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A Brief Analysis on the Concept of Preventive Detention and 1975 State Protection Act

The law does not provide a clear definition of the term 'State Prisoner' but it can be realized that a State Prisoner is one who is arbitrarily placed under personal restraint at the discretion of the government. Although the government deems their action sufficient to be placed under such restraint for a certain period,¹ such action is insufficient to institute judicial proceedings with the government. This law was promulgated by the British government in 1875. Pursuant to this colonial law, the government can detain any person 'for good and sufficient reason,' whereby if government suspects that a person might threaten the stability of their administration, his freedom of movement can be deprived at any time; and he can be placed under detention as a preventive measure. That law was effective in Burma for over one hundred years, but was abolished in 1992 by the ruling military junta (SPDC) with the Law No 1/1992 entitled "Law to Repeal the Laws."

It is assumed that two reasons prompted the military junta's repeal of that law.

The first reason is that they already promulgated similar law to place political oppositions under detention: 1975 Law to Safeguard the State from the Dangers of Destructive Elements (known as **1975 State Protection Act**). The law allows the government to impose side-ranging restrictions on individuals: anyone suspected of having committed, or who is committing, or who is about to commit any act which endangers the sovereignty and security of the state or public peace and tranquility, can be ordered by the Council of Ministers to be imprisoned for up to five years without trial.

The second reason is that the former law, 1875 State Prisoners Regulation, sets forth detainee's rights which the military junta no longer wished to allow. Surprisingly, exactly 100 years transpired in between the enactment of the two laws. Thus, an analysis is useful insofar as which law is more abusive from the perspective of promotion and protection of human rights.

A comparison of those two laws reveals that both are completely arbitrary laws insofar as they authorize executives and governmental authorities to whimsically detain suspects, as a form of preventive detention, without well-founded grounds upon which they could initiate a judicial proceeding.

With regard to a detainee or a suspect, the internationally accepted fundamental principle regarding criminals is the right to be presumed innocent until proved guilty in accordance with the law.² The national principle in Burma, inherited from common law tradition, bestows that it is better that several guilty persons escape than one innocent

¹ Article (1) and (2) of The State Prisoners Regulation, enacted on September 16, 1875.

² Article (14)(2) of ICCPR.

person suffer.³ Governmental practices stand in stark contrast to those principles; and as such, they are unacceptable in terms of international and national human rights law standards.

Nevertheless, former law had a justice seeking provision, to some extent, with proper governmental procedures to be applied in reviewing detention and allowing the detainee to address his own suffering to the government. In this regard, Article 1 of the 1875 State Prisoners Regulation states the following:

whereas the ends of justice require that, when it may be determined that any person shall be placed under personal restraint otherwise than in pursuance of some judicial proceeding, the grounds of such determination should from time to time come under revision, and the person affected thereby should at all times be allowed freely to bring to the notice of the President of the Union all circumstances relating either to the supposed grounds of such determination, or to the manner in which it may be executed.

Similar provision is made in the 1975 State Protection Law with respect to the first relevant part of the article regarding 'revision' or 'review'.⁴ Unfortunately, the 1975 State Protection Law refuses to speak about the essence of the law mentioned in Article (1) 1875 State Prisoners Regulation, as well, which is the portion that is directly relevant to the rights of a detainee.

Furthermore, despite the fact that the 1875 State Prisoners Regulation was enacted during the colonial period, the provisions set out in the fourth paragraph of Article (1) and Article (4) were significant insofar as they facilitated health conditions of detainees from humanistic perspective. These protectionist provisions were totally omitted from the 1975 State Protection Act:

"and where as the ends of justice also require that due attention be paid to the health of every State prisoner confined under this Regulation, and that suitable provision be made for his support according to his rank in life and to his own wants and those of his family;

When any State prisoner is placed in custody, the President of the Union will instruct a Judge or some other public officer, not being the person in whose custody the prisoner is placed, to visit the prisoner at stated periods and to submit a report to the President of the Union regarding the health and treatment of the prisoner."

Unfortunately, similar provisions were lacking in the 1975 State Protection Act which resulted in the death of innocent detainees.

Admittedly the Law refers to detention of a person without trial in circumstances that there is no sufficient evidence to make a legal charge or secure conviction by legal proof, but may still be sufficient to justify detention

³ U Phoe Thar. (Third Publication), Commentary of evidence act. Rangoon; Gondoo Press, p. 269.

⁴ Article 16 of 1975 State Protection Law.

in the interests of national security. It is left to the understanding of the arresting authority to determine what **sufficient** means. The absurdity of the Law becomes clear in its implementation. Detention is supposed to be for a maximum period of 3 years. After that, this is extended for another 2 years. This was amended to 5. It goes on and on. Regarding the revoked right of judicial appeal, in practice this means that detention is now a continued process for any number of years until death. Detention under the State Protection Law is an inverted death sentence without charges and without trial. For instance, Si Thu Ye Naing and Aung Kyaw Moe were both detained in Tharawaddy Prison under the State Protection Law. Both of them died while under detention.⁵

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⁵ Gutter, P., and Sen, B.K., Burma's State Protection Law; Bangkok, Burma Lawyers' Council, December 2001. p. 38-39.