Law and Religion in Burma

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Burma was annexed by the British through the three wars in 1824-1826, 1852-1853 and 1885-1886. When colonial rule started, it was British policy (as in other British colonies) not to interfere with local religion. The British did not want to create further confrontations. If they had not adopted this policy, there would have been more uprisings and more discontent among the people. And that would have endangered the position of the British. The policy reflected the experience of the colonial administrators in the implementation of colonial rule in India in the 18th century.

The experience gained was included in the provision of the Charter of Mayor Courts granted in 1753. This Charter indicated a reservation to the native residents in the British territories in India of their laws and customs.[1] The policy was repeated in the provision of Warren Hastings' 23rd rule of 1772. It said with regard to civil rights that in cases of marriage, inheritance, caste, and other religious usages the laws of the Koran with respect to Muslims, and those of the Shaster with respect to Hindus, should be invariably adhered to.

This guideline of colonial policy was included in the Act of Settlement in 1781. The Act confirmed the preservation of the religious laws of Hindus and Muslims. It directed that all matters relating to inheritance, succession and contract were to be determined for Muslims and Hindus by their own respective laws; and where only one of the parties was a Muslim or Hindu by the laws of the defendant.

The Charter Act of 1833 referred to such laws. It declared that they should be ascertained, enacted, consolidated and amended wherever necessary. In this regard a Law Commission was established. This Commission knew that it would be unattainable to bring all people in India under the same law. Therefore the

principle of the Commission was "uniformity where you can have it, diversity where you must have it, but in all cases certainty".[2] However, the task of codification was never completed.

Provisions with respect to religion were found in most of the Acts of the several provinces of India.[3] Religious customs having the force of law were also recognized in the laws of the Punjab.[4] The policy was again put into force in the Government of India Acts of 1914 and 1935. So the preservation of laws in the area of religion was not a new concept when colonial rule began in Burma.

Law, Religion and the British

When the British further developed the administration of civil justice in Burma, Buddhist Law first appeared in section 6 of the Burma Courts Act of 1872.[5] This section made Buddhist Law the guide of the British courts in Burma, especially when they had to deal with succession, inheritance or marriage in cases where both parties were Buddhists. The section did however not apply to Buddhist laws that had been altered or abolished by legislative enactment, or to Buddhist laws that were opposed to any custom having the force of law in British Burma.

A similar provision was again made in the Burma Act of 1889. In all these Acts, however, no provisions were made with respect to other religions. This is surprising because colonial rule brought with it a large number of people from China and India. The resulting variety of religions needed accommodation in laws, but this was mentioned only briefly in the Burma Laws Act of 1898. This Act was not comprehensive but made Buddhist Law (Burmese Customary Law) a statutory, religious and non-territorial law.

The preservation of Islamic Law was not complete. Apart from the Shariat Acts, the effect of Islamic Law was to apply this only to gift in Madhya Pradesh, East and West Punjab, Ajmer-Merwara and Oudh. It was also applied as the law of the parties or of the defendant in the Mufassal of Bombay and the Courts of Rangoon. But it was not applied in the rest of Burma. Some courts in India had applied Islamic Law to gifts as the rule of justice, equity and good conscience. The Rangoon High Court held that this was an erroneous assumption. The reason for this decision was as follows: in Burma, Islamic Law was applied to gifts not as a rule of Islamic Law but as a rule of justice, equity and good conscience. There was no rule of Islamic Law to be saved by section 129 of the Transfer of Property Act, which did not operate to save a rule of justice, equity and good conscience. Therefore section 123 applied.[6]

Similarly, the preservation of Buddhist Law was not complete. As in India, not all people in Burma were Buddhists: there were also Hindus, Muslims, Portuguese and Armenian Christians, Parsees, Sikhs, Jains and Jews. The tendency of the Burmese Courts was to apply to all these groups the principles of Warren Hastings' rule, in so far as they showed a disposition to place themselves under British law.

Buddhist Law

In the case of Muslims, though there may be different schools or sects, there is still one body of Islamic Law for all Muslims. The same applies to the body of Hindu Law for all Hindus. However, "Buddhist" is a much wider term and may be somewhat misleading in the context of law, as it includes many nationalities other than Burmese. There is no Buddhist law for all Buddhists, although the Vinaya[7] has remained largely the same throughout Buddhist countries. Although this is largely concerned with the life of Buddhist monks and nuns who in practice keep aloof from worldly affairs, it would be a mistake to think of the Vinaya as nothing more than minutiae about monastic dress and monastic eating times. *Samantapasadika* (CPD 1.2, 1)[8] is the great 5th century commentary on the Vinaya, allegiance to which practically defines what it means to be a Theravada Buddhist. One third of it is devoted to the discussion of just three of the 227 rules of the Patimokkha[9], those concerning theft, murder and unlawful sex. As long as Southeast Asian authors of law texts have been interested in regulating these three activities, they have borrowed from the Vinaya.

If the Buddhist Law for those living outside the monasteries, as accepted by the Courts of Burma, was Burmese Buddhist Law[10], there is the legal question as to whether it would be obligatory on the part of the courts in Burma to apply it to Buddhists from other countries.[11] And then there is another legal question, concerning the difference between the terms *Burman* and *Burmese*. "These two English terms were used interchangeably in colonial times. It was only in 1935 when a distinction arose. 'Burman' came to be the designation of the ethnic majority and 'Burmese' that of inhabitants of the country as a whole".[12]

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Although Burmese Buddhist Law has undergone changes, the original content remained basically the same. Under British colonial rule it did not extend beyond the Buddhist people to whom it applied. Most ethnic minorities in Burma were under a separate judicial and administrative system; they had their own substantive and procedural laws in contradiction to the laws that applied elsewhere in Burma. According to the Burma Laws Act of 1898, for example, the civil, criminal and revenue administration of each of the Shan States was vested in the respective Chief of the State.[13]

British judges responsible for the administration of civil justice in Burma did not always fully understand Buddhist Law. Therefore they often used a two-volume reference work of Burmese legal treatises called "The 36 Dhammathats".[14] Sir John Jardine, the Judicial Commissioner of British Burma, researched the area of Buddhist Law even further.[15] Eventually his work proved invaluable to British judges in Burma. In his law research he found that the Buddhist law called *Manugye* was most complete. It was written in Burmese prose and was translated by the Principal Assistant to the Commissioner of Tenasserim, Richardson. It was published in 1847 in both English and Burmese versions. It was thus the first translation in English and one of the fullest compilations of Burmese Buddhist Law, existing even before the occupation of Lower Burma. In 1951, during a case before the Supreme Court, the reliability and viability of the Manugye were finally challenged. Due to errors in the translations of the Manugye, the Court had great difficulty to appraise the authority of Buddhist Law.[16]

Religious and Customary Law

When Burma was included in India as a part of the British empire, there was a question as to whether the principle of international law in relation to Buddhist Law would apply in deciding the validity of marriages between Burmese Buddhists and Muslims or Hindus. The answer was beset with difficulties, as there was no provision regarding mixed marriages in section 13 of the Burma Laws Act of 1898. The courts in Burma had been frequently called upon to decide the validity of mixed marriages, especially when questions arising from divorce or succession were involved. In fact, no marriage is legally possible between a Muslim man and a Buddhist woman or vice versa. If there is a conversion to Islam however, a legal marriage can be contracted with any person irrespective of his or her previous religion.[17] The Holy Koran permits polygamy as a legal institution: a man may have up to four wives.[18] During colonial rule in Burma, most Muslim men who could afford more than one wife took Burmese women as their wives, in addition to their Muslim wives. This did not raise any legal questions, however Burmese wives lost all rights which they had as Burmese women, such as joint ownership of property and a preferential right to inherit. The legal questions only arose when cases of divorce were brought to the courts. The Holy Koran makes no provision for wives to divorce their husbands (a right normally reserved to husbands) except when they fear abuse.[19] The Burma Laws Act of 1898, remaining in force even today, allows Islamic Law to form the rule of decision in such cases.[20]

In mixed marriages between Burmese Buddhist women and Hindus, Burmese women were in a worse position. Many Indians migrated to Burma and it often happened that Burmese women, not knowing anything about Hindu Law and

customs, married with Hindu men and subsequently lost all the rights conferred on them by Burmese customary law.

The Sikhs in Burma were governed by Hindu Law. Although the Sikh religion is a blend of Hinduism and Islam, its basic tenets are similar to those of Hinduism (however without caste distinctions).

Section 13 of the Burma Laws Act of 1898 says nothing of the law applicable to Christians, as most of their cases were regulated by British law. According to Christian Marriage Act XV of 1872, a legal marriage between a Burmese Buddhist and a Christian could be contracted either by means of a Christian religious ceremony or by civil contract before a Registrar. Under this Act, conversion was not necessary but a Buddhist could not sue a Christian for a divorce under the Indian Divorce Act.

By section 13, Burmese Customary Law became the Buddhist Law. As a result, Burmese society was divided into a number of religions as well as being geographically divided by other regulations. As the society was thus divided, communities were strongly entrenched by religion.

This situation was known to the colonial government as well as to Burmese nationalists and judges. As a result, the Special Marriage Act of 1872 was amended in 1923, making intermarriage easier. This was a step forward but still not entirely satisfactory. Hence, a new Act came into force in 1939,[21] the predecessor of the Buddhist Women's Special Marriage and Succession Act which was drafted and passed by parliament in 1954,[22] the only Special Marriage Act in Asia which protects the rights of Buddhist women. Section 21 of this Act made provisions for the registration of marriage, thereby greatly improving the position of the Buddhist woman who marries a non-Buddhist man. If a non-Buddhist man and a Buddhist woman live together in such manner as would raise the presumption that they are man and wife by Burmese custom, the Act establishes that they are lawfully married from the time they started to live together, even if there is no written document or registration. In such a case, they can formalize the marriage by registration or they can live together as presumed by the Act. Either way, their marriage is governed by Burmese Customary Law.[23]

The Buddhist Women's Special Marriage and Succession Act says the following with regard to conversion: If a woman who is a citizen of Burma converts to Buddhism while she is married, then the whole family comes under Burmese customary law.

While the different religions in Burma were given the freedom to settle affairs through their own laws, the accountability of any religious trust (not only of Buddhist monasteries and pagodas, but also of mosques, churches, synagogues

and Hindu temples) was ensured by Section 92 of the Civil Procedure Code of 1909.[24]

The Buddhist Monastic Order

Now that a lot has been said about the laws for those living outside the monasteries, it becomes interesting to consider the Buddhist monastic order (which is called *Sangha* in Pali, or *Tangha* in Burmese). This has always been a powerful institution in Burma. Already in the 19th century, a Roman Catholic bishop remarked, "When we speak of the great influence possessed by the religious Order of Buddhist monks, we do not intend to speak of political influence. It does not appear that in Burma they have ever aimed at any share in the management or direction of the affairs of the country. But from a religious point of view alone, their influence is a mighty one. Upon that very Order hinges the whole fabric of Buddhism. From it, as from a source, flows the life that maintains and invigorates religious belief in the masses that profess the creed. We may view the members of the Buddhist Order as religious, and as instructors of the people at large, and principally of youth. In that double capacity, they exercise a great control and retain a strong hold over the mind of the people".[25] This is why Burmese rulers have consistently attempted to control the Sangha, thereby not hesitating to either use or abuse the law.

At its best, the Buddhist monastic order has two main characteristics: the constant cultivation of mindfulness concerning human existence and complete accessibility to the people. Both are equally important. Social contact with and within the Sangha is essential if the ethical and spiritual values of Buddhism are to be transmitted to the surrounding society. Equally essential is the faithful practice of the contemplative life. In this way, although it is not supposed to interfere with state affairs, the Sangha assists the state in maintaining peace and prosperity, thus making it unnecessary and unethical to devise laws to bring the Sangha under state control.

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In accordance with the last words of the Buddha, the Dhamma[26] is to be the monk's only guide. A Buddhist monk has given up the world and should therefore not be active in politics. Since 1921, however, several associations of monks, with political objectives have been created to exist along with the traditional Burmese Sangha, such as the YBA[27] and the KSA[28]. The official hierarchy of the Sangha has always taken the opinion that political activity is incompatible with monastic discipline.[29]

U Nu and Freedom of Religion

Although in October 1961, under the U Nu government, a law was passed that established Buddhism as the state religion, other religions were not threatened, as their existence was guaranteed in Article 21 of the 1947 constitution. Article 21 said that, "The State recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union [of Burma]. The State also recognizes Islam, Christianity, Hinduism, and Animism as some of the religions existing in the Union at the date of coming into operation of this constitution. The State shall not impose any disabilities or make any discrimination on the ground of religious faith or belief. The abuse of religion for political purpose is forbidden (…)". At the same time, Article 20 of the 1947 constitution was amended upon the request of leaders of other religions: freedom of expression was added in terms of religious practices. The U Nu government continued its support for other religions. It even arranged visits of Burmese Christian leaders to the Vatican and Burmese Muslim leaders to Saudi Arabia.

The Monks and the Military

In 1962, when the Burmese armed forces took direct and exclusive control of the government, the 1947 constitution was abolished. The military did not support the recognition of Buddhism as the state religion, because this (together with the demands of minority leaders for federalism) was perceived as a threat to the union's very existence. Despite his reliance on Buddhist concepts and his rejection of Marxist dialectics, General Ne Win was secular in outlook. He believed that the Revolutionary Council (the name of the Burmese military government at that time) ought not to favour any particular religion. This proved difficult because of the traditional closeness of state and Sangha. Because the vast majority of Burmese people are Buddhists, the generals saw Buddhism as a useful state ideology in order to build up Burmese nationalism. Paradoxically, the Sangha was immediately seen as a threat to military rule, not only because the Sangha was so powerful and well-established, but also because it represents the Buddhist religion which in no circumstances allows the taking of life—making the whole idea of an army repugnant. The monks are still among the most active of Burma's people in the struggle for the restoration of democracy and human rights.

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The junta has never hesitated to suppress Buddhist monks who are suspected of being against military rule. Between 1963 and 1967, the Revolutionary Council issued a number of directives restricting the freedom of monks, such as, "Monks who want to travel need a Movement Order [sic] from the local mili-

tary authorities"[30], or, "Anyone who wants to become a monk needs permission to do so from the military". In April 1964, all Sangha groups were ordered to register with the government. This measure was taken in order to purge the Sangha of 'political monks'. A directive from 1971 said, "The appointment of an abbot must be countersigned by the local military committee". All these edicts remain in effect at the present in Burma. And although the 1974 constitution included several provisions relating to religious freedom, these were subject to limitations and even punishable. Article 153 of the 1974 constitution, for example, says that, "…every citizen shall have the right to freely … profess the religion of his choice. The exercise of this right shall not … be to the detriment of national solidarity and the socialist social order (…)"[31] In order to curtail religions even further, the military government has been enforcing several laws such as the Emergency Provisions Act of 1950, the Unlawful Association Act of 1908 (amended in 1957), the State Protection Act of 1975 (amended in 1991), and the Sangha Law of 1990. Accordingly the Sangha is being watched by the Burmese military intelligence agencies.

Under the Emergency Provisions Act, anyone who "…violates or infringes upon the integrity, health, conduct and respect of State military organizations and government employees towards the government, or causes or intends to spread false news about the government, or causes or intends to disrupt the morality or the behaviour of a group of people or the general public", is liable to imprisonment for up to seven years. Because he had written an article about the Buddhist tenet of non-violence, a monk from Mandalay was sentenced to three years under the Emergency Provisions Act in 1991.

Under the Unlawful Association Act of 1908, amended in 1957, "anyone who has been a member of, or contributes to, or receives or solicits any contribution towards any association … which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, …[or] which has been declared unlawful by the President of the Union [of Burma]", is liable to imprisonment for up to five years. This Act gives unrestricted power to the military government to declare any association unlawful. Because he was suspected of having had connections with the MSA (Mon Sangha Association, which claimed to desire an independent Mon state, but only in a peaceful way), a monk from Maymyo was sentenced to four years under the Unlawful Association Act in 1989.

The State Protection Act of 1975, amended in 1991, is to safeguard the State against the danger of "destructive elements", regardless of what these may be. "Any person suspected of having committed, or is about to commit, any act which endangers the … security of the state or public peace and tranquility, can be kept in detention without trial for a period of up to five years by executive order". This Act, being vague and over-broad, and excluding the appeal to review detention, has not only been used against the Sangha but also against Mus-

lims and Christians. Hundreds of thousands of Muslims living in Arakan and Karen states are suffering from military suppression. The military regime believes that the Muslims, like the Christians living in the mountainous Chin, Kachin, Kayah and Karen states, are supporters of the ethnic insurgency movements.[32] This belief fuels their suppression.

