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● Regular Feature

- Daw Aung San Suu Kyi and her detention
- Burma's military leader and freedom of expression
- The assault on humanitarian assistance
- Analysis on U Aye Myint's case
- Environment

● In Brief

- Waiting on the rule of law
- Burma's junta's loss of sense

● In Review

- Burundi transition
- Interpretation of statutes

● News & Notes

- Open letter to UN Security General
- Activities of Pyi-Daung-Su Law Academy

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Legal Journal on Burma

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Content

Regular Features

- ⊙ Daw Aung San Suu Kyi and her detention.....4
- ⊙ Burma's military leader and freedom of expression12
- ⊙ SPDC's assault on humanitarian assistance23
- ⊙ Legal analysis on the case of advocate U Aye Myint.....34

In Brief

- ⊙ Waiting on the rule of law.....41
- ⊙ Burma's junta's loss of sense.....43

In Review

- ⊙ Burundi transition.....45
- ⊙ Interpretation of statutes.....48

News and Note

- ⊙ Open letter to UN Security General.....50
- ⊙ Activities of Pyi-Daung-Su Law Academy.....50
- ⊙ UN Human Rights Council.....51

Daw Aung San Suu Kyi and her detention

B.K. Sen

On 30 May 2006, the military Junta passed a fresh order extending the house arrest of Daw Aung San Suu Kyi for another period of one year. She has been put under house arrest four times. This makes it the fifth. The total period of detention has been 10 out of the last 16 years. This essay attempts to give a legal analysis of the detention, i.e. whether it is arbitrary, illegal and unsustainable.

First the background of the detention may be viewed.

- The first detention was from 20 July 1989 to 10 July 1995 and was at the time when the general election was held (May 1990).
- The second detention was from 1 September 2000 to 14 September 2000, at the time of her Dala journey.
- The third detention was from 22 September 2000 to 6 May 2002, at the time of her Mandalay travel.
- The fourth, from 30 May 2003 to 30 May 2006, was at the time of the Depayin incident.
- The fifth and most recent, from 30 May 2006 to 30 May 2007, came after the visit of Mr Gambari the UN's Under-Secretary-General for Political Affairs.

First and foremost it is necessary to examine the law itself under which the detention has been made. The *State Protection Law 1975* (SPL) was passed when Ne Win was in power and it was passed in the parliament constituted under the fake Constitution of 1974. This Constitution collapsed after the 8.8.88 uprising and the military junta seized power. The law therefore ceases to have legality. It has been universally accepted that a power-holder after a military coup may hold on to power for no more than three years. There are many decisions on this point by Supreme Courts of

different countries.

The “doctrine of necessity” cannot be invoked to sustain power in perpetuity. From this point of view the State Peace and Development Council (SPDC), which has been in power for much more than three years, cannot invoke the “doctrine of necessity”. Only a legislature constituted on the will of the people has law-making power. The SPDC is ruling without a constitution, without Parliament, without a separation of powers of legislature and executive, and without checks and balances. It is an illegal government. This point is particularly clear after the May 1990 election. By holding that election, the SPDC admitted that it was a temporary government, and should have transferred power to the winning party, the National League for Democracy (NLD). Contrary to that, the SPDC has kept the NLD’s leader in detention over the years.

Not only has the bad faith of the SPDC become as clear as daylight, the obvious illegality of its status becomes sharper. The gist of the argument is that SPDC, which should have gracefully retreated from the seat of power, has no right to detain the very person to whom power should have been transferred.

Having said that, it should also be recalled that when it was originally passed, the State Protection Law allowed judicial review (articles 19 to 21). Chapter 7, Article 9 of the State Protection Law says “any person against whom action is taken has the right of appeal while action is being taken”. It is difficult to imagine how to appeal “while action is being taken”. How can someone appeal while being dragged through the street by armed security troops?

Article 20 of the State Protection Law says “appeal can be made to the (military) Cabinet regarding orders regulating restriction, arrest, detention or denial of rights laid down by the Central Board under this law. The (military) Cabinet can annul, alter or approve the order as may be necessary”. This emphasizes the fact the junta is not accountable to anyone.

Article 21 of the State Protection Law says “if the Central Board considers it necessary to extend any orders passed under this Law with prior permission from the (military) Cabinet, an appeal can be sent to the Council of People’s Justices. The Council may alter, annul or approve the order as may be necessary”.

The right of appeal has been given to the Council of People's Justices, which is of course completely under the junta's control. After the military coup in 1962, the Supreme Court and the provisions for redress of infringements of fundamental rights were abolished. In addition, the State Law and Order Restoration Council, (SLORC) Notification No. 11/91 abolished Article 21 of the *State Protection Law*. Therefore, there is no effective remedy at all, contrary to Article 8 of the Universal Declaration of Human Rights, which says that everyone has the right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted by him by the constitution or by law. The State Protection Law has to be taken into account together with its context. The context is that it was passed by the 'Pyithu Hluttaw' parliament of the Burma Socialist Programme Party (BSPP), and the legislators provided the right of appeal to judges as an integral part of the law. When an integral part is torn out, the Law itself is vitiated. Hence, amendment of Notification No. 11/91 has rendered the State Protection Law invalid.

All countries who have national security laws have provisions for judicial intervention. The Executive is the detaining authority and must be reviewed by an independent body as to whether the detention order is within the requirements laid down in the law. The detaining authority cannot be the reviewing body. What the SPDC has done is to amend the review clause and abolish it altogether. The power of review is vested in the cabinet.

The second detention related to Daw Aung San Suu Kyi's visit to Della, a neighboring suburb of Rangoon. She went out to meet her party workers and give instructions. The SPDC blocked her car and ordered her to return. She refused, stayed in her car for 7 days while the villagers and her supporters helped her. Daw Aung San Suu Kyi eventually returned. This attempt to meet her party workers could not be categorized as a threat to the public peace by any stretch of imagination. Her party was a legally registered and recognised political party and as long as that remains the situation, she has every right to travel. If the SPDC didn't want her to visit certain areas, it could notify her under the law which restricts movements. But by no standard can a blanket ban on her movements culminating in her detention be justified. Article 10(b) can restrict travel but not authorise a total ban. Further, the restriction on travel is limited to the situation where travel is a threat to the

public peace. Public peace is not the same as law and order. Instead it is a situation where the tempo of public life is dislocated, from events such as a general strike or seizure of strategic position.

The third detention related to Daw Aung San Suu Kyi's Mandalay trip. She was to go to Mandalay to give evidence in a court case which was launched against the comedian Pa Pa Lay. The train schedule in which she was to travel was cancelled and she was forced to return home. Soon after came the detention order. It is hard to determine what threat to the public peace her trip to Mandalay posed. There was absolutely no ground for detention. SPDC reacted whimsically and arbitrarily to demonstrate that the power lies with them.

On the 30th of May, 2003, in the Depayin township of Burma, members of the military regime organized and implemented nearly 5000 perpetrators to attack the motor tour of Aung San Suu Kyi, other leaders of the National League of Democracy (NLD), and civilians, leaving a number of persons dead and missing. After the massacre, 64 people from the NLD were imprisoned and Daw Aung San Suu Kyi was assigned to house arrest. The purpose of the NLD tour was to establish confidence in the democratic process. The weight of the evidence shows that the junta orchestrated the massacre to silence democracy by producing terror in the hearts and minds of those in opposition to their policies.

The regime refuses to investigate and prosecute the issue in direct opposition to the General Assembly of the United Nations, in its 58th session, which called for a full and independent inquiry into Depayin. This highlights that no judicial solution to the Depayin massacre can occur within Burma.

The decision based on subjective satisfaction can be challenged on a number of grounds such as:

- non application of mind
- presence of factual and or legal bad faith
- application of wrong tests to arrive at a subjective satisfaction
- misconstruction of a statutory provision
- reliance on irrelevant or extraneous grounds
- failure to consider any matter which the statute expressly or implicitly requires to be considered, and
- unreasonableness.

The legal detention order of Aung San Suu Kyi can be challenged on each of the grounds stated above.

The distinction between 'law and order' and 'public order' is one of degree and looks at the extent of the reach of the act in question on society. It is the potential of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved, as distinct from a wide spectrum of public, it could only raise a problem of 'law and order'. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps to distinguish it as an act affecting 'public order' from that concerning 'law and order'. The question to ask is: Does it lead to disturbance of the current life of the community, so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on its facts. Considering that background, there can be no manner of doubt that the incidents related to 'law and order' and not to a 'public order' situation.

The ground and material of a detention order cannot be the same subject matter of an earlier detention order. There must be new grounds or new circumstances. A detention order cannot be justified simply by an addition to earlier existing facts. The fact that an earlier detention order has been made and then fulfilled means those events have been legally addressed and cannot be the basis of a fresh detention order.

Further, a solitary ground of detention is ordinarily insufficient. For one action to be sufficient to sustain an order for detention there must be indication that it is an organised act or a manifestation of an organised activity. There is no proof Depayin was organised by NLD and no indication that it will be repeated if the detainee is left free.

In one case, the single ground indicated in the grounds of detention was that the detainee and others entered a bus which resulted in the shooting of two people. A subsequent criminal trial ended in acquittal when the witnesses turned hostile. The detention order was unsustainable because there were no grounds to be satisfied that the criminal prosecution failed due to tampering with the

evidence by the detainee. Further, there was no evidence that the detainee would repeat such an incident.

