



# Legal Journal on Burma

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and An Uncommon Question
- Ethnic Issues and Civil Society in Burma
- Thailand must steer Clear from Burma  
junta's way to Democracy

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- Burma Restricts ICRC
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- Corruption
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## **Legal Journal on Burma**

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## Burma and the common law? An uncommon question.

John Southalan<sup>1</sup>

What is the role of the common law in Burma's current and future legal system? It is often assumed that common law concepts are relevant to, and applicable in, Burma's legal system as they are in England and other former English colonies. However, closer analysis shows that such an assumption may be wrong in many respects. Various common law concepts have been negated by statutory laws in Burma's legal history and developments in the country's legal system between the mid 1960's and 1980's. The lack of judicial independence from 1962 onward has also been a serious impediment to the common law's use and operation. However, even if Burma obtained judicial independence tomorrow, this article suggests that earlier developments have negated many common law concepts. It is difficult to see how the common law can provide much to Burma's legal system unless there is specific legislative revival. This article also identifies areas where the common law is inadequate and constitutional or statutory arrangements should be considered for Burma's future legal system.

This article examines the issue in four stages:

- 1 introduction/overview of the common law;
- 2 outline of some common law concepts;
- 3 relevant developments in Burma; and
- 4 conclusions.

### ***1 Introduction /overview of the common law***

This first section provides a summary of the common law's origins and operation. This helps in understanding how the common law worked, and can work, in Burma's legal system. An understanding of the common law's operation also enables us to consider some of the potential limitations.

## 1.1 History

The common law is a system of law derived from England's legal system. The common law revolves around the concept of precedent and court hierarchy. Legal principles are established in the decisions of a superior court, and those principles must be followed by the lower courts unless parliament legislates otherwise. This means the common law, more than other legal systems, is shaped by previous court decisions and judicial approaches. It is useful, therefore, to have an understanding of the common law's history and scope.

The 1200s were significant in the common law's development. The Magna Carta gave some guarantees of legal process and other rights, and there were also the beginnings of a truly independent English parliament passing statutes to make law. Earlier 'laws' were just executive rulings of the monarch, able to be changed or revoked by the monarch at any time. The 1300s saw the beginning of wide-scale recording and reporting of decisions. This greatly increased the use and importance of precedent. Many of the basics of the common law were then in place, although developments continued - in the 1800s, a series of statutes codified much of the criminal law except homicide. 'Codifying' is where all the law on an area, both statutes and court decisions, are collected together and written in one statute or 'code' which then becomes the source for that law. This trend of greater parliamentary regulation has continued, and over time, more and more areas are being addressed by statute rather than simply the common law. Examples of this phenomenon can be seen in the fields of employment, commerce, property, and marriage.

## 1.2 The common law outside England

The common law started in England, but how and to what extent it is observed in other countries? The general situation is that when England acquired a colony, all English law relevant to the conditions of the colony became the law of the colony (this included both English statutory law and common law). Laws that were particular to local English conditions didn't become part of the colony's law (eg. laws about local arrangements in England, English religious practices and observances etc). Developments in English law after the colony began did not automatically become part of the colony's law, but the English parliament often retained power to legislate directly in relation to the colony. This usually continued even after the colony established its own par



liament and legal system.

The common law distinguishes between colonies that were settled (ie. controlled by occupation) and conquered/ceded (ie. control gained after a war or where it had been given to England by another government). In settled colonies the common law applied automatically to all citizens (subject to the above general rule – ie. only the English law which is relevant to the conditions in the colony). In conquered/ceded colonies, the common law only applied through the decision or action of executive/parliament, and this could specify exceptions (eg. for some colonies, the government decided the common law applied only to particular persons, or in certain geographical areas).

The above paragraphs explain 'the law' according to the English, or common law, system. Obviously, most colonies were populated by peoples who had their own laws and legal system, and these laws viewed the English and their common law very differently. However, in most colonies, the English enforced their rule and law to such a degree that the common law become the paramount system. Where a colony had a legal system/laws before the English arrived, *parts* of that legal system sometimes continued. The general situation is the common law provided the overall structure and procedural law, but there was sometimes potential for different substantive law within that overall framework. Sometimes, of the pre-existing law, the 'private law' continued (ie. law about relations between people – marriage, inheritance, religion) however the 'public law' was almost always regulated by the common law (public law here meaning the law about relations between citizen and state). This could result in a 'mixed jurisdiction' - a legal system where there is more than one type of law (eg. common, civil, indigenous, religious).

An important distinction, which must be constantly borne in mind, is the distinction between 'the common law' and 'the law in common law countries'. The law in common law countries can come from three sources: the constitution (if there is one), parliamentary law (eg. statutes, regulations), and common law principles contained in previous court decisions. When a court's decision is based on this last source, the decision forms part of 'the common law' and can be of considerable importance for other common law courts. However, when the decision is based on the first two sources, it is of far less relevance to courts that do not have similar constitutional or parliamentary laws.

One of the more complex aspects in understanding the common law is that there isn't one single 'common law' but differ-

ent 'common laws' in different jurisdictions. This is because the common law is drawn from judges' decisions, and when each colony established its own legal system and courts, these court decisions would develop the common law for local conditions. For example, Australia had different conditions to England (eg. drier climate, more land, less people) and so the case law developed differently on landowners' liability for fire escaping their property. Different 'common laws' can occur even within a country. The United States of America, for example, has separate common laws in each state whereas other federal nations (eg. Australia) have one common law for the entire country.

The existence of different common laws is important to remember when considering court decisions from another country or jurisdiction. When these decisions refer to 'the common law' it is necessary to decide whether the 'common law' of your country is the same. This will depend on various things including: the sources of law for that decision, the factual situation there considered, and comparisons with your own country's situation and the facts you now face. Also relevant is the relation between the courts of the two countries. Where a colony/country still has a right of appeal to English courts (like the Privy Council) those appeal court decisions are binding on all courts within the colony/country and other English courts' decisions have considerable weight.

Courts in common law colonies/countries would often gain their common law jurisdiction simply by reference to the English courts. For example, many of the Australian colonial courts were created by laws which granted the courts the same jurisdiction as England's superior courts.<sup>2</sup> This gave the colonial court the power to apply the common law and grant common law remedies.

### **1.3 Parliament, the executive, the courts**

Another issue to understand in the English legal system and its many offshoots is the relationship between courts and parliament. The common law recognises parliamentary supremacy. That is: where the parliament passes a law on a subject within its power, that law must be respected and enforced by the courts. In common law countries, where the law-making powers of the national parliament are listed in a constitution (eg. USA, Canada, Burma 1947-1962), the courts will not enforce a statute that falls outside the parliament's listed powers. In common law countries without this constitutional list of powers (eg. UK, New Zealand, Israel)



the courts must simply interpret and enforce all parliamentary statutes. But all common law countries have the same approach - where parliament has power to make a law, then that law must be followed even if the law contradicts previous court decisions or long-standing concepts of the common law.

The common law has relatively few rules about relations between parliament and the executive. This is partly due to the differences in the executive in many common law countries (eg. there are significant differences in how the executive is chosen and what powers it has in the UK and the USA). However there are common law concepts about the relationship between courts and the executive, and courts and the parliament. Under the common law, the courts will avoid considering issues (these issues are seen as 'non-justiciable') where:

- the law clearly gives the responsibility to another arm of government (eg. executive, parliament); or
- there are few rules guiding the government's action – it is a matter for policy or political process.

Examples of matters that the common law considers 'non-justiciable' include the executive's decisions and actions in making treaties, declaring war, dissolving parliament, or mobilising the armed forces.

The common law has no specified court structure that it requires. Where there are no constitutional requirements, the government (parliament or executive) can determine what courts exist, their relationship and jurisdictions. Because the common law has no required structure, the government can abolish courts and create new ones in their place. The usual situation is that the judges from the old court will be appointed as judges of the new court. But if a statute creates a different situation (eg. not reappointing judges), the common law does not prevent this.

### ***1.4 Inherent rights***

It can be seen, then, that common law rules and concepts create rights even where they are not contained in constitution or statute. These rights become inherent in the common law system. This offers considerable protection, but inherent rights depend on the court system to work. So where courts or judges are not independent, the common law is unlikely to be of much use. The common law is often slow in responding to changes because modification of the common law needs to come from the highest court (because of the precedent system). A further difficulty is caused by the common law's constant potential to develop, causing un-

certainty as to the permanence of various principles. And even where a principle may be established, it has to be drawn from court decisions, so it can be difficult to find or define.

The common law's inherent rights are also weak because they can be changed by statute. In contrast, constitutional rights can't be ignored except by amending the constitution (which may or may not be easy). But common law rights can simply be changed by parliament – courts MUST follow a statute passed by parliament. This requires courts to recognise and enforce statutes even where they may breach human rights or other international recognised standards.

Even though the common law is able to be changed by statutory or constitutional provisions, any such change need not be permanent. Certainly, where a parliamentary or other law modifies the common law, that part of the common law no longer operates. However the general rule is that where a statute modifying the common law is repealed, the common law will revive.<sup>3</sup>

## **2 Outline of some of the basic common law concepts**

Keeping in mind the basic workings of the common law explained above, it is now possible to examine some of the central common law concepts. The source of these 'rules' is from previous decisions (sometimes from very old cases) that have been repetitively followed or applied by courts which use the common law. Through this process, the rules become part of the common law and are applied by common law courts unless the rule is modified by constitution or parliamentary statutes or the country's highest appeal court.

There are a wide range of common law concepts. Some of them give the court power to grant orders or remedies, like injunctions (a court order preventing a person from doing something) or remedies against misuse of public power (eg. a *mandamus* order requiring a government agency to fulfil its legal duty, or a *certiorari* order revoking a government decision that had been made improperly. Other common law concepts address evidentiary matters - how a party must prove matters in court, and what is acceptable and unacceptable evidence. The common law provides a trial by jury for more serious criminal cases – an accused has the right for a jury to decide factual issues in relation and also whether the accused is guilty of the charges. As noted earlier, the common law has no particular structure for courts. However the



common law concept of 'inherent jurisdiction' dictates a superior court can decide any issue before it, unless excluded by statute.

These are just some examples of common law concepts. However there are two particular areas that merit more detailed attention in understanding the common law's operation in Burma. These are the common law's principles of statutory interpretation, and provisions in relation to judicial independence.

## ***2.1 Principles of statutory interpretation***

The common law dictates that fundamental rights will not be overridden by general or ambiguous words in a statute. Unless a statute clearly states to the contrary, the courts will presume that even the most general words were intended to be subject to the basic rights of the individual.<sup>4</sup> As noted earlier, the courts' respect of parliamentary supremacy means that parliament can alter these rights if it decides to do so. But it must indicate that decision clearly in the words of a statute.

Under the common law, unless a statute uses specific words to deny these rights, the courts will presume<sup>5</sup> that parliamentary statutes do not:

- restrict peoples' access to the courts;
- deny people the protection of legal professional privilege (the rule that communications between a client and lawyer cannot be used as evidence in court);
- exclude the right to silence as protection against self-incrimination (ie. a person cannot be forced to give evidence that may show s/he committed a crime);
- excuse those exercising public authority from acting legally, reasonably, and honestly – this includes giving a person who may be adversely affected by a decision the opportunity to respond;<sup>6</sup>
- give a wide application to legal immunities for government agencies;
- interfere with equality of religion; or
- require persons to do something impossible,<sup>7</sup> this also leads to an assumption that legislation does not have a retrospective effect (but only applies to events occurring after the legislation is passed).<sup>8</sup>

## 2.2 *Judicial independence*

Although most laws in relation to judicial independence come from a country's constitution or statutes, the common law does provide some concepts, useful where these other sources are silent. Following a 1701 statute in England, the common law has three minimum requirements that must be observed in relation to judges:

- they have immunity from suit (they cannot be liable for things they do or say in the course of their work);
- they have tenure during good behaviour (they can only be dismissed for incapacity or misbehaviour, by a decision of parliament); and
- they must be provided with an adequate salary.

The common law also has two other principles that can assist in protecting or providing an independent judiciary: bias and contempt.

The rule against *bias* is designed to ensure that judges are independent and neutral. Where a judge has a financial or proprietary interest in the outcome of the case, this disqualifies the judge from hearing the case unless s/he discloses the situation to the parties and they agree to her/him hearing the case. If there is no disclosure, the judge's decision on the case cannot stand and has to be set aside. The 1998 case concerning Chile's General Pinochet<sup>9</sup> is an example where a decision was set aside because of bias, and in this decision the UK's highest court expanded the grounds for bias, ruling that it is not simply an assessment of financial or proprietary interest. A judge will also be precluded from hearing a case where: (1) s/he is associated with a party to the case; and (2) the party is seeking a particular outcome which is contrary to one of the other parties. Judges can also be excused where the circumstances of the case may cause a reasonable person to think the judge is not fair or neutral.

The law on *contempt* is designed to ensure people treat courts, and court proceedings, with appropriate respect. Parties can commit contempt in various ways including through publications that interfere with the court's process (eg. writing or talking about a case currently in progress that could interfere with its progress) or that 'scandalize' the court or its officers (eg. talking/writing something that causes people to think less of them). It is also contemptuous to disobey a court order. The last area of contempt is broadly called 'contempt in the face of the court' and this includes things like insulting a judge, interfering with the pro-



ceedings, refusing to answer questions, recording proceedings without permission, and suppressing evidence. Where a person commits contempt the superior courts of that jurisdiction can try and punish them (even including prison sentences).