In addition to the aforementioned laws, the military government enforces the Village Act of 1908 and the Towns Act of 1907, two pre-independence statutes allowing forced labour. Military officials and security forces often compel persons, especially in rural areas, to contribute money, food, or uncompensated labour to state-sponsored projects to build, maintain or renovate Buddhist monasteries and pagodas.[33] The military junta even went so far as to claim that forced labour is considered as 'a noble act of charity' in a Buddhist country.[34] This is not only a serious insult to the Buddhist religion but also a gross affront to human dignity. In August 1994, the army used the Village and Towns Acts to raid Buddhist monasteries in Mandalay, thereby relocating hundreds of monks who were forced to work at agricultural projects. Many other monks were forced to disrobe and dredge the moat at Mandalay Palace to the extension of the runway at the local airfield.

The SLORC (State Law and Order Restoration Council, the name of the Burmese military government at that time) issued Order 6/90 on 20 October 1990 dissolving "illegal" monk organizations while reiterating the primacy of the official hierarchical Sangha organization formed since 1980. It was followed by Order 7/90 on the next day, declaring that any monk or novice who contravened regulations against non-religious activities would be dissociated from the Sangha and would be liable for prosecution; and authorizing military commanders to try Buddhist clergy before military tribunals for "activities inconsistent with and detrimental to Buddhism". The following day security forces raided over 130 monasteries in Mandalay. Those deemed to have contravened the law were arrested, and unethical and illicit activities of the "robed persons" (in the eyes of the military, they no longer qualified as "monks") were exposed to the public in a media campaign in the following days.

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The Sangha Law

In a move to further consolidate such actions against the Sangha, SLORC Law 20/90, also called the Law Concerning Sangha Organizations or *Sangha Law*, was put into force on 31 October 1990. This law is clearly an intrusion of the state in Sangha affairs. Subsequently, more than 200 monks and novices were found to be guilty of contravening these rules and regulations and were stripped of their monkhood.[35] Here the 18 articles of the Sangha Law are given, together

with some remarks.

Article 1 of the Sangha Law gives its full name in Burmese: "Tangha Ahpwe Aseewe Sainya Upedeih" (Law Concerning Sangha Organizations).

Article 2 of the Sangha Law explains the terms Theravada[36] and Sangha, and sees the regulations of the Sangha as laid down by the General Assembly of the Sangha.

Article 3 of the Sangha Law says, "There shall be only one Sangha organization, embracing all the Buddhist sects [sic] according to the rules". Some remarks: In each of the seven states and seven divisions of Burma, a group of 120 Sayadaws[37] choose the eventual members of the Sammuti Sangha Council that is consisting of 1,400 monks. This Council, also called the General Assembly, represents the entire Sangha of Burma. From this Council, 300 monks are chosen by means of consensus, and from among them, the 47 members of the Sangha Maha Nayaka[38] State Council are elected. The Supreme Patriarch of Burma is the chairman of this state council. This is considered Burma's highest advisory committee for religious affairs. The Burmese Sangha consists of nine Nikayas (branches), of which the Thudhamma and the Shwegyin Nikaya are the largest. The others are the Weiluwun Nikaya, Dhammanudhamma Mahadwaya Nikaya, Dhammavinayanuloma Muladwaya Nikaya, Dhammayuttika Nikaya Mahayin, Catubhummika Mahasatipatthana Hngettwin, Ganavimut Gado and the Anaukchaung Dwaya. Article 3 of the Sangha Law uses the word "sects", however this is not the most appropriate term for the Nikayas since the existence of different Nikayas has not resulted in the development of separate doctrines.[39] The Supreme Patriarch of the Sangha, the highest ranking monk in Burma, may come from any of these Nikayas.

Article 3 of the Sangha Law is not the first attempt of the government to interfere with the Nikayas. In 1886, the British confirmed power of jurisdiction to the Nayaka Council in Mandalay, thereby formalizing the power of the Supreme Patriarch. The Nayaka Council, not the Nikayas, got the authority to take up civil cases against monks, e.g. cases of inheritance. But in 1935, the High Court in Rangoon moved away all legal power from both the Nayaka Council and the Supreme Patriarch: even religious matters would have to be settled by a civil court. Burma's religious jurisdiction was thus deprived of its remaining importance, because the High Court did not recognize the authority of the Supreme Patriarch on the grounds that his office was not mentioned in the Vinaya.[40] In 1950, an Act was passed giving power to a Buddhist Tribunal to deal with civil cases again. All members of this tribunal had to be monks, who could come from any Nikaya. Law No. 1 of 1965, passed by the Revolutionary Council, withdrew all the powers given to the Sangha by the previous acts. The Revolu-

tionary Council found it not reasonable to base laws on Buddhist tenets. Law No. 3 of 1980 added to this that all decisions by the Sangha Maha Nayaka State Council must be submitted to Court for enforcement. Notification Letter No. 1 of 1984, issued by the military government, mentioned the Nikayas as the associations within the Sangha that should be disbanded, because "…they are politically active. Monks should not be politically active".[41] In comparison, Article 3 of the Sangha Law is rather vague with the statement "according to the rules", leaving the question unanswered whether the existence of the nine Nikayas is ruled out or not.

Article 4 of the Sangha Law says, "All monks are members of this Sangha, the Union of Burma Sangha". Some remarks: There are no other options. Article 4 makes it easy for the military government to disband the various associations of monks that are suspected of being politically active.

Article 5 of the Sangha Law says that the nine Nikayas "…are not allowed to be separate groups unless their own rules are subject to the central body of the Sangha. The nine Nikayas according to their admissions can follow the regulations subject to the regulations as laid down by the central body of the Sangha". Some remarks: This brings the various groups within the Sangha under tight government control, creating a small next step for the military government to abolish the Nikayas completely.

Article 6 of the Sangha Law says, "Any local organizations shall be within the Nikayas mentioned in Article 5". Some remarks: This means that the government says that a tenth Nikaya cannot be set up. Although according to the Vinaya there should be no attempts to create division in the Sangha, there is to a certain extent the possibility to create schools within the Sangha, when the monks consider this necessary by joint unanimous vote.[42] The Buddhist monastic order has a long history of basing major decisions on collective discourse.

As for democracy as a procedure of decision making, we find in the Buddhist tradition a strong recognition of the need for consensus. The Dalai Lama said, "The Vinaya rules of discipline that govern the behaviour and life of the Buddhist monastic community are in keeping with democratic traditions. In theory at least, even the teachings of the Buddha can be altered under certain circumstances by a congregation of a certain number of ordained monks".[43]

The rules of organization of the Sangha create a system of democracy.[44] On the occasion of the fortnightly Uposatha[45] ceremony, Sangha affairs were settled initially by the joint unanimous vote of all monks and towards the later part of the life of the Buddha by majority vote. If a matter was exceedingly complicated and the discussion deviated from the point, the question could be referred to a smaller committee. If that committee

were unable to reach a decision, it would hand the matter back to the Sangha assembly to be settled by the majority vote. Unanimous consensus or majority vote of the Sangha assembly also settled the course of action to be taken on monks who violated its regulations. Resolutions were moved and procedure decided usually by the eldest monk, but if he did not know what to do, by the most learned and competent one.[46] In this sense the monastic regulations of the Vinaya made the seating hierarchy within the Sangha dependent upon the length of service only. Decisions concerning the organization of the Sangha should be made by the Sangha, based on the Vinaya and not on laws issued by the government.

Article 7 of the Sangha Law says that the 'sects' [sic], mentioned in Article 5, have got the liberty to unite among themselves by 'consent' [sic]. Some remarks: The word 'consent' refers to giving agreement or permission. The law does not say to whom the matter should be referred in order to get permission. The word 'consensus' should have been used instead. But in spite of the fact that this is important in the Vinaya, there is no word in Burmese for 'consensus'.

Article 8 of the Sangha Law says that "…except for the sects mentioned in Article 5, no new sect shall be formed". This Article is not repeating Article 6, as that is specifically referring to local level. Article 8 is referring to national level.

Article 9 of the Sangha Law is repeating Articles 6 and 8, as it says, "Except organizations under the supervision of respective religious organizations, no other organization shall be formed [within the Sangha]".

Article 10 of the Sangha Law is dangerously vague. It says, "Nobody shall do or cause to do, nor shall they speak or write, anything which destroys or disrupts religion".

Article 11 of the Sangha Law says, "When the Sangha undertakes action that causes breach of rules, regulations or practices, the agreed party shall abide by the decisions by the Sangha Council" (not necessarily the Sangha Maha Nayaka State Council). Some remarks: This Article speaks about "rules, regulations or practices" without specifying whether these are religious, military, or otherwise.

Article 12 of the Sangha Law says, "If breaches are committed under Articles 8 or 9, and clear case of offence is made out, the violator shall undergo imprisonment of minimum six months and maximum three years".Some remarks: This Article does not mention the fact that violations of the Vinaya are first considered within the monastery.

Article 13 of the Sangha Law says, "If breaches are committed under Article 10, the violator shall be imprisoned for a minimum of six months and a maximum of three years". (Punishment is the same as in Article 12, but the nature of offence is different).

Article 14 of the Sangha Law says, "In case of breach of Article 11, the punishment shall be six months imprisonment". Some remarks: Neither Article 11 nor Article 14 is specific when it comes to the findings of the (local) Sangha Council.

Article 15 of the Sangha Law says, "If under Articles 12 or 13 a case has to be filed, only the Ministry of Home and Religious Affairs shall file the case". Some remarks: This means that the prosecutor must be an official from the Ministry of Home and Religious Affairs. In this setup, the prosecutor will of course be a military officer. Why are internal affairs and religion being put together in one ministry? It destroys the autonomy of the religious body. The Sangha Law makes the grip of the state on the Sangha very obvious: a military ministry controls the prosecution.

Article 16 of the Sangha Law says, "If under Article 14 a prosecution has to be made, the Director-General of the Department of Religious Affairs shall cause the delegated person to file a direct complaint". Some remarks: The Director-General of the Department of Religious Affairs is a military officer directly under the command of the Minister of Home and Religious Affairs, at that time Lieutenant-General Khin Nyunt.

Article 17 of the Sangha Law is very dangerous. It says, "No action or prosecution shall be taken against a public servant who bona fide carries out his duties". Some remarks: In other Articles the provision for sanctions is given, but Article 17 constitutes a blank impunity order. According to this Article, the police can enter any monastery and arrest anyone. This Article not only places the public servants above the religion, but also above the law.

Article 18 of the Sangha Law says, "The Ministry of Home and Religious Affairs, in consultation with the Sangha Maha Nayaka State Council, may enact further rules and regulations, in order that the Revolution is carried out". Some remarks: The Ministry is in consultation with the Council, but the Ministry will enact the rules of course. That turns Article 18 into a fluid area, because what is meant with "in consultation"? It does not necessarily mean that the Council would agree with the Ministry.

Religious freedom, like all other freedoms in Burma, is subject to military rule.

The Junta's Crusade

The present military regime, the State Peace and Development Council or SPDC, rules the country without a constitution. Directives and decrees form the basis for law. Religious freedom, like all other freedoms in Burma, is subject to military rule. The SPDC issued Order No. 85 that prevents any members of the National League for Democracy and other political parties from being ordained in the Sangha. The junta strictly censors all religious publications, thereby even changing some words in the Holy Bible.[47] Under SLORC Law No. 5 of 1996, anyone who commits "…an offence to instigate, protest, say, write or distribute anything which would disrupt and deteriorate the stability of the state, communal peace and tranquility, and the prevalence of law and order, … [or an offence] to affect and destroy national consolidation, … [or] to cause misunderstanding among the people", is liable to imprisonment from three months to twenty years. In 1996, a monk from Moulmein was sentenced to two years under SLORC Law No. 5, because he had distributed leaflets about *Samma-sati* ('Right Mindedness') without prior permission from the local authorities. However, the judgment did not answer the question as to how Right Mindedness can possibly lead to deterioration of the stability of the state, or to misunderstanding among the people. The military regime continues to imprison monks for efforts to speak and associate freely.

Sayadaw Ahshia Nandabo, a 66-year-old monk from Mudom township, Moulmein, had built a pagoda on a patch of ground given to the Sangha by a member of parliament of the National League for Democracy. On 6 January 2001, the monk was arrested, and on 19 January he was sentenced to ten years (under which law?) because "no prior permission had been taken from the government for the construction of the pagoda".[48] A directive from 1972 said that, "no monastery or pagoda may be built, rebuilt, renovated, or maintained without prior permission from the military authorities", which currently remains in effect. Military personnel often loot, damage, or destroy Buddhist monasteries in ethnic minority regions, thereby arresting or extra-judicially killing the monks.

The junta's crusade is part of their political interests. Although according to the regime there is religious freedom in Burma, the reality is that there is religious discrimination. The junta is suppressing Muslims and Christians in order to disperse them, while it pretends to promote Buddhism. Buddhism is promoted by the military at the expense of other religions to increase SPDC's nationalism. The generals systematically use propaganda in their attempts to falsely convince the Buddhists that the military regime is representing their interests.[49] Such is the state of Law and Religion in Burma today. Under the cloak of law, Buddhists are suppressed and the Sangha curtailed, as these are among the most active in the struggle for the restoration of democracy and human rights.

The generals systematically use propaganda in their attempts to falsely convince the Buddhists that the military regime is representing their interests.

Endnotes

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1. B.S. Sinha, "Custom and Customary Law in Indian Jurisprudence". *Indian Sino Legal Journal*, Vol. 2, 1976, p. 89.
2. Government of India, "Social Legislation: Its Role in Social Welfare". New Delhi, 1956, p. 18.
3. For example, in section 37 of the Bengal, Agra and Assam Civil Courts Act of 1887, and in section 16 of the Madras Civil Courts Act of 1873.
4. For example, sections 5 and 6 of the Punjab Laws Act of 1872.
5. This was repeated in section 4 of the Burma Courts Act of 1875.
6. For example, the case of Ma Asha vs. B.K. Haldar (1936) Indian Law Reports Vol. 14, Rangoon Series 439.
7. Code of Monastic Discipline.
8. CPD numbers, used to identify Pali texts, refer to the bibliography in "A Critical Pali Dictionary" edited by V. Trenckner. Copenhagen: Royal Danish Academy of Sciences and Letters, 1924, 1:37-69.
9. The Fundamental Rules of a Buddhist monk.
10. In 1927 the High Court at Rangoon ruled that the term "Buddhist Law" was to be interpreted as "Burmese Buddhist Law". A further ruling in 1956 stated that it was to be interpreted as "Customary Law of the Burmese Buddhists"; in 1969 this law was changed to read "Burmese Customary Law". This law does not apply to the whole Union of Burma, but only to cases involving Buddhists.
11. When the Burma Laws Act of 1898 was promulgated, British judges in Burma had difficulty in interpreting the term "Buddhist Law" and also in determining to whom the law should apply. Around 1930 however, the courts settled that also the Chinese Buddhists in Burma were to be governed by Burmese Buddhist Law.
12. According to Dr U Than Naung, in an interview with the author, 9 December 1995.
13. The same Act declared that "the punishments which may be awarded thereunder, or the practices which are permitted thereby, are in conformity with the spirit of the law in force in the rest of British Burma" (*Report on the Administration of Burma for the year 1921-22*, pp. 14-15).
14. This was an important digest of Burmese law, compiled by Kinwun Mingyi U Gaung between 1893 and 1897 for the Judicial Commissioner of Upper Burma.
15. Sir John Jardine, "Notes on Buddhist Law". Rangoon: Government Superintendent of Documents, 1953.
16. This was the case of Dr Tha Mya vs. Daw Khin Pu. (Burma Law Reports, 1951).
17. Hidayatullah, M. and A., "Mulla's Principles of Mahomedan Law", 19th Edition. Bombay: N.M. Tripathi Ltd., 1990, p. 224.
18. The Holy Koran, 4:3.
19. The Holy Koran, 4:128. (However, "The Burma Code", Vol. XI, p. 25 (Act No. 14 of 1953, still in effect today) regulates the divorce of Muslim women

contrary to Islamic Law under certain conditions, "…without prejudice to any basic tenet of Islam". Mr. B.K. Sen, Advocate, was confronted with a case under Act No. 14 before the Rangoon District Court).