The police commissioner had said that Daw Aung San Suu Kyi did not pose any threat. Yet, as stated by the Police Commissioner, an extension of the detention could only be made on ground of threat. This case clearly shows no threat existed and that the order was perverse. It has also been said that there had been talks between Daw Aung San Suu Kyi and the junta before her detention was extended. There was discussion on conditions for her release. They became abortive when talks failed. This means, that detention has been made not because of a “threat” but because of failure in the talks. The ground for detention became even weaker as the SPL has no such ground within its parameters. Hence the detention is not sustainable under junta’s own law.

The issue of previous talks gives a new dimension to the larger question related to release of Daw Aung San Suu Kyi - the situation for democratic activists is not hopeless as it seems. It is an admission by the junta that Daw Aung San Suu Kyi is a force to reckon with. Daw Aung San Suu Kyi, who is holding the banner of the rule of law, has survived and will eventually triumph.

State Protection Law

The main power base for the military regime is the State Protection Law.

Laws already on the books provide the government with enough power to handle whatever threats that do exist. But in each of these laws, there is provision for trial. The State Protection Law has no such provision. In normal criminal cases, sufficient evidence has to be put to the court for there to be a conviction. The State Protection Law is crafted exactly for cases where there is insufficient evidence to stand for trial. The basic principle in criminal law is that an accused is presumed to be innocent until it is proved to the jury the accused is guilty. Furthermore under normal criminal law, even if there is some evidence, that is not sufficient to convict an accused because the principle of a person only being convicted ‘where proved beyond reasonable doubt’.

When a regime has these criminal laws, the existence of State Protection Law is in violation of these laws. It cannot operate in

the manner it has been doing. It also violates the fundamental principles of jurisprudence. No one shall be subject to a limitation greater than that necessary for the purpose of meeting the requirements of morality, public order and general welfare. Daw Aung San Suu Kyi has repeatedly reiterated her faith in non violence and peaceful change. She can never be a potential threat to public peace. She has called for calm and discipline amongst people whenever sparks of unruly behaviour arise and people lose control.

The Security Council

The military government's actions have strengthened the resolve of the US and some European countries to involve the Council in Burma. The US has stated that by extending Suu Kyi's detention, Burma has shown that it is unwilling to engage in a credible and inclusive political process.

At the same time it seems that members like China, Russia and Japan have made it clear that their positions have not changed and that it would be hard for them to accept a resolution. Taking action in Burma under the formal agenda of the Council is still not an option for these countries. China views the situation in Burma as an internal issue that needs to be solved nationally. Japan has also indicated it would find it difficult to accept a resolution on Burma as it sees the situation as a humanitarian and human rights issue that should not be discussed by the Council.

The European countries are likely to see some merit in the US resolution but they are aware that this issue could polarise the Council without effectively increasing pressure on the authorities in Rangoon. On the other hand, there is also a sense that Gambari's visit has opened up a window of opportunity that should be used productively.

The following questions remain: Is the political situation created by junta a threat to international peace? Does the detention constitute a crime against humanity and how can the law truly defend human rights? If a few veto-wielding countries in the UN's Security Council can obstruct and derail the mandate and will of the overwhelming majority of the rest of the world, the UN body will cease to have the respect of a large number of oppressed peoples. The Burma issue is debated in the Council but it is high time that it is prioritised in its agenda.

The UN can unseat the SPDC regime from representing Burma as happened in the case of Cambodia when the power-struggle went on between two factions of Prince Si Har Nu and Hun Sein. The 1990 Burmese election has clearly determined the will of the people. The military regime no longer has the right to represent the country. The seat should be vacant until this question is resolved further. Those countries which support human rights should withdraw their diplomatic missions in view of the gross violations of human rights and the regime's refusal to respond to the august body of the UN. When diplomatic pressure has mounted on the junta, the countries sitting on the fence will have to rally around the UN. Isolation and diplomatic pressure will trigger a new energy in the people to call for Daw Aung San Suu Kyi's release. This will place Burma in the limelight and the Generals will be forced to come to the negotiating table to salvage the broken ship.

Burma's Military Leaders and Freedom of Expression

Burma Lawyers' Council

Burma has been characterized as a pariah state, or a state “ruled by thugs”. Burma is said to be an outpost of tyranny that has reduced the country into such a poor state of affairs. And it is not difficult to find out why. It is the absolute power wielded by its rulers that has caused them to rule in the manner they are doing. Absolute power is not an abstract concept. It has various ramifications, and of these, a significant issue is the suppression of freedom of expression. The ‘guys with guns’ only have their way unless they have mechanisms in place to keep Burma’s populace suppressed. One such mechanism is the institution of the Ministry of Home Affairs, Military Secret Service which have perfected their skill in limiting the voice of the people. Freedom of expression is one of the fundamental rights which all civilized nations observe. It is the freedom to talk, criticize and write one’s own views on various topics including the governance of the country. But it is more. It helps create a vibrant society. The interaction among various perspectives and thoughts allowed through freedom of expression enable many new ideas open up. They lead to improvement and development be it in the fields of education, science, economic administration, health care or others.

True democracy can only thrive in a free space of competing ideas and philosophical debates of a political, economic and social nature. Freedom of expression has an important role to play in facilitating democracy. The emerging constitution, which is supposed to be the goal of the military rulers, can never be based on the will of the people unless it is developed through freedom of expression, including all the different sectors and parties participating in the process.

It is essential for people to be informed, fully and truthfully, on all matters of public importance. Many liberal democracies have a Freedom of Information Act which enable citizens to have access to a range of information. In contrast, oppressive rulers resort to laws to suppress freedom of expression. They use the enforcement authorities to implement those laws. They use the judiciary to give legitimacy to their actions thereby holding the entire populace in fear.

An attempt has been made to survey the laws which Burma's military rulers use to keep the people in fear and which have turned the entire country into a big prison house. This survey may partly be successful in exposing the length and breadth of Junta's ignominious strategy to gag the people's voice. However, that is not the whole story. The Junta can impose reasonable restrictions but cannot totally deny freedom of expression. It controls the media and no newspaper it publishes important news such as the visit of Mr Gambari the UN's Under-Secretary-General for Political Affairs, or the extension of the detention of Daw Aung San Suu Kyi's. Further, electronic media never gives any hint of news that displays opposition to the Junta. People are fed propaganda news of the great development activities they are carrying on for the 'upliftment of the people'.

The author gratefully acknowledges Irrawaddy News which compiled a 'Chronology of Burma's Laws Restricting Freedom of Opinion, Expression and the Press'.¹ Much of the following list is reproduced from the chronology in Irrawaddy News.

1908 - *Unlawful Association Act (amended in 1957)*

This Act is used in conjunction with other laws to suppress freedom of expression. Under this Act, an association that "interferes or has for its object interference with the administration of the law and with the maintenance of law and order, or that it constitutes as a danger to the public peace," may be deemed illegal. It may also be used to prosecute persons on the grounds of their being members of, or having contact with, illegal organizations. Those found guilty of either offence can be sentenced to imprisonment for up to three years and fined. Managers of such associations risk a higher sentence of up to five years.

1923 - *Official Secrets Act*

The *Official Secrets Act* makes it an offence to possess, control,

receive or communicate any document or information of which the disclosure may have an adverse effect on the sovereignty and integrity of the state, or which may affect Burma's foreign relations or threaten the safety of the state. No provision is included on the disclosure of classified information in cases of public interest. The Act gives the authorities extensive powers to classify any information as "secret." Those found guilty under this Act can be punished with imprisonment for up to two years or fined, or both.

1933 - Burma Wireless Telegraphy Act

Under this law, enacted by the British government, it is an offence to possess any "wireless telegraphy apparatus" without official permission. The Act was amended by the junta in October 1995 to include fax machines, and again in 1996 to include computer modems. Anyone found in possession of one of these apparatus without official permission is liable to face imprisonment for up to three years or fines of up to 30,000 kyats (US\$5,000).

1950 - Emergency Provisions Act

This act, passed by Burma's parliament two years after the country gained its independence, is used to prosecute journalists and writers. Section 5 of this Act makes it a criminal offence "to spread false news, knowing, or having reason to believe that it is not true". The Act also proscribes anyone from contributing towards the diminishment of respect or disloyalty among members of the civil service or the military towards the government. Either of these offences can be prosecuted with up to seven years imprisonment. Additionally, any action that may "affect the morality or conduct of the public or a group of people in a way that would undermine the security of the Union or the restoration of law and order" is punishable with equal severity.

1957 - Penal Code of Burma

Sections of the Penal Code are used to suppress freedom of expression through prosecuting persons on charges of treason against the government. Section 122 of the code is particularly severe, with prison sentences including a maximum of 25 years imprisonment and the death penalty.