### **2.3 Common law shortcomings**

It should not be thought, however, that the common law is always beneficial to an individual's legal rights and standing. Various common law rules conflict with human rights standards or contemporary understandings of the rule of law. For example under the common law there is no right of appeal – when a court makes a decision, if there is no appeal available under the country's constitution or statutory laws, then that decision is final.

The common law also provides various immunities or legal protections for a government. Most of these derive from the concept of sovereign immunity which originated when the government was the monarch. Historically, the monarch was above the law and so the government's actions cannot be questioned in any court - 'crown immunity from suit' prevented most legal proceedings being commenced against the government regardless of the cause of action. Many of the immunities originally recognised by the common law have been amended/removed through parliamentary statutes. For example in the UK through the *Crown Proceedings Act 1947*, and in many countries the national constitution provides that legal proceedings can be taken against the government. However, if there is no statute or constitution addressing this, you need to be aware of common law limitations. There are other crown immunities, which may result in legal proceedings against the government being struck out, including:

- immunity from the 'unwritten' law – such as common law claims in tort and contract;
- immunity from the written law, that is from the application of statutes that apply to the community generally.

Even when immunities don't prevent the claim being initiated, there are other immunities that can protect the government during the proceedings. Immunities can also enable the government to withhold evidence if it considers the public interest requires the court and the parties not to have the evidence. Another crown immunity is that the government is immune from execution against its assets, which limits a successful plaintiff's enforcement options.

### 3 Relevant developments in Burma

Burma's legal history affects what use can be made of the common law in Burma today. In order to properly understand and assess the role for common law principles in contemporary Burma, it is necessary to consider some of Burma's legal history.

#### 3.1 Pre-independence

Following the first contact between various Kingdoms in Burma and the English in the 1600s, a series of wars ended with Burma becoming part of the colony of India in 1886. It remained part of India until 1934 when it became a separate English colony. So it is also necessary to consider the common law in India because this impacts on Burma's legal system.

India was not a 'settled' colony of England, and so the common law only applied through actions/decisions of the government. The presence and power of the East India Company, which exercised governmental powers, saw the common law apply first only in certain areas in India, and then later throughout the colony but only to certain persons. However, by the time of Burma's absorption into the English colonial empire, the authorities had decided that English law (and those common law aspects of it) applied to all of the territory but not to matters governed by the personal law of Hindus and Muslims (eg. marriage, inheritance, religion). Over time, much of the law in India was codified – collected into the *Anglo-Indian Codes* dealing with various subjects (eg. procedure, criminal law etc). This occurred to an even greater extent than it had in England. For these codified areas of law, all the previous statutory and case law became redundant – the source and extent of the law was now simply what was written in the code. Many areas were 'codified': criminal law, civil procedure, evidence, contract, and some equitable laws. Many common law concepts were transferred into these codes (eg. hearsay, habeas corpus, best evidence rule) and so these concepts exist in India's legal system. However the source for these laws then became the code, NOT the common law.

In Burma, as in other colonies, the colonial powers used the local legal system to assist their rule. They were happy for it to continue and develop in areas that didn't interfere with English interests. This resulted in two sets of laws in same jurisdiction,



with differing application depending on subject. In Burma, Burmese Buddhist law governs, for practising Buddhists, laws of marriage, divorce, inheritance, succession (ie. division of property where there is no will), in effect becoming a type of mixed jurisdiction.

Burma, like other English colonies, used the Privy Council (part of the UK's House of Lords) as the highest court of appeal in Burma's legal system. So Privy Council decisions directed and influenced the common law in Burma. The common law in Burma was also circumscribed through statute. All the Indian acts relating to Burma were codified into the 13 volumes of the *Burma Code*,<sup>10</sup> originally issued by the government authorities in India and then subsequently the responsibility of the independent parliament in Burma.<sup>11</sup>

In 1934, Burma became a separate colony of England. Burma's Parliament supplemented and amended the Burma Code. According to a Burma legal expert, this gave the following three main sources of law in Burma.<sup>12</sup>

#### **1 – The Burma Code and other statutes**

The most important source, containing 'the law' on most areas including procedure, evidence, contract, local government, and criminal law.

#### **2 – The common law applies in two areas: torts and damages**

**Torts** – a 'tort' is a civil action taken by one person against another who has wronged them. Examples include *negligence* (when a person doesn't take care and this injures another person), *defamation* (when someone says or writes something that injures another person's reputation), and *misrepresentation* (when someone says something wrong, and another person relies on this and suffers loss because it is wrong).

**Damages** – the law on how to determine the amount a plaintiff should receive as compensation if the court decides the defendant has broken the law.

#### **3 – Religious law on some matters**

By legislation in 1898, some of Burma's religious laws and customs were recognised and enforced in cases dealing with 'succession, inheritance, marriage or caste, or any religious usage or institution'.<sup>13</sup> In these cases, the courts should use '(a) the Buddhist law in cases where the parties are Buddhists, (b) the Muhammadan law in cases where the parties are Mohammedans, and (c) the Hindu law in cases where the parties are Hindus'.<sup>14</sup>

There is also a *fourth source*, after 1947, being the constitution.

### **3.2 1947-1962**

When Burma became an independent nation in 1947, it ended all legal ties with England. The final court of appeal was now a domestic court in Burma. However, the continued use of the com-

mon law was supported by court practice and also various provisions in Burma's first constitution. The constitution established a High and Supreme Court and specified their jurisdictions, including that the High Court had 'original...jurisdiction and power to determine all matters and questions whether of law or of fact'.<sup>15</sup> This gave the High Court the power to use common law concepts and grant common law remedies. The High and Supreme Courts were designated to be 'courts of record'<sup>16</sup> meaning they had to keep a permanent record of proceedings before them and publish their decisions – critical for the common law's operation. The decisions of the Supreme Court were constitutionally stated to be binding on all other courts.<sup>17</sup>

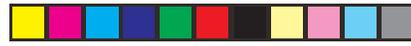
As apparent from earlier discussion, for the common law to operate effectively requires an independent judiciary. The 1947 constitution promoted a strong and independent judiciary in several respects:

- The constitution supported a competent judiciary through a detailed procedure for their appointment,<sup>18</sup> necessary qualifications,<sup>19</sup> and also a requirement that judges had to give an oath to uphold the constitution & law.<sup>20</sup>
- Each judge's position was protected through constitutional provisions that their employment conditions had to be specified in law and couldn't be reduced during their time as a judge<sup>21</sup>, and that they couldn't be dismissed except through a decision and detailed procedure involving both houses of parliament.<sup>22</sup>
- Each judge was constitutionally bound to decide matters independently.<sup>23</sup>

During the first 15 years of the country's independence, the courts in Burma referred to common law concepts and decisions of the Privy Council and other courts. Burma's courts granted various remedies like certiorari, mandamus, and habeas corpus (against preventative detention). These were common law concepts, certainly, but the actual source of much of this law was from the Burma Code rather than directly from the common law.

### **3.3 1962-1974**

In 1962 the military staged its first coup, aiming to control the whole country. The military didn't formally revoke the 1947 constitution but they abolished the parliament and the two main courts (High Court and Supreme Court). The 1947 constitution thereby became ineffective because there was no way to use or enforce its terms. The loss of these institutions also had signifi-



cant impact on the common law.

The military created a new court called The Chief Court. In 1965, the Chief Court gave a decision in *Maung Ko Gyi -v- Daw On Kin*<sup>24</sup> addressing the sources of Burmese law. Justice Maung Maung (who later became Burma's Judicial Minister and then President) directed judges to seek the Burmese law not in the common law, but from dhammasattha (Buddhist law texts) based on 'lawkabila taya' or the 'principles upholding the universe'.<sup>25</sup> Remedies such as certiorari, mandamus, habeas corpus were not used after 1962. They were not officially removed, but have never since been granted by courts in Burma.<sup>26</sup>

In 1972 the legal system was significantly restructured, and there were two significant developments impacting on the potential for the common law. The first of these was that the judiciary became part of the executive and legislature, as part of the one party state. The second significant development was that a "system of people's justice" removed an independent judiciary and replaced this with panels of three party members (usually without legal training) who made decisions. The panel was advised by legal advisers (ex-judges) but their advice could be ignored.

In 1973, a government manual for the courts directed judges on where to (and where not to) find the law. The manual stated that judges should not refer to any decisions from other countries. It also directed that judges should not even refer to earlier decisions of Burma's courts because "the circumstances vary from case to case depending on different social and historical factors".<sup>27</sup> This created a significant restriction on the operation of the common law: a judicial system that discourages reference to previous judicial decisions is almost the contrary of how a common law court arrives at its decision.

### 3.4 1974 onwards

The legal system's restructuring of 1972 was formalised in the 1974 constitution.<sup>28</sup> This constitution had one aspect that could support the continuation/use of common law. This was an article directing that the "Administration of justice shall be based on...principles [including: (a) to administer justice independently according to law...[b] to dispense justice in open court unless otherwise prohibited by law...[and (c)] to guarantee in all cases the right of defence and the right of appeal under law".<sup>29</sup> Arguably, these provisions could give some support to an independent judi-

ciary. However, much of the operation of the 1974 constitution was contrary to the common law. This can be seen in various matters like:

- the constitution provided direction on how cases are to be decided;<sup>30</sup>
- the validity of government acts were only determined by parliament, not the courts;<sup>31</sup>
- parliament, not the courts, was now the body responsible for interpreting the constitution;<sup>32</sup> and
- the 'judiciary' and courts were formed from members of the parliament.<sup>33</sup>

One of the main obstacles to the common law under the 1974 constitution was the removal of judicial independence. This was undertaken because "now the working people of Burma are in charge, the checks and balances offered by an autonomous bureaucracy and judiciary are no longer necessary".<sup>34</sup> These changes were particularly evident in the lack of judicial tenure,<sup>35</sup> the imposition of non-judicial responsibilities (for example that the "Administration of justice shall be based on the...principles...to protect and safeguard the Socialist system"<sup>36</sup>), and that the courts were now responsible to the parliament.<sup>37</sup>

Did the common law continue after these developments? It's a question on which commentators disagree although the weight of opinion is that the common law effectively ended. A UK academic considers Burma has been "dislodge[d]...from the common law family into the socialist law family".<sup>38</sup> He sees this having happened through three particular developments: (1) the 1965 *Maung Ko Gyi -v- Daw On Kin* decision, (2) the legal system's restructuring in 1972, and (3) the 1974 constitution. A recent decision of a superior court in the United States of America agreed, stating "...the socialist regime of the 1960s and 1970s...ended the common law system in Burma".<sup>39</sup> In that case, however, an opposing voice considered that "Burmese law has remained a common law system right through the anti-socialist military coup of 1988 up to the present century".<sup>40</sup> This was the view of a legal expert called by parties associated with Burma's military rulers.

And what of contemporary Burma? The 1998 coup removed all previous legal institutions,<sup>41</sup> and so it is a valid question to ask what is the current relevance of common law concepts. There is certainly a lack of judicial independence:

- There is officially no separation of powers. The military announced it exercises executive, legislative and judicial power.<sup>42</sup>



- The military established a new Supreme Court in 1988<sup>43</sup> and has since appointed and dismissed many judges, demonstrating a complete absence of tenure. In late 1998 the military stated that five (of the six) Supreme Court Judges were 'permitted' to retire.<sup>44</sup>

This lack of judicial independence makes it very difficult for the common law to operate. However, some commentators say the courts have some degree of independence in cases that do not have political interests for the military.<sup>45</sup>

There are other signs that may suggest a greater resilience in the common law. A study of Burma's Supreme Court decisions in 1998 shows that the Court does make some reference to earlier decisions (including to cases from pre 1947, 1947-1962 and after 1962).<sup>46</sup> This appears a move closer to one aspect of the common law system, than was the case under the 1973 court manual.

The military's *Judiciary Law 2000*<sup>47</sup> regulates the courts' operation and therefore the potential for the common law. There are various aspects in this law that support or contribute to the continuation/use of common law.

- The Judiciary Law establishes a Supreme Court,<sup>48</sup> vests it with jurisdiction in many areas,<sup>49</sup> and empowers it to function through employing staff and issuing rules.<sup>50</sup>
- The Judiciary Law enables a court hierarchy and precedent system to operate and for the lower courts to follow the decisions of the Supreme Court. It does this by specifying the structure of Burma's court system with the Supreme Court above the State, District and Township Courts,<sup>51</sup> and through providing a right of appeal.<sup>52</sup>
- The Judiciary Law gives the courts the power to make orders similar to common law remedies of habeas corpus and certiorari. These words are not specifically used in the Judiciary Law,<sup>53</sup> and should the courts chose to exercise these powers, any orders made would be pursuant to the Judiciary Law and not the common law. However, given the lack of direction in the Judiciary Law as to when and how these powers should be exercised, it is quite conceivable the courts could refer to previous decisions and common law principles in exercising these powers.