20. "The Burma Code", Vol. I, Officially Published under the Authority of the Government of the Union of Burma, 1955, p. 9 (Article 13, Section 3).
21. Act No. 24 of 1939.
22. Act No. 32 of 1954.
23. Mr. B.K. Sen, Advocate, Burma Lawyers' Council; personal communication with the author, 6 April 2001.
24. This was repealed by Burma Act IV, 1944.
25. P. Bigandet, "The Life, or Legend of Gaudama The Buddha of the Burmese". Rangoon, 1866, p. 523.
26. *Dhamma* is a word from Pali, the ancient language which the Buddha spoke. Dhamma is generally used to denote the Law or the Teachings of the Buddha.
27. Yahan Byo Ahpwe, or Young Monks' Association, formed in 1938.
28. Kyaungtaik Sayadaw Ahpwe, or Presiding Sayadaws' Association, formed in 1948.
29. For an interesting background on the organized political monks' reaction to the government's policies and actions, see: Donald E. Smith, "Religion and Politics in Burma". Princeton, New Jersey: Princeton University Press, 1965, Chapter 8; and also: Tin Maung Maung Than, "The Sangha and Sasana in Socialist Burma". *Sojourn: Social Issues in Southeast Asia*, Vol. 3, No. 1, February 1988, pp. 26-61.
30. According to Mr. B.K. Sen, personal communication with the author, 1 May 2001.
31. Khin Maung Win, "Religious Freedom in Burma: A divisive and suppressive practice of the military regime". *Legal Issues on Burma Journal*, No. 4, October 1999, p. 20.
32. According to the Reverend Cung Lian Hup, personal communication with the author, 6 June 1996.
33. "Human Rights Yearbook Burma, 1999-2000", National Coalition Government of the Union of Burma, Washington, D.C., August 2000, p. 225.
34. "Junta Leader Defends Forced Labor", United Press International, 28 April 1994.
35. Press Conference No. 107 of 7 December 1990, reported in the *Working People's Daily* (8 December 1990). The state deemed the actions of the dissident monks an attempt to divide and destroy the officially sanctioned Sangha organization.
36. *Theravada* is one of the two main schools of Buddhism, found in countries such as Sri Lanka, Burma, Thailand, Laos and Cambodia. The other main school is called *Mahayana*, found in countries such as Vietnam, Tibet and Korea.
37. *Sayadaw* is a term of respect for a monk who has spent ten years or more in the Burmese Sangha.
38. *Nayaka* is a title for the Head of a Buddhist school, or the chief monk among a group of monks.
39. Mendelson, E. Michael, "Sangha and State in Burma: A Study of Monastic Sectarianism and Leadership", edited by John P. Ferguson. Ithaca, New

40. Peter Gutter, "Between Junta and Nirvana. Buddhism in Southeast Asia: A Comparative Study". The Hague: Eurasia Group Ltd., 1997, p. 55.
41. U Mya Sein, "Customary Law", 8th Edition (in Burmese). Chapter 20, "Monks and Judiciary". Rangoon: Than Swe, 1993, pp. 383-398. Thanks to Mr. B.K. Sen for translating.
42. For a thorough account of monastic discipline, see: Vajirananavarorasa, Sangharaja, "The Entrance to the Vinaya", Vols. I & II. Bangkok: Mahamakuta Rajavidyalaya Press, 1969-1973.
43. His Holiness the Dalai Lama, "Buddhism, Asian Values, and Democracy". *Journal of Democracy*, Vol. 10, No. 1, January 1999, pp. 3-7.
44. See: D. Gokuldas, "Democracy in the early Buddhist Sangha". Calcutta: University of Calcutta, 1955.
45. *Uposatha* is the building in a Buddhist monastery where monastic ordination takes place.
46. This regulation according to *Mahâvagga* II.
47. Khin Maung Win, p. 24.
48. *Khitpyaing*, April 2001, p. 8.
49. For example, *The New Light of Myanmar*, Vol. VIII, No. 216, 18 November 2000, p. 12: "…the State Peace and Development Council is endeavouring under … the eminent Sayadaws for promotion, propagation and perpetuation of the Sasana [Buddhism]".

Toward Transition With Rule of Law

*B.K. Sen**

The new political scenario in Burma has given hope for change. The scenario relates to the current talks between the Junta and Daw Aung San Suu Kyi, the leader of the democratic opposition. The scenario is new because the past has witnessed disastrous confrontation between the two forces. The Junta stated first that they wanted the annihilation of the National League for Democracy. Now the Junta has condescended to talks. Hope for change has come because an end to the long military rule since 1962 is in sight. The end of the military rule is pregnant with the expectations of the people that there will be a beginning of the Rule of Law. The transition from authoritarianism to democracy will be ambiguous if it is not founded on interim institutional changes on issues of Rule of Law.

The Head of the Junta, in his address to the Nation on 27 March 2001, said that the Military wants to take the country to democratic change and urged all parties to reduce the conflict and work for reconciliation. He said that it is important to lay down the foundations first (whatever he meant with foundations). By accepted definition, foundation means the basic fabric of society. Society is based on social contract between the ruler and the citizens. This social contract is based on the Rule of Law. It is the pillar on which the stability of society and state rests. The Head of the Junta has to search for the meaning of Rule of Law and ways for implementing it.

In the period between 1962 and 1974, when General Ne Win ruled with his Revolutionary Council, he ingeniously created a façade of Rule of Law. The dictators are in desperate need to maintain this façade. That is the paradox: the more brutal a regime is, the more it tries to camouflage its illegality. Reform is not a destabilizing force but a revitalizing factor in civil society. To be stable, a state must be legitimate. Transition can only give legitimacy to the state. State

institutions to check abuses of power of other institutions or actors are necessary to ensure that state officials comply with law. The most important system for this is the judicial system. Ne Win maintained the judicial system and the legal system during his reign while manipulating and emasculating all institutions. In the period between 1974 and 1988, another exercise in the undermining of Rule of Law was undertaken. All the characteristics of Rule of Law were introduced by the regime which was controlled by the Burma Socialist Programme Party (BSPP). The drama of a fake referendum, a sham Constitution, a worthless Parliament, fraudulent Judiciary and everything associated with outward forms of Rule of Law was staged. Rule of Law was shorn of its core contents and a ceremonial dress was foisted on Rule of Law. Be that as it may. The generals have to understand clearly that there can be no stability unless Rule of Law is made the foundation of the governance. Reforms in law, politics and state economy generate stability. Guns failed to bring stability for half a century. The only option is reform.

Legal reform is one of the best ways and an effective instrument to restore mutual trust. It is not a pressure strategy. It is a step which the Junta took themselves as far back as July 1991, when the SLORC announced the formation of a nine-member Law Scrutiny Central Board (Notification No. 33/91, dated 17 July 1991). The Board were given the power to recommend the amendment, abrogation or replacement of any existing law which would be found non-beneficial to state and people and not in conformity with the prevailing conditions. The Board, chaired by an Attorney-General, was reported to have recommended that 151 laws be repealed. Another 35 "old laws" and 78 "subsidiary laws" were repealed and replaced by new laws.

In 1994, SLORC's representative assured the United Nations General Assembly that 68 laws existed in Burma to protect human rights. But neither was material provided to enable appreciation of the truth, nor was any access to information given. According to the memo (dated 21 March 1996) regarding human rights, submitted by the Burmese ambassador to the UN, the Board was scrutinizing laws to be either repealed or replaced. If the reforms of laws, as suggested here, are seen in that light, the process of change becomes more likely.

The Junta, whatever their motives were, did a promising thing to bring ceasefire agreements with 14 armed groups. This was an attempt to enable the dissidents to return to the legal fold, an environment which looks like a Rule of Law. Unfortunately, the Junta stopped half-way and did not pave the way for the 14 armed groups to participate in the process of shaping their economic and political systems.

If only the Junta had gone into the exercise of liberalization or reforms, it would have found that a new civil society was born which would have been against violence and/or civil war. In other words, the Junta would have achieved stabil-

Between 1974 and 1988, the Rule of Law was undermined by a fake referendum, a sham Constitution, a worthless Parliament, fraudulent Judiciary and everything associated with outward forms of Rule of Law.

ity and lasting solutions. All problems related to Rule of Law (namely a Constitution, federal autonomy versus secession, and sustaining development) could have been sorted out. The transition from an outlawed position to a legal fold has its own problems, which cannot be solved without recourse to Rule of Law. Due to this failure of the Junta, there is a total impasse now. Neither can the Junta rule nor are the armed groups able to self-govern. The situation is tragic and the root cause of this state of affairs is the flagrant disregard of the time-tested principle of Rule of Law.

It is argued that Rule of Law seems to gain its brightest lustre when it is under threat and there is a sense of danger surrounding its prospects for survival. It is least appreciated when it appears to be most secure.[1] There can also be a conflict between justice and the rule of law, like in East Germany where civil-rights activist Bärbel Bohley said, "We wanted justice but got the rule of law",[2] which has almost become a dictum.

While the talks go on, the Junta must first and foremost begin with tackling the issue of Rule of Law. The core of Rule of Law is the absence of arbitrariness. To ensure that there is no arbitrariness governing the affairs of the state, the Law is to be made by representatives who are freely elected by the people. There must be accountability: those who govern must be amenable to law. There has to be independence of Judiciary to adjudicate the breaches of law and mete out punishment or compensation as the Law directs. When these tests are applied, it will be found that the laws passed by the Junta were ordained by just a few persons without any mandate from the people. It could be, that unless transition has not taken roots, it is not possible to initiate reforms to restore the Rule of Law. As a first step, laws that are Draconian and openly abusive have to be kept in abeyance forthwith. These laws are in the nature of Ordinances and not laws passed by a democratically elected Parliament.

While the talks go on, the Junta must first begin with tackling the issue of Rule of Law. The core of Rule of Law is the absence of arbitrariness. To ensure that there is no arbitrariness governing the affairs of the state, the Law is to be made by representatives who are freely elected by the people.

This article will focus on some harsh laws which are clearly unreasonable. It is necessary to create a functioning, independent ministry of justice in Burma (because there is currently no such thing in Burma). Everybody has to have access to such a ministry. The ministry has to create a number of commissions to deal with core problems which afflict the issue of Justice. A genuine Rule of Law requests an overlapping, reinforcing, system of agencies of horizontal accountability.

This involves the creation or empowerment of a number of complementary institutions that are independent. First, there has to be a Law Commission (composed of judges, lawyers and journalists) to review and examine the current role and functioning of Law and Justice. Second, there has to be a Review Commission for all criminal cases to assess the miscarriage of Justice and to give recommendations. Third, there has to be a Human Rights Commission to monitor human rights violations. And fourth, a Consultative Assembly has to be put in

place to go into the questions of wide-ranging reforms for transition. If the pace of the current developments is accelerated and fast reforms are introduced, they may create problems and tensions among the participants in the reform process. Law reform is a great facilitator in this process. Immediate changes are necessary in the following laws – to begin with, these laws are to be kept in abeyance:

1. **The Towns Act of 1907 and the Village Act of 1908:** These directives are ambiguous, they allow the practice of forced labour and restrict free movement within Burma. All travel is subject to reporting requirements. Everyone must carry registration or identity cards. Every resident is obliged to register any guests who stay overnight with the local authorities. On failure one is liable to imprisonment. Such restrictions violate internationally accepted human rights standards and contravene Article 13 of the ICCPR. This issue has been debated but the situation is only worsening. These Acts have to be removed – at least they have to be kept in abeyance forthwith.

2. **The Judicial Law 5/2000:** The jurisdiction of the Supreme Court has to be widened to enable it to take cognizance of a petition of habeas corpus and enable it to decide in accordance with justice. The competence of the District Court to admit such petition and transmit it to the Supreme Court has to be enlarged. The power of the Supreme Court to conduct judicial training and training in human rights has to be vested. The Supreme Court must be empowered to create a Central Administrative Tribunal with jurisdiction to take up and decide cases related to service grievances of public servants.

3. **The Bar Council Law of 1950 (amended 1988):** The present law has to be amended and that of 1950 must be restored. Withdrawal of lawyers' licences has to be canceled: lawyers should be allowed to practise.

4. **The Emergency Provisions Act (EPA) of 1950:** This law has been grossly abused. Its vagueness and ambiguity violate the minimum international standards laid down in respect to laws affecting the liberty of persons. Under this law, anyone who "violates or infringes upon the integrity, health, conduct and respect of State military organizations and government employees towards the government, or causes or intends to spread false news about the government, or causes or intends to disrupt the morality or behaviour of a group of people or the general public, is liable to imprisonment of up to 7 years". Article 3 of this law prescribes the death penalty. The Emergency Provisions Act violates one of the fundamental tenets of jurisprudence: no one shall be subject to greater limitations for the purpose of meeting the requirements of morality, public order and general welfare. Article 29/2 of the Universal Declaration of Human Rights (UDHR) and article 5/10 of the International Covenant of Civil and Political Rights (ICCPR) have made provisions for protection of liberties and human rights.
Other domestic laws have sufficient provisions to meet situations apprehended

in the Emergency Provisions Act. Sections 121 and 122/1 up to 130/b of the Burma Penal Code have adequately met with the provisions of clauses A and D (relating to High Treason) of the EPA. Even the colonialists did not have laws as Draconian as the EPA. The provisions for law, order and tranquility mentioned in clauses 5E and J are covered in sections 143 and 144 of the Penal Code. The Burma Penal Code has wide provisions for punishment of all sorts of crimes and offences. If they were considered as insufficient, some of its sections could be amended to meet extraordinary situations. In no case can special statutes be enacted. That goes for all statutes that are vague and arbitrary.

5. **The State Protection Act of 1975 (amended 1991):** Article 14 of this law enables imposition of wide-ranging restrictions on individuals. "Any person suspected of having committed, or is about to commit, any act which endangers the sovereignty and security of the State or public peace and tranquility, can be kept in detention without trial for a period of 5 years by executive order". This is not subject of judicial review. This law also enables issuing restriction orders, such as keeping a person under house arrest for the same period of time. The Burma Penal Code and the Police Act have sufficient provisions to meet the situations apprehended in the State Protection Act, which is over-broad and violates all principles of jurisprudence. Article 9 of the International Covenant of Civil and Political Rights (ICCPR) has laid down the guarantees in relation to preventive detention.
During U Nu's regime there was a Preventive Detention Act (also called the Public Order Preservation Act or POPA) but it had provisions of representation. It was also subject to writ remedy in the Supreme Court. The State Protection Act is against the tenets of human rights laws, and should be abolished.There is ample scope in the exiting Statutory Laws to cover the provisions of this law when it is abolished.

Flowering of thoughts and ideas have been stifled and society has come to stagnation. All books, magazines, periodicals, songs and films are vetted by a Press Scrutiny Board prior to publication and distribution. There is no judicial review of this Board's decisions.

6. **The Unlawful Association Act of 1908 (amended 1957):** This is a law which was brought in by the colonial rulers. Later, the U Nu government amended it to meet the situation of civil war (then raging in rural areas). However at that time there was a Constitution with a Supreme Court and other democratic liberties. The continued application of the Unlawful Association Act has estranged the people and enabled law enforcement authorities to abuse the law. It is short of international human rights standards. It has conferred wide and unrestricted powers to the government to declare any association unlawful and impose restrictions on individuals arbitrarily. Armed opposition groups who have entered into cease-fire agreements have not been spared from the operation of the Unlawful Association Act.

7. **The Printers and Publishers Registration Law of 1962:** This law was introduced soon after the military coup of 1962 and was amended several times, lastly in 1989, widening the scope and increasing the severity of punishment. This law is the main instrument of censorship. Its sweeping provisions have

successfully stifled all dissent. It is an accepted norm in all civilized societies that there is freedom of thought. One can differ and express alternatives for progress and reforms, which is the very crux of growth and development. As a result of this law, flowering of thoughts and ideas have been stifled and society has come to stagnation. All books, magazines, periodicals, songs and films are vetted by a Press Scrutiny Board prior to publication and distribution. There is no judicial review of this board's decisions.
This law is repugnant to the very principle that the regime has made a commitment to multi-party democracy. This law is bound to operate as a dead weight to the process of peaceful transition. This law must be removed, to enable the people to have a say in the matter of transition. A debate and discussion will result in a lasting outcome of the current talks between the military regime and Daw Aung San Suu Kyi and, eventually, with the ethnic leaders. There are provisions in the Burma Penal Code under which actions can be taken against people who indulge in derogatory writings and publications. As this law is no longer necessary, it should be kept in abeyance.

8. **The Sangha Law 20/90, and SLORC Law 5/96:** These laws allow interference of the Government in Sangha affairs. But if the Sangha sticks to the Code of Monastic Discipline, the Sangha will automatically be beneficial to the State. So the State need not interfere. These laws established a single Sangha to be officially approved. The Sangha however is traditionally regulated by its own regulations. The State has no right to lay down laws for it. This interference will also lead to interference in the affairs of other religions. SLORC Law 5/96 is against Article 21 of the Universal Declaration of Human Rights, as it has put a total ban on freedom of expression and the right to democratic participation.

9. **Section 197/1 of the Burma Penal Code of 1861:** This section provides that if a public servant is prosecuted, sanctions have to be taken by their executives. This has given virtual impunity to state officials, resulting in gross violation of laws.

10. **The Burma Criminal Procedure Code of 1861:** This law has to be amended in order to include some provisions of fair trial. Granting of Bail must be mandatory if the prosecution fails to frame a charge against the accused within 3 months of putting the accused in custody. In case of framing of charge, the accused has to remain in custody; the trial has to be concluded within a time frame.

11. **The Jail Manual of 1894 (amended 1937):** This has to be updated and all inhumane provisions removed from it. It has to be brought in line with the international standards.

12. **The Ministry of Trade and Commerce Act 4/78:** This act must be abolished as it made it compulsory for the farmers to sell large amounts of rice to

the government at prices far below the market value. If farmers refuse, their farms are confiscated.

13. **The Universities Act of 1924 (amended 1973):** This contains directives curtailing fundamental rights and has regimented education. Autonomy has to be restored to the academic bodies.