1962 - Printers and Publishers Registration Law

Repeatedly extended in scope and severity over the years, the *Printers and Publishers Registration Law* was introduced shortly af-

ter the military coup in 1962 that brought General Ne Win and his Burma Socialist Programme Party to power by force. Under this law all printers and publishers are required to register and submit copies of books, magazines and periodicals to Press Scrutiny Boards (PSB) for scrutiny prior to, or in some cases, after, publication or production. The PSB, answerable to the Ministry of Home and Religious Affairs, have extensive powers to ban publications and demand alterations as they see fit, at a great cost to the publisher. In 1989, sentences under the *Printers and Publishers Registration Law* were increased to seven years imprisonment and fines to 30,000 kyats (equivalent to US \$5,000).

1975 - Memorandum to all printers and Publishers Concerning the Submission of Manuscripts for Security

This memorandum issued by the Printers and Publishers Central Registration Board set out guidelines, which are open to interpretation, to be followed by the PSB. Materials that will not be tolerated are as follows:

- a. anything detrimental to the Burmese socialist program;
- b. anything detrimental to the ideology of the state;
- c. anything detrimental to the socialist economy;
- d. anything which might be harmful to national solidarity and unity;
- e. anything which might be harmful to security, the rule of law, peace and public order
- f. any incorrect idea and opinions which do not accord with the times;
- g. any descriptions which, though factually correct, are unsuitable because of the time or circumstances of their writing;
- h. any obscene (pornographic) writing;
- i. any writing which would encourage crimes and unnatural cruelty and violence;
- j. any unconstructive criticism of the work of government departments;
- k. any libel or slander of any individuals.

1975 - State Protection Law (The Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts)

This law has been used to arrest numerous journalists and writers. It gives the authorities sweeping powers to detain anyone who has committed, or is about to commit, an act that may be considered an “infringement of the sovereignty and security of the Union of

Burma,” or a “threat to the peace of the people.” Those suspected of violating these provisions may be detained for up to five years without trial. To protect the State against these threats in advance, the government has been granted the authority to declare a state of emergency, which can be extended indefinitely with the approval of the People’s Assembly.

1988-1992 – Various martial law orders

After the September 1988 coup until September 1992, the entire country was placed under martial law. Those accused of breaching martial law provisions were tried by military tribunals, set up in July 1989 under Martial Law Orders 1/89 and 2/89. These orders, which are no longer in force, had the power to pass only three punishments: life imprisonment; death or a minimum of three years hard labour.

*** Martial Law Order 2/88 (1988)**

This decree enforces a night curfew and a ban on public gatherings of more than five people whether “the act is with the intention of creating disturbances or committing a crime or not.” The order has been used against journalists and writers.

*** Martial Law Order 8/88 (1988)**

This order bans any activity, literature or speeches “aimed at dividing the defense forces.”

*** Martial Law Order 3/89 (1988)**

This order makes it an offence to publish any document without prior registration. Organizations wanting to publish material are required to seek exemption certificates from the Home and Religious Affairs Ministry.

1996 - The Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the successful Performance of the Functions of the National Convention against Disturbances and Oppositions

Chapter II of this law prohibits various matters, including “demonstrating, delivering speeches, making oral or written statements and disseminating [information] in order to undermine the stability of the State, community peace and tranquility, and prevalence of law and order.” It also makes acts committed in order to “undermine, belittle and make people misunderstand the functions being carried out by the National Convention,” liable to prosecu-

tion. Those found guilty of committing an offence under Section 3 may be punished with a minimum term of imprisonment of five years and a maximum sentence of 20 years. They may also be liable to pay a fine.

1996 - Television Video Act

The Act makes it obligatory for owners of televisions, video recorders and satellite television to obtain a license from the Ministry of Communications, Posts and Telegraphs. It also requires that permission be obtained, even by UN agencies, for public showings of imported videos. Video Censorship Boards are charged with the responsibility of scrutinizing all imported and Burmese-made videos for material that may be considered offensive or detrimental to the State. The Board retains the right to ban, censor or restrict showings. Under the Act, all private video users and video businesses must obtain a license from the Video Business Supervisory Committee, which also has the authority carry out on-site inspections. Violators of any of the provisions face imprisonment for up to three years and fines of up to 100,000 kyat (equivalent to US\$17,000), or both.

1996 - Computer Science Development Law

Under this law, freedom of the press has been suppressed through the restriction of communication equipment. The law requires prior approval to be obtained from the Ministry of Communications, Posts and Telegraphs before any computer equipment, networking or communication facilities can be possessed, imported or utilized. Those found guilty of any of these acts without authorization face fines and prison sentences of up to 15 years. Article 34 makes it a punishable offence to do “any act which undermines state security, prevalence of law and order and community peace and tranquillity, national unity, state economy or national culture,” including the “obtaining or sending and distributing any information”. The law allows for the establishment of three types of computer-related associations; the Computer Enthusiasts’ Association; Computer Scientists’ Association and the Computer Entrepreneurs’ Association. Unauthorized computer associations will be considered illegal and association with such a group can be punished with up to three years imprisonment or a fine.

2000 - Internet Law

In 2000, regulations for internet users were issued by the Ministry of Communications, Posts and Telegraphs. The regulations in-

cluded the prohibition of the posting of any writings on the internet that may be detrimental to the interests of the Union, its policies or security affairs. Violations of the guidelines are punishable. These regulations make media access and the publication of information critical of the junta very difficult.

Motion Picture Law

Licenses to make films must first be obtained from the Myanmar Motion Picture Enterprise. All films are subject to censorship by the Motion Picture Censor Board. If the terms and conditions of the license are broken then the license may be revoked and the violator may be charged with fines of up to 50,000 kyats (equivalent to US \$8,500).

In the above laws, the important sections have been quoted directly. The laws are not only vague and ambiguous, they are able to be interpreted anyway that the judges want. No Judge over the years has dismissed a single case although the sentences are able to be appealed.

Freedom of expression is a birth right. It cannot be taken away. Society has evolved a rule of conduct whereby freedom of expression is not abused. This rule of conduct has manifested as law that restricts this freedom only to the extent that it is reasonable and fair. And even then, the restriction can only be made by legislation, which implies it to be made by representatives of people. In the case of Burma, it is Senior General Than Shwe who has passed many laws as if he were the king, a law-maker. You can understand the gravity of situation when it is seen that even the NLD, a party which won a landslide victory in 1990 election held by the Generals themselves, is not allowed to have its own newspaper. It is a legal party, duly registered and a legitimate stakeholder in Burma's governance.

There are the many journals and magazines in Burma, but most of them relate to fiction, sports, music or similar topics. The following are some of them:

Beauty Magazine, City FM, Computer Journal, Dana Magazine, Eleven Media Group (Mandalay Branch), Eleven Media Group (Pyinmana Branch), Fashion Image Magazine, The Flower News Journal, Idea Magazine, The Irrawaddy Publishing Group (IPG), Khit Myanmar Journal, Kyay Hmon (The Mirror), Living Color Magazine, Mahar News Journal, Mandalay Daily Newspaper,

Moemaka Radio and Multimedia, Myanmar Dana Magazine, Myanmar A-lin, The Myanmar Times Journal, Myanmar Radio and Television (MRTV), Myawaddy Television, The New Light of Myanmar, Popular Journal, Radio Free Asia (RFA), 7day News Journal, 7day News Journal (Head Office), The Voice Journal, The Yangon Times Journal, Yadanarbon Newspaper, Zay Gwet [The Market] Journal

State controlled media, television and internet do not allow the people to know the truth. People's freedom to be fully and truthfully informed on all matters of public importance is an inalienable right. The media laws and ethics of the country have to be tested on this anvil. The flow of information and news is deadly for the ruling junta so their response is to systematically gag everything.

Manipulating the Media

The art of the military elite lies in replacing the political representation of values, interests and ideas (which is at the heart of democracy) with media representations of a non-existent political reality that is the core of military dictatorship. Their open ambition for status and wealth is the opposite of the culture of self-sacrifice and non-materialism of the founding father of independent Burma. The military's project of excluding the people from political life runs directly contrary to patriotic intelligentsia's mission of giving power to the people. The regime's strategy is to keep up the illusion of political representation while at the same time preventing the interests and sentiments of the election-winning parties from being represented. The media is the chief instrument in achieving these goals.

The first step to democratization in Burma is to do away with the oppressive restrictions and restore at least partial freedom of expression. If dissent with the regime is allowed to be published, it will give the people feeling of greater relaxation. That will enable the people to come up with better ideas on governance. It will enable the country to face the brewing crisis.

Take for example the very current issue of corruption. Without a flow of information, corruption cannot be tackled. Consider the issue of human trafficking, or of HIV/Aids. Programs to tackle these issues can only be developed with cumulative ideas which

flow from information exchange. Exclusion cannot be the rule. The basic principle of the rule of law is tackling arbitrariness. If decision-making is made by a single person or by a coterie, instead of the people who are seriously affected, that decision can never be fruitful. Just as the release of Daw Aung San Suu Kyi from detention is a key political issue, press liberalization is also a central legal issue from legal perspective. Pressure has to be mounted on the generals to give at least a partial freedom of the press. The junta is well entrenched in all spheres, be it the executive, the judiciary, law-making or law enforcing. It is isolated from society and the junta in self delusion if it aims to rule forever.

Ludu Sein Win wrote a public article in the International Herald Tribune dated May 24, 2006, entitled "The Burmese people can't wait much longer". Like-minded persons ought to bring out a daily newspaper and it will be the harbinger of resurgence of free thoughts in Burma.

