

# Legal Issues on Burma

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## Regular Features

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“The Control of Money Laundering Law”  
Significance of the Press Briefing

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Attorney General or Prosecutor General (Burma) ?

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**Burma Lawyers' Council**

# Legal Issues on Burma

## JOURNAL

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The Editor

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# John Doe & Others -v- Unocal Corporation & Others

**U.S. Court Decision Confirms Human Rights Abuses of Ruling Junta**

*John Southalan\**

Decision of United States Court of Appeals for the Ninth Circuit 18 September 2002

The US Court of Appeal recently ruled on a procedural appeal in legal proceedings regarding human rights abuses associated with the construction of a pipeline in the Tenasserim region in southern Burma. The Court's decision is not a final decision in the proceedings - they are still continuing with a trial to occur in the future. However, the Court's decision is significant support for those seeking to improve human rights in Burma. The Court overturned the decision of the US District Court that the case could not be made out against Unocal, and the trial has been ordered to proceed.

The factual background to the proceedings are familiar to many observers of Burma. Military authorities had been dealing with French and US companies to produce and sell gas resources. The contractual arrangements were complex, involving subsidiary and related companies, joint venturers and other parties. However the overall arrangement was that the US company, Unocal Corporation, had involvement in the construction of the gas pipeline. The construction of the pipeline occurred with Burma's military providing security and other services. Unocal documents showed the company's knowledge of military involvement in the pipeline's construction (which was also confirmed by independent docu-

ments from the US embassy in Rangoon, Burmese authorities, and company internal e-mails).

Legal proceedings were commenced, in the US courts, in 1996. The proceedings were commenced on behalf of Tenasserim villagers, the Federation of Trade Unions of Burma and the National Coalition Government of the Union of Burma. The claims were against Total SA (French company), Unocal, senior officers of Unocal, and the Burmese military. The proceedings alleged violations under a US law which allows people to sue parties in the US for wrongs committed abroad. The law had been used successfully before, but this was the first time against a company.<sup>1</sup> Various interlocutory hearings were fought in the courts, and the claim against the military authorities was dismissed in 1997 because of sovereign immunity. Additionally, the Trade Unions and Coalition Government were prevented from continuing the proceedings on the basis they did not have sufficient 'standing' to bring the claims. This left the claim being between the villagers against Unocal. Unocal applied to have this remaining part of the claim stopped and, in 2000, the US District Court ruled that there was insufficient material to proceed against Unocal and made orders in the company's favour (including that the parties bringing the claim must pay Unocal over US\$125,000 in legal costs). This decision was appealed, and the US Court of Appeal decision allowed the appeal, reinstating the proceedings against the company and directing them to proceed to trial.

Unocal gave practical assistance to the Myanmar Military in subjecting Plaintiffs [Tennaserim villagers] to forced labor. The practical assistance took the form of hiring of Myanmar Military to provide security and build infrastructure along the pipeline route in exchange for money or food. The practical assistance also took the form of using photos, surveys, and maps in daily meetings to show the Myanmar Military where to provide security and build infrastructure.

The essence of the Court of Appeal's decision is that US law prohibits a company from having knowing practical assistance in, or encouragement that had a substantial effect on, forced labour, murder and rape. In this case, the Court ruled, a reasonable factfinder could find that Unocal had met this standard and so the trial should occur to resolve this issue. An important passage in the Court's decision states:

*The evidence...supports the conclusion that Unocal gave practical assistance to the Myanmar Military in subjecting Plaintiffs [Tennaserim villagers] to forced labor. The practical assistance took the form of hiring of Myanmar Military to provide security and build infrastructure along the pipeline route in exchange for money or food. The practical assistance also took the form of using photos, surveys, and maps in daily meetings to show the Myanmar Military where to provide security and build infrastructure.*<sup>2</sup>

One important issue in the judgement is the use the Court made of various sources to find that Unocal would have known of human rights abuses. The Court explained that Unocal was made aware of the allegations of military abuses from: its own officers and internal briefings; hu-

man rights organisations; consultants Unocal had hired; and US government reports. This demonstrates the importance of reporting and documenting human rights abuses - even where there may appear no immediate benefit in reporting, it ensures relevant information is retained 'on the record' and makes events like this Court ruling possible.

Other noteworthy elements in, or from, the Court's decision are summarised below.