Steps are also needed in the international field to join relevant instruments for protecting and promoting human rights. Cooperation with UN agencies and other inter-governmental organizations needs to be normalized. Peaceful transition to democracy lies in the way it evolves. Continuity of the current governmental setup is not the sine qua non of transition. Structural reforms may appear to be destroying continuity. That is a misunderstanding, as it is bound to create confusion and alarm. Reforms will give a level playing ground to the opposition forces. If the talks fail, the reforms nevertheless will give hope. If the basics are being kept in view, there is no cause for apprehension: Rule of Law can never harm people. Wherever the law rules and human rights are assured of protection, the protection of ethnic, linguistic, and religious minorities is most likely to be assured and/or implemented in a manner which accommodates majority and minority concerns through political and cultural reconciliation and a mutual guarantee of rights.[3] Implementation of genuine Rule of Law strengthens human rights and sustains development.

Endnotes

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1. Geoffrey de Q. Walker, "The Rule of Law: Foundation of Constitutional Democracy". Melbourne: Melbourne University Press, 1988, p. 127.
2. Ingo von Münch, "Rule of Law Versus Justice?" In: "The Rule of Law", edited by Josef Thesing. Sankt Augustin: Konrad Adenauer Stiftung, 1997, p. 186.
3. Ludger Kühnhardt, "Human Rights, the Protection of Minorities, and the Nation State in the CSCE Process". In: "The Rule of Law", edited by Josef Thesing. Sankt Augustin: Konrad Adenauer Stiftung, 1997, p. 226.

Ensuring Free and Fair Elections in a Democratic Burma: Establishing an Electoral System and Election Processes

*Jeremy Sarkin**

Introduction

A country embarking on a transition to democracy has many issues to deal with. One of the most critical is the question of elections, the type of system chosen and the manner in which elections are conducted.[1] Free and fair elections are necessary to establish a democratic, human rights-based society, and to ensure that the government and the state are legitimate.[2] The right to vote is an instrument of power for both the voter and the state. When giving the people the right to vote, it is necessary to determine who is permitted to vote, and to regulate the exercise of the vote through a system which could include legislation and ways of verifying the identity of people. Such a system helps to prevent non-resident citizens from voting, and to exclude residents who do not qualify to vote. In some countries, for example, prisoners may not vote.

The need to ensure an election that is free, fair and open in a politically polarised country such as Burma is obvious. As far as possible, practical problems and problems of credibility and legitimacy must be avoided. All systems introduced within this period must ensure an increase in the confidence of the people that the process is free and fair.[3] All parties must be given freedom to campaign and freedom of political expression, provided this does not impinge on the freedom of other parties. Education and information about the various parties must be freely available to allow voters to make a free and informed choice.[4] Parties must have the freedom to canvass people. However, to ensure fairness,

there should be certain limitations on what parties may do during the election campaign period. For example, practices which undermine fairness must be strictly controlled, including not allowing the intimidation of voters.

Electoral Systems

Electoral systems shape the voting process, and how votes are translated into the distribution of seats in the legislature.[5] How seats are allocated is one of the most important differences between the electoral systems in use in different parts of the world.[6] The three main systems in use are the plurality system, the majority system, and proportional representation.[7]

The **plurality system**, also known as the single member constituency system, is a 'winner-takes-all' system – only the views of those who support the winner of the election will be represented in the legislature.[8] A constituency is a geographically-defined area where the voters elect a candidate. A candidate is elected only when he or she obtains more votes than any other candidate in that particular constituency election.[9] The government is formed by the party which wins the majority of constituency seats.[10] An important element of the system is that an absolute majority is not essential in any constituency. If the party which won the most seats does not have a majority of seats in parliament, it cannot form a government until it has formed a coalition with enough parties to have a majority.

The plurality system has a number of advantages.[11] Firstly, it lends itself to stable and effective governing and it usually results in a single-party government without the need for coalitions. Forming single-party governments is easier in situations where there is at least one large party; when there are many small parties, coalitions are often required. Secondly it presents an opportunity for the running parties to take the emphasis off race, ethnicity and caste, put policy and ideology at the forefront, and promote a national approach to issues and policies. Thirdly, public opinion is largely reflected in the number of seats won and there is usually a reasonable correlation between the number of votes for a party and the candidates who represent that party in Parliament. Fourthly, it is possible for individual candidates not linked to any party to stand for election. Finally, members of the legislature have a direct link with the constituency in which they were elected because constituency elections are fought be individuals, so they may be more accountable to the voters than in other systems.

There should be certain limitations on what parties may do during the election campaign period. For example, practices which undermine fairness must be strictly controlled.

There are also a number of disadvantages. Firstly, there is no link between the total number of votes the people cast nationally for a specific party and the number of seats it wins. Because the votes for each constituency election are counted only for that constituency, it is possible for a party which received

fewer votes overall to win more seats than a party which received more voter support overall. Secondly, a person may win a constituency election without a clear majority. Thirdly, there is no parliamentary representation for the views of those voters who supported the losing candidate. Fourthly, ruling parties may manipulate constituency boundaries to help them win elections. Finally, a small party stands a chance of winning seats only if its support is strongly concentrated in one or more constituencies.

Within the **majority system**, an absolute majority of the votes is needed. This means that a candidate has to get 50 per cent plus one vote to be elected. Where a candidate does not achieve a majority, one of two systems are used to settle the result: the second ballot or the alternative vote.

A *second ballot* is held when one candidate does not obtain an absolute majority.[12] A series of ballots may have to be held, with the candidate who receives the fewest votes being eliminated from contention in each round until one candidate has achieved a majority. The only problem associated with this system, especially in unstable situations, is that one side may cancel or disrupt the second ballot because it anticipates losing the election.

The *alternative vote* is used in single-member constituencies. Here voters indicate their choice of candidates in order of preference. There is only one election. If no candidate receives a majority of votes, the candidate with the smallest number of votes falls out of contention. The votes cast for that candidate are divided amongst the others according to the second preference indicated on those ballots. This process continues until a winner is found. This system encourages coalitions between parties.

Proportional representation is used when there are multi-member constituencies. Seats are allocated according to party lists, which can be compiled according to the list system, or the single transferable vote.

In *the list system*, before the election, the parties contesting the election compile a list of their candidates in order of preference. In this system, voters choose parties, not individual candidates. The proportion of votes a party receives in an election determines the number of seats it is allocated. The system can confine voters to voting for party, with the order of candidates on the list being determined by the party. Alternatively, it can allow voters to choose between different candidates of their preferred party or even across party boundaries. A common type of list system has a minimum threshold requirement which parties must meet in order to obtain any seats. Unlike the plurality system which uses local area constituencies, the area in which voters cast their ballots is often regional/provincial or national. Countries using national list systems allocate seats

proportionally at national level. Some countries choose to allocate seats both regionally and nationally in different legislatures. Allocation at national level will provide an election result which more accurately represents the overall will of the voters than regional or local-level elections can. In addition, a small party which does not have enough support to win seats in any one regional election may have enough support nationally to win seats because its votes are not split across regions. However, national tallies of votes tend to mask regional differences.

Within the system of *the single transferable vote*, the electorate in multi-member constituencies can vote for a particular candidate of the party of their choice as well as for candidates who are not members of this party. This system is similar to the alternative vote of the majority system because both systems allow voters to indicate their preferences. The single transferable vote also provides for preferential voting but, unlike the alternative vote, it requires multi-member constituencies. Its two central features are that it tries to secure proportional representation of political opinion, and the provision for choice of candidates within, as well as between, parties. Votes that cannot be used to elect a candidate, either because they are surplus to what to what he or she needs to secure election, or because the candidate has too few votes to be elected, are transferred to other candidates. This contrasts with the list system which offers only a minimal choice of individual candidates or no choice at all.[13] To the individualists who devised the single transferable vote, the representation of opinion was as important as the representation of the party, and their view was that the voter ought to be allowed not only to decide which party was to govern the state, but also to influence the policies it should follow.

A central characteristic of this system is that it contains a built-in primary election, in which every elector, whether a registered member of a political party or not, can play a part. It works best when there is a maximum choice of candidates, with a number of seats. Voters list candidates in order of preference, rather than voting for a party as is the case in list systems of proportional representation. In order to be elected, candidates have to obtain a minimum number of votes.

An Independent Electoral Commission

Free and fair election cannot work unless there is a mechanism to run the elections. A competent civil service and an independent judiciary are important when arranging and overseeing elections. However, to ensure impartiality, independence and freedom from undue influence, an independent electoral commission is often appointed to take managerial and operational control of the use of

resources and personnel required to run the election.[14] It is usually an autonomous body comprised of independent experts who have no association with the past government. This is not to say that government departments who have dealt with elections previously cannot play a part. These departments often have logistical skills, infrastructure and experience to help with the smooth running of an election.

The constitutions of a number of countries require an independent electoral commission.[15] Such structures can help to create conditions of fairness by, for example, helping to prevent those in power from using civil servants in the government to gain an electoral advantage over other parties. In some countries, the powers of such commissions are strictly limited to the administrative part of elections. In others they have exclusive powers over electoral matters, including legislative and judicial power to determine and set standards for acceptable electoral practices.

A commission ought to have the capacity to determine its own procedures for convening and conducting its proceedings. It should have the power to appoint sub-committees and establish directorates as it sees fit to effectively meet its responsibilities. It should also have the power to appoint administrative staff as well as expert outsiders. A measure of control can be introduced by the requirement that the chairperson of these committees must be a commissioner and that decisions of the sub-committee are subject to review by the commission.

The real and perceived independence of the electoral commission is the key to ensuring that the electoral process is legitimate and fair. However, in order to sufficiently guard the commission's independence, it is crucial that appointment and dismissal procedures are carefully designed to ensure independence and ensure that there is no room for political manipulation through the use of executive power.[16] This commission's function should not be influenced by political or other bias. An option could be for the United Nations or another non-partisan body to assist in the process of appointment. The commissioners could be appointed after a panel interview.

Once appointed, the members of the commission should be afforded certain privileges and immunities. It is recommended that remuneration of the election commissioners should be on the scale of a senior civil servant and their status should be the same as that of judges. Furthermore, once appointed, the only grounds for removal should be gross negligence, mismanagement, financial impropriety or an inability to perform the functions of the office. Removal processes should come under the review of a legal tribunal or court. Commissioners should be required to divest themselves of any office which might interfere or be seen to interfere with their performance.

In some countries, the electoral commission is constituted of representatives of

registered political parties. The administration of the election is therefore in the hands of the political parties. However, this could be problematic because during a transitional period there is a tendency for the number of political parties to increase. If each of these parties were to be represented in the commission, the commission would be unwieldy and ineffective. Also, appointments made on party affiliations may result in a commission which lacks the skills and experience to run an election.

In some countries, the laws specify qualifications for commissioners. Such criteria must be sufficiently clear so that the public has confidence in the appointment process, and those appointed must meet the criteria. The commission must be non-partisan and must be seen to be so. Commissioners should ideally not have held any political party or military office prior to their nomination since this could undermine the independence of the body. More detailed criteria could include, for example, experience in electoral management, knowledge of electoral systems, a known reputation for fairness, and a commitment to democracy.

Mechanisms should be devised to ensure the appointment process to the commission is transparent and that there is public participation in the process. Public nominations should be invited through press advertisements. Proposed nominations should be published in official government publications as well as the press and published for public comment, allowing enough time for public comments and objections to be evaluated. Provision should be made for candidates to be interviewed in public and deliberations should be held in open meetings. Reasons for nominations and appointments should be published, including details about the criteria that have been taken into account in making the appointments.

In some countries there are separate commissions for each province or state under an overarching central commission. A national commission and provincial or state commissions need staff for polling stations which include presiding officers (to oversee voting); electoral officers (regional representatives of the chief electoral officer); returning officers (who hold public court for the nomination of candidates for election in their constituencies, and who supervise the administrative arrangements for counting votes.); counting officers (who supervise and undertake the count which occurs at a central polling station in the constituency), polling officers (who attend to the managerial functions of the poll); and administrative staff. There is thus a considerable devolution of authority to the officials working at the regional level and this relationship has to therefore be formalised in the electoral law. A decision has to taken by the government on who appoints these officials – a central body or a regional one. Training should also become the foremost responsibility of the election commission between elections. Programmes must be designed to familiarise officials with procedures and decision-making, as well to train officials about the impor-

tance of free and fair elections.

Compiling a Voters' Roll

As it is likely that voter registration will be necessary for future national and state elections – one list of eligible voters should be compiled at a national level. A national voters' roll would ensure uniformity, and should be capable of being broken down into lists of provincial and local voters. The voters' roll would be useful for statistical analysis of voting patterns, which would enable easier identification and solving of systemic problems.

A national voters' roll will be easier to maintain and update than many smaller rolls. For example, it would enable addresses to be changed in one place, avoiding duplication, reducing costs and reducing the chance of voter fraud.

Burma should follow international precedents by placing upon government the responsibility to register all eligible citizens. There are three general models of voter registration systems internationally: (1) where the onus of responsibility to register voters falls entirely on government, and a universal list of voters is drawn up from identity documents or through a census; (2) where government agencies such as welfare bureaux or drivers' licence offices register voters and update registrations automatically; and (3) where citizens must register themselves. Of the three systems, automatic registration through a list of citizens is the most comprehensive and the least expensive to compile and update. It is also cost effective because the list may be used for other governmental purposes, for example, information for the population census, statistical analysis, and health care. Lists are permanent, and are constantly updated as citizens become eligible to vote, lose their eligibility, or move. Some countries using automatic registration systems include Mexico, Finland, Germany, Switzerland and Sweden. These countries have achieved nearly universal voter registration. A voter registration system must be inclusive, accurate and inexpensive. It addition, it must have a regular format and it must be easy to correct errors in the system.

The first, and most labour and cost-intensive step of compiling a national list of eligible voters is compiling the first base list. This could be done through a variety of ways in Burma, the most effective being to use automatic registration systems. An automatic registration system should be augmented and updated through an ongoing agency-based registration programme. Such a programme would increase the accuracy of the rolls, and would reduce last-minute changes and additions to the voters' rolls.

An independent electoral commission (IEC), in consultation with relevant government departments, should first identify agencies and programmes that reach

large populations (for example, schools, universities and health clinics), and designate these as voter registration sites. With the consent of their clients, the voter registration agencies should forward information relevant to voter registration (such as newly eligible voters, or voters who have changed their names or addresses) to the voter registration division at the IEC. In this way, an agency-based programme would continuously update the list of voters.

While the programmes described above would go far toward the goal of universal voter registration, it should be expected that some voters will slip through the cracks, and will find on election day that they are not on the voter registry. Because this would be the result of administrative failure, the IEC should provide for a mechanism to enable these people to exercise their right to vote. One such mechanism would be where a voter could both register and vote at the polls on election day. In order to prevent double voting, voters who register and vote on election day should be required to present proper identifying documentation. If the automatic and agency-based registration techniques outlined above were properly implemented, the number of voters exercising this option would be minimal.

Running an Election[17]

Free and fair polling: The object of polling is to record votes accurately.[18] The freeness and fairness of polling will depend on it. It is important all those who are eligible to vote have easy access to polling stations near to where they reside, that they know how the voting procedure works, that they are given sufficient time to vote, and that provision is made for illiterate voters. For an election to be free and fair, the most important principle of one person one vote should be implemented, and efforts should be made to make sure that fraudulent practices during voting are eliminated. Examples of these fraudulent practices are double voting, removal of ballot valid papers, ballot box stuffing and ballot box swopping. Voters must be able to exercise free choice when they vote and protected from influence or intimidation by any official or any other person at the polling station.

Polling stations: Their location is important in an election. Voters should not have to travel far to cast their ballot. This is of particular importance in rural areas because these are far from towns and cities. Polling stations must have enough trained officials to staff them and to educate the voters in the voting procedure.

Voting period: There are different views on whether voting should take place on a single day or over a number of days. If the decision is to have voting on a single day, it is essential that there are sufficient polling stations and election of-

ficials so that no voter is turned away when the station closes. Voting over more than one day carries the risk that ballot boxes could be tampered with overnight. However, elections should, with controls in the process, last more than a day where voters need more time because of problems such as poor transport facilities or slow processing of voters.

Special votes: These are provided in some countries for those who cannot vote at the polling station on election day. This is a dangerous practice as it can allow vote manipulation or rigging to occur. Sometimes exceptions are allowed for voters who, through no fault of their own, are unable to vote at a polling station during the polling period.

Preventing double voting: In order for all votes to be equal, no person may vote more than once. Where there is no voters' roll, using indelible ink to mark voters can help prevent repeat voting. Before a vote is cast, the voter's hands and documents ought to be examined to determine if they have already voted. Sometimes religious beliefs prevent hand staining. Alternative approaches can then be used.

Protecting ballot boxes: The stuffing of ballot boxes with false ballot papers and the exclusion of genuine ballot papers may ruin an election. Special provisions must be made to safeguard ballot boxes when the boxes are constructed and when they are distributed to polling stations. When polling begins, the presiding officer should show party agents that all ballot boxes are empty. Once this has been done, the presiding officer should seal the box and the party agents should add their seals to the box. All ballot boxes should have seals on them and if a seal has been broken, it is clear that the box has been tampered with. All ballot boxes should be placed in areas in the counting centre where presiding officers and party agents can see them throughout the day. Presiding officers should have the right to ask voters to show their ballots to ascertain whether these have the necessary official marks. The presiding officer does not have the right to look at the side which the voter has marked. Ballot boxes should be sealed at the end of the day, when the boxes are full, and at the end of the polling period. The presiding officer and the party agent must close the boxes with their seals.