With the unfurling of the "road map", Burma's generals have to urgently address the question of what place freedom of speech and expression should occupy in the country's emerging constitution which the military want to clamp in place their naked dictatorship. But the basic principles crafted in the constitution's National Convention do not mention anything on this issue. What a contrast to this position can be seen when it is compared with the words of Nehru, the first Prime Minister of independent India, at the time of protest against the Indian Press Act:

"I would rather have a completely free press with all the dangers involved in the wrongful use of that freedom than a suppressed or a regulated press".

The basic touchstone on which legislation is tested for validity is its conformity with the democratic norms, and principles of equity and justice. Courts in Burma have no powers of judicial review. Courts cannot examine the validity of a law. Further, the proposed constitution in the "Road Map" doesn't give the power of review to the country's highest court. From the point of view of freedom of expression it can be said the constitution is a sham and will never be accepted by the people who desire true freedom.

Even the editor of Sport Eleven was put under arrest. Ludu Sein Win, a reputable international journalist and editor of former newspaper "Guardian", spent 13 years in prison for his opinion. All

these are done to keep the sword of Damocles hanging over the heads of the magazines which have been permitted to function.

There is one newspaper, “Myanmar Times” printed in both in English and Burmese, which runs as a joint venture by an Australian business man and some retired army officers. It covers only business news and there is no space for politics. In its issue dated 1 June 2006, the front page showed the visit to Burma of Mr Gambari, the UN’s Under-Secretary-General for Political Affairs. But no mention was made of the object of his visit to bring national reconciliation. Similarly, his meeting with Daw Aung San Suu Kyi was also not mentioned. Simply said – this ‘newspaper’ is of questionable value in actually providing the news.

Censors have been consistently trying to gag popular Burmese comedian Zarganar. No Burmese newspapers can publish anything about him. During the traditional Burmese water festival Zarganar performed satirical stage shows. He criticized government corruption and official regulations. He was also imprisoned. Zarganar has been awarded the Lillian Hellman and Dashiell Hammett Award. His video movie “Run out of Patience” has been banned.

In such a context, doubts have been raised as to whether there will ever be democratic changes in Burma. Of course people have a right to be sceptical - they have suffered greatly after previous failed uprisings. Many pin their hopes on international intervention. An assertion of freedom of expression is a step. A non-violent people’s movement will shake the edifice of military rule and pave the path of democratic transition with the restoration of freedom of expression.

(Endnotes)

1 <www.irrawaddy.org/aviewer.asp?a=3534&z=14>, accessed 9 July 2006.

SPDC's assault on Humanitarian assistance

Acceptance of democracy promotion as a norm of practice within the international system is a new global trend. Humanitarian assistance is an integral part of democracy promotion. There is also a widespread agreement that democracy promotes human rights, development, and peace. The practical manifestation of this trend has been a proliferation of democracy-assistance programs funded by governments, multilateral bodies such as the United Nations and the European Union, international financial institutions, and independent foundations. Such programs, which have gained broad international support, provide technical and material assistance to governments that are trying to consolidate democracy, as well as to nongovernmental groups that seek to monitor public institutions and processes, promote human rights and access to information, and encourage democratic participation.

A counter-trend has emerged of resistance to democracy programs, especially those that seek to empower civil society; promote free media; and strengthen democratic political parties, institutions, and processes. This new phenomenon needs to be distinguished from the conventional resistance to democracy that is central to such longstanding dictatorship as Burma. It has never permitted democracy assistance and dealt harshly with any sign of internal opposition. Even humanitarian assistance by INGOS is in its dragnet.

Independent NGOs and parties have often been subjected to various forms of official harassment. The difference today is that new legal restrictions on - and extralegal impediments to - democracy assistance have assumed menacing proportions and pose a major new threat to the advance and consolidation of democracy.

In these cases, autocrats have either restricted reformists after a

brief interval of show of democratization, or have held on to power while accepting superficial liberalization and modestly more open political space for democratic opposition. The presence of NLD is a case in point. Hybrid regimes often retain certain formally democratic procedures, including relatively free (if not fair) elections, and permit civil society organizations to function and receive foreign assistance. But the underlying political realities are manipulated elections, a weak parliament, show of National Convention, Road Map to Democracy.

Open dictatorships-could see the fate that might be awaiting them. If they did not tightly control political expression and choke off foreign democracy assistance, at some point internal opposition could get out of hand. In effect, they came to see the force of Abraham Lincoln's adage that "a government cannot endure permanently half slave and half free. It will become all one thing, or all the other." To the degree that internal democratic groups can use the limited freedom they have secured in order to press the cause of liberty, they threaten to tip hybrid systems toward authentic democracy.¹

The SPDC on June 3, 2006 in Burma has passed a new order titled "Guidelines for UN Agencies, International Organization and NGO/INGOs on Cooperation Programme in Myanmar." It mentions that UNODC representative observed that there have been no collaboration and coordination among the NGOs. The question is why such a situation developed? The answer is simple. Various obstructions put by the SPDC to the activities of INGOs rendered it impossible to work. He further stated that "effective services have not been rendered to the people." The interesting point that emerges is that SPDC is not interested in service to the people. All that it wants is to suck all the money that came through the channels. In this regard the Minister observed "many programme of activities will benefit both sides" By that he meant the assistance givers on one side can manage the show of assistance and the receiver on (other side) will receive to maintain the show of appearance. The show business as usual can continue in this pipeline. This criticism is borne out true if one looks at the formulation of the "Guidelines"

The Objectives of the Programme Guidelines are as follows:

- To enhance and safeguard the national interest
- To prevent the infringement of the sovereignty of the State

- To cooperate without any string to the State
- To provide guidance to be on the right track, render necessary assistance as well as cooperate and coordinate with the view to contributing the socio-economic development of the Nation.

The question of sovereignty and national interests are so broad that anything can come within those ambits. Who is to interpret? It is the Ministry of National Planning and Economic Development, which means the SPDC itself. The most important part appears under the heading, "Registration and opening of offices" It states," Registration and opening of the offices:

- NGO/INGOs shall register with the Ministry of Home Affairs and the opening of office will be allowed only after registration of organization.
- At the time when NGO/INGOs open their offices they shall inform the Ministry of National Planning and Economic Development, Ministry of Foreign Affairs, Ministry of Home Affairs and concerned Ministries.
- When NGO/INGOs close their offices, it is also required to inform the Ministry of National Planning and Economic Development, Ministry of Foreign Affairs, Ministry of Home Affairs and concerned Ministries.
- NGO/INGOs may apply for extension of their registration in accordance with the existing procedure.

It means unless a formal approval for registration is obtained, no agency can start functioning. Impediments to registration and denial of legal status. Many governments jealously guard the process by which organizations can register as legal entities and gain the rights and prerogatives which that status brings. On the one hand, governments often insist that groups, even some as small or informal as a neighborhood association or a babysitting cooperative, must register, thereby ensuring that the state can monitor them. On the other hand, regimes make registration difficult, limiting the ability of advocacy groups and other NGOs to exist. Tactics include asserting excessive government discretion over the registration process; making registration costly or difficult in terms of the type or amount of information required; incurring excessive delays in making registration decisions; and requiring re-registration every few years, thus giving government the right periodically to revisit the issue of whether an organization should be allowed to exist.¹

Regulations governing the registration process are left deliberately vague, giving officials wide leeway to impose delays, make numerous demands for information, or even deny registration outright.

Appointment of staff

Prior consent from Myanmar side, is mandatory in respect of appointment of international staff, and international personnel in the UN Agencies, international organizations and NGO/ INGOs for representative offices and projects. List of local staff has also to be provided. The object of SPDC is that local staff will be its own men so that they can monitor things.

Internal Travel:

Officials from Ministry of National Planning and Economic Development will accompany them in every trip. Necessary approval of the travel programme will have to be obtained. There is no freedom of travel and there will be constant surveillance.

Management

The Central Co-ordination Committee will be formed with the concerned ministries including the Home Ministry with Minister for National Planning and Economic Development as chairman. The co-ordination committee goes down to the level of township committee. The Agencies have to co-ordinate to that level also. "The UN Agencies, International Organizations and NGO/ INGOs shall refrain from the activities not within the scope of work. If it is necessary to carry out the activities which are not within the scope of work, the respective organization shall seek the prior approval from the concerned Ministry." who is going to judge as to whether "the activities are not within the scope of work."? This is imposition of impractical restrictions. Only those from which SPDC will be benefiting politically from foreign assistance delivery are acceptable.

NGO/INGOs which have not yet registration are require to do so.

In hybrid democracies similar Guide Line are laid down to restrict the work of INGOs.

Conclusion

Global Fund announced withdrawal in August 2005 citing ob-

stacles to “effective program implementation”

European Commission confirmed new humanitarian program for Burma after its representatives received written assurances last Friday that European Commission will be offered a certain undisclosed level of access to the general population and will not be subject to political interference. This assurance is on the table in another form “Guidelines.” Analysis will belie the above fact.

Guidelines said that all workers in the field will be accompanied by a government sponsored official. Guideline said that all aid funds will have to be deposited in the government owned Myanmar Foreign Trade Bank and withdrawn in foreign exchange central bank. This will effectively allow the government to make financial profit from international humanitarian funding.