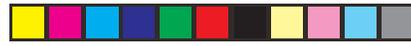
The *Judiciary Law 2000* also has other aspects that, while they do not mandate its use, are consistent with the common law being used by Burma's courts. For example the military appoints Supreme Court judges,<sup>54</sup> and there is a 'guarantee...in all cases [of]

the right of defence'.<sup>55</sup> However caution should be exercised in relying too heavily on these words because there is sometimes a difference between what the law provides and the degree to which judicial independence exists in practice.<sup>56</sup> In Burma, as in some other common law countries (eg. New Zealand, Australia), the executive has almost complete freedom in who they appoint as judges. This system has permitted the appointment of some very good judges, however in Burma this freedom, together with the lack of judicial tenure, has been used by the military to ensure a compliant judiciary.<sup>57</sup>

Regardless of the actual degree of independence where the law is neutral, there are some provisions in the *Judiciary Law 2000* that clearly act as obstacles to the common law's use in Burma. The main areas in this regard are noted below.

- Courts are charged with non-judicial responsibilities. For example, "The administration of justice shall be based upon...principles [including] aiding in the restoration of law and order and regional peace and tranquility...[and] aiming at reforming moral character".<sup>58</sup>
- The Supreme Court is given wide-ranging powers to interfere in the independence of other courts in conducting their business. The Supreme Court has the power to order cases be transferred to it, or that they be transferred from "any Court to any other Court".<sup>59</sup>
- The Supreme Court also has extensive powers in relation to the creation and supervision of the lower courts<sup>60</sup> and appointment of their judges.<sup>61</sup> These provisions can seriously impair the independent exercise of the judicial functions in the lower courts.

Another significant obstacle to the common law's use in contemporary Burma is the lack of access to previous court decisions. The common law is based on previous decisions and for this to work, those decisions must be easily available. The most important decisions will be those of Burma's superior courts, and various commentators and judges have indicated the difficulty in obtaining the decisions of Burma's courts.<sup>62</sup>



## 4 *Conclusions*

And what of the future? In assessing the potential relevance of common law for future Burma, it must be appreciated that Burma's recent legal history demonstrates significant departure from the common law system.

- In contrast to other former colonies and countries using common law (eg. India, Malaysia, Sri Lanka, Australia) where many of the concepts used at independence are still similar to practices now, this is not the case in Burma.
- Burma's court system has changed significantly (at various times).
- The sources of law have changed over time, with judges directed to and using, various sources to find 'the law'.
- The legal structure changed - currently there is no official recognition of a separation of powers, and therefore no independent judiciary.

Thinking about the common law's role is relevant to Burma because, if there is a return to the rule of law, there may be an opportunity or necessity to decide what the law and legal system will be. There are different views as to the relevance of the common law to the future of Burma's law. A UK academic considers that "future Burmese law will be no closer to the English common law than is the law of Thailand and Cambodia".<sup>63</sup> That may be true - without significant change, the common law will have little relevance to Burma's courts and legal system. Certainly the lack of knowledge of, or access to, court decisions makes it difficult for the common law's principles of precedent to function.

It is difficult to see how common law concepts can be used directly in Burma's current legal system. In tracing these concepts' development or modification, we can see many of them have been taken into the Burma Code or other statutory provisions. The court, as the body through which the common law operates, needs to have the jurisdiction to be able to use common law concepts. The current Supreme Court cannot trace an unbroken history back to earlier times which would support its use of the common law. The Court's jurisdiction is as set out in the military's establishing law – a law that, when viewed in total, provides little room for the common law to operate.

But perhaps parts of the common law can be re-introduced through statutory or constitutional provisions. Particular areas for attention could include

- improving judicial independence and the rule of law (eg. through use of a constitution, observing the separation of powers, stronger judiciary, reduced interference of court cases etc);
- re-introducing certain common law rules through statute; and
- better availability of court decisions.

Through developments such as these, there may be potential for renewed use of common law principles.

- .....
- <sup>1</sup> LLB, Barrister & Solicitor of the High and federal Courts of Australia. This article was written following three months'lecturing at the Pyi Daung Zu Law Academy in Thailand and was shaped in part by the views and thoughts of the Academy's students. The author gratefully acknowledges the students' germination of ideas.
  - <sup>2</sup> For example, section 16 of the *Supreme Court Act 1935* (Western Australia) provides that the state's Supreme Court 'is invested with and shall exercise such and the like jurisdiction, powers, and authority within Western Australia and its dependencies as the Courts of Queen's Bench, Common Pleas, and Exchequer, or either of them, and the Judges thereof, had and exercised in England' in 1861.
  - <sup>3</sup> *Marshall v Smith* [1907] HCA 33, decision of Australian High Court, available at [www.austlii.edu.au/au/cases/cth/HCA/1907/33.html](http://www.austlii.edu.au/au/cases/cth/HCA/1907/33.html), accessed 14 December 2006.
  - <sup>4</sup> *R v. Sec. of State for Home Dep't, ex. p Simms & ano'r*, House of Lords (UK), 8 July 1999, judgement of Lord Hoffman, <[www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990708/obrien01.htm](http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990708/obrien01.htm)> accessed 10 December 2006.
  - <sup>5</sup> See J Spigelman, 'Statutory Interpretation And Human Rights', 2005 <[www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_speech\\_spigelman260705](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_speech_spigelman260705)>, accessed 10 December 2006.
  - <sup>6</sup> *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, see New Zealand Parliament's Legislative Advisory Committee *Guideline on Process and Content of Legislation* <[www.justice.govt.nz/lac/pubs/2001/legislative\\_guide\\_2000/](http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/)>
  - <sup>7</sup> *Withey & Ors v Commissioner of Inland Revenue* (No 2) (1998) 18 NZTC 13, 732; see *Guideline on Process and Content of Legislation* (note 6 above).
  - <sup>8</sup> *Accolade Autohire Ltd v Aeromax* [1998] 2 NZLR 15; ; see *Guideline on Process and Content of Legislation* (note 6 above).
  - <sup>9</sup> *In Re Pinochet*, House of Lords (UK), 17 December 1998, <[www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm](http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm)>, accessed 10 December 2006.
  - <sup>10</sup> '[S]ince Burma as it was then known was administered with India, when much of the common law was codified in India the codification was similarly adapted in Burma and eventually compiled into the 13 volumes of the Burma Code', J Finch and D Schmahman 'An Updated Look at Whether Investors in Southeast Asia should enter Myanmar', *Today Magazine*, 1997, as reported at <[www.ibiblio.org/obl/reg.burma/archives/199707/msg00054.html](http://www.ibiblio.org/obl/reg.burma/archives/199707/msg00054.html)>, accessed 11 December 2006.
  - <sup>11</sup> Encyclopaedia Britannica, as reported at <[www.1911encyclopedia.org/Burma#Law](http://www.1911encyclopedia.org/Burma#Law)> accessed 11 December 2006.



- <sup>12</sup> From analysis by A Huxley, 'Case Note: Comparative Law Aspects of the Doe v Unocal Choice of Law Hearing', 2006, *Journal of Comparative Law* (Issue 1), available at <[www.wildy.co.uk/jcl/pdfs/huxley.pdf](http://www.wildy.co.uk/jcl/pdfs/huxley.pdf)>, accessed 11 December 2006.
- <sup>13</sup> Section 13(1) of the *The Burma Laws Act* (India Act XIII, 1898), as reported at <[www.blc-burma.org/html/Burma%20Code/lr\\_e\\_bc01\\_02.html](http://www.blc-burma.org/html/Burma%20Code/lr_e_bc01_02.html)>, accessed 13 December 2006.
- <sup>14</sup> *Section 13(1) of The Burma Laws Act 1898 (India)* see note 13 above.
- <sup>15</sup> *The Constitution of The Union of Burma (1947)*, section 134
- <sup>16</sup> *Section 148, 1947 Constitution*
- <sup>17</sup> *Section 152, 1947 Constitution*
- <sup>18</sup> *Section 140, 1947 Constitution*
- <sup>19</sup> *Section 142, 1947 Constitution*
- <sup>20</sup> *Section 139, 1947 Constitution.*
- <sup>21</sup> *Sections 144 & 149, 1947 Constitution*
- <sup>22</sup> *Section 143, 1947 Constitution*
- <sup>23</sup> *Section 141, 1947 Constitution.*
- <sup>24</sup> *Maung Ko Gyi v Daw On Kin* (1965) C.C. 913, as reported in A Huxley, 'The Last Fifty Years of Burmese Law: E Maung and Maung Maung', 1998, *Lawasia: Journal of the Law Association of East Asia and the West Pacific*, 9-20, available at <[www.ibiblio.org/obl/docsThe\\_last\\_50\\_years\\_of\\_%20Burmese\\_law.htm](http://www.ibiblio.org/obl/docsThe_last_50_years_of_%20Burmese_law.htm)>, accessed 11 December 2006
- <sup>25</sup> As reported by A Huxley, 'The Last Fifty Years of Burmese Law: E Maung and Maung Maung', 1998 (see note 24 above).
- <sup>26</sup> Myint Zan, 'Judicial Independence in Burma: No March Backwards Towards the Past', *Asian-Pacific Law & Policy Journal* (2000), <[www.hawaii.edu/aplj/pdfs/05-zan.pdf](http://www.hawaii.edu/aplj/pdfs/05-zan.pdf)> at 19, accessed 14 December 2006.
- <sup>27</sup> Forward to *Courts Manual*, 1973 Chief Court Press, Rangoon, as reported in Myint Zan, 'A Comparison of the First and Fiftieth Year of Independent Burma's Law Reports', [2004] *VUWLRev* 14, available at <[www.upf.fr/recherche/IRIDIP/RJP/RJP10/08%20Zan.pdf](http://www.upf.fr/recherche/IRIDIP/RJP/RJP10/08%20Zan.pdf)> accessed 11 December 2006.
- <sup>28</sup> *The Constitution of the Union Of Burma (1974)*, available at <[www.blc-burma.org/html/Constitution/1974.html](http://www.blc-burma.org/html/Constitution/1974.html)>, accessed 11 December 2006.
- <sup>29</sup> Article 101, 1974 Constitution.
- <sup>30</sup> Articles 101 & 202, 1974 Constitution.
- <sup>31</sup> 'The validity of the acts of the Council of State, or of the Central or Local Organs of State Power under this Constitution shall only be determined by the Pyithu Hluttaw', article 200(c), 1974 Constitution.
- <sup>32</sup> Articles 200(a)&(b) & 201, 1974 Constitution.
- <sup>33</sup> Articles 95 & 103, 1974 Constitution.
- <sup>34</sup> A Huxley, 'The Last Fifty Years of Burmese Law: E Maung and Maung Maung', 1998 (see note 24 above).
- <sup>35</sup> Article 97, 1974 Constitution.
- <sup>36</sup> Article 101, 1974 Constitution.
- <sup>37</sup> Article 104 1974 Constitution.
- <sup>38</sup> A Huxley, 'Case Note: Comparative Law Aspects of the Doe v Unocal Choice of Law Hearing', (see note 12 above).
- <sup>39</sup> Decision of Chaney J, Superior Court of California, *John Doe & o'rs -v- UnocalCorp&o'rs*, 2003, <[www.ccr-ny.org/v2/legalcorporate\\_accountability/docs/UnocalCALawDecisionI.pdf](http://www.ccr-ny.org/v2/legalcorporate_accountability/docs/UnocalCALawDecisionI.pdf)>, accessed 11 December 2006.
- <sup>40</sup> As reported in A Huxley, 'Case Note: Comparative Law Aspects of the Doe

v Unocal Choice of Law Hearing', (see note 12 above).

