties. The committee was formed after a mass government crackdown following the NLD's announcement of its plan to convene a People's Assembly. The Representative Committee is to function as a legislature until the People's Assembly is convened.

The first action taken by the Representative Committee, immediately after its formation on 16 September 1998, was to publicize relevant legal issues. The committee has issued declarations, known nation-wide, stating that laws promulgated by the SLORC/SPDC after 1988 are of no effect until ratified by the People's Assembly. The Representative Committee also repealed a series of repressive laws.

Previously, the NLD, which was mandated by the people in the 1990 elections to govern the country, had made it clear that many of the maneuvers by SLORC/SPDC were not in accordance even with the laws the junta had itself promulgated, including its failure to respect the Election Law.

The NLD also pointed out that some of the regime's laws operate retrospectively, so that people who were innocent of any offence under the original law could later be declared to be guilty of an offence. The best example of this is the Law Amending the Election Law. This legislation enjoys retrospective effect and was promulgated only two years after the adoption of the original 1989 Election Law, under which the 1990 elections were held. Many elected people's representatives have been prosecuted under this law, and some have been banned from standing in future elections.
After the massive defeat by the junta in the 1990 elections, it issued Order 1/90, which declared that the elected representatives were merely entitled to draft a constitution. In this way the junta sought to create legal justification for not handing over power. Law No. 5/96 limits the scope of Order 1/90, prohibiting the right to draft a state constitution outside the military-controlled drafting process. The NLD has pointed out the conflict between these laws, and has stated that it will not comply with such laws.

In July of this year the NLD lodged a complaint with the Supreme Court against SPDC members at local levels about their illegal deterrence of NLD members, including elected representatives, from travelling outside their home towns. The intention of the party's leaders was to expose the lack of independence of the judiciary, which is controlled by the junta.

Control of judicial independence by the Military Intelligence Service

There have been examples of Military Intelligence Service (MIS) officers, known as the brains of the present military junta, forcing judges at all levels to over-punish democracy activists. The arrest of a student a few months ago for discussing his ideas about the future constitution is one obvious example of how the MIS, on behalf of the government, has destroyed the independent role of the judges. The student argued in court that the expression of his ideas was in conformity with government policy, printed in the daily government newspapers. This policy states that "the emergence of a state constitution is the duty [sic] of all citizens." However, the MIS officials who monitored the trial process forced the judges to sentence him to seven years imprisonment.

The use of legal warfare by the NLD and the Representative Committee has at least damaged the unity of the judges. Some judges want to perform their tasks as legal professionals while others bow to pressure from the MIS so as to retain their appointments. Burmese opposition groups in exile have stated that they have received reports that the MIS is interfering with judicial discretion, especially in politically motivated cases. The Supreme Court judges were among those who suffered from pressure from the MIS.

The removal of five out of six judges in the Supreme Court led observers to understand that the military junta has no tolerance for independent judges. In fact the situation is even worse than international observers realise, as the removal of judges at lower levels is unknown to the international community.

It is notable that Supreme Court Chief Justice U Aung Toe is the only incumbent after the recent removals. U Aung Toe is a member of the Convening Committee for the National Convention that has been drafting a state constitution since January 1993. U Aung Toe, also a member of the recently-formed Political Affairs Committee headed by MIS chief and SPDC Secretary-1 Khin Nyunt, is known to play a crucial role in legalizing the political maneuvers of the junta.
Due process of law versus Mafia State

In addition to the lack of judicial independence, due process is not observed in the legal system generally. While the lack of due process makes the democratization process difficult, it will also have a serious affect on the business sector. Businesses laundering money, and those run by drug-lords, are now legalized in Burma. Many of these extend beyond Burma's borders. Many observers have pointed out the involvement of the Burmese military in drug trafficking. The lack of due process means that some multinational investors in Burma are not required to meet employment standards existing in countries where due process of law prevails. If due process of law is not restored soon, no one can guarantee that Burma will not become a land of state-sponsored Mafia business.

Going against regional trends

It is also important to understand that the Burmese military junta is leading the country in a different direction from that of the region, where judicial reform is being loudly called for. It is in the interests of Malaysians who are concerned with the arrest and trial of Mr. Anwar Ibrahim to push the government for judicial reform that will guarantee individual rights of all citizens. In fact, the judicial system in Malaysia is already much better than that of Burma. By agreeing to investigate the wealth and corrupt practices of former president Suharto, the Indonesian government has been forced to take some steps towards judicial reform.

Burma's close relationship with these two countries demonstrates the junta's desire to copy the social, political, economic and judicial systems operating in those countries. The Burmese military junta supported the so-called Asian Value advanced by Dr. Mahathir, a highly arguable and controversial sentiment at the international as well as the regional level. While Indonesians are expressing dissatisfaction with their authoritarian system of government, the Burmese military junta still dares to copy the Indonesian model of an authoritarian presidential system.

Many observers are expecting that the crises in Indonesia and Malaysia must be followed by reforms in their political and judicial systems that will pay full respect to constitutionalism and democracy. By contrast, Burma, where a serious struggle for the restoration of democracy is in its 11th year, is a country moving in a different direction from the common democratic trend in the region. As a result, Burma will be the country with the most oppressive regime in the ASEAN grouping.

It has become clear that the judicial system in Burma can no longer protect the rights of citizens. Instead the judicial system has been totally converted into a tool serving the military junta. Those who want to see democratization in Burma should also give serious attention to judicial reform, the necessity for which has been shown by the NLD and the Representative Committee.