The UNDP representative had held a discussion in Bangkok with exile groups order to enable him brief UN on the situation in Burma. He stated there were three key concerns. One was political. With the convening of National Convention, the authorities have become more closed. Secondly the existing cease-fire groups have become more fragile. Potential tension exists on lack of recognition. There was great instability and greater fragmentation. Thirdly the health issue has become critical.

In that context it was view that humanitarian agenda was at stake. Everything goes down the drain. Even then he was of the view there was some space left and a holistic and pragmatic approach have to be taken.

ICRC Continues to Reduce Staff in Burma

The International Committee of the Red Cross said on Monday it will continue to scale down its operations in Burma in the absence of a solution that would allow the organization to resume prison visits. The ICRC has cut staff numbers since January, particularly expatriates who have been reassigned to other countries. But it has also had to recently reduce its Burmese staff from 278 to about 240. The organization has cut its foreign staff from 54 to 28 since suspending prison visits last December because of what it says is interference by junta-affiliated groups, including the Union Solidarity and Development Association and the Myanmar Women’s Affairs Federation, which insisted on accompanying

ICRC staff during inspections.

The deputy head of mission, Thierry Ribaux, said the ICRC had still not reached agreement on the issue with its government liaison, the Ministry of Health: "We haven't been able to find common ground," he said, adding there was still hope of finding a solution as long as discussions continue. The ICRC says it has no problem with other parallel prison programs or with providing technical assistance for related initiatives, but that its code of conduct says its own jails visits must remain independent. Meanwhile, the USDA has itself been visiting Burmese jails. State-run The New Light of Myanmar said the organization has donated food and medical supplies to prisoners in Thayet and Meiktila in the past two months.²

Guidelines for UN Agencies, International Organizations and NGO / INGOs on Cooperation Programme in Myanmar

- The UNODC Representative called on the Minister for Foreign Affairs after completion of his assignment in December 2005. During the meeting, he reported that there are 22 INGOs who have been engaging in Southern Shan State, WA area. He observed that there have been no collaboration and coordination among these INGOs. He also mentioned that these INGOs are not aware of the presence of the other INGOs working in that area and the effective services have not been rendered to the people in that area.
- In this regard, he recommended the Minister that there should be collaboration and coordination among these INGOs and their programmes should be coordinated and guided by the central responsible body.
- In the light of these circumstances, the programmes and projects that are being conducted with the assistance of UN Agencies, International Organizations and NGO/ INGOs were reviewed and analyzed.
- It is clearly observed that there are many programme of activities that will benefit both sides and contribute to the well being of the communities in Myanmar.

- It is also observed that UN Agencies, International Organizations and NGO/ INGOs that have been providing assistance for the socioeconomic development of Myanmar should be systematically coordinated and guided so as to achieve more effective and efficient outcomes.
- Myanmar welcomes the assistance being provided by these organizations. Myanmar side will cooperate and give support for the successful implementation of these cooperation programmes and projects.
- Aiming at efficient, smooth and systematic implementation of the activities to bring about more effective results, I would like to explain the Programme Guidelines for carrying out the cooperation programme.
- The Programme Guidelines cover the Objectives, Proposal for Basic Cooperation Agreement, Proposal for the Project, Proposal for MOU and Implementation Arrangement.
- The objectives of the Programme Guidelines are as follows:
 - To enhance and safeguard the national interest
 - To prevent the infringement of the sovereignty of the State
 - To cooperate without any string to the State
 - To provide guidance to be on the right track, render necessary assistance as well as cooperate and coordinate with the view to contributing the socio-economic development of the Nation

Initial Coordination

- The initial coordination among UN Agencies, International Organizations and NGO/ INGOs with respect to cooperation programme will be carried out by the Ministry of National Planning and Economic Development.
- The line ministry will be responsible for the implementation of the respective projects.

Proposal for Basic Cooperation Agreement

- The Draft Basic Agreement for cooperation to be signed between the Union of Myanmar and the UN Agencies, International

Organizations and NGO/INGOs shall be submitted to the Ministry of National Planning and Economic Development.

Proposal for the Project

- Any proposed project to be implemented in cooperation with UN Agencies, International Organizations and NGO / INGOs shall be submitted by these organizations to the Ministry of National Planning and Economic Development.
- The project proposal which is to be implemented in Myanmar shall be in line with the objectives of the Programme Guidelines. If the proposal is not in line with the objectives of the Programme Guidelines, consultation shall be made with the concerned Ministry to revise the proposal.
- If NGO/INGOs submit the project proposal which involves more than one Ministry, the Ministry which receives the proposal will scrutinize and transfer it to the Ministry of National Planning and Economic Development.

Proposal for Memorandum of Understanding (MOU)

- NGO/INGOs shall submit the Draft MOU, which is to be implemented in Myanmar, to the Ministry of National Planning and Economic Development after consultation with the concerned Ministries on the Draft MOU.
- Draft MOU which is to be implemented in Myanmar shall be in line with the objectives of Programme Guidelines. If the MOU is not in line with the objectives of the Programme Guidelines, consultation shall be made with the concerned Ministry to revise the MOU.
- If NGO/INGOs submit the draft MOU which involves multiple sector to the concerned Ministry, that respective Ministry will scrutinize and transfer the draft MOU to the Ministry of National Planning and Economic Development.

Implementation Arrangement

- Signing of Basic Agreement, Project proposal and MOU
 - The Basic Agreement between the Union of Myanmar and UN Agencies, International Organizations will be signed by the Ministry of National Planning and Economic Development.

- ment on behalf of the Government.
- The MOU/Project Proposal involving Overall Framework/ Multiple Ministry/ Multiple Sector, will be signed by the Ministry of National Planning and Economic Development.
 - If the MOU/Project Proposal is concerned only with the individual Ministry, that respective Ministry will sign the MOU/ Project Document.
 - NGO/INGOs shall seek the approval from the concerned Ministry before signing any sub -contract covered by the MOU/ Project Document.
- Registration and opening of the offices
 - NGO/INGOs shall register with the Ministry of Home Affairs and the opening of office will be allowed only after registration of organization.
 - At the time when NGO/INGOs open their offices they shall inform the Ministry of National Planning and Economic Development, Ministry of Foreign Affairs, Ministry of Home Affairs and concerned Ministries.
 - When NGO/INGOs close their offices, it is also required to inform the Ministry of National Planning and Economic Development, Ministry of Foreign Affairs, Ministry of Home Affairs and concerned Ministries.
 - NGO/INGOs may apply for extension of their registration in accordance with the existing procedure.
 - Appointment of staff
 - Regarding the appointment of international staff in the UN Agencies, International Organizations and NGO/INGOs in Myanmar, these Agencies and Organizations shall seek the prior consent from the Myanmar side.
 - Regarding the appointment of international personnel for the Representative's Offices in Myanmar, the Agencies and Organizations shall seek the prior consent from the Ministry of National Planning and Economic Development.
 - Regarding the appointment of international staff for the respective projects, the Agencies and Organizations shall seek the prior consent from the concerned Ministry.
 - The list of international and local staff working in Myanmar shall be provided to the Ministry of National Planning and Economic Development and the concerned Ministry.

- Internal Travel

- The Ministry of National Planning and Economic Development will coordinate for the travel programme and necessary approval for the official(s) /mission from the headquarter of the respective organizations with which Ministry of National Planning and Economic Development signed the MOU /Project Document. Official(s) from the Ministry of National Planning and Economic Development will accompany them in the trip.
- If the MOU /Project Document is signed by the other Ministries, that Ministry will coordinate for the travel programme and necessary approval for the official(s) /mission from the headquarter and official(s) from Myanmar side will accompany them in the trip.
- If the official/personnel is from UN Agencies, International Organizations and NGO/INGOs in Myanmar, the Ministry responsible for the project will coordinate for the travel programme and necessary approval from the concerned authorities. Official(s) from Myanmar side will accompany them in the trip.

- Management

- The relevant Ministry which has signed with the UN Agencies, International Organizations and NGO/INGOs will coordinate the matters on importation of equipment and motor vehicles for the project as well as the entry visa for the officials/ mission from the Headquarters in accordance with the rules and regulations of the State.

- For the smooth implementation of the projects, the Central Coordination Committee will be formed. The committee will be chaired by the Minister for National Planning and Economic Development and the Minister for Foreign Affairs and the Minister for Home Affairs will be vice-chairmen. The members of the committee are the Deputy Ministers from the concerned Ministries and the Deputy Minister for the Ministry of National Planning and Economic Development will act as Secretary. The Director General of Foreign Economic Relations Department will act as Joint Secretary.

- The Central Coordination Committee Meeting will be held every three months. Special meeting will be held if needed.

- The meeting among Central Coordination Committee and UN

Agencies, International Organizations and NGO / INGOs will be held every three months.