- <sup>41</sup> Paragraph 1 of *Announcement No 2/88* of the State Law and Order Restoration Council, 18 September 1988.
- <sup>42</sup> State Law Order and Restoration Council, *Announcement on Separation of Power*, 27 July 1990, Announcement No. 1/90, as reported in M Weller (ed), *Democracy and Politics in Burma*, National Coalition Government of the Union of Burma, Thailand, 1993.
- <sup>43</sup> 'By its Declaration No.5/88 of 27 September 1988, the State Law and Order Restoration Council appointed a Supreme Court with five members as the highest judicial court in the country. The Supreme Court is headed by Chief Justice U Aung Toe', Myanmar military's website <<http://mission.itu.ch/MISSIONS/Myanmar/basicfacts/organs.htm>>, accessed 27 Sept 2006.
- <sup>44</sup> 'The State Peace and Development Council has permitted the following Supreme Court Justices to retire from duties', see Military's notice, *Information Sheet No. A-0694(I)*, 15 November 1998, <[www.myanmar-information.net/infosheet/1998/981115.htm](http://www.myanmar-information.net/infosheet/1998/981115.htm)>, accessed 22 March 2004
- <sup>45</sup> 'A study of the 1998 reported cases in Burma suggests that, outside of political cases or cases in which the military has an interest, the legal system is operating acceptably (assessment by Burmese lawyer Mr BK Sen). The military's unexplained replacement of 80% of the Supreme Court judiciary in November 1998 perhaps indicates there was a degree of independence operating until that time', J Southalan, 'Impunity and Judicial Independence', 2004, *Legal Issues on Burma Journal*, no 17, p40 at 70, available at <<http://www.blc-burma.org/pdf/liob/liob17.pdf>> accessed 11 December 2006. Burmese opposition groups in exile have stated that they have received reports that the MIS is interfering with judicial discretion, especially in politically motivated cases. The Supreme Court judges were among those who suffered from pressure from the MIS.', Burma Lawyers Council, 'JUDICIAL REFORMS: An Urgent Need for Judicial Reform in Burma', *Legal Issues on Burma Journal*, No 3, as reported at <[www.hrsolidarity.net/mainfile.php/1999vol09no08/1242/](http://www.hrsolidarity.net/mainfile.php/1999vol09no08/1242/)>, accessed 11 December 2006.
- <sup>46</sup> See Myint Zan, 'A Comparison of the First and Fiftieth Year of Independent Burma's Law Reports' (note 27 above). Myint Zan notes, however, that the 1998 Supreme Court makes far less reference to earlier cases in its decisions than did the Supreme Court fifty years earlier.
- <sup>47</sup> State Peace and Development Council, Law No 5/2000, *The Judiciary Law, 2000*, 27 June 2000, New Light of Myanmar newspaper ('**Judiciary Law**'). As reported at <[www.blc-burma.org/html/Myanmar%20Law/lr\\_e\\_ml00\\_05.html](http://www.blc-burma.org/html/Myanmar%20Law/lr_e_ml00_05.html)>, accessed 10 December 2006.
- <sup>48</sup> Section 3, Judiciary Law.
- <sup>49</sup> Section 5, Judiciary Law.
- <sup>50</sup> Sections 27 and 26 (respectively), Judiciary Law.
- <sup>51</sup> Sections 5(d), 6, 7 and 14-22, Judiciary Law.
- <sup>52</sup> Sections 2(f), 5(d), 15 & 22, Judiciary Law.
- <sup>53</sup> The Judiciary Law states the courts have the power to 'inspect prisons [and]...police lock-ups for enabling convicted persons and those under detention to enjoy rights to which they are entitled to in accordance with law' (section 25 - equivalent of habeas corpus), and 'examin[e]...any



order and decision which is not in conformity with the Law relating to the legal rights of a citizen and altering or setting [it] aside as may be necessary' (section 5(h) - equivalent of certiorari).

<sup>54</sup> Section 3, Judiciary Law.

<sup>55</sup> Section 2(f), Judiciary Law.

<sup>56</sup>A study of judicial independence in Latin America emphasises the sometimes significant difference between independence 'de facto' and 'de jure'. That is, constitutional or statutory laws may indicate the judiciary has independence but the political realities are such that any legal independence is not exercised in reality. A Pozas-Loyo & J Rios-Figuera 'When and Why Do "Law" and "Reality" Coincide? De Jure and De Facto Judicial Independence in Chile and Mexico' (2006) at <[http://homepages.nyu.edu/~jrf246/Papers/APL\\_JRF\\_Final3.pdf](http://homepages.nyu.edu/~jrf246/Papers/APL_JRF_Final3.pdf)>, accessed 13 December 2006.

<sup>57</sup> 'Some judges want to perform their tasks as legal professionals while others bow to pressure from the MIS so as to retain their appointments. ... The removal of five out of six judges in the Supreme Court led observers to understand that the military junta has no tolerance for independent judges. In fact the situation is even worse than international observers realize, as the removal of judges at lower levels is unknown to the international community. ... [Burma's] judicial system has been totally converted into a tool serving the military junta', Burma Lawyers Council, 'JUDICIAL REFORMS: An Urgent Need for Judicial Reform in Burma', (see note 45 above).

<sup>58</sup> Section 2, Judiciary Law.

<sup>59</sup> Section 5(b)&(c), Judiciary Law.

<sup>60</sup> Section 12, Judiciary Law.

<sup>61</sup>Section 13, Judiciary Law.

<sup>62</sup> eg. decision Chaney J, Superior Court of California *John Doe and o'rs -v- Unocal Corporation* (see note 39 above); Myint Zan, 'A Comparison of the First and Fiftieth Year of Independent Burma's Law Reports' (see note 27 above); and A Huxley, 'Case Note: Comparative Law Aspects of the Doe v Unocal Choice of Law Hearing' (see note 12 above).

<sup>63</sup> A Huxley, 'The Last Fifty Years of Burmese Law: E Maung and Maung Maung', 1998 (see note 24 above).

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## Ethnic Issues and Civil Society in Burm

(By Aung Htoo, General Secretary,  
Burma Lawyers' Council)  
October 12, 2006

Almost every nation's population includes within its composition different ethnic or cultural groups. Ethnicity has become one of the underlying issues of Burma for almost six decades. The international community does not generally encourage the establishment of independent states on the basis of ethnicity, in the interests of preserving or maintaining peace, stability and socio-economic cohesion. However, to justly and peacefully resolve the stability and development issues within societies, the "**minority rights**" of different ethnic groups residing within nation states must be recognized in practice. National unity is emerging as a paramount issue within the boundaries of such states, particularly those developing nations that are emerging as liberal democracies subsequent to periods of authoritarian rule.

Social cohesion and harmony can only be achieved in such societies where the principle of unity in diversity is truly valued. Every member must be committed to the achievement of a pluralistic society, within which the cultural uniqueness of each ethnic minority group has a place. The principle of equity must permeate throughout each state institution and resources, political positions, employment opportunities should be fairly shared between all peoples, regardless of their membership to any particular ethnic grouping.

While the rights of ethnic minority people are highlighted, extreme ethnic nationalism should be avoided. In practice such extremism may translate into an approach that views all the issues only from an ethnic nationality perspective; where decisions are reached, whether right or wrong, solely on the basis of ethnicity; where a cooperative and collaborative approach is restricted and



confined to ethnicity. This could penetrate the making of critical decisions such as the appointment of political and government positions. It is clear that such practices would certainly discourage the national unity within a society. It is also required to reasonably resolve the claim for self-determination of the minorities living in areas dominated by other minorities.

In order to realise “minority rights” within a liberal democracy a democratic system should be sufficiently flexible and creative in its approach. To facilitate this, ‘federalism’ is usually considered in a way that it is to be incorporated into democratic governance. However, federalism alone may not be sufficient as it focus mainly on division of governmental power among the constituent units of a country vertically. In that case, if civil society, from horizontal aspect, does not energetically exist within each and every constituent unit, such a society or a nation state may end up in its collapse in the long term.

One of the most telling definitions of civil society is that, “Civil society is a dense network of associations working openly in a democratic society and having the ability to reach the decision-maker in order to influence events”. A civil society will consist of a mixture of various forms of associations that will freely interact and communicate with each other in a spirit of civility and tolerance for the sake of the entire population. Societal pluralism i.e. the ability of all groups to work freely, openly and equally without violating the rights of others, is one of the underlying concepts of civil society. Here, it is important to note that a civil society, which extols the idea of democracy, does not allow one civil group to act selfishly for their own goal without regard to the others.

This paper attempts to briefly introduce the issues of the ethnic minority people in Burma, from the perspective of the right to self-determination and recommends a certain type of federalism as a way to resolve it. In addition, it also highlights that the whole federal union entails the existence of civil society. It is expected that Burma may become peaceful and developed in future if the concept of civil society can be adopted and amalgamated with federalism on the basis of constitutionalism.

### **Nationalism and the Concept on National Unity**

Aung San is the national hero in Burma. Though Aung San passed away in 1947, a great majority of people in Burma still recognize him as the founding father of contemporary Burma.

He united the various ethnic nationalities in the whole country. He remains as a symbol for cohesion and unity in contemporary life.

Aung San's conception of national unity follows from his ideas on nationalism. When asked to define nationalism he said: In my view...every nation in the world must be free not only externally but internally. That is to say...every nation in the world being conglomeration of races and religions should develop such nationalism that is compatible with the welfare of one and all, irrespective of race or religion or class or sex. That's my nationalism.<sup>1</sup> By this, Aung San did not conceive of a strictly plural society with the several groups living in a common territory with little or no contact between them. Rather, he saw one society sharing a common life, the development of common interests, the use of a common language, and the growth of a feeling of community.<sup>2</sup> On more than one occasion, he said that national unity meant, unity of the entire people, irrespective of race, religion, sex, and sectarian and party interests.<sup>3</sup> He further held that nationalism is "ever changing in form and content". From his view of nationalism, it is clear that national unity was a vital problem for the peoples of Burma.

Aung San's idea of unity in diversity was the basis for the answers he gave to many of Burma's problems. In a report to the Executive Committee of the Anti-Fascist Peoples Freedom League (AFPFL)<sup>4</sup> in November 1946, he criticized the feudal administration in the Shan States.<sup>5</sup> He also restated his position as regards the Hill People. He said, "The Hill People would be allowed to administer their own areas in any way they pleased and the Burmans would not interfere in their internal administration."<sup>6</sup> Thus in practice as well as in theory, Aung San stood for local autonomy and diversity among the groups which were ethnically different from the Burmans and who wanted to retain their differences.<sup>7</sup> Regrettably, Aung San's assassination prevented him from translating his ideas into practical programs and policies. The responsibility for leading the people through the final stages of separation from Great Britain and into self-government fell upon the shoulders of U Nu, a man of different temperament and outlook.<sup>8</sup> U Nu, Prime Minister of the Union of Burma who ruled the country during the period between 1948 through 1962, argued that the problem of national disunity was as old as Burma's history. He perceived three sources of national disunity: those "caused by the natural barriers of water, dense forests and mountains; dissension and discord which naturally arise in the course



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of centuries”; and colonial rule, which he hypothesised, encourages mutual distrust and antagonism between peoples. An examination of Burma’s history reveals that in pre-colonial times, there were three short periods when the country was united; and this came as a result of force and violence under strong Burman Kings. Following the death of these men and their era, “their kingdoms, instead of firmly established, crumbled like a house of cards”.<sup>9</sup>

For Nu, the problem of national unity involved three interrelationships— the unity between ethnic groups, the unity between political groups, and the unity between the peoples and the government.<sup>10</sup> Nu constantly argued that unity was natural between ethnic groups in Burma because all their members were “sons and daughters of this land”. But, the act of political union, he argued, was a voluntary one. Therefore, each must accept an equal responsibility to protect its creation. Further, as co-equals, all must progress together in matters of politics, economic growth, and social development. “If portions of the Frontier Areas continues to be backward, the Burma union would be weakened in the same way a weak limb weakens the whole person.”<sup>11</sup> Whilst these assumptions did not differ greatly from the approach and views adopted by Aung San, the conclusions Nu drew were very different. He favored the establishment of a unitary state where the sole principle of ability or merit would determine who would be the administrators, without regard for ethnic composition.<sup>12</sup>

“My idea is that Burma should have a unitary constitution, and I want leaders with the required qualifications, whether they are Karens, Shans, Chins, Kachins, Karennis, Mons, or Burmans, to administer it.”<sup>13</sup>

Nu, as the successor to Aung San, felt obligated to follow the path marked out by his predecessor, but as times and circumstances changed he gradually developed his own approach. As a result, a great deal of misunderstanding occurred between Nu and the minorities— misunderstandings that reflected the dichotomy between Aung San’s promises and Nu’s practices.<sup>14</sup>

In the conference of the AFPFL held in May 1947, Aung San expressly mentioned that a unitary state system would not be suitable for Burma. After he was assassinated, his guidance was however ignored by his successors.<sup>15</sup> Furthermore, the sense of betrayal or disillusion of various ethnic communities was strengthened as the federal proposal to guarantee ethnic and cultural diversity, aiming to unite the whole people within a reasonable political framework was never been implemented.

### The Ethnic Minority Problems in 1947 Constitution

On the basis of the agreement and support from ethnic nationalities held at Panglong in February 1947, Burma gained its independence in 1948. The 1947 Constitution was drafted in the pre-independence era by a 111-member constitution drafting committee, composed of leaders from AFPFL, members of Cabinet, representatives of ethnic people, and intellectuals. The Constitution was merely a blue-print, due to the haste in drafting it in time for the independence. The equal rights for the ethnic people provided in the Constitution were not realized mainly due to lack of infrastructure and insufficient attention from the then country's leaders. The 1947 Constitution provided that parliament would consist of, which was composed of the Chamber of Deputies and the Chamber of Nationalities. <sup>16</sup> The Chamber of Deputies<sup>17</sup> was formed on the basis of population, while the Chamber of Nationalities<sup>18</sup> was constituted from representatives of different ethnic-states. The former was to practice democracy based on majority rule and the latter was to protect the rights of ethnic nationalities in the Union in terms of the structure of the state. However, non-Burman ethnic leaders were dissatisfied with the formation of the Chamber of Nationalities as their<sup>19</sup> analysis concluded that the Burman nationality influenced both the Chamber of Deputies but also the Chamber of Nationalities. The number of representatives comprising in the formation of the Chamber of Nationalities was as follows:<sup>20</sup>

State	Representatives
Shan	25
Karen	24
Karenni	3
Kachin	12
Chin	8
Remaining Territories	53
<b>Total</b>	<b>125</b>

Shan, Karen, Karenni, Kachin and Chin are the ethnic minority people. Under the title of *"Remaining Territories"* the Burman nationalities could also be represented in the National Assembly. In the formation of the State governments, the central government retained in practical term a high level of control and power in accordance with the constitution. Accordingly, Heads



of the States of the non-Burman ethnic nationalities who would also be Ministers and members of the Union government were to be appointed by the President only on the nomination of the Prime Minister of the Union Government.<sup>21</sup>

Under the 1947 Constitution 25 seats for representatives of Shan State were reserved in the Chamber of Nationalities. However, the selection process within Shan State was not democratic, with only the Chaofas or Saw Bwas (traditional local feudalists) selecting representatives from among themselves. Democracy was also not observed across Burma in the process of selecting heads of state. Democratic principles require that the people of a state should be able to elect their own head of state.