- 1 The Court referred to the Burmese military's long and well-known history of imposing forced labour on their citizens.
- 2 The Court spent some time discussing which law should apply to the proceedings, and the development of relevant international law. The Court made considerable reference to decisions and principles coming from the International Criminal Tribunals (for Former Yugoslavia and Rwanda) to support the ruling against Unocal. This demonstrates the importance of the international bodies (and reaffirms the urgency with which the International Criminal Court should begin operating to assist in development of this area of the law).
- 3 The case has only limited general precedent value against other companies doing business with the Burmese military authorities, because the decision is based on the particular (extensive) information known to Unocal in this case. As noted before, however, the case serves to highlight the utility of informing companies and other parties dealing with Burmese military of relevant information.
- 4 The Court considered the status of forced labour in international law and found that, like slavery, the prohibition against forced labour had become a general principle of international law applicable in all countries.

### Endnotes

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1. J Lobe, Oil Giant Liable for Overseas Abuses by 'Agents', Inter Press Service, 20 September 2002.
2. Paragraphs 52-53 of Court of Appeals decision, per Circuit Judges Pregeron & Tashima.

## Anti - Human Trafficking Law In Burma - Need Of The Hour -

*B.K. Sen\**

*“States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.”<sup>1</sup>*

In June 2002, US government issued a worldwide report on human trafficking. The report identified Burma among two other States where the practice of human trafficking is thriving and rated it as a Tier 3. This designation is given when a State does not comply with the Act's minimum standards and also when it has not implemented the necessary steps needed to eradicate the practice. “Current and former child soldiers from Burma” featured prominently in the sample of 69 interviews by UNICEF for the report, *Adult Wars, Child Soldiers*. “One Burmese boy had been abducted by Burmese government soldiers at the age of only seven, with promises of food and candy.”<sup>2</sup> On September 25, the Vice-Chief of Military Intelligence, Burma in his press conference stated that its government has taken serious consideration of the crime of human trafficking and has taken systematic measures to stamp it out. If that be so how come that Burma is on the top of the list identified in Tier 3 country, being a play ground of human trafficking? This is not based on fabricated facts. The press conference by Vice-Chief of military intelligence was targeted for consumption of the international community from which it receives humanitarian assistance. Although the problem has gone out of control, the ruling Junta has no other option but to admit the seriousness of the problem hoping that it would accelerate flow of fresh foreign assistance.

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Definition of the term human trafficking no formal legal definition. But definitions on international level are galore. Domestic law has to be compatible with international standard.

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### Definition

The term human trafficking does not exist in a formal legal sense. The victims of human trafficking are by and large women and the crime is de facto trafficking in women. There are many patterns of trafficking in women and not only trafficking into prostitution. Europe, Interpol and different NGOs have used several definitions. The definition given by GAATW was widely accepted. But later the Criminal Commission of the UN passed a Protocol. The Convention passed an amendment protocol (Palermo Protocol) dealing exclusively with trafficking in persons. For the first time it was defined on international level. It has been defined as;

- a) *shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception of the abuse of power or of a position of vulnerability or of the giving and receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs;*
- b) *The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) shall be irrelevant where any of the means set forth in subparagraph (a) have been used.*

Another definition is “*Trafficking in persons- The illegal and highly profitable recruitment, transport or sale of human being for the purpose of exploiting their labor - is slavery like practice that must be eliminated*”<sup>3</sup>

Yet another definition is “*Trafficking in persons*” *shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by any means, for forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.*”<sup>4</sup>

Under this criminal law definition, convictions would be easier to obtain and prosecutions would not be open to attacks for vagueness by defendants. The proposed definition eliminates the necessity to prove that threats, coercion, fraud, etc., are used to move a person into the trafficking situation. The ‘means’ used to move someone into a trafficking situation are not important but the process of moving people from one place to another in order to hold them in forced labor or slavery are essential to the crime. Lastly, the definition deletes all undefined and ambiguous

terms, leaving only crimes that are defined in international law and in the domestic law of many countries. The criminal law definition is broad enough to cover each and every form of trafficking - from trafficking into forced begging or domestic work to trafficking into forced prostitution or farm labor.<sup>5</sup>