- The coordination at the central level will contribute to smooth and successful implementation of the project activities.
- The Ministries concerned will hold the coordination meeting with the respective Departments monthly (or) every two months.
- State/ Division and Township Coordination Committees will be formed at the State/ Division and Township level consisting of the head of the General Affairs Department as chairman and the members from the concerned Departments. The Secretary of the Committee will be the Planning Officer of the respective State/ Division and Township Planning Department.
- The State / Division and Township Coordination Committees are responsible for coordination among NGO / INGOs as well as coordination with Departments and communities.
- Upon the arrival to the State / Division / Township, the team leader from the organizations which will implement the projects shall inform the State / Division and Township Coordination Committees.
- The UN Agencies, International Organizations and NGO/INGOs shall refrain from the activities not within the scope of work. If it is necessary to carry out the activities which are not within the scope of work, the respective organization shall seek the prior approval from the concerned Ministry.
- The UN Agencies, International Organizations and NGO/INGO shall provide monthly and quarterly reports to the Ministry of National Planning and Economic Development as well as to the concerned Ministries.
- If the proposed activities to be undertaken is substantive and is related to the another Ministry, the Scope of Work / Terms of Reference shall be revised officially and if the work is marginal, concurrence from the concerned Ministry will be required.
- Through close cooperation and coordination among the Ministries, UN agencies, International Organizations and NGO/INGOs

in accordance with the Programme Guidelines, it will lead to smooth, systematic and efficient implementation of the project activities bearing better results.

- The organizations which would like to implement the cooperation programme in Myanmar shall comply with this Programme Guidelines.
- Many organizations currently working in Myanmar may not require to change substantially the way they are working now. However, if there are some practices which are not in line with the Programme Guidelines, the organizations shall carry out their programmes in conformity with the Programme Guidelines in consultation with the concerned Ministry. NGO/INGOs which have not yet registered are required to do so.
- There are many NGO/INGOs which have been implementing their projects without any difficulty in Myanmar. For these organizations, we would not like to see any inconvenience in their activities. Accordingly in the process of their works, they may continue to carry out project activities in line with this Programme Guidelines.
- In the event of special circumstances, the Ministry concerned will consider the situation with understanding in order to implement the project smoothly.

Legal Analysis on the case of Advocate U Aye Myint

U Aung Htoo

A Brief Summary of the Case

Sentence was seven years imprisonment under Emergency Provision Act Section 5(E), on charge of propagating false news

There were 452.59 acres of pasture land for the cattle of the public in Phaung Daw Thi village, Daik-U township. This pasture land was divided and confiscated by the following organizations related to the ruling military junta:

- | | |
|---|-----------|
| (1) Light Infantry Regiment No (30) | - (82.50) |
| acres | |
| (2) No. (1) Military Animal Husbandry Association | - |
| (79.98) acres | |
| (3) Township War Veteran Association | - |
| (52) acres | |
| (4) Union Solidarity and Development Association | - (58.82) |
| acres | |

The military and its related associations took over 273.30 acres. Furthermore, 44.93 acres of street land and 2 acres of garden land were also deducted from the pasture land. This left only 132.36 acres of pasture land for the local farmers to use. This caused about 3,000 cattle of that area to be in starvation. The farmers from that area, dissatisfied with the result, and asked an advocate, U Aye Myint, to help them. U Aye Myint contacted Richard Horsey, Coordinator for Burma from International Labor Organization, and the case was started there.

On June 5, 2005, Deputy Police Officer Win Thwin Oo, acting as

a plaintiff, sued Advocate U Aye Myint under the 1950 Emergency Provision Act Section 5(E), accusing that he provided false information aiming to shatter the local administrative mechanism,.

On August 27, 2005, the police arrested Advocate U Aye Myint and only then, on August 28, 2005, a first information report was recorded. On August 29, 2005, the police filed the case with criminal number (960) of 2005 in Daik-U township court. On October 31, 2005, he was sentenced to seven years' imprisonment by that court according to the Emergency Provision Act Section 5(E). On January 2, 2006, with a second appeal, defendant lawyer U Aye Myint pleaded not guilty to the order and made an appeal to the Bago district court according to Criminal Procedural Code Section 407 and 408. The Bago district court summarily rejected his appeal. Again, Advocate U Aye Myint put forward the revision to Divisional Court on March 6, 2006. On the same day, Bago Divisional Court summarily rejected this. This case has been again appealed to the Central Court recently. It may be heard in this month, June 2006.

In this case, it is an uncontroversial fact that the pasture land has been used by the local farmers for many years and the Township Administrative body under the instructions of the authorities of SPDC, confiscated major portions of this pasture land and thus started the problem.

The Original Provision in Section (5) (E) of Emergency Provision Act

“Knowing that it is a false (or) believing that it is a false, intentionally do something or let it happen a similar cause.”

The main adjudication on the advocate U Aye Myint as guilty by Daik-U township court.

Since the Bago district court and divisional court summarily rejected advocate U Aye Myint's appeals, it is only to consider the grounds why the Daik-U court found him guilty. The Daik-U court reached a guilty verdict, relying on the evidence of the following witnesses:

Prosecution witness (13) U Aye Ngwe, Secretary of Township Peace and Development Committee (TPDC). The pasture land is sufficient for 1,600 cattle. The farmers didn't express their dissat-

isfaction in the meeting.

Prosecution witness (1) Deputy Police Officer Win Thein Oo. The farmers agreed on the dividing of the pasture land. The defendant, U Aye Myint, arrived, organized the farmers and wrote a false complaint to International Labor Organization (ILO). On knowing this, he opened the case and filed the complaint against Advocate U Aye Myint.

Prosecution witness (3) U Hla Min (a member of TPDC). The farmers did not express their satisfaction/dissatisfaction in dividing the pasture land between the group lead by U Aung Ngwe and farmers. Sayadaw agreed to withdraw the report and signed up in the withdrawal letter.

Prosecution witness (4) U Tin Hla (Senior division clerk, Township Directorate of General Administration). There was no objection to the use of the pasture land when the farmers were called together. All the farmers agreed. He does not know the relation between defendant lawyer U Aye Myint and the case.

Prosecution witness (5) U Tin Ngwe (a war veteran). If the farmers wanted more rights, his suggestion would be to ask a higher authority to change the decision. His organization of war veterans was satisfied with the result.

Prosecution witness (11) U Tun Lwin (Township Animal and Husbandry Department Head). The divided pasture land of 132 acres is sufficient for animal fodder and there is no death from starvation.

Analysis on the prosecution witnesses and their statements, quoted by the Daik-U Township Court.

1. In the judgment, the statements of other prosecution witnesses were quoted once, whereas the statement of Township Administrative Secretary U Aye Ngwe was quoted twice (in two paragraphs) although it is the same subject. This is proof that the court favored the administrative authority.

2. The Deputy Police Officer Win Thwin Oo stated that U Aye Myint organized the farmers and wrote a false letter. However, it was not corroborated by any of the prosecution witnesses.

3. Prosecution witness (3) U Hla Min and prosecution witness (4) U Tin Hla were administration staff and government servants and their above-mentioned statements do not contain facts that can justify the punishment of advocate U Aye Myint.

4. The prosecution witness U Tin Ngwe is a member of a war veteran group which was formed by SPDC. This group also benefited the divided pasture land and was satisfied with it. The statement of U Tin Ngwe does not contain any word, that is relevant to the criminal action of U Aye Myint.

5. The statement made by prosecution witness (11) U Tun Lwin, Township Animal Husbandry Department Head that the land is sufficient for animal fodder and there is no death of starvation was mainly referred to by Daik-U Township judge U Mya Han as true. U Tun Lwin did not mention any accusation on advocate U Aye Myint being sent a false statement.

Based upon the above mentioned statements of prosecution witnesses, U Mya Han, acting as a Daik-U Township judge, considered that the statement “the farmers were dissatisfied with the decision and the cattle were faced with a deadly starvation” was false, that defendant lawyer U Aye Myint positively knew that it was false statement and he purposely gave a false report. So, the court sentenced him to seven years imprisonment.

There are two main factors in considering this case.

1. *Is the assertion that reduced pasture land affects the scarcity of fodder for cattle, and, thus, the farmers were dissatisfied, false?*
2. *Did the defendant lawyer U Aye Myint purposely reveal this false news?*

The Statements of Prosecution Witnesses that Oppose and Differ with Daik-U Township Court’s decision.

The fact that the cattle were facing a starvation because of the reduced pasture land is not a false statement. It was a distinct fact, according to the statements of the following witnesses:

Prosecution witness (2) U Gyi Maung. He has lived in this Phaung Daw Thi village since 1958. There are 452 acres of pasture land in the main village. In 1999, the Light Infantry Regiment No (30),

Military Animal Husbandry Association, Township War Veteran Association and Union Solidarity and Development Association invaded these lands and did farming. The farmers put up this invasion which results in the scarcity of animal fodder, to the authority. Township Administrative Secretary U Aye Ngwe discussed with the farmers. The farmers put forward the insufficiency of animal fodder with only 132 acres of pasture land.

Prosecution witness (3) U Hla Min. Complainant U Kan Ya and sixty five people, including fifteen farmers, attended the meeting, and U Aye Ngwe explained about the farm land. U Kan Ya answered that they would only be satisfied when they get back their 452 acres of the past pasture land. U Aye Ngwe replied to U Kan Ya that 132 acres of the pasture land has been allowed and tried to persuade him to agree. U Kan Ya said nothing.

It was clear to see that the farmers were dissatisfied. During the meeting, nobody dared to argue with the Secretary of TPDC and everyone stayed quiet.