Despite the constitutional guarantees of democracy and self-determination, the reality was very different. The practice was when a leader supported the AFPFL, that leader would be appointed as Head of that State. However, if a Head of a State was not an AFPFL, he would be dismissed by the Prime Minister of the central government. This meant that, without the formal approval of the Prime Minister, a person could not be the Head of a State, although he might be elected by the State Council. (In practice, Prime Minister U Nu first attempted to dismiss U Htun Myint (Lin Khay) whom was democratically elected by the Shan State Council as Head of Shan State and finally transferred him to another government department.) Accordingly, it was evident that the 1947 Constitution deprived the States of the right to self-determination.<sup>22</sup> Economically, the key legislative power rests with the Union, not with the States.<sup>23</sup> Hence the capacity to raise revenue was heavily weighted towards the Federal Union. These powers include the power to legislate with respect to the following:

- natural resources such as forests, mine and oil-fields, mineral development, petroleum;
- land such as land tenures, including the relation of land lord and tenant and the collection of rents; transfer, alienation and devolution of land;
- development of industries and electricity; and
- taxes derived from sale of goods, companies, income, the capital value of the assets of individuals and companies, the capital of companies.

According to 1947 Constitution, the States of ethnic nationalities, despite possessing rich natural resources, did not possess the right to manage their own resources. Rather, the central government wielded the power and benefited directly from these resources.<sup>24</sup>



U Chan Htoon, who mainly took responsibility for drafting 1947 constitution<sup>25</sup> and who became the then Attorney-General of the Union of Burma, analysed the constitution and described it as federal in theory and unitary in practice.<sup>26</sup> Since then, non-Burman ethnic leaders concluded that they were hoodwinked by the Burman leaders and legal academics by taking advantage of their lack of political experience and legal knowledge.<sup>27</sup>

When it became apparent that ethnic people did not and would not in the foreseeable future enjoy political and economic equality with the Burman majority under the 1947 constitution, civil war broke out.

However, the 1947 constitution had many worthy aspects. These included parliamentary democracy; the guarantee of free elections and a multi-party system; an introduction of open market economy,<sup>28</sup>; a guarantee and protection of basic individual liberty and individual rights<sup>29</sup> such as the application of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* in the Supreme Court; and the creation of an independent judicial system<sup>30</sup>. More importantly, under 1947 constitution, civil society to some extent existed in Burma.

### **Ethnic Nationality Issue and 1962 Military Coup**

The democratic governments formed under the 1947 Constitution, which ruled the country from 1948 to 1962, fostered economic development for the country. The farmers who constituted about 80% of the whole population were content and growing prosperous. Burma exported over one million tons of rice. With the exception of isolated nationalist movements to promote the rights of ethnic nationalities, the situation of the whole country was generally stable.<sup>31</sup> However, under the 1947 Constitution development throughout the country was uneven. Progress generally occurred in the low land where the majority of Burman people resided whilst very little change happened in areas where other ethnic nationalities' were found.<sup>32</sup> The movement of the ethnic leaders for constitutional reform, based on federalism, emerged in this context. However, the military, led by General Ne Win, manipulated the situation and staged a coup in 1962 under the pretext of protecting the union from disintegration.<sup>33</sup>

With regard to the movement towards federalism, the two main issues centered on where power was located—that is, control over the financial resources and military. The federation sought to change the central-state relationship from a colonial-like arrange-



ment to one between co-dependent entities. It was hoped that reforming the Constitution in this manner would strengthen the Union and remove grievances that were contributing to unrest. The then Prime Minister U Nu was open to such discussions and arranged for a national conference to consider the new federal proposals. The conference, which began on the 24 of March 1962, never completed its work because General Ne Win overthrew the elected government and installed a military dictatorship. The next four decades of military rule in Burma only exacerbated the ethnic divide in Burma as it consistently waged a propaganda that federalism would lead to secession and disintegration of the union.<sup>34</sup>

### **The 1974 Constitution and Ethnic Rights**

Following the coup in 1962, to overcome the glaring problem of legitimacy, the regime drafted a constitution, known as 1974 Constitution, for the formation of a one-party state, which fully guaranteed the perpetuation of the military dictatorship. Some academic analysis conclude that the 1947 Constitution established a semi-federalist state under which the rights of the ethnic people were to some extent protected by the bi-cameral system through which legislative power can be checked and balanced. However, the 1974 Constitution abolished the Chamber of Nationalities, which had comprised representatives from the ethnic states. State power was exercised only by the People's Assembly, with its great majority of Burman representatives who were mostly army and ex-army personnel.

After dissolving the previous Union, composed of five ethnic states and Burma proper, as provided for in the 1947 Constitution, the constituent units in the 1974 Constitution were transformed into seven ethnic states, largely inhabited by non-Burman people, and seven geographical divisions, largely inhabited by the majority Burman people. As a result, an ethnic state had status equal to one division, in which only one seventh of the Burman people lived. Under the new 1974 Constitution the multi-party democratic system<sup>35</sup> and free-market economy was abolished.<sup>36</sup> The dissatisfaction of the ethnic people greatly increased following this further dilution of their rights and political influence. The armed struggle of the ethnic organisations consequently gained momentum between 1974 and 1988. The 1974 Constitution deprived individuals as well as collective groups of the freedom of association and political participation. As a consequence, the economic and socio-political situation of the country deteriorated

dreadfully. This set the scene for the popular democratic uprising in 1988. Then in September 1988 the military again staged a coup, abolished the 1974 constitution, and established a military administration that is undoubtedly the most rigid and centralised in the history of Burma.

### **The Ethnic Cease-fire Policy**

In mid-1989 the military junta initiated a policy of ethnic cease-fires. This occurred first in the north-eastern part of Burma, which had previously been controlled by the CPB. In 1989, the Wa ethnic people revolted in the north-eastern part of Shan State where the CPB held a liberated area. They expelled the CPB leaders to China, formed the United Wa State Party (UWSA) in 1989, and became the largest armed opposition force.<sup>37</sup> Previously, China had supported the CPB in establishing its liberated area. Following the coup, China no longer supplied the Wa troops, shifted its policy in favour of collaboration with the Burmese military junta, and abandoned the BCP.<sup>38</sup> It put much pressure on the Wa, including severing communication lines to China that resulted in a supply crisis within the UWSP.

The Burmese military junta manipulated this situation and persuaded the UWSP leaders to enter a cease-fire without requiring their laying down of arms. Many carrots were dangled, including the guarantee of the creation of "Wa" state, with regional development projects to be carried out therein. It is important to consider this in the context that the Chinese Government has direct relationship with the Burmese military and that there is a policy of cross-border trade. The Wa community was pressured to accept the cease-fire in return for access to territory across the frontier. Following the cease-fire between the military junta and the Wa group, other ethnic groups based in northern Shan State entered cease-fires one after another, domino-style. Other cease-fire agreements were reached with the following:

- KIO mainly based in Kachin States in February 1994;
- Karenni Nationalities Peoples' Liberation Front (KNPLF), Kayan New Land Party (KNLP), Shan Nationalities Peoples' Liberation Organization (SNPLO) mainly based in southern Shan State, in 1994 and in March, 1995
- New Mon State Party (NMSP) based in Mon State, in March 1995; and
- Karenni National Progressive Party (KNPP) mainly based in Karenni State in June 1995.  
( after three months, KNPP resumed fighting)



Cease-fire agreements between the military junta and ethnic organizations are pursued and determined solely by the military. Despite the request of ethnic organizations, political dialogue has not occurred since 1989 - the period that the UWSA entered the first cease-fire agreement. The military junta continues to ignore the ethnic minorities' political demands for a larger degree of self-determination and equality. Given, the inconsistent approaches by the junta with the various ethnic organisations in the ethnic cease-fire areas, economic and socio-political implications have become quite complicated. The SPDC has persuaded the leaders of the ethnic cease-fire organizations with business licenses, employment opportunities, and other material incentives such as land, houses and other facilities. As a result, economic inequities have grown between the leaders and grassroots members, and between the cease-fire organizations and the local ethnic people of economic status. These inequities have become more problematic as the common ethnic people in local rural areas presently face a serious socio-economic crisis. They have also seriously damaged relations between the local community and their organisations' leadership.<sup>39</sup>

### **The Military's New Constitution, Ethnic Minority Rights and Civil Society in Burma**

In order to produce a new constitution, the military junta has commenced convening its sham National Convention in January 1993 and laid down the detailed basic principles. Accordingly, the legislative power of the State is apportioned to the Union Assembly, the Regional Assemblies and the State Assemblies.<sup>40</sup> The Union Assembly consists of the People's Assembly and the National Assembly.<sup>41</sup> In the Peoples' Assembly, out of the 440 representatives, 110 military personnel nominated by Chief of Staff of the Defense forces will be the members.<sup>42</sup> In the National Assembly, out of the 224 representatives, 56 military personnel nominated by Chief of Staff of the Defense forces will be the members. Military personnel, submitted as representatives by Chief of Staff of the Defense Forces, whose number shall be equal to one third of the number of representatives, will be the members of the Regional and State Assemblies.<sup>43</sup>

The military is effectively established as an ultra-constitutional organization. It operates in practice, above the constitution and the rule law. The "Chief of Staff of the Defense Forces" is the most powerful person under the constitution. His appointment and removal are not referred to in the constitution. It is anti-

pated that he will be beyond the control of a civilian government. The Chief of Staff of the Defense Force and the military will be regulated by the military's own regulations, which will override the constitution. The Chief of Staff of the Defense Forces is entitled to nominate twenty five percent of all members of the People's Assembly, the National Assembly and the State and Regional Assemblies.<sup>44</sup> He is also entitled to nominate the Ministers for Defense (i.e. the Chief's own boss), the Minister for the Interior and Minister for Border Affairs.<sup>45</sup> The State President and Vice-President shall be elected by the Presidential Election body comprising three groups: the elected representatives of the National Assembly; the elected representatives of the People's Assembly, and military personnel representatives.<sup>46</sup> Each group shall elect a Vice-President. Out of these three Vice-Presidents, one will become the President and the others will become the Vice-Presidents.<sup>47</sup> Accordingly, at least one military personnel representative nominated by the third group will become either the President or the Vice-President of the State. Once first and second group also nominate two military personnel as their presidential candidates, all three military personnel will become President and two Vice-Presidents. It is anticipated that the members of the Union Assembly appointed by the military will form a block vote and unite with the political parties aligned with the military to ensure that the Vice-President nominated by the military is elected as the President.<sup>48</sup> The President will appoint not only Union Ministers<sup>49</sup> and Deputy Ministers<sup>50</sup> but also a Chief Minister for each state and region.<sup>51</sup> It is evident that executive power is above the judiciary as the President has the power to dismiss the Chief Justice of the Union.<sup>52</sup> In the regions or provinces where ethnic nationalities mainly constitutes, Chief of Staff of Defense will appoint the Ministers for Security and Border Affairs in every government; these governments will be headed by Chief Ministers appointed by the State President; and, Chief Ministers will further appoint other Ministers.<sup>53</sup> As such, it is evident that the constitution would be one which exercises the most rigid centralization in the history of Burma, absolutely ignoring the rights of ethnic minorities, in terms of self-determination and equality, while prohibiting the emergence of civil society.

### **Rights Oriented Culture and Constitutionalism**

In the case of Burma, it would be tricky to predict when the structural change will take place. 'Structure' can be considered as 'Form' whereas 'Rights' can be regarded as 'Essence'. It is to



promote the rights of the people, be 'individual' or 'collective' rights, by applying the structure of society; and, the structure should be re-created on the basis of the protection and the promotion of rights. The notion is that 'Rights Oriented Culture' be practiced and 'Rights Based Society' be established.

The term '**rights**' is not familiar with the people who have been living under the rule of authoritarian regimes, regardless of whether they are 'left' or '**right**' oriented governments or military juntas in Southeast Asia. Previously the issues were approached mainly from the aspect of "community" or "**society**," but not on the basis of 'rights' of the people. Structures of the state were applied and the reasoning was this was being carried out in the interest of society, but only elites benefited. In terms of structure, a constitution is one of the major elements. Producing a constitution will be meaningless for the people, if it is not based on constitutionalism. To this end, it will be impossible to protect such 'rights' if society does not practice a "**rights oriented culture**". The existence of a society should be to protect and to promote the 'rights' of the people. 'The well-being and development of society' should not be a proper reason to ignore or reject the 'rights' of the people. At the same time, the well-being and development of society should also be effectively sought. In fact, the protection and promotion of the rights of the people is also for the well-being of society. The question is how these two objectives can be reasonably and practically amalgamated. "Popular sovereignty" is highly regarded as one of the major fundamentals in constitutionalism<sup>54</sup> thereby government by the people through representative institutions, universal and equal suffrage by all citizens, and freedom of political activity (speech, press, assembly, association) are all well acknowledged. Genuine national unity within a society can be achieved by providing 'mutual respect' on the basis of 'rights'. Efforts should be made to promote national unity within a society by guaranteeing the rights of the people; raising awareness on "rights" among the people; furthermore, creating institutions and situations whereby the people themselves promote their own rights.