Considered and intended vote: The cross on a ballot paper should reflect the voter's free choice of candidate or party. The design and presentation of the ballot should assist voters to make that free choice by being accessible to all voters, irrespective of class, language, culture or level of literacy. If there are too many choices on the ballot paper, voters may struggle to make a choice. In some countries, parties or candidates are expected to demonstrate that they have some quantifiable support before they may appear on a ballot paper. Furthermore, it is advisable that parties are placed on a ballot paper in alphabetical order so not to give preference to any particular party. The starting order should

be decided by drawing the name of a party from a hat and then the alphabetical system continues with that party at the top of the ballot followed by the other parties in alphabetical order thereafter. A voter who makes a mistake should be given an opportunity to take another ballot paper once the old one is destroyed or cancelled.

Independent vote: Polling should be conducive to independent voting. Therefore, no party official or voting official should have any influence on the voters' choice of party in and around the polling station. There should be no communication between voters and voting officials during voting and care should be taken that no one enters the voting compartment when the person is voting. No electioneering should take place in the vicinity where polling takes place. The only exception to these principles ought to be where a voter would be deprived of the vote if not assisted.

Secret vote: There are a number of methods that have been developed to ensure the secrecy of a vote: the name of the voter should not be written on the ballot paper; the voter should use a mark that cannot be linked to that voter; and no person may see who the voter is voting for. Secrecy must be permanently maintained.

Counting the votes: There are different views on where counting ought to occur. Some argue that by counting ballots at the polling stations, the results can be determined more quickly as boxes don't have to transported to a different location. Counting can be shared between election officials so that less manipulation of results is likely. However, counting at polling stations can cause a loss of secrecy. The integrity of the votes must be maintained and therefore issues of security, transport and so on are vital factors which need to be taken into account. It is extremely important that accuracy in the counting of ballots takes place. Therefore a number of counting officials must be appointed under the supervision of a returning officer. Monitoring also ensures accurate counting and party agents and monitors can help by making sure the ballots are counted accurately. When the count is completed, only one specifically authorised official must announce the result.

Transitional societies are often the source of major difficulties for a variety of reasons. A key question is whether there is sufficient trust in the electoral process itself and whether the body responsible for organising and counting the votes is perceived to be independent and capable.

Conclusion

At the core of any democracy is its electoral system.[19] Free and fair elections are the key to the transition to a democratic, human rights-based society.[20] Not only must they be free and fair, but they must also be seen by all to be free and fair. Nothing should occur to undermine the credibility of the elections.[21]

The type of electoral system is probably one of the most crucial aspects of a de-

mocracy.[22] Various types of electoral systems exist, from individual constituency systems to those where there is proportional representation. In proportional representation, a particular party enjoys the percentage of representation in the legislature in accordance with the percentage of the national vote that it has received.

Transitional societies are often the source of major difficulties for a variety of reasons. A key question is whether there is sufficient trust in the electoral process itself and whether the body responsible for organising and counting the votes is perceived to be independent and capable. A system that appears faulty or not independent could lead to chaos and violence that could compromise the legitimacy of elections.

There is also a need to ensure an election is free, fair and open. Thus, the independence of the body (or commission) that runs the election is vital to ensure that the electoral process is legitimate and fair. Should the process of setting up the commission and the structure itself be beset by credibility, legitimacy, practical and other problems, the consequences will be serious. If the process of establishing the electoral commission or the structure of the commission itself is seen to lack credibility, the election will not be seen to be free and fair.

Endnotes

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1. Haggard, Stephan, and Steven B. Webb, eds., "Voting for Reform: Democracy, Political Liberalization, and Economic Adjustment". Oxford: Oxford University Press for the World Bank, 1994.
2. Franck, T.M., "The Emerging Right to Democratic Governance". *American Journal of International Law*, (86), 1992, p. 46.
3. Moe, Terry M., and Michael Caldwell, "The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems". *Journal of Institutional and Theoretical Economics*, 150, No. 1, 1994, pp. 171-195.
4. See: Vergara, Ana Cecilia, "Justice, Impunity and the Transition to Democracy: A Challenge for Human Rights Education". *Journal of Moral Education*, (23), 3, 1994, pp. 273-84; Brabeck, Mary, et al., "Human Rights Education through the 'Facing History and Ourselves' Program". *Journal of Moral Education*, (23), 3, 1994, pp. 333-347; Claude, Richard, "Human Rights Education:

The Case of the Philippines". *Human Rights Quarterly*, (13), 4, 1991, pp. 453-524; Henry, Charles P., "Educating for Human Rights". *Human Rights Quarterly*, (13), 3, 1991, p. 420; Misgeld, Dieter, "Human Rights and Education: Conclusions from some Latin American Experiences". *Journal of Moral Education*, (23), 3, 1994, pp. 239-259.

5. Lakeman, E., "How Democracies Vote: A Study of Electoral Systems". London: Faber and Faber, 1974.
6. Bognador, "Parliamentary Democracy". *Human Rights Law Journal* 394, 1988.
7. Rawlings, H.F., "Law and the Electoral Process". London: Sweet & Maxwell, 1988.
8. Leonard, D., "Elections in Britain Today". London: Macmillan, 1991.
9. Moyo, J.N., "Voting for Democracy: Electoral Politics in Zimbabwe". Harare: University of Zimbabwe, 1992.
10. Sartori, G., "Parties and Party Systems: A Framework for Analysis". Cambridge: Cambridge University Press, 1976.
11. See generally Steytler, N., et al. (eds.), "Free and Fair Elections in South Africa". Juta, 1994.
12. Lipset, S.M. and Stein, R., "Party Systems and Voter Alignments". Toronto: Collier-Macmillan, 1967.
13. Vanhanen, T., "The Process of Democratization: A Comparative Study of 147 States, 1980–1988". New York: Crane Russak, 1990.
14. On the independence of state institutions generally, see: Sarkin, J., "Examining and Enhancing the Role of National (Constitutional and Statutory) Human Rights Institutions in Developing a Human Rights Culture In South Africa". *South African Public Law*, (2), 2000, pp. 290-330.
15. See generally Sarkin, J., "L'écriture de la Constitution Sud-Africaine de 1996: Approache Formelle et Materielle". *Revue Française: Droit de Constitutionnel*, Vol. 44, 2000, pp. 746-767.
16. See: Sarkin, J., "Reviewing and Reformulating Appointment Processes to Constitutional (Chapter Nine) Structures". *South African Journal on Human Rights*, (4), 1999, pp. 587-613.
17. See: Steytler, N., et al. (eds.), "Free and Fair Elections in South Africa". Juta, 1994.
18. Darcy, R., and Schneider, A., "Confusing Ballots, Roll-off and the Black Vote". *The Western Political Quarterly*, (42), 3, 1989, p. 347.
19. See further: Sarkin, J., "Comparing and Contrasting Democracy and Human Rights Provisions in Two Draft Burmese Constitutions from an International Perspective". *Legal Issues on Burma Journal*, No. 4, October 1999, pp. 56-69.
20. On other important issues, see: Sarkin, J., "Dealing With Past Human Rights Abuses: Promoting Reconciliation in a Future Democratic Burma". *Legal Issues on Burma Journal*, No. 7, December 2000, pp. 1-14.
21. Diamond, L., "Promoting Democracy in the 1990s: Actors and Instruments, Issues and Imperatives". New York: Carnegie Corporation of New York, 1995.
22. Diamond, L., "Prospects for Democratic Development in Africa". Stanford University: Hoover Institution, 1997.

Human Rights and Legal Issues for a Democratic Transition of Burma

*Aung Htoo**

Many people and organizations have commented that the event that never happened before in Burma has happened now. It refers to the current dialogue process between the military regime and the National League for Democracy (NLD). However, unfortunately, it is still not entirely certain whether it is an authentic process, which would successfully create a democratic transition of Burma, or a political strategy of the regime, prolonging its power. The NLD announced to resolve the issues of the country several times, by establishing a genuine political dialogue, and so did the major ethnic resistance organizations. Controversy is not attributed to the position of the NLD but to the previous actions of the military regime.

The first military coup took place in Burma in 1962. After one year, the regime declared a nationwide general amnesty and called for a political dialogue with the armed resistance organizations. The people who aspired to achieve internal peace then whole-heartedly supported the process, as such an event had never occurred since Burma gained independence in 1948. Then, in the end of 1963, after having held dialogues for a few months, the regime itself put an end to the process by simply alleging that the ambition of the armed rebellious organizations for the country was not sincere and honest. The regime also insulted the good aspirations of the army with regard to some underground activities of the rebellious organizations (mainly the Communist Party of Burma, CPB).

At that time, there was no international involvement in the transitional process. Furthermore, the involvement of the civil society was not allowed internally,

public meetings of all other political organizations were restricted, and the media were controlled by the military. That is why the other organizations which participated in the dialogue never got an opportunity to explain to the people what happened during the dialogue processes in detail. Consequently, the justification of the regime on the collapse of dialogue was more or less acceptable to the majority of the people as well as to western democratic countries (mainly the United States with their anti-communist position at that time). With this political strategy, following the foundation of the Burma Socialist Program Party, the regime could prolong its power from 1963 to 1988, despite the fact that under its rule Burma became one of the seven poorest countries in the world.

The political dialogue created by the military regime in 1963 (an event that had never happened before) was greatly beneficial for prolonging the regime's power whereas the people suffered awfully. The second military coup took place in Burma in 1988. After one year, the regime itself called for cease-fire agreements with the armed ethnic organizations. The major reason for this was local development in the ethnic areas. The regime allowed the armed ethnic organizations to continue holding their arms under cease-fire. As a result, the regime got good credits, mainly from ASEAN countries, and could to some extent convince the international community that they were finally doing something good for the establishment of the internal peace. But actually, under that cease-fire program, the regime divided the democratic forces and armed ethnic organizations. The regime even created division among the ethnic organizations themselves.

With that political strategy, the regime strengthened its power for the next decade from 1990 to 2000. But under its rule within that period, human rights violations have remained unabated and development has never become a reality. The most serious event under the cease-fire program was the abolition of the principle of Rule of Law.

The Unlawful Association Act has been effective in Burma for decades, and pursuant to that act, the regime has declared the major ethnic armed organizations unlawful. Without cancellation of that Act and other declarations, the regime would legitimize the existence of those organizations. In law, provision is one thing and implementation is another. In Burma, the foundation for Rule of Law was absolutely withdrawn and the culture to ignore laws has obviously grown up.

Nowadays, Burma is not under the Rule of Law but under the rule of man. This has seriously affected every sector of society including economy and investment. For instance, the Singapore-based Yaung Chi Oo Trading Company, entered into a joint venture with SPDC's Ministry of Industry No. 1 in 1993 to rescue the bankrupt Mandalay Brewery. The brewery succeeded in business thanks to the efforts of then Yaung Chi Oo's managing director. But then, on 11 November 1998, armed soldiers seized the brewery on the orders of SPDC Chairman,

General Than Shwe. This was one of the actions taken by the regime, obviously breaking the principle of Rule of Law. Stemming from the political sector upon the implementation of the cease-fire, the Rule of (corrupted) Man has prevailed in the business sector. As a result, both national economy and private enterprises failed.

The current dialogue between the regime and the NLD is, in such as long nature, the first since 1990. But in spite of that it could possibly be a ploy created by the regime. The indicators for this are as follows. A great majority of political prisoners, including the top leaders of the NLD such as U Saw Mra Aung (Chairman of the Committee for Representing People's Parliament or CRPP) and U Win Tin (an Executive Committee member of the NLD), have not yet been released. Some of the political prisoners that were released are those who had served their prison terms already.

The State Protection Act of 1975, amended in 1991, which deprives the Right to Liberty and Security of individuals is still in force. That law authorized the executive, appointed by the regime, to detain a citizen for five years without trial. So long as this Act is effective, the democratic environment will never emerge in Burma; democracy activists remain afraid of being persecuted and arbitrarily arrested at any time.

The Printers and Publishers Registration Law of 1962, which violates the principle of the freedom of expression is still in force. Under this Act, the media are strictly controlled by the regime. One of the major factors in promoting the rights of people is the existence of Freedom of Media. Total freedom of media is still not possible in Burma, so efforts should be made to effectively improve this freedom, for example by reforming the Press and Publication Act.

The Unlawful Association Act (mentioned before) of 1908, amended in 1957, which violates the principle of Freedom of Association, is still in force. The gathering of more than five people is strictly prohibited, which violates the principle of Freedom of Assembly. Under these laws and similar restriction orders, public meetings cannot freely be held by the NLD or any other political party. In this way, independent democratic institutions and other human rights organizations will never emerge. Democratic transition cannot become a reality unless these Draconian laws and orders are reformed.

The military regime has not yet done anything to promote the factors mentioned above. Although the regime has announced many times that they are taking time to go forward to democracy, they have not provided any clear messages on how they are going to reform those factors which are foundations for democracy.

ODA and Development Issues

In the current dialogue process, no progress has been made for the democratic opposition or for the people. But the military regime has already benefited. For instance, Japan has decided to start providing Official Development Assistance (ODA) to the regime while referring to the dialogue process. Within the context of the current situation, ODA will not be helpful to speed up the democratization of Burma. It will only be beneficial to the military regime. Unless structural changes take place in Burma, any 'development' assistance from the international community would be against the modern concept of Development and against the principle of the 1986 United Nations Declaration on the Right to Development.

Ideas of development policy and development 'strategies' have also changed in recent years. In the 1950s, governments were the central factor in the strategy of development. This was universally accepted, although significant differences existed between 'left' and 'right' governments. Virtually all development specialists regarded governments as the dominant agency of growth.

The Burmese military regime has declared and exercised so-called market economy since 1988. Nevertheless, no economic development has been put into place so far. The difficulty is that 'over-controlled' practices were rigidly carried out by the regime, without paying any attention to the principles of Rule of Law. The Yaung Chi Oo Trading Company and other companies which withdrew their investment from Burma, and the failures of Burmese private enterprises are obvious example cases. Without prevailing Rule of Law, a genuine market economy will never become a reality in Burma. Development assistance, mainly to the military regime, which discourages the privatization and free-market economy, is against the modern development concepts. So long as the illegitimate military junta rules the country, development assistance from the international community will only be exploited to prolong the power of the junta, and economic development for the people can never become a reality. At the time of the second military coup in 1988, the army had 186,000 soldiers. Nowadays, with all the development assistance to the regime, the Burmese army has become the second largest army in Southeast Asia, with over 400,000 soldiers and a huge military intelligence organization. Nothing has been done for the people. Health and education remain undeveloped.

Without prevailing Rule of Law, a genuine market economy will never become a reality in Burma. (…) So long as the illegitimate military junta rules the country, development assistance from the international community will only be exploited to prolong the power of the junta, and economic development for the people can never become a reality.

The principles on Development were mentioned in the introduction of the 1986 United Nations Declaration on the Right to Development: "…the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits

resulting therefrom; (…) confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations".

The actual practices under the rule of the regime in Burma are against the principles and provisions of this UN Declaration. Ironically, forced labour is the only "participation of the people" in the so-called development projects in Burma. In other words, the participation of the people in Burma has absolutely been denied. The people in Burma have never benefited from any government development project since 1988. This happens in all those countries where the people cannot influence the development policy and practices of the government: such governments do not exercise transparent policy, with the result that terrible corruption has become common in every sector of the government. In such a climate political parties cannot function. In Burma there are no non-governmental organizations which can play a critical role. Professor Amartya Sen, the 1998 Nobel Prize Laureate in Economic Science, rightly pointed this out in his book entitled "Development as Freedom":

> "While much can be done through sensible government policy, it is important to integrate the role of the government with the efficient functioning of other economic and social institutions – varying from trade, commerce and the markets to active functioning of political parties, non-governmental organizations, and institutions that sustain and facilitate informed public discussion, including effective news media".[1]

The Karenni National Progressive Party (KNPP) is an ethnic resistance organization which mainly represents the local Karenni people who live in the area in Karenni State where the Lawpita hydropower plant is situated. The present plant was built in 1952 by Japanese engineers. It was paid for by the Japanese as war indemnity. Despite being located inside Karenni State, the successive military regimes of Burma have never allowed Karenni civilians to use the electricity. The power plant distributes its electricity through the rest of Burma, particularly to Rangoon, the capital, and Mandalay, the second largest city.

On 24 April 2001, the KNPP issued a statement regarding Japanese Government plans to provide US$ 24 million to the military regime for extending the Lawpita plant. It stated, "…Since the SPDC's take-over, seven villages have been forcibly moved out of the Lawpita area. In addition to this, 10,000 anti-personnel landmines have been laid. Because of massive numbers of landmines, lots of Karenni villagers have lost their lives or were injured, and tens of thousands head of cattle belonging to the villagers living in the area have been killed. Should the extension of the Lawpita power plant go ahead, more dams would be built which will destroy tens of thousands of acres of farmland. Many more people living on the Karenni-Shan border will become homeless".