Prosecution witness (5) U Tin Ngwe TPDC secretary said that the present allotment was done by the higher authorities and will be reconsidered by a higher authority if requested by the farmers. Farmer U Kyaing said that the allotted pasture land was insufficient and it could be more suitable if the responsible township authority put the case to the higher authority.

Prosecution witness (6) U Kan Ya. The present allotted pasture land of 132 acres is insufficient for the present number of cattle and again asked the associations to give back the former pasture land. The accusation by the police on defendant lawyer U Aye Myint that he organized the farmers to make a false report ignoring the farmer's agreement with the decision of TPDC is totally untrue.

Prosecution witness (7) U Kyaing. The allotment of 132 acres pasture land is insufficient. We, including U Kan Ya and fifteen farmers with the same agreement, complain against it. We met defendant lawyer U Aye Myint in the year 2005. We have complained about the pasture land from the year 1998 up to 2005.

Prosecution witness (8) U Kyaw Thein. Concerning the pasture land, we have complained to the authority, but no specific an-

swers were attained. So we ask help from defendant lawyer U Aye Myint because we are farmers and cannot write an official letter.

Prosecution (9) U Hla Thein. Annually we complain to the higher authority to get back our pasture land. The number of cattle are much too high in relation to the allotment of land. With such a small allotment, the cattle will starve.

Prosecution witness (10) U Win Maung. We solemnly requested advocate U Aye Myint to help us. He wrote the letter on our behalf, and it is not his responsibility. It is true that U Dhamma Parla and fifteen farmers are responsible. With regards to 132 acres of pasture land, the fodder was insufficient for the cattle and there was a bare land. It is true that we were dissatisfied with it until now.

Daik-U township court does not refer to the statements of the above mentioned eight prosecution witnesses. From the above statements it is clear that the farmers are dissatisfied with the allotment of pasture land. It is not a false statement. Prosecution witness (11) U Tun Lwin (Township Animal and Husbandry Department Head) admitted this. He also stated that the complaints of the farmers were due to the failure of his department to solve the problem.

Epilogue: Analysis on the Whole Case from Factual and Legal aspects

1. Advocate U Aye Myint was arrested in advance by the police on the night of August 27, 2005 and examined. Only at 11:45 am. on August 28, 2005, the First Information Report was recorded. As such, it has proven that the police failed to comply with the Code of Criminal Procedure Section (154) and the court also ignored it.

2. The main fact on the scarcity of fodder was the remaining pasture land of 132 acres left behind from the original 452.59 acres of pasture land. It is not a falsity. The most important factor is that the appearance of the dissatisfied farmers was not recognized in the court's judgment. This was a failure of duty by the primary court.

3. The news about the scarcity of fodder resulting in the starva-

tion of cattle the farmers' cannot be considered to be false news. The farmers knew their cattle's condition and they themselves complained about it. If there is a responsibility on the statement in regard to sufferings of cattle, it will mainly rest with farmers, themselves, who gave statements before the court as well as the ILO officer Mr. Richard Hussey.

4. According to the Evidence Act (101), the plaintiff has to provide sufficient proof that the accused clearly committed the crime. Here, this is not clear. Every prosecution witnesses does not state that advocate U Aye Myint purposely fabricated a complaint knowing that it was false. It was only deputy police officer Win Thwin Oo, who arrested Advocate U Aye Myint and took action against him.

There is divergence in the evidence of prosecution witnesses. According to law of crime to impose punishment there must be conclusive evidence. In the instant case, two different evidences emerged contradictory to one another. Some of the prosecution witness did state there was dissatisfaction among farmers and what U Aye Myint did was on behalf of the farmers under their instruction. In the face of this evidence the court could not come to a decision that U Aye Myint sent false information knowing it to be false. On the contrary it is clear that the authority brought a false case against U Aye Myint so that farmers would fear to agitate on the issue.

U Aye Myhint's case is a classic case which reveals that judiciary from bottom up is subservient to the military general.

4. The case is a very good example of conditions of lawyers living inside Burma, who are struggling for truth and justice and fighting to develop the rule of law as far as they can. All international and inside organizations, political leaders and the law academicians should come forward to help in freeing U Aye Myint, who may sacrifice his life because of this unjust decision.

Note:

Burma's Spreme Court fixced July 22 for hearing the appeal, first time the case will have been subject to a formal review. ILO has urged the Junta to release U Aye Myit failing referal of the case will be made to the International Court of Justice in the Hague.

Waiting on the rule of law

From a legal perspective, there is a similar situation between southern Thailand and Burma. In southern Thailand, the victims of the *State of Emergency Act* (SEA) have been waiting for years on the rule of law. In Burma, the *State Protection Law* (SPL) has dispensed with waiting as no trial is sought when persons are detained and detention is extended indefinitely.

In April 2004, there was a protest outside the Tak Bai police station, Thailand, resulting in 56 persons being arrested and held for trial. But over the past two years, only 2 of the 1,935 witnesses have finished their testimony in this case. The trial is scheduled to finish in July 2007 but this seems unrealistic. The reality is it will take years to pass judgment. Even though the accused have been released on bail, which seldom happens in Burma, it is of no comfort to them. Being on bail is an impediment to finding a permanent job, as well as being financially and mentally exhausting. Justice delayed is justice denied.

In Burma the situation is that once a case is put up, it is mandatory for the court to finish it as soon as possible so that the status of the accused changes – either to ‘convicted’ or (less often) found ‘not guilty’. In practice, however, from the time an accused is convicted nobody can question the conviction except the judicial appeal process. Recall, however, that the judiciary is under the full control of Burma’s military rulers, so all appeals against conviction end in confirmation of convictions.

The National Reconciliation Commission of Thailand devoted a large part of a report to discussing the issues of accessing the justice system in the region. In principle an arrest is only possible under a court warrant. However, authorities generally will arrest the suspect first and then obtain a court order. The Thai SEA facilitates this practice, since the police can keep suspects other than a police station until a warrant is issued. The SPL in Burma is also used in the same manner. It has clearly fallen short of its

intended goal of bringing peace to the country. The army has also expanded to an enormous strength that is not necessary for internal peace.

There is no public mechanism to evaluate or inspect the implementation of Burma's SPL. In the case of Thailand, a subcommittee Report of the National Reconciliation Council stated: "the Act has violated basic rights that [are] stipulated by the constitution". In case of Burma, there is no constitution. However, Burma's Generals cannot abrogate all the mandates in the Universal Declaration of Human Rights. The Thai study strongly recommended that the SEA should no longer be used in this area and access to the justice system is essential. In the case of Burma, there cannot be any similar study. Waiting is the only alternative.

Burma's junta's loss of sense

Dr. Salai Tun Than was issued with a passport (tourist) for which a round trip air ticket is mandatory with that passport and air ticket he went to U.S.A, Japan and South Korea from Seoul he came to Bangkok on Thai visa. After a short stay, he went to the airport. He was refused Boarding Pass although he was with the passport and return air ticket. On asking the reason for refusal, he was told that the Burmese Embassy in Bangkok had instructed the airline TG, Thai international air ways, not to allow him to board, Dr. Salai Tun Than contacted the immigration. It directed him to contact Foreign Ministry Thailand. Dr. Salai Tun Than contacted the Foreign Ministry. He was told to wait to enable it find out what was the matter. He then travelled to Burma Embassy, Bangkok.

Important issues have emerged from the situation.

1. BBC announced that SPDC had declared Dr. Salai Tun Than's passport is as null and void. He was not intimidated nor did the Burmese Embassy Bangkok call Dr. Salai Tun Than to surrender his passport. Neither, it responded to his fax.

1. Can SPDC make the passport null and void?

The immigration law does not provide such action political ground on which revaluation was made existed at the time passport was issued. Why then passport was not refused at the outset.

2. Having issued a passport on the basis of return air ticket can a government revoke a passport of its citizen.

3. If passport is revoked is not a citizen entitled to a travelling document to return to his country.

4. If the state considered its citizen a potential danger, is it not incompetent on the state to allow him to return to the country and then take action according to law.

5. What happens when the validity of Thai expires? Will Thai government detain him and extradite him to Burma?

6. Is it a game plan of SPDC to force Dr. Salai Tun Than to seek refugee status and proceed for resettlement. Can a government put his citizen in permanent exile?

Law of the nation and countries which have diplomatic relation have reciprocal obligations country which issues passport its citizen and the country which has given a visa to him showing hospitality is bound to take back its citizen. It cannot be used as a dumping ground for unwanted citizens. There are landmark judgments of American Supreme Court which declared acts of immigration department illegal when immigration department refused entry of its citizen to his own country on ground that he was a draft evader. There was an exception when he was a deserter from the army.

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The Junta had a same game plan when it offered Daw Aung San Suu Kyi to travel abroad. She was quick to see the game and defused.

The Government on covenant on Universal Declaration of Human Rights provides right to travel. It includes right to hold a valid passport. Neither international law nor domestic law enable SPDC to revoke the passport. After spurning Kofi Anand's appeal for release of Daw Aung San Suu Kyi, SPDC has been embolden to do whatever its like.

Burundi's Transition

**Training Leaders for Peace, Howard Wolpe and Steve McDonald Issue no.1, Vol. 17, January 2006
Journal of Democracy**

The above article is a brilliant analysis of dynamics of democracy. Although it relates to Burundi, it is applicable by and large to all transition in democracy. It is very instructive for Burma also although it has not entered into a democratic transition which has been stalled. A survey of what the article conveys is necessary to be able to determine how far it is relevant to Burma.