### **The Civil Society**

In a country, where 'rights oriented culture' is well regarded, the establishment and strengthening civil society is essential. Despite that a constitution plays a major role in creating the structure of a society, it alone may not be able to protect the rights of people. The protection of 'rights' in connection with the constitu-

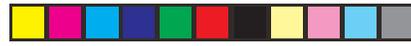
tion may become a reality only when institutions, people's associations and non governmental organizations exist independently and protect the rights of people. This is one of the fundamental characteristic of civil society.

When the organizations are formed with voluntary participation and cooperate with other organizations socially, economically and religiously, they may be considered as an initial stage of civil society. However, they may be regarded as sectors of civil society only if they skilfully watch, criticize and balance the government's corruption of power, its manners affecting individual and group rights, and damages done to society and the country because of its implementations. This means that independent organizations balance, supervise and monitor the policies and power abuses of the government.

Unfortunately, in Burma, the military junta is still attempting to mislead the international community by promoting organizations such as the Union Solidarity and Development Association (USDA), similar to the Golkhar of Indonesia, Myanmar Maternity and Child Welfare Association, which are rigidly controlled by the SPDC, as being civil society. The establishment of civil society will entail empowering the grassroots people in Burma, as an effective alternative to help create changes in society in order to achieve human rights for all people for the long-term purpose.

### **Current Background Situations of Burma from the Aspect of Civil Society**

Government controlled organizations such as Union Solidarity Development Association, Myanmar Maternal and Child Welfare Association and Myanmar Red Cross are still playing major role by the name of civil society. Almost half of the other organizations inside Burma are those affiliated with religions. Professional organizations constitute about 20% while the remaining percents have been occupied by welfare, charity, relief or humanitarian assistance, and development organizations. Unfortunately, those organizations mainly existing in areas of Burma under the direct control of the ruling regime have not yet oriented to the track of civil society in balancing, supervising and monitoring the policies and power abuses of the government. More importantly, independent status and gender dimension have remained controversial; interaction with the poorest people has not yet been known; and, poverty, livelihood and other underlying social issues have never been addressed and highlighted by those organizations. No



organization operating formally inside Burma under the rule of SPDC has established a clear objective to stand as a counterweight against the unjust ruling and fight for social justice, as a foundation for civil society.

The effective laws and judicial system do not facilitate the emergence and strengthening of the civil society in Burma. 1988 Association Law enacted by the regime prohibits formation and function of independent organizations. The existing judiciary is not able to provide protection for civil society educators and human rights activists given that it is subservient to the ruling military regime. As such, characteristics of the independence of judiciary have been waning rapidly. Despite that there are a number of rich business people in Burma, majority of them shares benefits with the regime in exploiting country's natural resources, foreign trade and enterprise licenses and they do not constitute a middle class that will facilitate the emergence of civil society.

The international community and UN agencies have as yet established a clear policy and working program for the emergence of civil society in Burma. Except ICRC and ILO, UN agencies reportedly seek appeasement with the regime for their concern that they may no longer be permitted for operation in Burma. Merits and demerits of their activities have not yet been publicized well. Particularly, in respect of fund transferred by the international community to those so-called civil society organizations inside Burma, transparency is lacking. The ruling regime is enjoying a lot of benefit from the support of such international community by taking advantage of currency exchange rate.

### **Ethnicity and Civil Society**

In many areas of Burma, mainly where the ethnic armed organizations control, the grip of the SPDC is to some extent loosening. While political stalemate is taking place for both democratic opposition and ethnic armed organizations, the younger ethnic generation is attempting to explore another alternative to promote the situation of society. They have formed a number of organizations focusing on youth, women, worker, ethnicity, human rights, legal affairs, environment and other contentious local issues, in spite of the fact that they cannot operate formally. In cooperation with the civil society organizations based on Thai Burma border, they were able to publicize the issues on sexual abuses, human trafficking, lack of the rule of law, narcotic drugs, environmental degradation, forced relocation and forced labor,



natural gas, ethnic language, land confiscation and etc. internationally.

The existence of civil society organizations in every constituent unit of the federal union will assuredly facilitate the decentralization processes and protect the rights of local people. More importantly, networking among themselves transcending over the boundaries of each unit will strengthen the cohesion of the whole federal union and facilitate the national unity.

**Conclusion**

In spite of the fact that it needs to address the ethnic issue properly with a special emphasis, it doesn't mean that the issue has been too complicated to resolve. It is also unreasonable, as the military junta usually mentioned, that without a strong centralization by military prowess in order to establish stability, Burma would collapse. If Burman and non-Burman ethnic nationalities reach a common understanding on how to construct a political union, where the minority groups feel they belong and which they are proud to be a part of, "trust" would be established.

The possible emergence of civil society in Burma might strengthen the power of grassroots people, Burman and non-Burman alike, and help create a venue to gather together for all ethnic nationalities in attempting to resolve the particular issues in their local areas peacefully, thereby stepping forward to establish a new democratic society within the framework of a federal union.

Burma have not yet sufficiently learnt and adopted the concept of civil society.

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End note

<sup>1</sup> “The Struggle for National Unity in the Union of Burma,” A Thesis Presented to the Faculty of the Graduate School of Cornell University for the Degree of Doctor of Philosophy by Joseph Silverstein, September 1960, p.218

<sup>2</sup> Aung San “Problems of Burma’s Freedom”, p.13; and *New Times of Burma* [10 December 1946], p.4

<sup>3</sup> Aung San, “Problems of Burma’s Freedom”, p.21.

<sup>4</sup> AFPFL, Anti-Fascist People’s Freedom League, the major organization which led the country to achieve independence from the British in 1948.

<sup>5</sup> *New Times of Burma* [2 November 1946], p.2.

<sup>6</sup> *Ibid.* [11 February 1947], p.1.

<sup>7</sup> *Ibid.*, p.221.

<sup>8</sup> *Ibid.*, p.226.

<sup>9</sup> U Nu, *Towards Peace and Democracy* [Rangoon, 1949], p.205.

<sup>10</sup> *Ibid.*, p.10.

<sup>11</sup> *Ibid.*, pp. 134-35.

<sup>12</sup> *Ibid.*, p.236.

<sup>13</sup> *Ibid.*, p.174.

<sup>14</sup> *Ibid.*, p.244.

<sup>15</sup> Federal Principle or Paper for the Amendment of the Constitution of the Union of Burma submitted by Shan State, approved in the state conference held at Taunggyi on 25 February 1961, p. 34.

<sup>16</sup> Article 65 of the Constitution of the Union of Burma.

<sup>17</sup> Article 83 of the Constitution of the Union of Burma.

<sup>18</sup> Article 87 of the Constitution of the Union of Burma.

<sup>19</sup> “Secession and Equality Issue” presented by Union Nationalities League for Democracy: “From Peaceful Co-existence to a Genuine Federal Union”; Historical Records of the Union Nationalities League for Democracy collected and submitted by Lian H. Sakhong

<sup>20</sup> Second Schedule, the Constitution of the Union of Burma.

<sup>21</sup> Article 160, 173, 181, 189 and 197 of the Constitution of the Union of Burma.

<sup>22</sup> Presentation by the delegation of Shan State in the Ethnic Nationalities Conference held at Rangoon City Hall on 29 September 1957, p. 8.

<sup>23</sup> List One and Two of Third Schedule of the 1947 Constitution.

<sup>27</sup> U Htun Myint, “Shan State which exercises equality within the Union”, p. 53.

<sup>28</sup> Article 23 of the Constitution of the Union of Burma.

<sup>29</sup> Chapter 2 of the Constitution of the Union of Burma.

<sup>30</sup> Chapter 8 of the Constitution of the Union of Burma.

<sup>31</sup> The Information reported in the *Mirror and the New Light of Myanmar*, the newspapers published in 1961-62.

<sup>32</sup> U Tun Myint, Secession Issue of Shan State [23 January 1957], pp. 17-18.

<sup>33</sup> The Statement of the Revolutionary Council in March 1962.

<sup>34</sup> Analysis of SLORC’s National Convention, Constitutional Seminar Record, published by the Burma Lawyers’ Council, 1995, p. 47.

<sup>35</sup> Article 11 of the Constitution of the Socialist Republic of the Union of Burma (1974).

<sup>36</sup> Article 6 of the Constitution of the Socialist Republic of the Union of Burma (1974).

<sup>37</sup> *Ibid.*, p. 440.

<sup>38</sup> Interview with a central committee member of the CPB in 1989.

<sup>39</sup> “Analysis Paper on Cease-fire” by Kayan New Land Party.

<sup>40</sup> Para (1) Detailed Basic Principles for the Legislature, Constitution Principles for the Constitution of the Union of Burma.

<sup>41</sup> Para (2) and (3) Detailed Principles for the Legislature, Constitution Principles for the Constitution of the Union of Burma.

<sup>42</sup> Para (4) Detailed Principles for the Legislature Constitution Principles for the Constitution of the Union of Burma.

<sup>43</sup> Para (23) Detailed Principles for the Legislature Constitution Principles for the Constitution of the Union of Burma.

<sup>44</sup> The Military and Its Constitution, published by the Burma Lawyers’ Council

<sup>45</sup> Para (2.2) Appointment of Union Ministers, Detailed Basic Principles for the Executive.

<sup>46</sup> Para (5) Principles for Chapter on Formation of States, Constitution Principles for the Constitution of the Union of Burma.

<sup>47</sup> Para (5) Principles for Chapter on Formation of States, Constitution Principles for the Constitution of the Union of Burma.

<sup>48</sup> The Military and Its Constitution, published by the Burma Lawyers’ Council



<sup>49</sup> Para (2) Appointment of Union Ministers, Detailed Basic Principles for the Executive.

<sup>50</sup> Para (3) Appointment of Union Ministers, Detailed Basic Principles for the Executive.

<sup>51</sup> Para (22) Appointment of Regional or State Ministers, Detailed Basic Principles for the Executive.

<sup>52</sup> Para (4) (j), Empowerment of the State President, Detailed Basic Principles for the Judiciary.

<sup>53</sup> Para (22) Appointment of Regional or State Ministers, Detailed Basic Principles for the Executive.

<sup>54</sup> Elements of Constitutionalism by Professors Henkin & Greenberg





## Thailand must steer clear from Burma junta's way to Democracy

*B.K Sen*

The military coup in Burma had taken place on March 2, 1962 and its junta is in the seat of power till today, over four decades. The military coup in Thailand took place while the premier was abroad on September 19, 2006 and its junta is in power. The two are neighboring countries and a close study of the two coups is essential to draw lessons. Although they have fundamental differences, there is danger of their congruence. A comparative study of the two will provide guidelines to the democratic activists of respective countries and steer the anti-democratic movements back to the path of democracy.

### Similarities and Differences

On January 4, 1948, Burma became independent of the colonial rule and had its Constitution for the first time in its history. The constitution emerged through elected Constituent Assembly and it gave fundamental rights, Freedom of expression and association and it was a parliamentary democracy quasi-federal in character. The Thai Constitution of 1993 emerged after street battles with army ending absolute monarchy. Thailand for the first time was freed from army domination and democracy on constitutional monarchy was established. The Thai constitution was unitary in character. Both the constitutions provided two houses but their respective powers and composition were different. In Burma, the House of Representatives was directly elected on territorial basis and the House of Nationalities was elected on proportional ethnic basis. In Thailand the House of Representatives was directly elected on territorial basis and the Upper House Senate was elected on party list basis; the elected members ceasing to be party members after election. The electoral system was different. In both the majority winning party elected its Prime Minister and he nominated his cabinet. Periodic elections were common features. The status of the President under Burma's 1947 constitution was somewhat similar with the King of Thailand. The political parties and civil society under both the constitutions were guaranteed freedom. The Head of the Army under both the constitutions was not the General of the



Army but the President and the King respectively. In case of serious deterioration of law and order situation, there is a provision in both the constitutions for declaration of Emergency. Over ruling and over stepping that, the juntas in both the countries seized power and declared Martial law Coups in both the countries were bloodless and without resistance. This common feature is the manifestation of people's frustration of the governments in power although both were popularly elected. In Burma the democratic government ruled for 12 years and there had been 4 elections In Thailand the democratic government ruled for 12 years and 2 elections has been held under 1993 constitution. In both the countries democracy was fragile, rule of law was given a go-by, rampant corruption became a hallmark and insurgency threatened stability. The excuse for seizing power was identical, threat to the integrity of the State. In Burma the 7 ethnic nationalities and the Communist party of Burma went into armed struggles to achieve their goals of self-determination and peoples' power .In Thailand the ruling Thaksin Party manipulated the political system to clamp one party rule, corruption became menacing and the ethnic Muslim minority in the South challenged the sovereignty threatening to form a separate state