Trafficking means much more than the organized movement of persons for profit. The critical additional factor that distinguishes trafficking from migrant smuggling is the presence of force, coercion and/or deception throughout or at some stage in the process - such deception, force or coercion being used for the purpose of exploitation. While the additional elements that distinguish trafficking from migrant smuggling may sometimes be obvious, in many cases they are difficult to prove without active investigation. A failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. States are therefore under an obligation to ensure that such identification can and do take place.<sup>6</sup>

Not only sex but every other activity field has been included in the expanded definition. As the global situation in respect of the magnitude of human trafficking surpassed expectation, connivance was no longer possible. The UN General Assembly adopted the Convention on the Rights of the Child on 20 Nov 1989. On 16 July 1991 (nearly after one and half years) Burma became a signatory to the convention (with reservations on articles 13 & 37). The Child Law SLORC Law No. 9/93 was enacted on 14th July, 1993. Under UNCRC Section 4 of the promulgated law, which mandates that government shall form the national committee on the rights of the child. The committee was formed under notification order 15/93 dated 30 Sept 1993. By notification 42/02, dated 20 July 1992, juvenile courts were established in Rangoon division. Supreme Court by notification 25/93, 29th July 1993 conferred powers to the juvenile judges on 15 October 1993. SPDC withdrew the reservations after more than 2 years. It is interesting to go through the reservations to understand the mind set of the ruling junta.

### Rationale behind reservations to UNCRC

SPDC's reservations to article 15 and 37 of UNCRC speak volume about its sincerity and commitment to Child Law.

#### *Article 13*

1. *The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or imprint, in the form of art, or through any other media of the child's choice.*
2. *The exercise of this right may be subject to certain restrictions, but there shall*

*only be such as are provided by law and are necessary:*

- (a) For respect of the rights or reputations of others; or*
- (b) For the protection of national security or of public order (order public or of public health or morals.*

### **Article 37**

*States parties shall ensure that:*

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;*
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;*
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separate from adults unless it is considered in the child's best interest visits, save in exceptional circumstances;*
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.*

Human trafficking in Burma by and large relates to women and child. There was no reason to react to article 13. The phrase “rights to freedom of association and freedom of peaceful assembly” panicked SPDC and it took 2 years to give up objection. Similarly Article 37 has no offensive meaning but the words like torture, liberty, right to challenge in court etc. made SPDC lose common sense and it took them years to come to a decision that there was nothing wrong in those words. Under Section 4 of the Law it was mandatory to form a National Committee and under article 44 of the convention a report has to be submitted. This was complied with on 14 Sept 2000 although due in 1993. The point that is being argued is that even in matters related to the welfare of child there had been so much dragging of feet. What then will be the fate of law enforcement? The attitude of SPDC toward human trafficking stands clearly exposed. The flaws in the Child law is not the subject matter of this essay. It is incidentally brought out as it is integral part of human trafficking and it throws flood light on junta's callousness to the welfare of the people.

In its Report 1995 and 2002 to UNCRC by the SPDC it has been stated that the implementing agencies are department of health, education and social welfare. S.65 & S.66 of the Child Law prescribe the punishment up to 6 months or with a fine up to K1000. Traffickers are encouraged by such laws. They are powerful and escape prosecution. The border police and other officials are also encouraged to think that the crimes are free from gravity. The close ties are therefore established. For the victims of trafficking, access to other types of work is difficult as they are passed directly from trafficker to brothel keeper. The punishment may be for one day or a fine of K1. It is inconceivable how for such a heinous crime related to child a nominal punishment clause can take place in a statute. Obviously the offenders are given encouragement to commit the crime. Under article 33 (b) the National Committee can obtain assistance and cooperation of the UN organizations voluntary social workers and NGOs. The game plan of the SPDC is that they have put in place a law and hence they are qualified to receive assistance. This is how in the name of compliance with requirement of international law, SPDC has been squeezing the internal humanitarian aid. This is an insult to the convention when the Report states that these were the measures to harmonize the national law and policy with its provisions. The report stated about several projects, plans of action. What they are and what output, there is no mention. Paragraph 48(b) of the CRC Report, 1995 states Section 26 of the Child law states that every child may enjoy fully the rights mentioned in this law. Government departments and organizations shall perform their respective functions to the fullest extent possible. Voluntary social workers or non-governmental organizations may also carry out measures as far as possible in accordance with the law. What has the ruling junta to say? It is given below,

**Is Child Law an Anti-trafficking Law?  
Answers given in admissions below,**

Constraints given by SPDC are excuses of its failure and its in competency to meet with the challenge ha put in place a domestic Child Law the object is to gain legitimacy of its regime and financial help to hide over its chronic economic crisis.