It is clear that ODA from the Japanese Government would not foster the development of the local Karenni people; on the contrary, those people would even suffer from it. Without the existence of functioning political parties, independent democratic institutions, human rights organizations, and independent media in Burma, government accountability cannot be ensured. While the people can neither influence nor participate in the decision making process of the government, any development assistance from the Japanese and other governments should be frozen.

Issues of Legitimacy

The conflict in Burma differs from those between Israel and the Palestinian Liberation Organization (PLO), or between the Tamil Tigers and the Sri Lankan Government. The Israeli-Palestinian conflict is a conflict between two countries, mainly based on racial difference. In spite of the existence of territorial claims by both sides, many academics analysed that the PLO constitutes a de facto government of a country. The Sri Lankan conflict, between government and opposition in one country, seems similar to the case of Burma. The difference between Sri Lanka and Burma, however, is that in Sri Lanka the conflict is mainly based on racial issues, while in Burma the conflict is mainly based on the Legitimacy of government.

It remains to be seen whether the approach by the international community would be successful in case they tried to apply the conflict resolution formulas used in Israel, Sri Lanka or elsewhere. It would not be a question of conflict resolution formulas or diplomatic skills. It is a question of Legitimacy. This might become a precedent for future Burma or for any other country.

The perspectives of the people in Burma would not also be beneficial for democratization and long-term peace in the country, presuming that the current dialogue is relevant and accountable only to the regime and the NLD. Because, the question of Legitimacy is relevant to every citizen of Burma. History has already proved that only a government that emerged from free and fair elections can have the right to rule the people. That is a legitimate government. So that is why the position of the people should not be somewhere in between.

In attempting to resolve the Legitimacy issue of Burma, the experiences of countries in southern Europe and Latin America are interesting to observe. While facing economic and other crisis, the ruling military regimes in those countries did not have any legitimacy to rule the country.[2] Consequently, elections were held, whereupon power was transferred to the election-winning par-

ties.

Burma's case is quite peculiar. While the elections were already held ten years ago, no power has been transferred to the election-winning party, the National League for Democracy. Instead, the military junta attempted to steal the Legitimacy from the NLD by convening a sham National Convention in January 1993. In the current dialogue process, the two major factors that have to be dealt with are the May 1990 election results, and the sham National Convention created by the military regime.

In Cambodia, national general elections were held in July 1998. After these elections, the country was in serious dispute due to a controversial seat allocation formula and, consequently, the election results could not be approved for some time.[3] In contrast, in the elections held in Burma in May 1990, it was remarkable that there were no disputes whatsoever in the whole election process. The NLD was officially recognized as the election-winning party by the whole country (including the military regime) and the international community. At that time, it was generally considered quite difficult to neglect or ignore the result of the elections, as the succeeding governments would face the legal and political crisis of resolving the issue of Legitimacy to rule. However, the military government ignored the result of the elections. Continued recognition of the people and the international community of the election results would strongly enhance the bargaining power of the NLD in the current dialogue process. Equally important is the formal and official recognition of the result of free and fair elections, especially in Southeast Asia where some countries are still facing the threat of a coup d'état.

The National Convention in Burma is a major political strategy of the military regime in an attempt to achieve the Legitimacy to rule the country. Following the May 1990 elections, instead of transferring power to the election-winning party, the military regime convened its sham National Convention. Under the heading of "Convening of a National Convention" the regime issued Order 11/92, dated 24 April 1992. When this was announced, the people heard the expression "National Convention" for the first time, not less than two years after the elections. Of the 702 delegates attending the National Convention, more than 600 were selected by the military regime. Based on the experiences of the elected members of parliament who attended the National Convention, and other relevant documents, an analysis was made during a constitutional seminar in which 169 delegates (from 40 democratic and ethnic organizations in Burma) participated, in October 1994. Part of their analysis is as follows:

> "The six aims mentioned in Article 1 of the National Convention Procedural Code are the cardinal principles circumscribing the whole National Convention. There is no permission to refer to history as a background to debate the cessation of civil war,

> which has been the main cause of human rights violations in Burma. For the SLORC,[4] it is immaterial whether to have constitutional provisions, guaranteeing the equality of all the indigenous ethnic nationalities, or to define where and how the sovereignty resides, and it allows the discussion only about the stability of sovereignty. The aim of "The participation of the military, in the leading role, in the national politics of the State" is an attempt by the military to gain the constitutional rights to interfere in civil administration".
> "The Freedom of Speech of the delegates is totally prohibited by Articles 1, 5(c), 8(j), 37, 45(a), (b), (c) and (j). According to Articles 15(c) and 16(i), action can be taken against a delegate at any time for matters included in discussion. Action has been taken, (…) for example [in] the case of Dr Aung Khin Hsint".
> "Though the expression "National Convention Discussions" was used, in actual practice only papers were read and there had been no free discussions. When the stage for laying down basic principles was approached, the discussion papers had to be submitted to the Presidium. The Presidium, if necessary, according to Article 45 (j) summoned the delegate concerned and could ask to make changes in the paper. If the delegate refused, his paper would be sent to the Working Committee which made changes as desired, making the papers suitable for presentation in the meetings. Of course, the presentation had to be exactly in accordance with the version as edited by the Working Committee".

The military regime is attempting to gain the right to legally prolong its rule by framing a state constitution which its National Convention has been drafting, guaranteeing the perpetuation of military dictatorship. Based on this, and on analysis of the National Convention, a position statement of the democratic and ethnic organizations participating in the constitutional seminar was issued on 21 October 1994: "As the SLORC is not a legally elected government, it has no right to convene a national convention. The "National Convention" being held by the SLORC is merely a fraudulent one. It is concluded that the basic principles for a state constitution laid down by the convention are for the legalization of the rule of military dictatorship. Therefore, all the delegates unanimously reached the position to totally repudiate the SLORC's National Convention and the results emanating from it".

Following that constitutional seminar, the analysis of the regime's National Convention was widely publicized. Subsequently, 86 NLD-elected representatives participating in the National Convention withdrew from it in November 1995. In this way the NLD supported the position of the constitutional seminar, with the result that the military regime had to postpone its sham National Con-

vention. It was a historical landmark for the democratic movement and also a major challenge against the regime's ploy to achieve legitimacy in a deceitful way.

Many major armed ethnic organizations are still adhering on that position and they have never participated in the National Convention. Some of these organizations are still fighting against the regime (such as the Karen National Union and the Karenni National Progressive Party), while others entered into cease-fire agreements with the regime (such as the Kachin Independence Organization and the New Mon State Party).

Provided that the regime and the NLD reach an agreement in the current dialogue process to implement the May 1990 May election results, there won't be any problem. However, in case the regime tries to persuade the NLD to join the National Convention again, this would be unacceptable for the NLD. The issue of Legitimacy is not only concerning the regime and the NLD but also the people at large, with reference to Article 21(3) of the Universal Declaration of Human Rights: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedure".

The Issue of Previous Human Rights Abuses

Almost every country which emerged from the rule of dictatorial regimes had to confront 'the past', particularly in terms of human rights abuses. It is not possible to escape from this confrontation. In the case of Burma, it is necessary to take into account whether this issue should be included in the current dialogue process or not.

Actually the process should be the one which lays down the foundations for a genuine national reconciliation, based on the promotion and protection of human rights by properly dealing with the previous abuses. In this regard, there are two schools of thought. The first one is that this issue should not be discussed or publicized during the current dialogue processes, as it could make the regime hesitate to make democratic changes; there might be a human rights trade-off for democratization. The second one is that, without dealing with previous human rights abuses properly, the perpetrators will enjoy impunity. This would violate the individual Rights of Justice for the victims, because a situation is created in which future human rights abuses can freely be committed.

Dealing properly with previous human rights abuses is a foundation for a genuine national reconciliation.

In respect of the former, the experiences of many countries proved that only

the will of the ruling regimes to make changes for democratization did not play a crucial role, as authoritarian regimes generally do not like to lose power. However, factors like crisis and other pressures created by the people and the international community, forced the regimes to make changes. In the case of Argentina in 1983, while the military was holding power, Raul Alfonsin of the Radical Party participated in the presidential elections, promising to investigate human rights violations and to bring to trial a. the military chiefs who had given the orders to abduct, torture, and kill "subversive elements", and b. the army officers and guerrilla leaders who had committed cruel human rights abuses.[5] Alfonsin was elected president and he was able to deal with the previous human rights abuses with the support of the people. He did not have any assistance either from foreign invading armies (such as in Germany and Japan after the Second World War) or from national armed forces (such as the situation in Greece where some military factions did not oppose the trial). The army in Argentina was unified in its opposition.[6]

In the case of Burma, the regime is not so naïve as to absolutely ignore the issue of accountability on previous human rights abuses. Former dictators like Pinochet from Chili, Milosovic from Yugoslavia, or Habré from Chad, have been facing trials. Twenty-one Truth Commissions, in countries emerging from brutal military regimes were established to confront 'the past', the unforgettable history. Of course, it would be possible to keep silent on the issue of previous human rights abuses, when the parties in the dialogue process pretend to forget it. But would that be beneficial? Can such an issue be covered in the current process and be dealt with later, only after a new democratic government is formed?

According to Neil J. Kritz (of the United States Institute of Peace), "diplomats and negotiators involved in efforts to curtail violent disputes, who previously might have dismissed any focus on past atrocities as an obstacle to stability and the resolution of conflict, today increasingly recognize this as an integral and unavoidable element of the peace process. For example, although recent peace accords to conclude civil wars in El Salvador, Bosnia, and, most recently, Guatemala may each have their respective weaknesses regarding accountability, each reflects this paradigm shift by incorporating various mechanisms to deal with the legacy of past violations and recognizing that a durable peace would be unattainable without them".

According to Stephen Landsman (Professor of Tort Law and Social Policy at DePaul University), "Prosecuting the human rights violations of a predecessor regime can yield at least half a dozen significant benefits to a democratic government. First, it can substantially enhance the prospects for the establishment of the Rule of Law. Second, prosecution can function as a means of educating the citizenry to the nature and extent of prior wrongdoing. Third, prosecution is one of the most effective ways of identifying and creating the predicate for the compensation of victims of a predecessor regime's misdeeds. Fourth, prosecu-

tion can provide a means of punishing wrongdoers for their criminal conduct. Fifth, prosecution can enhance a society's ability to deter future violations of human rights. Finally, prosecution may be essential to healing the social wounds caused by serious human rights violations".

Blanket amnesty might not be applicable for all serious human rights violations. The new democratic government, which would emerge from the old regime after completing the dialogue process, has the responsibility to take action on the offenses committed under the Genocide Convention, the Convention against Torture, and the Conventions on Crimes Against Humanity and War Crimes. Should there be no agreement on how to deal with the previous human rights abuses in the current dialogue process, then how is a new government going to respond to questions raised by the international community and human rights organizations? There are thousands of victims of human rights violations in Burma. Once a new government has been formed, complaints will certainly come forward, with the demand for proper action by the authorities of course. How is that new government going resolve this issue?

The new government would undoubtedly face serious problems once they attempt to deal with the issue of previous human rights abuses without any agreement in the current dialogue process. Nobody knows how long the current dialogue process is going to take. It has been going on for seven months and no progress has been made. It may take several years. During such a long dialogue process, not mentioning the issue of previous human rights abuses would certainly create an atmosphere of impunity. It would inspire the regime to continue ruling the country brutally.

To avoid this, a clear message should be provided to the regime that the longer they stay in power, the more serious the situation becomes for them: human rights abuses will not be pardoned under the gradual spread of litigations by the victims and by international human rights organizations; by the UN Security Council through the current International Criminal Tribunal; and by the International Criminal Court (another international mechanism for the protection of human rights, which will come into existence in 2002). The military regime knows of course that it is not possible to continue ruling the country without committing more serious human rights violations.

A clear message should be provided to the regime that the longer they stay in power, the more serious the situation becomes for them: human rights abuses will not be pardoned under the gradual spread of litigations by the victims and by international human rights organizations.

The dialogue process would never be successful if an allegation be made that all the previous human rights abuses were perpetrated only by the regime, such as 'Victor Justice' was sought by the Neurenberg Tribunal after the Second World War. The experiences of the countries which changed from authoritarian rule to democracy in a peaceful way, proved that the accountability for previous human rights abuses had to be sought not only among the authorities of the former regimes, but also among other responsible persons in the liberation movement, as human rights abuses usually ensued from both sides. "In the case of South

Africa, after struggling against the white apartheid regime for several decades, 80% of the perpetrators who came forward to the Truth and Reconciliation Commission and made full disclosures on how they committed abuses, were black people", according to Professor Paul van Zyl (former Executive Secretary of the Truth and Reconciliation Commission of South Africa). This process would also create the feeling of justice in the mentality of the authorities of former regimes, thereby speeding up the dialogue. However, it is still not sure whether the forces in the liberation movement of Burma are prepared to face this issue.

Further detailed discussion among the parties in the dialogue process on how to deal with the previous human rights abuses would be beneficial. For instance, under the principle of command responsibility, all the abuses committed by subordinates might not be accountable to the commanders.

In conclusion, keeping silence on the previous human rights abuses in the dialogue process would not be beneficial in order to seek justice for the victims, to stabilize the country, to achieve a genuine national reconciliation, or to enjoy long-term peace in Burma. The parties in the current dialogue process should find a mechanism by which the previous human rights abuses can properly and justly be dealt with.

The Junta's Ploy

In 1963, the military regime in Burma could manipulate the Peace Talk Process and benefited from that. It should not be provided another opportunity in the current process. There is quite a difference between the situation in the world in 1963 and 2001. Now that the Cold War has ceased to be, democratic countries no longer see communism as a major threat in the Asian region. This makes the Burmese military regime hesitant to simply tell the people that the dialogue process has collapsed due to the underground activities of the communists. In the current cease-fire situation, it is also not possible to allege the ethnic organizations as scapegoats for the collapse of dialogue process.

Within this context, freezing the current dialogue process might not be advantageous for the military regime. But while the talks go on, the regime might want to win time without making any fundamental democratic changes. Some analysts suggest that the parties should take time for confidence building. That might be true for the parties in other national and international conflicts, however for two reasons it remains doubtful in the case of Burma, where the regime obviously takes more time than necessary.

The first reason is that the NLD communication channels (both national and international) are being cut. The functions of the party are still strictly controlled by the military. Many NLD leaders are currently under house arrest or in prison. The current structure of the state and the existing laws create a situation for the NLD which is not favourable. As a result of all this, the power of the NLD has been weakened. Meanwhile the military regime can use its communication channels freely. The junta can manage its activities in whatever way it likes. The structure of the state and the existing laws are directly beneficial to the military, which is not only enjoying political credits but also material assistance from the international community. In this context, the regime could have a hidden agenda in the current dialogue process: the more time it takes, the better it can strengthen its power.

The second reason is that since 1989 the regime has told the leaders of those armed ethnic organizations which entered into cease-fire agreements to establish 'trust and confidence building' first, whenever political dialogue is mentioned. The junta usually works on 'confidence building' for the ethnic leaders by granting private licenses for business and providing land for private use.

This has already been going on for ten years. The 'confidence building' process between the junta and the ethnic leaders shows no signs of it ending, while national issues are never discussed. At the mean time (except for the United Wa State Party which managed to grow with narcotics money) all other armed ethnic organizations which entered into cease-fire agreements have become weaker, whereas the military regime has become stronger. The regime is applying similar tactics towards the NLD now. By manipulating the current dialogue process, 'confidence building' might take another twenty years with no fundamental democratic changes in Burma.

Strengthening the Democratic Opposition

While the military regime could strengthen its power (by receiving huge amounts of assistance from China and Pakistan, by manipulating the country's budget, by making profits on narcotics), the international community should not ignore the vulnerable situation of the democratic forces in Burma. In the ASEAN context, countries have interfered in each other's internal affairs. ASEAN itself sent a troika (consisting of government representatives from Indonesia, the Philippines and Thailand) to Cambodia in 1997, after current Cambodian Prime Minister Hun Sen had staged a coup. It was a meaningful step of ASEAN to help resolve the problem of the Cambodia. But unfortunately, whereas ASEAN openly recognized the Cambodian election results, it never did so in the case of Burma. The democratic forces in Burma would be strength-

ened if ASEAN publicly recognized NLD's victory in the May 1990 elections.The NLD has been weakening and its local activities are almost paralyzed now. This is not the result of ineffective leadership on behalf of the NLD. It is the result of the existence of unjust laws and practices of the military regime.

Strengthening Civil Society

It would not be helpful for the democratization of Burma if the international community remained in a 'wait-and-see' passivity. The people in Burma have a responsibility also, by exerting their concerted efforts to promote their rights. However without the effective assistance of the international community, the struggle of the people would be too arduous. The emergence and strengthening of civil society in Burma are top priorities. What kind of international assistance would be beneficial for Burma in the long term?