In Thailand the King is the Head of the State and very revered. Till 1932, Thailand had absolute monarchy. The wave of democratic movement wavered between a Republican State and Constitutional monarchy. The army exploited the situation and wanted to dominate. But the struggle of the people and the students in 1993 sealed the hegemony... of the Army. The King intervened and prevented the army from setting up a dictatorship. He opted for constitutional Monarchy and abdicated his power to the people. The Coup of 2006 in Thailand therefore had marked difference from that of Burma. In Thailand, the Head of the state, the cabinet ministers, leaders of political parties were not put behind bar, which was the case in Burma. Under martial law the political parties have been banned but the newspapers have not been gagged. Interim Civilian government has been set up. Judiciary's power of judicial. Review has not been abolished. The Head of the Army after the Coup sought the King's approval and it looks that the King has not dissented the Coup. The big question that has been thrown up is "What form of government is now in place? Has the King "appointed" Gen- Sonthi the country's administrator?" Does the Constitutional Monarchy prevail? Or is it a military dictatorship that rules the Country. The Army head has declared that an interim Constitution will be drawn out may be for the "lawful" functioning of the Junta now in power. Election will be held within the end of October 2007 under a new constitution and power returned to the elected body. The question is who will draw up the interim

Constitution, from where it will have its legitimacy? Will the King have mandate to give it legitimacy. Save the abolition of absolute monarchy in 1932, this is the 16<sup>th</sup> change. The other big question is what will be the Constitution drawing process? The collateral question as to what will be the political solution for the Sonthi, where the Muslims are in majorities and the General himself belongs to Muslim minority. The Constitution-making process, which the Burmese junta has adopted and its approach to the ethnic autonomy are the two issues which have been rudely criticized. The Army in Thailand or its proxy the interim government must come out and pledge accountability and transparency. At no cost, Sonthi should stay in power beyond the timelines with interim government. Under military tutelage. The King can play a vital role as the King is universally revered in Thailand as the ultimate protector of the country's interests and wellbeing and Army hopefully will listen to him unlike Burma which is in an unfortunate position. The Junta will not listen to anybody, the UN or The ASEAN or the world Community. Thai Army must not follow the path that Burma Army has in its road map of 6 steps to restoration of democracy. The Army Junta flouted the election result of 1990 although it gave tall promise to hand over power. The Thai Army must not defy the result of the election to be held after new Constitution is drawn up. Importantly, the Army must honor its time bound schedule to restore democracy. The Burma Junta is determined to be in power forever, it has not set any time-frame for bringing the Constitution in force. All that the Junta is doing is violating all human rights, reinforcing the rule under fear and perpetuate its hegemony on the society. The Thai Army Generals hopefully will be sincere, trustworthy and restore constitutional democratic rule in Thailand. It should not feel very encouraged by the blessing of the King, the total absence of any resistance to the Coup at home, by indifference of international community, including Thailand's neighbors not threatening political and economic sanction. US already have clamped sanction. It should not be under self delusion that the people were not opposing the take-over and they can prolong the rule the self delusion may be natural as when soldiers patrolled the streets, number of residents greeted the soldiers and they offered bouquets and posed for photograph with them.

The King brought Thai judiciary into political equation and the Constitutional Court annulled the April election which the opposition had boycotted. Lightning military Coup d'etat on September 19 was unexpected but not surprising as the political confrontation between pro and anti-Thaksin forces became indefinitely deadlocked. Opposition led by the Public Alliance for Democracy was determined to force Thaksin step down for his corruptions, abuse of power and



lack of legitimacy. The Coup makers thought they would resolve the chronic crisis. But it could only be in short term. In long-term volatility remains. The ousted Prime Minister is a popular figure with rural poor and can plot a come back. The military junta can contain the situation only if it puts in motion a political reform process. The charter of 1993 has been abolished although it's integral ingredient namely. The Constitutional Monarchy remains. The anomaly has to be removed, otherwise the King will get a bad name that he has become an absolute Monarch. The King has to play his role that his name is not besmeared, that the international community continues its respect for him, the jittery investors and markets both at home and abroad are assured. Recently the The Times Magazine has showered praise on him and expressed the hope that he will stand by the people as he has done before. He has been designated as "Asian Hero". It wrote "The Thai people will look to King Bumble, trusting him to ensure that the generals keep their promise"

#### **The contributing factors that led to the military take over**

First, Thaksin was at loggerhead with the army chief Gen-Sonthi to wards the issue of Southern insurgency. Thaksin rejected negotiations with the insurgents, the army wanted dialogue. Thaksin also undertook reshuffling of army command with his loyalists at key commands. Secondly, the alleged bomb assassination plots against Thaksin implicated senior army officers. Army took it as an insult and his maneuver to weed out those not in his favor created disaffection Thirdly, PAD's street protests threatened likelihood of violence and provided a pretext to unseat

Thaksin. Fourthly, Thaksin's declaration of a state of emergency and removal of Sothic and his political challenge to palace propelled Gen-Sonthi to take power. Sonthi's post-coup statement, defense of throne and unaddressed... corruption allegation were the two rationales for the military intervention. Fifthly, Thaksin's popularity, notwithstanding scandals and power of manipulation in all institutions of the country, was a serious threat to establishment. Last but not the least is the immaturity of political parties and weaknesses of the Civil Society which could not empower the people. The 1993 constitution could not create a new spirit in the new generation of army officers with commitment to democracy. Consequences of the Coup

Thaksin's future hangs in the balance. As head of the Thai Rak Thai party, he remains in exile. The Army has declared that he would not be allowed to return. He faces a wide variety of charges of corruption. But the Army head has stated no clinching evidence has yet been unearthed. The question therefore is what role Thai Rak Thai party, now banned, will play in the emerging political process? Thaksin can

return on electoral mandate. In April 2 election he did win a 57% majority of popular votes. Opposition is weak and splintered. The Thai intelligentsia cannot alone lead the country's politics.

Second, what will be Thailand's political future? The Coup has clearly set the clock back on Thailand's democratic evolution... 15 years back the Army putsch ended in disgrace in a bloody confrontation in May 1992. Thailand has returned to a vicious cycle of Constitution – Election – Corruption – Coup. The new constitution by itself cannot strengthen democratic forces and weaken the intervention of military forces in Civilian governance of the Country.

In Burma during the democratic regime, General NeWin of Burma Army was invited by the Prime Minister U Nu to head a caretaker government formed by the General himself, General Ne Win at that point of time showed reluctance but eventually agreed to take power, held General election and subsequently handed over power to the winning party. Later, the same General overthrew the Prime Minister and seized power. Thailand Army's Gen. Sonthi, who is now in power, for weeks prior to the denouncement, answered the people through media statements that he was not plotting a takeover and that coup were things of the past in the S.E. Asian nations... Unfortunately, things happened contrary to these statements. Thai General has to understand that credibility is a very important factor with people. He must stay clean and committed to the promise he made after the Coup. Although it was bloodless, it was made against a man who was elected by the people more than once and he has to convince the international Community about the "legitimacy" of his power grab on September 20, two days after the Coup, Gen. Sonthi assumed himself as the head of the Council for Democratic Reform under Constitutional Monarchy (C.D.R.M.) A military official read out the monarchy decree and Gen. Sonthi bowed before the portrait of the King (the King did not preside over the Ceremony). The Junta proclaimed establishing its defector status as the new power and the royal decree was projected as Gen. Sonthi's empowerment as de jure ruler.

Retired army Commander Gen. Surayud Chulanont became Thailand's interim Prime Minister with endorsement by King. The 63 years old had spent 40 years in the military. He has earned some reputation specially by keeping officers out of politics. He declared that he wanted to solve the insurgency by peaceful means, different approach to the hard-line stance of ousted Thaksin; Speaking is easy. Even after he took power there was uprising in violence in Thailand's Muslim majority Southern, where a two years rebellion has left more than 1,700 dead. Another key point he said was that "I will focus on self-sufficiency, more than focusing on the G.D.P. numbers." He would bring a shift in Thaksin's economic policy but how has not be spelled



out. Open market economy in all probability will continue.

The interim Charter guarantees basic human rights, installed a 36 members Cabinet, The legislative body is to pass laws and check the administration and an assembly of 242 representatives is to select a panel to write a new Constitution. The Article of Charter transformed the CDR into the Council for National Security. It will make appointments including national legislative body and other key positions. He started with reshuffle and removed from commands in military rank Thaksin appointed personnel... He sidelined Thaksin's key supporters and put their in positions outside the chain of command. ; There is apparent division in the army.

### **Challenges to Gen. Sonthi**

Thaksin has been accused of widespread corruption and abuse of power. He is widely detested among Muslims in the South where bloody insurgency has flared up. One rebel group leader stated to bring Thaksin and some generals to the Court of Justice in The Hague. Another urged authorities to investigate Thaksin for alleged crimes against humanity, saying that this ousted leader should be tried at the International Court of Justice for alleged murders and disappearances of suspected insurgents. Sonthi faces many challenges. Being one of the few Muslims in the country to rise to such a prominent position is a healing force for the conflict. But if he goes the way Burmese military leaders have gone in solving the ethnic crisis, he will end up in the way Gen. Than Shwe of Burma has.....

The "insurgency" in South gained momentum since early 2004, and Thaksin had used the very same armed forces, which have now turned against him, to try and quell the "Muslim rebellions" by strong-arm tactics. There was large scale human rights violation of suspected separatists and persons involved in drug trafficking. Gen.Sonthi has to shed light on the internal dynamics of the decision making process under Thaksin that caused death of innocent person. And human rights abuses

Month old – political crisis against Thaksin a billionaire business magnate politician was brewing because of alleged corruption and electoral fraud although he managed a landslide victory in 2005. Political uncertainty and Southern insurgency had come to paralyze the country beginning this year. The polls were reset for Oct: 15, under King's decree after the King counseled the political leaders to "put the Country back on Course". The question is why Gen.Sonthi imposed the martial law at a time when general elections were actually round the corner? Kings Council and the related poll-setting decree were two significant aspects to predict that Thai law would emerge unscattered from the crisis that triggered the protest rallies against Thaksin. Thaksin's



frozen main protector of the fiscal laws in order to amass nearly \$ 2 billion on tax-free gains on the extended sale of shares in his family brought his condemnation to climax.

Thaksin remained immensely popular among the people who have seemed sound welfare schemes for them, including health care facilities. The intelligentsia turned against him. He ordered polls to gain a fresh mandate. Always he won a landslide victory. April 2. Poll was annulled on grounds of electoral fraud. It was at this time Gen.Sonthi struck "Thaksinisation" of Thai politics... was a key challenge during the time that led to the Coup. No doubt this was uncertainly in Thai politics but that could not justify blowing up of the Constitution. The need of the hour however is to accelerate the process of return of democracy to Thailand.

### Conclusion

The question of legitimacy of the Coup and other related matters have become academic. Unlike Burma, Thailand has to take a positive step. The new Constitution will suffer from many shortcomings. But that should not be bone of contention. The political wheel has to move towards holding election and by political process get rid of the military control. A Civilian representative government under a popularly approved Constitution whatever shortcomings it may have is the immediate goal. If Thailand succeeds where Burma failed, it will provide new incentive to the Burmese democratic activists and also it will be beacon light for democracy and warning to all self-motivated Coup makers.

The Thai Army must look at the record of Burma Army. After Coup, it continued with martial law, and then brought a sham Constitution of 1972, keeping its control. The 1988 uprising brought down the '72 government. Army again seized power after killing hundreds of students. It promised election... and transfer of power, Election was held in 1990 and power was never transferred. It has launched into an exercise of National Convention drawing new Constitution.

Thai National Convention was convened in 1993 and deliberating body was picked with its yes men. . No debate or discussion is permitted. The National League for democracy. The winning party in 1990 elections had a few representatives only but they had to leave as there was no freedom of speech. The UN, Asian and Nobel laurels tried to nudge the Junta to expedite the political process. Talks was started with Daw Aung San Suu Kyi but subsequently she is in house arrest for long 16 years. All dissidents are arrested and detained. The political prisoners are not released although their term of sentences has been served. The Army leaders from time to time had given assurances for reforms but every one has been dishonored. Army has



lost its credibility and has made the Country a pariah State. The Thai Army leaders have to draw lessons from this tragic experiment and honor promises made. The Country is in real crisis and Army leaders can play a positive role to give back power to the people. Thailand will be a Country based on Rule of Law and democracy. The role of monarchy in the context of history must also not be overlooked. Given the time table for transition, broad debate and participation, Thailand unlike Burma will definitely move forward. Burma's junta will be utterly exposed and its days.

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## Junta and its New Constitution

The national convention convening commission claimed as far as late July that 75 percent of the new 15- chapters' constitution had been drafted. Burma's foreign minister said the "possible times" for accomplishing the National Convention would be announced in December. The program of Junta's reform plan is transparent enough for anyone to conclude. That the motives of Junta are not honorable. It started in 1993 in the context of 1990 General Election. That context has changed. The momentum of mass upheaval and urgency for change are lost. Rule of Law has been buried substituted by rule of one man. Gen. Than Shwe, the opposition has been pushed with its back against the wall. Daw Aung Sun Suu Kyi continues to be in house arrest. The recently released student hero Min KO Naing has again be arrested. Nobody hear any thing about dialogue or national reconciliation. International Community is frustrated and UN / Asean have become on lookers. Despite the fact that the Burma issue may be debated in the Security Council, there is no hope for the Burmese people. Burma's profuse natural gas helps to keep the Junta in power by paying for weapons. Thailand, India and China are the biggest buyers.