The author has focused on the importance of leadership training as a key to reconciliation and good governance. The matters on reconciliation do apply to Burma. He outlined four basic political challenges.

The first was that of overcoming the pervasive zero-sum, winner-take-all wartime mindset. The key would be persuading leaders to see collaboration with onetime foes not as an abstract ideal but rather as a matter of enlightened self-interest. Democracy becomes possible and peace secure only when leaders of a divided society realize that, whatever their conflicting interests, they share still more important interests in common. Often, sharp inequalities in power and resources fuel violent conflict in culturally plural societies, and sustainable peace and democracy are attainable only when the underlying social and political inequities are corrected. Yet the resolution of these inequities becomes virtually impossible if there is no recognition of interdependence and common interests. Democratic nation-building is not simply a matter of persuading political leaders to subordinate their parochial interests to those of the nation. Real transformation requires not greater altruism from leaders and citizens, but rather a new recognition that their self-interest can be more effectively advanced through

collaboration and inclusive political process.

Second, somehow, while grassroots reconciliation efforts were plentiful, the Tutsi, Hutu, and Twa leaderships were still at odds with one another, and this had to change. Somehow, a means had to be identified to restore trust among key leaders and to rebuild their personal relationships so that peace might be sustained.

Third “leaders have to restore firm consensus on the ground rules for sharing state power and making public decisions.

Fourth and finally, war had seemingly robbed Burundian elites of their communication and negotiating skills. Leaders needed to learn or relearn how to hear others’ concerns and not to express their own in ways that would encourage a search for solutions rather than endless blame-throwing. Democracy and stability cannot thrive in a climate of constant accusations and demands.

For Burma, both inside and outside the leaders ought to take lessons from the Burundi experiment. The article under review becomes therefore relevance for Burmese democratic movement.

The author has brilliantly explained the “Ngozi process.” It planned out workshops and other exercises how leadership quality has been promoted.

The author has also brought out how the leadership training started from top to bottom. He stated, “Former rebel leader and president-elect Pierre Nkurunziza asked the BLTP to conduct a weeklong Ngozi-process workshop for himself, his two vice-presidents, the Council of Ministers, and the various chiefs of staff of the executive leadership. The president has asked that this training be continued for the top tier of government and be extended to parliamentary leaders.”

What is exciting about the Burundian transition is the emergence of a new political culture reflective of a more inclusive way of doing politics.

The present military leaders will do well to study this experiment. They may then appreciate that dialogue is the only positive solution of the political crisis which has overtaken the country for decades.

The conclusion of the article has to be quoted as it has a direct bearing on the situation in Burma.

“Burundi’s experience so far suggests that peace-building and international post-conflict interventions can benefit significantly by focusing on the leadership dimensions of institutional transformation and combining the skill-sets of both diplomats and organizational specialists. Neither diplomats nor “trainers” can by themselves implement effective leadership interventions. Diplomats have access to national leaders and usually see the “big picture” fairly clearly, but typically have little training in or understanding of techniques of institutional and conflict transformation. Trainers generally have scant access to national leaders and little knowledge of the larger political and diplomatic dynamics that effect divided societies. Yet diplomats and trainers working together-as they did in Burundi-can add up to more than the sum of their parts and in the process give a badly needed boost to the cause of democracy.

Interpretation of Statutes

Law Journal published by office of the Attorney general, Union of Myanmar in its issue Vo.6 2005 January, Number 2 had an article captioned “interpretation of Statutes” written by U Ba Kyng, retired director of the said office and part time professor, law department, University of Yangon.

The article is well written but without any context. For example, he began it with “for an independent sovereign state, it requires a constitution and appropriate domestic laws to administer the affairs of the state. Before promulgation of the above said laws, the policies (ideas or facts) of the law have to be considered, discussed and then drafted and approved by the legislative authority. After administering the law for a certain period if the following errors or flaws are found in the above said laws it has to be interpreted or amended or rewritten”

There is no mention anywhere of the fact that the country is not having a constitution for decades. What then is the effect? He wrote” If the usage in the law is not consistent, it is difficult to interpret the law as intended by the ministry concerned. What does “intended by the ministry concerned” means? How is intention of the ministry relevant? Laws therefore will have to be interpreted according to the intention of the government of the day. Does it not amount to giving predominance to the Executive? Does it not mean that judiciary will have to be subservient to the Executive?

Under the heading “sources of interpretation,” he stated, “there are five sources that have guided interpretation of the Constitution.”

- (1) the text and structure of the Constitution,
- (2) intentions of those who drafted, voted to propose, or voted to ratify the provision in question,
- (3) prior precedents (usually judicial),
- (4) the social, political, and economic consequences of al-

- ternative interpretations, and
(5) natural law.

The point raised is interpretation of constitution. Question is where is the constitution and if there is no constitution, what should guide interpretation of law?

He has discussed three rules of interpretation under discussion under mischief of rule he stated four things are to be considered 1st what was the Common Law before the making of the Act, 2nd What was the mischief and defect for which the common Law did not provide, 3rd What remedy that Parliament resolved and appointed to cure the disease of the Commonwealth; and 4th The true reason of the remedy.

It is the duty the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy. It is a sound rule, interpretation should be so construed as to prevent the mischief and advance the remedy according to the real intention of the makers.

Having said that he should have discussed how this is done by the court in Burma.

All writing in the journal are devoid of facts happening in the country itself.

Not being objective, only being abstract the journal serves as a facade to the gross abuses that the courts in Burma are committing besides being subservient and corrupt.

NEWS AND NOTES

Open letter to UN General Security

BLC sent an open letter to Kofianan, UN, Security General on 16 June, 2006. It relates to the freeing Daw Aung San Suu Kyi from house arrest and appropriate action on Depayin episode which is supposed to be the reason for her continued detention. The letter made an analysis of the Depayin episode as a state. Sponsored terrorist attack on peaceful activity of the democracy icon, it requested the Secretary General to put the matter before Security Council for consideration and action.

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Law Academy

The BLC's Advisory Board of law Academy held a meeting on July 7, 2006. It was attended by eminent professors from abroad who deliberated on this guidelines of the Academy. They endorsed the guidelines already framed and gave some valuable suggestions for further improvement. They also met with the students and encouraged them to take their studies seriously so that they can become future leaders of Burmese society.

UN Human Rights Council

A new Human Rights Council has been formed in March. It would be a subsidiary body of the General Assembly. This would make it directly accountable to the full membership of the UN. Among 64 contested countries, the UN General Assembly elected 47 members for the new Human Rights Council in early May. It was a "truly historic occasion" as it reflects the will of all 191 member states of the world body. The new body replaces the much criticized and now defunct Human Rights Commission. It held its first meeting on June 19 and started functioning in right earnest. It has universal jurisdiction and has a right to suspend its members. The objectives of Human Rights Council are 1) to serve as the main UN ----- for dialogue and cooperation on human rights. 2) help member states to meet the obligations through dialogue. 3) recommend to the General Assembly for further development of international law in the field of human rights observer, V.90, inter-government organisation, national human rights institutions and specialized agencies will participate in the council through the same arrangements and practices that applied to the commission.

It is learnt that Daw Aung San Suu Kyi's release case, the first of its -----, has been filed before it. It will be great if it declares continued detention as violation of Rule of Law and recommend to the General Assembly to pressurize the Security Council to put the matter in its Agenda. A member state of UN cannot be allowed to continue its membership of UN. When it ---- ----- the request of UN Secretary General and ----- world community.

Four exile groups outlawed and threat to outlaw NLD

The Junta accused NCUB, NCGUB, FTUB, NLD(LA) and ABSDF of being responsible for bomb attacks since 2003 and declared them as unlawful association. NLD also was accused of having links with the exiled groups and threat was given to outlaw it as has firm evidence to declare NLD unlawful. All these have been under law that is Unlawful association Act.

What firm evidence the junta has is never disclosed. It is its whim and fancy and then it dragged in a law to give legality to its illegal act. The Act does not provide extra territorial jurisdiction and all the organization declared illegal are outside in exile.

Acknowledgement

Errors in Issue No. 23 are regretted. We thank Lowin and John Southaland and their team of Australia students for editing this issue.

Burma Lawyers' Council

Everyone is equal before the law.

Wisdom is power to transform the society into a just, free, peaceful and developed one.

Mission Statement

“By vigorously opposing all unjust and oppressive laws, and by helping restore the principle of the Rule of Law, the Burma Lawyers Council aims to contribute to the transformation of Burma where all the citizens enjoy the equal protection of law under the democratic federal constitution which will guarantee fundamentals of human rights.”

The Status of Organization

The Burma Lawyers' Council is an independent organization which was formed in a liberated area of Burma in 1994. It is neither aligned nor is it under the authority of any political organization. Individual lawyers and legal academics have joined together of their own free will to form this organization.

Objectives of the BLC

- Promote and assist in the educating, implementing, restoring and improving basic human rights, democratic rights, and the rule of law in Burma;
- Assist in drafting and implementing a constitution for Burma, and in associated matters of legal education; and
- Participate and cooperate in the emergence of a Civil Society in Burma.