India and Pakistan gained independence at the same time as Burma. But where India managed to establish a stable democracy, Pakistan faced military coups. Many academics have pointed out that unlike Pakistan, India has a strong civil society. Civil society has played a significant role in promoting the rights of the people in many Southeast Asian countries, such as Thailand, the Philippines, Indonesia, and even Cambodia. But not yet in Burma. The emergence and strengthening of civil society in Burma would enable the strengthening of the democratic movement. It would speed up the current dialogue process. Furthermore, the people would be able to promote their own rights for the long term: a strong civil society will deter the vicious circle of military rule in Burma.

It may take time, but the emergence of civil society in Burma is a strong foundation for democracy and also a long-term protection for human rights. In this regard, the UN, democratic governments, international organizations interested in promoting human rights and democracy in Burma can do a lot.

UN agencies working in Burma should improve their relationships with the forces working for the restoration of democracy and human rights. The role of the UN in the current dialogue process should be actively promoted so that it can be officially involved in the process.

First, education should be provided to the democratic ethnic organizations along the Thai-Burma, India-Burma and China-Burma border areas, in order to enable them to implement human rights and education programs themselves on a wider scale.

Second, UN agencies working in Burma should improve their relationships with the forces working for the restoration of democracy and human rights. The role of the UN in the current dialogue process should be actively promoted so that it can be officially involved in the process. The actions of the Red Cross and the International Labour Organization should be honoured and strengthened.

Third, effective monitoring and intervention by international media and legal communities, in order to promote the independent judiciary and independent media in Burma, would be extremely beneficial.

Endnotes

* Aung Htoo is the General Secretary of Burma Lawyers' Council.

1. Amartya Kumar Sen, "Development as Freedom". New York: Alfred A. Knopf, 1999, p. 162.
2. Francis Fukuyama, "The End of History and the Last Man". New York: The Free Press, 1992, pp. 13-38.
3. ANFREL, Asian Network for Free Elections, "Statement on Asian Monitors' Assessment of Fairness in Representation in Cambodia's National Assembly", 9 October 1998.
4. SLORC stands for 'State Law and Order Restoration Council', the military regime's official name at that time.
5. Carlos S. Nino, "The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina". *The Yale Law Journal*, 100:8, June 1991, p. 2622.
6. Ibid., p. 2623.

New Lawsuit against Daw Aung San Suu Kyi: Hidden Agenda?

*B.K. Sen and Khin Maung Win**

The new lawsuit that U Aung San Oo has filed against Daw Aung San Suu Kyi is a suit filed after the Court had dismissed the first suit for inheritance. The defect in the earlier suit apparently has been taken care of. But it will have to go through rough water. Section 6 of the "Transfer of Immovable Property Restriction Law" of 1987 reads "(...) when any person leaves Myanmar for good (...), the Ministry concerned may after scrutiny case by case in respect of the immovable property owned by that person, carry out in conformity with the procedures as follows: (a) allowing right of inheritance in accordance with law; (b) confiscating by the State". Section 7 of the Law reads, "If the Ministry concerned decides to allow right of inheritance under subsection 6, as to who should inherit the immovable property shall be by consensus of the heirs or by the decision of the Court in accordance with the relevant succession law".

Under this provision a foreigner is barred from putting up claims to property which has devolved on him upon the death of his parents. He can only do so when the government gives him permission to put a claim, and, if necessary, to establish it in a Court of Law. In the instant case U Aung San Oo must have approached the Home Ministry, which in this case is the competent authority, for requisite permission and he was readily obliged. Instead, the Ministry could have withheld the allowing the right of inheritance and referred the parties to reach a consensus first.

Daw Aung San Suu Kyi in all probability would have agreed to an out of court

settlement. But that would have defeated the political purpose at issue. This exercise of the power to refer to the decision of the Court, to say the least, is a gross abuse of Law. It is discretionary, as the section itself says, that after scrutiny case by case, decision will be made. The action that followed by the State is interference by the State in family affairs. A foreigner has been given favour against a citizen who is the daughter of General Aung San, the father of the nation. The foreigner, ironically, is one who renounced the citizenship bestowed on him by his legendary father. Unmistakable, the victim of the permission is the acclaimed leader Daw Aung San Suu Kyi, who is engaged in mortal political combat with the authority that has given the permission to sue her. The criteria for giving permission are the matter being bona fide, there is a prima facie case and there is public interest.

First, the so-called permission does not meet any of the aforementioned criteria. The matter is patently mala fide for reasons stated, and made clear by the ongoing confrontations between the givers and victim of the permission. The fact that the victim is under house arrest makes it clear that the permission givers are persons interested and clearly disqualified to exercise the power of giving permission. It is a case where judge and prosecutor are one.

Second, there is no prima facie case to give the permission. In the earlier case the Home Ministry had given exemption enabling U Aung San Oo to file the suit even though there was no prima facie case. The very fact that the case was dismissed on a preliminary point showed the suit not being maintainable. It proved to be disgraceful that the Home Ministry's order ended in disrespect. Prima facie the case is untenable on cogent legal grounds. The suit is barred under the principle of res judicata. It says that no second suit is entertainable on the same cause of action once it is dismissed. In the first case the cause of action was inheritance of the mother's property. It is the same in the second case. What should have been done was to ask for amendment of the plaint in the first suit or, alternatively, ask for withdrawal of the suit with liberty to file a fresh suit. U Aung San Oo did not do either and gave his sister a leeway to extricate her from the trap laid.

The matter is patently mala fide. (...) The fact that the victim is under house arrest makes it clear that the permission givers are persons interested and clearly disqualified to exercise the power of giving permission. It is a case where judge and prosecutor are one.

Third, there is another flaw in the present suit. U Aung San Oo's mother died in December 1988. The present suit was filed in April 2001, after 12 years! The suit will be barred by Law of Limitation. The power given to the Court to extend time is not applicable in this case. If it is exercised, however, it will be yet another abuse of Law. The Court has framed two preliminary issues since Daw Aung San Suu Kyi filed her objections, namely 1. Whether the suit is barred by Law of Limitation; 2. Whether a foreigner has the right to file the suit. After hearing the arguments of both sides, the court will have to pass order and hopefully this will be dismissal of the suit as in the previous case.

However the disturbing factor is the role that the Ministry has played in allow-

ing Right of Inheritance to be brought to Court. This role has sent a wrong message and it is a retrograde in the process of confidence building, which is so important in the ongoing talks between the SPDC and opposition leader Daw Aung San Suu Kyi. Some may even say that it is a provocative act. Obviously Burma is going through a painful process of transition; conflict resolution seems far away. Perhaps it is the birth pang of a new order which has no time frame.

Endnote

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Law Reporting in Burma: Lack of Transparency

*Win Maung**

Introduction

Law reporting emerged from the doctrine of precedent, which requires that like cases should be decided in the same way. In most countries, leading cases decided by Supreme Courts are officially published in law reports, which contain the names of the persons appearing, pleas of the defendant, the judgment, and the reasons for judgment.[1] Law reports should be reliable sources for those practicing in the legal field.

The distinction between authorized and other reports is important when it comes to citing a case in court. Although a case may be reported in a number of law reports, one should cite the authorized report as this has been revised by the judge. It often contains a summary of the arguments that the barristers put to the court. Both the judge and the barristers have to read from the same law reports. Cases are cited by stating the name of the case, the volume number or year number of report series (or both), the name of the report series and the page number where the case begins. Not every single judgment is included in law reports. The councils of law reporting and the editors of law publishing companies decide on which judgments are included. Generally the cases that are included in the report are landmark cases, those that are considered to be important for a point of law or those having an unusual set of facts.

Burma Law Report

In some countries there are private reports, weekly law reports and legal journals. These are often published by law publishing companies. In Burma however, this is not allowed. There are no privately owned newspapers, and the state newspapers controlled by the government never mention legal issues or political cases. *Burma Law Report* (BLR) is a government publication, published annually by the state-controlled Law Report Publishing Board. It is the only source for Burmese advocates. The report is based on judgments passed in significant cases by the Supreme Court. The selection of cases is at the discretion of government legal officials of course, and there is no transparency of judicial proceedings. Law reporting means *accountability* – the very thing that military juntas are afraid of. So it is not surprising that the reasoning leading to judgments in the BLR usually consists of a few sentences only, while the whole text contains repetition of selected facts. The duty to write down the judgment properly, in compliance with the rules laid down for this, is shirked and perfunctorily performed. The gross abuse of the principle guiding law reporting is patently visible. *Burma Law Report* reflects the way the junta is thinking in respect of law.

Judicial Principles and the Jurisdiction of the Supreme Court

People depend on the Court for justification in accordance with the laws. Even if the judges fully and independently exercise judicial power, the Court can be reliable for the people. Some provisions mentioned in the Judicial Law[2] of the State Peace and Development Council or SPDC are reliable clauses with a standard not lesser than the international norms. For example, some of these clauses are:

Law reporting means *accountability* – the very thing that military juntas are afraid of. So it is not surprising that the reasoning leading to judgments in *Burma Law Report* usually consists of a few sentences only, while the whole text contains repetition of selected facts.

Judicial Principles

- Article 2(a), administering justice independently in accordance with law;
- Article 2(e), administering the functioning of justice in open court unless prohibited by laws;
- Article 2(f), guaranteeing in all cases the right of defense and the right of appeal under the law.

Jurisdiction of the Supreme Court

- Article 5(d), adjudicating on appeal cases against any judgments,

orders and decisions passed by the State and Division Courts;

- Article 5(e), adjudicating on revision cases against any judgments, orders and decisions passed by any court;
- Article 5(g), examining any judgments, orders and decisions of any court which are not in conformity with the law, altering or setting aside such judgments, orders and decisions if necessary;
- Article 5(h), examining any orders and decisions which are not in conformity with the law, relating to the legal rights of citizens and altering or setting aside such orders and decisions if necessary.

Miscellaneous

- Article 25 says that the Chief Justice, Deputy Chief Justice, the Judges of the Supreme Court and the Judges of State, Divisional and District Courts may, if necessary, inspect prisons, *yebet* (labour) camps and police cells in order to enable those under detention to enjoy the rights to which they are entitled in accordance with the law, and in order to prevent undue delay in trials.

These are provisions that comply with the international norms. However, the judges in Burma have to obey the orders of the military junta also. At a meeting the First Secretary of the junta, Lt-Gen Khin Nyunt, said that, "…the Judges need to consider state policies, planning and administration in their judgments, other than merely considering judiciary perspectives".[3] U Aung Toe, Chief Justice of the Supreme Court, while delivering a speech during the same meeting, used the words "under the First Secretary's guidance" many times. He reminded the judges to follow that guidance. Under such guidance it is difficult to believe that judges are independent and that their judgments are fair and just. The selection of cases for *Burma Law Report* is, of course, in accordance with Khin Nyunt's guidance also.

Cases Mentioned in *Burma Law Report*

Burma Law Report consists of two parts: criminal and civil cases. This paper is focusing on the criminal part. In the criminal cases part of BLR, there were 51 cases mentioned in 1992,[4] 50 cases in 1993,[5] 24 cases in 1994,[6] 39 cases in 1996,[7] 16 cases in 1997,[8] and 37 cases in 1998.[9] In the reports over the years 1992 and 1998, cases were included with punishments ranging from six months imprisonment up to capital punishment.

The judgments as mentioned in BLR are mostly related to the Criminal Code,

such as theft, swindle, embezzlement, rape, murder, and receiving stolen property. Some other cases are related to laws such as the Criminal Procedure Code, the Burma Evidence Act, the Tenant Act of 1962, the Narcotics and Dangerous Drugs Act of 1974, and the Narcotic Drug and Psychotropic Substance Law of 1993.

Mostly minor cases were mentioned in BLR between 1992 and 1998, such as theft cases. One theft case as described in BLR of 1994, for example, tells about the secretary of the board of trustees of a temple in Pegu, who had accused a carpenter of stealing an estimated 1500 kyat (equivalent to 4 US dollars at the unofficial rate) worth of timber from the temple, whereupon the carpenter countered that he had taken the timber with the village headman's consent, to make chairs for the temple. The decisions of both Primary and Lower Appeal Courts on this case were eventually submitted to the Supreme Court.[10]

Another case mentioned in BLR was about the act of stealing a toddy palm worth 1200 kyat from a farm. Both parties in the case had previously owned the farm as co-heirs. Later on, the farmland had been divided before the village headman and other witnesses, but the ownership had not been legally recognized. The plaintiff (seeing himself as the only true owner of the farm) maintained that the accused should have asked his permission to take the toddy palm away. The accused countered that, as co-owner of the farm, he did not need anyone's permission to do so. Eventually an appeal was submitted to the Supreme Court.[11]

By looking at Supreme Court judgments in this kind of cases, one would assume that citizens in Burma can enjoy their rights of submission, appeal, review and revision, and that the judges perform their duties in accordance with the law. But while trivial cases are mentioned in *Burma Law Report*, no cases whatsoever are mentioned regarding the actions taken against members of political parties.

There have been hundreds, if not thousands of political cases in Burma, such as cases under the Emergency Provisions Act of 1950, the State Protection Act of 1975, and the Printers and Publishers Registration Law of 1962. Judgments in cases under these laws – very often with an unjust, unfair, ambiguous and politicized nature – remain unreported in BLR.

While trivial cases are mentioned in *Burma Law Report*, no cases whatsoever are mentioned regarding the actions taken against members of political parties.

Unreported Landmark Cases

Landmark cases that were not mentioned in *Burma Law Report* include the following traffic accident cases. While U Saw Hlaing (an official of the National League for Democracy) was driving his car, he collided with a trishaw[12] in

Taunggoo District. Although the collision only resulted in minor injuries to the trishaw driver and his two passengers, U Saw Hlaing was taken to Kyunggone Police Station and charged under Article 338 of the Penal Code, "for causing grievous injury". He was sentenced to five years. However, the case had not been taken to any court of law and defence counsels were denied,[13] totally against the Criminal Procedure Code.

Strangely enough, more serious traffic accidents may carry less severe penalties. Maung Htut Kyaw Win (the son of a military officer) caused an accident with his car, resulting in Maung Ye Win (a student at the Institute of Economics) getting severe injuries. Maung Ye Win was admitted to hospital where he died. Maung Htut Kyaw Win was arrested, detained for a couple of weeks, and then suddenly released.[14] Of course the judgment cannot be found in BLR. But it is obvious that, after Maung Htut Kyaw Win had been driving a car, his father must have been driving a coach and horses – through the law.

While twenty-eight political prisoners, including U Win Tin (the Secretary of the National League for Democracy and Vice-Chairman of the Writers' Association), were serving long-term imprisonments under Section 5(j) of the Emergency Provisions Act, they were again charged, this time for contravening prison regulations. Such regulations are laid down in the Jail Manual, but as this describes relatively light punishments, they were charged under Section 5(e)[15] of the Emergency Provisions Act which carries more severe penalties. The case was tried in prison without defendant lawyers, whereupon the existing prison sentences were extended with another 7 years.[16] According to the procedures as stated in the Evidence Act and the Court Manual, the judgment of the court is a public document and people concerned in the case should have the right to access that judgment. The junta's obstruction, however, has made it extremely difficult for citizens to get any concrete information about cases tried in prison.

Ko Khin Htun, who was visiting his jailed friend, was also charged for contravening prison regulations. Although Burmese prison regulations refer only to prisoners and not to their visitors, Ko Khin Htun was accused of violating Article 5(d)[17] of the Emergency Provisions Act of 1950 and Article 42 of the Jail Manual of 1894 (amended in 1937). Although the prosecutor was unable to produce any evidence, the prison officials who were supposed to be eyewitnesses were never summoned to testify. Although until the last session of the trial any legal aid was denied,[18] the court sentenced Ko Khin Htun to a combined penalty of 4 years and 3 months imprisonment. This was totally against Section 340 (1)[19] of the Criminal Procedure Code, Article 455(1)[20] of the Court Manual and Article 2(f)[21] of the Judiciary Law. Besides, this trial totally ignored an earlier ruling of the High Court (even mentioned in BLR!) which said, "… the court cannot rule to be affected upon an offence without giving permission to defend the accused (…)"[22]

Sometimes a case is based on mere suggestions, for example the case of Dr Min Soe Lin (a member of parliament since the May 1999 elections, and Secretary of the Mon National League for Democracy). Two members from the Central Committee of the New Mon State Party (NMSP, which entered into a cease-fire agreement with the military regime) had requested Dr Min Soe Lin to give the NMSP some suggestions. A letter with suggestions was written, whereupon the military junta accused the three persons of agitating against the cease-fire agreement. Under Article 5(e) of the Emergency Provisions Act, the accused were sentenced to 7 years in 1995. It would be interesting, necessary even, to know the reasons for deciding such (political) cases, however none of these have been mentioned in *Burma Law Report.*

The Law Report Publishing Board

The Law Report Publishing Board consists of members appointed by the military government. Following are the members of the Board since 1988: Chairman U Tin Ohon (Supreme Court Judge), U Ba Than (Chief Director of the Supreme Court), U Tin Aye (Director of the Criminal Cases Department of the Supreme Court), and U Soe Nyunt (Director of the Civil Cases Department of the Supreme Court). U Thet Htun (Director of the Administration Department of the Supreme Court) was the Secretary of the Board. In 1994, four members were added to the Board: U Than O and Dr Tin Aung Aye (both Supreme Court Judges) became the Chairman and Vice-Chairman respectively, U Thin Zaw became the Joint Secretary, and U Chan Htun became Member.[23] Current members of the Board are from the Supreme Court but they are not practicing advocates. During the period of parliamentary democracy before 1962, members of the Board (including the Editor) were mostly practicing lawyers, while at least one of the members came from the Office of the Attorney-General.[24]

Conclusion

Burma Law Report has not included any political cases since 1988, which is not surprising because it is a government publication. The BLR has not been a reliable source since 1962, when the military seized power. The current BLR is a result of the destruction of Rule of Law in Burma. It has become a façade, which ironically very clearly reflects the attitude of the military regime towards law. BLR should stand for *Bad Law Report.*

Endnotes

* The author is an Executive Committee Member of Burma Lawyers' Council.