The Asian Development Bank said gas was Burma's biggest export - annual sales to Thailand alone are worth more than \$ 1 billion. Thailand is currently importing about 1.13 billion Cubic feet a day. In view of all these, is it not naive to speculate that the Junta will undertake political reform and end this political Crisis? Ironically, a new situation has emerged in its neighboring Country, Thailand; a military Coup has ended the democratically elected Government. An interim Government, a new Prime Minister and a Cabinet with a new 272-member National Legislative Assembly. A new Constitution will be put in place and a one year time frame it has been set. The new Prime Minister has stated there will be "broad inclusive debate and include all voices in the debate. There are marked differences between the political processes of the two Juntas of the two Countries. Hopefully the Thai Junta will keep its promise and restore democracy in Thailand. That will not only be return of rule of law in Thailand it will be an exposure of the Burma's Junta's dilly dallying policy It will have a great impact on the second generation of army officers of Burma Army and the people's struggle for restoration of rule of law in Burma.



## UN & Burma

More than two years back and now recently, Mr. Gambari an emissary of UN. Secretary-General Kofi Anan visited Burma to oversee the political process for reform that the Junta had promised. Nothing happened except that he was the only foreigner allowed to see the 61 years old, democrat icon, Daw Aung San Suu Kyi. Hopes were raised that Daw Aung San Suu Kyi would be released. Kofi Anan himself made a personal appeal, there were other global calls and the Asean leaders also joined as her term of detention was about to expire. Contrary to all expectations, Daw Aung San Suu kyi's detention was extended and she is now under house arrest for such a long period. It is inhuman. Detention of this kind, notwithstanding her live-in maid, with no contact with outside world, amounts to solitary confinement. Even solitary confinement has limits set down by law. The Junta perhaps expects that she will become a mental case and forget her commitment to democracy. Its main enemy is being tackled and she will ever remain under pressure. The Junta can rule in perpetuity. Flagrant abuse of Rule of law is its benchmark. The visit of Mr. Gambari has to be seen in that context. Indisputably, there has been a major shift in the policy of Junta. Not only has the shifting of the Capital to Napidaw, but it's series of actions in totality speak volume of how its mind is working. Its first task is to gag any dissent and take no chance in leaving them outside. The arrest of Min KO Naing and 8888 generation student leaders reveal how insecure it feels in spite of its guns and soldiers. It is going ahead with its National convention and the modest demands of the opposition to change its procedure have been rejected. It is rumored that Mr. Ganbari will be taken to the National Convention. The motive is to fool him about its transparency.

Mr. Gambari came for the second time to pressure the Junta for democratic reforms. UN General Secretary has urged Burma to show "tangible steps forward" on human rights, democratic reform and national reconciliation. The visit came at a criti-



cal time for Burma as the UN Security Council has held discussions on Burma in September, with U.S. pressing for a resolution on its human rights abuses and lack of reforms. Burma is on the Council agenda despite strong opposition from China and it is likely to come after Gambari's visit.

A non-binding annual resolution is to be tabled before the General Assembly. It calls for independent access by UN representative to regions of concern and to carry on humanitarian programs. It also urged to take steps in "an inclusive and credible process of national reconciliation." "Burma's ruling junta has ignored 28 previous resolutions adopted by the General Assembly

Mr. Gambari's task is most challenging. It has to hear the Junta but not put faith in what it says. Armed with his report after this visit, the Security Council can go ahead. U.S. has to neutralize China and see through a conflict resolving resolution and international intervention. Once the undercurrent of change is generated, people can take care of emerging situation so that Rule of Law returns to Burma

She has spent 11 of the last 17 years in detention, mostly under house arrest. She met Mr. Gambari but no details of the meeting were made public. Only thing he said he was "Conveying a message from Sr. Gen. Than Shwe" to Mrs. Suu Kyi. The backdrop of the meeting must not be lost sight of the UN Security Council took the historic step of putting the country on its agenda in September, meaning that Burma's ruling Junta is subject to greater UN Scrutiny. The U.S. plans to introduce a resolution on Burma to the Security Council after the Mr. Gambari's visit. Gambari described his talks with Gen. Than Shwe as "good and constructive" whereas previous May meeting was characterized as "a polite and diplomatic". The case was more of a "give and take". Gambari was also allowed to meet NLD leaders, which is interesting. The question that arises is what "is give and take"? What has Sr. Gen. Than Shwe given to Daw Aung San Suu Kyi to take? What has Daw Aung San Suu Kyi has to give for Than Shwe to take? All these obviously relate to the National Convention. If Than Shwe is agreeable to give in to the demands that NLD made as conditions of its participation, Daw Aung San Suu Kyi probably can take and enable NLD to be a role player. All that ends well is well. Let's hope Burma's brighter days are in the offing. The continued engagement with Burma is welcomed.

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## **1. Power Sharing and International Mediation in Ethnic Conflicts**

**Timothy D. Sisk Publisher U.S.  
Institute of Peace**

## **2. Policy Papers, Letters and Statements Ethnic Nationalities Council**

The book is of great relevance to Burma democratic activists. It deals with ethnic Conflicts in divided Societies. Democratic governance is fundamental human rights and ethnic group claims for self-determination should ideally be accommodated in a democratic frame work within existing set up. It disapproves Secession and discusses power sharing as the effective way of resolving to disputes. At one stage of Burma's political history, it appeared that ethnic problems were the prime reason for conflicts in Burma. However the ethnic nationalities have come to new understanding of the Situation as is succinctly reflected in the book "Policy papers letters and Statements published by Ethnic Nationalities Council (ENC), Union of Burma.

It stated that ENC has been reconstituted in April 2005 Conference being State-based and decision taken for establishment of a future Federal Union of Burma. From the statement of the book under Review it appears that ENC has genuinely grasped the ideas on Conflict resolution as propagated in the first Book. The book presents the debate over power sharing in the Context of ethnic conflict dynamics and identifies the principal approaches to, and practices of, power sharing. It also has given instances where power sharing experiences failed.

International Community's intervention came in different forms depending on situations. Sometimes monitoring, Sometimes Suggesting changes in one form or other is necessary. Some-

times formulas are offered – e.g. institutional blueprints for post conflicts structure, membership of trade / international organizations. The best way is facilitating negotiation instead of mediation or giving other solution. The second book although a good recipe of Burma politics, it however appears there is some confusion. It states in political crisis in the Union it is not just an ideological Confrontation between democracy and military dictatorship or totalitarianism. The problem is rooted in a Constitutional problem, which came about because the 1947 Pang lung Agreement, which formed the basis of Union of Burma, was never fully implemented. “The fundamental problem is Burma to-day, for ethnics or for non-ethnic Burmese is the continuation of political power absolutely under control of the Burma General for decades. Since the ethnics have agreed to a Federal state and the Burmese majority claimed by NCUB has agreed to a Federal State on the basis of its identity being one at par with other nationalities, no disputes on the form of Constitution remain. Basically the Federal Union which ENC and NCUB stated is a power sharing mechanism and to put at in force, it is necessary to push the power-holder to a position from where it will come to negotiation and national reconciliation. The two books read together are enlightening and are likely to help the activists to find way and for peaceful transition.

**In Review: “Law Journal” vol: 5, May 2003. No. 1,  
Published by Central Workers’ welfare Committee,  
Office of the Attorney General.**

**Article – Territorial Jurisdiction and Myanmar Legislation**

**Daw Myint Swe  
Law officer Grade 1  
Officer of Attorney General**

The author in the above article made an effort to explain what is territorial jurisdiction and Myanmar legislation on the subject. The article mostly dwelt with extra- territorial jurisdiction and trial on the basis of nationality. It has completely left out territorial jurisdiction of Civil Suits. Even for criminal cases, it does not discuss where a trial will take place, the place of offence the place of residence or the place where this offender is apprehended.

According to Burma Penal Code, a person who commits offence outside Burma shall be dealt with in Burma according to the provision of this law. The article says that when a per-



son commits an offence outside Burma, only when he is a Myanmar Citizen at the time Constitution came, can be tried in Burma for otherwise foreign Subject can not be tried. The matter is simple. A foreigner who committed a crime outside Burma will be sent back to the Country where he had committed the offence on request of the government of the Country provided there is extradition treaty between the two Countries. Simple matter has been confused by stating "if a person who commits an offence outside the Union of Myanmar is a Myanmar Citizen at the time of commission of the offence he will be Subject to the jurisdiction of the Courts of Myanmar". This is not correct. Supposing a Myanmar Citizen Commits murder in Thailand, Certainly the Thai Court can try him according to the Law of Thailand. The question of citizenship arises only when the offender after having committed a crime in his country runs away to another Country. The Penal Criminal law is that the place of commission of crimes gives jurisdiction to the Court. Foreign Exchange Regulation Act, Narcotic Drugs and Psychotropic substances law are special laws amongst many others. They come within the parameters of Burma Penal Code and Criminal Procedure Code. Offences Committed under these laws are covered in the matter of extra territorial jurisdiction. The subject is of interest and needs further study.

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NEWS AND  
**NOTES**

### Custody death

A 34 years old political prisoner Ko Thet Win Aung died in custody in Mandalay prison where he had been tortured and suffered from Malaria. He has been in prison from 1988 against peaceful student protests against educational system and for release of political prisoners. He was imprisoned under Emergency Provisions Act 5 (1) and (17 1-2) Unlawful Association Act. No enquiry has been instituted as to the cause of his death and to make finding public. There was international condemnation. The Jail Manual has made it incumbent that all deaths in prison are investigated enquired into and paper published. The Junta's insult to Rule of Law is abundant and this is one more case.



### Burma restricts ICRC

Burma's Junta has ordered the International Committee of the Red Cross (ICRC) out of key border areas and rejected moves to resume prison visits. The ICRC said it "utterly deplores" the decision to close five field offices in Mandalay, Mawlamyine, Hpa-an, Taunggyi and Kyaing Tong. "The ICRC is seriously worried that those most in need today will bear the brunt of the current stand-off," said Pierre Kraehenbuehl, the agency's director of operations.





## UNDOC — Dangerous drug trend in Burma

The United Nations Office of Drugs and Crime (UNDOC) issued a new report... According to the UNODC, the cultivation of opium has dropped 29 per cent in the past year. Burma now has 21,500 hectares under opium cultivation (about 134,400 rai). That is down from 30, 900 hectares in 2004, which was a drop from 44,200 in 2003, and soon.

These are encouraging statistics but you can prove anything with statistics except the truth. The executive director of UNODC highlighted figure on decreasing acreage, but he neglected other statistics in his own publication. One disturbing trend was the figures on actual opium production. They show that the opium crop yield rose 55 per cent even as acreage was falling.

The increasing importance of drugs within the Burmese economy. Indicate that drugs are not just attractive to the gangs and the military dictators who have long acquiesced to the narcotics trade. Now, it appears, opium and therefore heroin has rapidly become an important mainstay of the farmers and merchants who have been lured or pressed into the drug trade. Farmers will likely to become increasingly reluctant to give up their illicit harvest. UNODC said that all measurements of the economic importance of opium rose during the past year. Crops have higher yield, and the estimated value rose 24 per cent to \$72 million, or about 2.7 billion baht. UNODC even estimated in the fine print of its statistics that the potential production increase in the next crop year is 315 tones- or 3.15 tones of heroin.

This is atrocious news for Burma, and almost as bad for its neighbors, who have long suffered the fallout of Burmese drug-dealing: Violence, addiction, HIV infection, border problems and refugees among them. Burma is supposed to be halfway through a 15 year plan to make the country drug-free. In such a programme, there always will be setbacks. There is also no denying the fact that Burma has greatly reduced the acreage of its opium, even including a relocation of population. The opium crop, while still the worlds second largest after Afghanistan, has generally dropped. But the new UNDOCK figures released this week must be cause for great concern.

Burma's two opium-producing neighbors have basically wiped out their commercial drug production. Thai and Lao farmers have switched to other crops. But Burma's attempts to force or persuade opium farmers away from opium have reached a criti



cal stage. Instead of providing alternative markets, Burma has depended upon force to get the farmers to switch. Instead of diminishing profit, farmers now were relatively flourishing. Instead of keeping the drug gangs away, the government has allowed them to show the opium growers how to increase their yields and protect their fields.

Thailand has shown and Afghanistan has proved that crop substitution programmes are only as good as their leadership. Thai farmers gladly switched from to alternative crops when provided with a chance. Afghanistan, with none of these advantages, has sunk to the role of world's top drug provider. It is understandable that the UN wants to dwell on the part of its programme that is succeeding.

It will be a tragedy if it fails to meet the challenge and reality that the Burmese drug traffickers are on the verge of a major success.



## Corruption



The top official in Burma's Custom Department and assistant has been sentenced to lengthy prison terms. 40 high ranking officials were put under arrest. Searches were in the entire Custom department including Sea ports and Airports have taken place. Most of the officials have strong links with to Burmese military officers including Junta leader.



## Law Academy

Prof. David Fisher, Prof. Venkat Iyer, Prof. Mikes Hayes and Mr. Somchai give law lectures to the students. Mr. John and Ms. Louise spent 3 months in covering the course of the Academy. The students were engaged in Green forum and Land Reform research work. They also get training in office administration, Legal Aid and Legal Clinic of BLC.





# 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.