*53. Constraints: Dissemination of health education to the community is vital to the survival and development of children. However, ineffective dissemination is a difficulty and an obstacle in implementation of the programme. In spite of arrangements made for information hand-outs and educational talks, people in remote areas do not have easy access to these activities and thus progress is slow. To overcome this obstacle, television relay station is established in various parts of the country under the Border Development Programmes. However, it is not possible to set up relay station for all parts of the country and thus there is need for support from international organizations in this sector.*

*56. Constraints: Involvement by the public and their knowledge of the subject are*

*essential in promoting respect for the views of the child. In the dissemination of knowledge to the public, since the number of periodicals issued is insignificant compared to the population of the country, there are some constraints. In addition, there is also a shortage of printing materials and paper and lack of assistance from foreign organizations.*

*59. Constraints: Birth/death registration can be implemented only in 153 townships up to 31 March 1994. Thus, affidavits are used as birth certificates for people in remote areas. Plans for registration of births and deaths are being adopted, with the collaboration of UNICEF.*

*64. Constraints: Distribution of children's literature is not sufficient as the Government is the only publisher and distributor. Publishing by the private sector remains weak as there can be a loss in investment. Children in remote areas have difficulty in obtaining books as the number of books reaching these areas is small. The expense of publishing books by the private sector is high as papers are expensive. Because of the high cost of books, children cannot afford to buy them. Although Television Myanmar relay stations have been established in border areas television sets are not generally available in all houses.*

The Law is full of guarantees of civil rights and freedom but no provision for enforcement. If the authorities fail to implement the provisions, the rights remain on paper only. The spiral rise in child trafficking speaks volume about the total failure of the law; it has been used as a smokescreen.

In its report under paragraph 114 ( Legal context), it says:

- (a) Kidnapping from the Union of Myanmar, and kidnapping from lawful guardianship are defined in the Penal Code, sections 359, 360 and 361 respectively. Section 362 which deals with abduction, states that whoever by force compels, or by deceitful means induces, any person to go from any place is said to abduct that person;
- (b) Punishment for kidnapping or abducting in order to murder; kidnapping or abducting with intent secretly and wrongfully to confine a person; kidnapping; abducting or forcing a woman to marry, etc.; kidnapping or abducting in order to subject the person to devious hurt, slavery, etc.; wrongfully concealing or keeping in confinement a kidnapped or abducted person; and kidnapping or abducting a child under 10 years with intent to steal from its person; are specified in the Penal Code, sections 364, 365, 366, 367, 368 and 369 respectively.

### Comparison with Penal Code and the definitions given above

Below is given the respective sections of the Penal Code in direct quotations

*Section 359.*

*Kidnapping is of two kinds: kidnapping from the Union of Burma, and kidnapping from lawful guardianship.*

*Section 362.*

*Whoever by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person.*

*Section 364.*

*Whoever kidnaps or abducts any person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered, shall be punished with transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.*

*Illustrations*

*(a) A kidnaps Z from the Union of Burma, intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.*

*(b) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section:*

*Section 365.*

*Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

*Section 366.*

*Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and*

*Whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person shall also be punishable*

*as aforesaid.*

*Section 366 A.*

*Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.*

*Section 366 B.*

*Whoever imports into the Union of Burma from any country outside the Union of Burma any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, [\*\*\*\*]<sup>1</sup> [whether by himself or by another person,] shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.*

*Section 367.*

*Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous hurt or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

*Section 368.*

*Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person shall be punished in the same manner as if he had kidnapped or abducted such person with the some intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.*

*Section 369.*

*Whoever kidnaps or abducts any child under the age of ten years, with the intention of taking dishonestly any moveable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

It will be found from the above definitions in the Penal Code that none of them fit in or harmonize with the definition of human trafficking given at the out set. They are not in accordance with international standard. The present crimes are enormous in nature.