1. See: R.J. Walker and R. Ward, "Walker & Walker's English Legal System", 7th Edition. Chapter 3, C, "The Historical Development of Law Reporting". London: Butterworths, 1994, pp. 78-85.
2. The Judiciary Law (State Peace and Development Council Law No. 5/2000), issued on 27 June 2000.
3. Speech by First Secretary of the State Law and Order Restoration Council, at the Coordinating Meeting of Supreme Court Judges, State and Division Judges, District Judges and Law Enforcement Officers, on 22 August 1994.
4. See: *Burma Law Report*, 1992
5. See: *Burma Law Report*, 1993
6. See: *Burma Law Report*, 1994
7. See: *Burma Law Report*, 1996
8. See: *Burma Law Report*, 1997
9. See: *Burma Law Report*, 1998
10. *Burma Law Report*, 1994, pp. 155-160.
11. *Burma Law Report*, 1994, pp. 112-116.
12. A *trishaw* (or *saika*) is a small three-wheeler bicycle taxi with one seat next to the driver and another seat behind that. The two passengers are sitting back to back – highly uncomfortable.
13. "Letters to a Dictator: Correspondence from NLD Chairman U Aung Shwe to SLORC's Senior General Than Shwe, December 1995-March 1997". Burmese edition. Published by the All-Burma Students' Democratic Front, Bangkok, July 1997, p. 30.
14. "Letters to a Dictator", p. 20.
15. "… If a person aims to disseminate false information and has committed such an act or is in the process of doing so, knowing that the news is not correct or that there is enough proof that the news is not correct, [this person] shall be punished with up to seven years imprisonment, or a fine, or both" (The Burma Code, Vol. II, p. 244).
16. "Letters to a Dictator", pp. 29-32; and, "Myo Myint Nyein and the 21 Prisoners' Case". *Legal Issues on Burma Journal*, No. 2, June 1998, p. 13.
17. "… Whoever conducts an act with the intention to frighten the general public or a group of people, or conducts an act with this result (…)" (The Burma Code, Vol. II, p. 246).
18. "Letters to a Dictator", pp. 27-28; and, "The Rule of Law and the Advocate's Role". *Legal Issues on Burma Journal*, No. 2, June 1998, p. 21.
19. "Any person accused of an offence before a criminal court, or against whom proceedings are instituted under this [Criminal Procedure] Code in any such court, has the right to be defended by a pleader" (The Burma Code, Vol. VIII, p. 264).
20. "Every person charged with an offence shall have the right to be defended by a pleader" (The [Burma] Court Manual, p. 266).
21. The Judiciary Law (State Peace and Development Council Law No. 5/2000), issued on 27 June 2000.
22. *Burma Law Report*, 1979, "The Socialist Republic of the Union of Burma vs.

Maung Nu", p. 90; and U Myint Naing, "Burma Digest 1973-1993", published in June 1996, p. 268.

23. See: *Burma Law Report*, 1994 and 1998.
24. According to Mr. B.K. Sen, Advocate and current Executive Committee Member of Burma Lawyers' Council, who has more than 40 years of experience in the legal field. He has been a member of the Burma Bar Council and was Joint Secretary of the Burma High Court Bar Library.

Designing Constitution as Policy Formulation to Stop Human Rights Violations

*Khin Maung Win**

An intensive people's movement for the restoration of democracy and human rights has been existing in Burma for more than a decade. In the meantime, both government and opposition groups have been drafting constitutions, to be put into force during the transition to a more open and democratic system of government.

The adoption of a new constitution in Burma (the country with the worst human rights record in the region) would probably not help to improve the present situation unless it adequately addresses the political issues that have been the main cause for human rights abuses. There are several political issues to be addressed by the new constitution, one of these being the half-century-old ethnic conflict, which has been a major cause for the serious and systematic human rights violations.

Burma's experiences from the past suggest that the resistance movements, run by the non-Burman ethnic minority groups, would not be satisfied until their demands for political equality are guaranteed by the constitution. Even when Burma was led by a democratic government from 1948 to 1962, the non-Burman ethnic groups were not convinced that only having a democratic government would be sufficient to ensure their political equality. As long as the constitution fails to guarantee political equality for the ethnic groups, they will continue their resistance against the central government, no matter how democratic it is.

Political Equality Guaranteed?

During the struggle for independence, the Burman leaders (particularly General Aung San, the architect of Burma's independence movement) told the non-Burman minority groups that their political equality would be guaranteed by the post-independence constitution. It was promised that such a constitution would create a federal system of government. However, when this constitution was finally put into force in 1947, most non-Burman ethnic groups felt that the quasi-federalism mentioned in it did not really guarantee political equality with the Burman majority group.

Therefore, the non-Burman ethnic groups demanded an amendment to the 1947 constitution, by adding provisions that would provide political equality. Ethnic minority groups conducted a series of consultation meetings, both among themselves and with Burman government leaders, in order to come to the desired amendment. The main demand was to transform the government system into what they called a "genuine federal system" in which Burmans would no longer be granted special privileges. If this demand was not met, the non-Burman ethnic groups' option would have been the exercise of the right of secession as laid down in Chapter 10 of the 1947 constitution.

The movement of non-Burman ethnic groups demanding political equality, also known as the Federal Movement, reached its peak between 1956 and 1962, co-incidentally along with the leadership crisis within Burma's ruling party, the Anti-Fascist People's Freedom League (AFPFL), which had been in power since the independence. As a result from this crisis, the AFPFL split into two factions (AFPFL-Clean and AFPFL-Stable) in May 1958, whereupon prime minister U Nu, also leader of AFPFL-Clean, invited army chief General Ne Win to form a caretaker government. This caretaker government was assigned to conduct general elections and to transfer power to the election winning party. The general elections were held in 1960, bringing U Nu's faction back into power.

Meanwhile, the leaders of the ethnic minority groups continued demanding ethnic equality and federalism, and wanted discussions with U Nu about the amendments to the constitution. General Ne Win, prime minister in the caretaker government, saw this as a major threat to the integration of the country. Accordingly, when Ne Win seized power in 1962, he justified the coup by reasoning that the political situation had demanded the army to respond in this way, to save the country from disintegration by the Federal Movement. Ne Win's military government, known as the Revolutionary Council, arrested U Nu and many ethnic leaders including Sao Shwe Theik, ex-President of Burma.

As it became clear that the military regime would not be offering any possibility for political equality, many non-Burman ethnic groups joined the underground

and intensified their insurgency against the military government. In the eyes of the non-Burman ethnic groups, the military was conceived as representing the Burman majority anyway.

With the propagation of the 1974 constitution, totalitarianism was installed, supported by the army-controlled Burma Socialist Programme Party (BSPP). The quasi-federal form of government, as described in the 1947 constitution, was replaced by a centralized unitary system of government.

Insurgency: Reason for Human Rights Violations?

As a consequence of government's failure to properly address the demands of ethnic minority groups, that could have been resolved peacefully if only the government had been willing to do so, the insurgency movements emerged. According to the Revolutionary Council, the main reason for the coup d'état was to defend the integrity of the country against the Federal Movement. While the military strengthened its power at central as well as regional and local levels, it intensified its actions against ethnic insurgency movements. The army has allowed itself to commit any kind of human rights violations, if this is "considered necessary for the consolidation of the state". The army often sees civilians who belong to non-Burman ethnic groups as supporters of the insurgency movements. It is even said that the military regime keeps the civil war going in an attempt to propagate military leadership as essential in defending the integration of the country. The military government sees the existence of the ethnic insurgency movements, together with their demands for political equality, as justifying factors for imposing suppressive actions—resulting in systematic human rights violations.

Systematic Human Rights Violations

International human rights organizations such as Amnesty International and Human Rights Watch, have been documenting more and more human rights violations committed by the Burmese military government against its own people. As in all authoritarian states, human rights violations are usually politically motivated. Human rights violations in Burma can generally be seen in two categories: violations against individuals and violations against ethnic groups.

If violations are committed against individuals who are involved in politics critical of the government, this can be classified under the first category. This type

The military junta in Burma sees the existence of the insurgency movements as a justification for systematic human rights violations.

of violations is not based on ethnic background but on political activity. That is why the violations against individuals are selective in terms of targeted victims and arbitrary in terms of practice.

Violations against non-Burman ethnic groups are irrespective of involvement in politics. Any non-Burman ethnic group waging war against the government is often considered as "one unit" by the government, and subject to suppression. Forced relocation, burning down the whole village, destroying crops and rice fields, confiscation of property, rape, torture and murder have become part of military operations in the suppression of ethnic insurgency movements. Worst is the practice of what is called the "Four Cuts Policy": cut off communication lines between villagers and the insurgency movements, cut back on new recruitment for insurgency groups, cut up their logistics and cut down their flow of information. As a tragic consequence, such operations have become systematically entrenched in military government policy. Innocent non-Burman ethnic people at large suffer from these indiscriminate military operations.

The features that make the human rights violations in Burma *systematic* include (a) that the military government backs the violations (b) on a massive scale, with (c) the intention to eliminate the ethnicity of the victims (for example, Burmese soldiers are 'encouraged' to marry ethnic minority women, whereupon these women have to change their religion into Buddhist), (d) entire populations are indiscriminately targeted as belonging to the resistance groups, and (e) there is no political and judicial remedy available for the victims.

The Remedy

Non-Burman ethnic groups opt for the insurgency movements because the government fails to resolve their demands for political equality peacefully within a democratic framework. The military junta in Burma sees the existence of the insurgency movements as a justification for systematic human rights violations. Only when two essential steps are taken—first, to restore a democratic government that is willing to resolve the demands of the non-Burman ethnic groups peacefully, and second, to introduce constitutional arrangements that guarantee the political equality of the non-Burman ethnic groups—can the systematic human rights violations be brought to an end.

Endnote

* The author is an Executive Committee Member of Burma Lawyers' Council.

Burma's Transition to Rule of Law in Different Contexts

*B.K. Sen**

As Burma views the transition in Palestine, the first quarter of the 21st century has witnessed dramatic developments in the global scenario. The democratic community has been making an assessment of the situation in the context of Rule of Law. The Arab-Israel conflict has been raging for decades. Considerable progress to resolve the conflict peacefully gained momentum. But the negotiations have suddenly broken down with violence as the tragic result. This proves that conflict resolution is a difficult path of peaceful democratic transition.

The time has come for major international initiatives in domestic situations where the Rule of Law is thwarted, or its legitimate restoration is obstructed, or when its denial pushes a country to the brink of civil war, or when its suppression endangers a regional conflict. That initiative of course has to be peaceful, responsible, and dignified, and such things cost hardly anything. The United Nations and the international community must intervene to facilitate a solution. Israel has resisted the Palestinian request to the UN Security Council to dispatch unarmed military observers (or an unarmed peace-keeping force) to monitor the violence. It is argued that without explicit Israeli permission such cannot be done.

Under International Law, civilians under military fire are entitled to immediate protection against state-sanctioned aggression. It is to the interest of the aggressor to complicate this. Countries with a commitment to democracy must devise options for a force or organization to restore the peaceful right of self-determination of the Palestinian people. The UN General Assembly's Resolutions on the conflict have to be implemented, otherwise the faith of the people, struggling for peaceful transition, will be shaken. The reputation of the UN,

when it comes to conflict resolution, should not be the one it had among the Cambodians, who referred to the organization as "United Nothing". Because the disastrous result will be violence, leaving the struggling people confused.

In the case of Burma, the UN has successfully brought about on-going confidence-building talks between the military junta and the democratic opposition. The UN must continue to play this crucial role. Restoration of the Rule of Law in Burma cannot destroy the concerned parties; on the contrary, Rule of Law essentially provides the mechanism to resolve conflicts. If the domestic mechanism does not work, the only other option for the International Community is to take initiatives to prevent the outbreak of violence. The key to change (in Burma as well as in the Israeli-Palestinian conflict) by and large is in the hands of the International Community. Democratic transition can only emerge peacefully if there is interaction between the domestic and international forces. Rule of Law is without borders.

Transition in the Philippines: A Burmese Perspective

Burma and the Philippines share several common features, including a history of colonialism and authoritarian rule, a large ethnic population, and a legislative and administrative framework which has allowed social inequalities to become entrenched.

The democratic transition and restoration of the Rule of Law in the Philippines have been matters of great interest to the legal fraternity. The authoritarian Marcos regime was overthrown by people's power. The military sided with the people and the country could take peaceful transition. A democratic constitution was put in place, and the Philippines took the road to democratic reforms. However, President Estrada was indicted on charges of corruption while the Rule of Law was about to take its normal course. Impeachment proceedings were opened. Estrada refused to budge, but the People forced him out with the support of the military. Recently a sort of rebellion was started by Estrada's supporters to bring him back to power. This attempt has again been foiled by the people, again with the help of the military. The role of the army has become crucial in the democratic transition of the country. In this case, the army played a double role to uphold the Rule of Law.

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On the first occasion the army intervened to topple a dictator. On the second occasion it intervened when the due process of Law was on its course. This could be a lesson to the military in Burma. If the army sides with forces promoting the Rule of Law, it will get full support of the people. The army would retain its intervention role throughout the democratic transition when the transition

emerges from a compromise. The basic conflict in Burma is between the forces of Rule of Law and authoritarianism. The key players have to resolve the conflict through negotiation and compromise. The 1990 elections in Burma have given legitimacy to both players; now they have to find their way on the broad principles which emerged out of the elections. The way out of trouble need not necessarily be exactly in terms of the result, that is, so long as the spirit of the result is adhered to.

In such a difficult situation, Law is the tool to break the impasse. Of course it is not suggested that lawyers are the only competent persons to conduct negotiations, but the Law finally puts the negotiation process in place. Like in the Philippines, the Burmese army will have to play a positive role, but it must not replace civilian rule. The Burmese army should not have a double role. It should only sustain democratic transition. This transition will face lots of challenges, as can be seen from the Philippines and Indonesia. It looks like a gentleman's agreement form of power sharing, while Civilian Rule is the norm. The army leaders in Burma need not have any fear about their role during the transition. In many countries the army forms a bulwark of democracy and Rule of Law. There is, however, a difference between Burma and the Philippines. Brian Joseph wrote, "There is no shortage of democrats in Burma. What's missing is democracy"[1]. In the Philippines it's the other way round.

Burma's Transition: About Corruption and Abuse of Power

These two elements, which the emerging democracies of today have inherited from the authoritarian regimes in the course of transition, are perverting the Rule of Law. Corruption and abuse of power are the twin dangers to sustainable growth of society. The big question is how a democracy can fight these two viruses. In Burma's context this question has become highly critical because of its four decades of lawlessness and military rule. The essential requirement to rescue a country like Burma is accountability.[2] Constitution is at the top of her agenda. The constitutions of 1947, 1974, and the one has being framed by the junta since 1993, have not provided any safeguards against the dangers of corruption and abuse of power. The same goes for the constitution drafted by the National Council of the Union of Burma (NCUB). The future constitution of Burma must provide institutional mechanisms for accountability. The scandals in Indonesia, around the limitless corruption of Soeharto and his cronies, should have a place in the Guinness Book of Records. Similar corruption scandals around top political leaders in the Philippines, Pakistan, India, Thailand, and a lot of other countries are a tragic reminder that corruption is the result of abuse of power. This has become a global disease, which happens when the Rule of Law is undermined. Rule of Law therefore ordains that the constitution

must enshrine accountability. The mechanisms toward accountability relate to the reinforcement of transparency, and public accountability of all those who wield power. Burma's junta has curbed a system for themselves (with no constitution) which shields them from these mechanisms. Currently there is no medium which can play the critical role. Although Burma has an Anti-Corruption Act, this has been kept in cold storage while rampant corruption sustains the regime.

Endnotes

* The author is an Executive Committee Member of Burma Lawyers' Council.

1. *Far Eastern Economic Review*, 22 June 2000, p. 37.
2. See: Pranay Gupte, *Newsweek*, 25 October 1999, p. 4.