### Magnitude of the problem recently focused

“About 80, 000 are women and children have been trafficked to Thailand for the sex trade since 1990, the highest numbers are from Burma”

Trafficking networks:

- Tour operators and travel agencies. (“front” businesses)
- Employment agents.
- Foreman and trafficking gangs
- Crime syndicates with bases in many countries.
- Bar owners and local women recruiters
- Parents, relatives and friends
- School teachers
- Villagers and village headmen
- Mam asans and brothel owners
- Pimps and procurers
- Customers, clients of sex workers
- Corrupt officials. e g. police, customs, immigration officials, border patrollers <sup>7</sup>.

The Penal Code was enacted during colonial days in 1861 in conformity with the then conditions. Human trafficking was non existent. Cases of individual nature used to take place. Law therefore had to be enacted to meet the situation. Today’s human trafficking is the direct result of globalization, civil wars and ethnic tensions. It is imperative to make national laws compatible with the UN definition. The Penal sections mentioned above are not only outdated, they have become unenforceable. They have too many elements that would have to be proven by prosecutors, thus making prosecutions more difficult. Also some of the language is ambiguous which could end up in acquittal on benefit of doubt.

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The present domestic law, Burma Penal Code 1861 is totally unable to meet human trafficking on an international scoll. The ingredients of that law don't meet with the ingredients given in definition.

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The paramount need is enforcement of law and to make law tough not symbolic, punishment being deterrent. The lack of specific and/or adequate legislation on trafficking at the national level has been identified as one of the major obstacles in the fight against trafficking. There is an urgent need to harmonize legal definitions, procedures and cooperation at the national and regional levels in accordance with international standards. The development of an appropriate legal framework that is consistent with relevant international instruments and standards will also play



an important role in the prevention of trafficking and relate at exploitation. As an illustration the pious provisions of rights under the Child Law may be compared with the dubious legal frame work that it has provided.

*Article 88. Section 66(a) (b) (c) and (d) of the Child law protect the children from being degraded and abused. The law prescribes that “whoever commits any of the following acts shall, on conviction be punished with imprisonment for a term which may extend to (2) years or with fine which any extend to Kyat 10,000 or with both:-*

- (a) Neglecting knowingly that a girl under his guardianship, who has not attained that age of 16 is earning a livelihood by prostitution;*
- (b) Permitting a child under his guardianship to live together or to consort with a person who earns a livelihood by prostitution;*
- (c) employing a child to beg for his personal benefit; falling to prevent a child under his guardianship from begging; making use of the child in any manners in his livelihood of begging;*
- (d) Willfully maltreating a child, with the exception of the type of admonition by a parent, teacher or person having the right to control the child, which is for the benefit of the child.”*

According to the Report, Myanmar Police Force, Institutions, Educational talks to personnel take care of the children held. Trainings are in place to protect the child from being abused. The question that arises is why then the mounting crisis in the field of human trafficking which has brought Burma in disgrace. The Report under the heading “illegal transfer and forbidding the return” states “the Penal Code prohibits any person from taking children abroad and selling them to others.” In respect of implementation it said the Myanmar Police Force is implementing. The Ministry of Religious Affairs conduct culture courses to raise awareness. Severe punishment of 7 years imprisonment is given. It doesn't give any data regarding the cases. As far as information goes and from the Law reports published by SPDC there is no case reported where action has been taken. This shows that it is utterly callous about the national menace. Articles published in the Journals run by the Attorney General office and Supreme Court never address these issues and are evidence of the callousness and criminal negligence on the part of the ruling Junta.

Burma Immigration (Emergency Provision) 1947 Act as amended by SLORC Law No. 2/90, section 3(2) states that no citizens of Burma can enter or depart Burma without official permission. Violations may result in six months to five years imprisonment, a fine, or both.

Under the Thai Immigration Act of 1979, all aliens without proper documentation are subject to arrest, detention and deportation. Illegal entry

into Thailand is punishable by detention of up to two years or fines of up to 20,000 baht (\$500). They are tried for illegal entry although they are the victims of trafficking and exploitation.

### **The root cause of human trafficking**

Although there is evidence to suggest that trafficking in persons is increasing in all regions of the world, few traffickers have been apprehended. More effective law enforcement will create a disincentive for traffickers and will therefore have a direct impact upon demand.<sup>8</sup> "This needs governance based on rule of law. An enforcement Authority is the agency of that governance. In Burma, military dictatorship for 50 years has created and aggravated this crisis of human trafficking. There is a total break down of social fabric. The conflict between state and custom has aggravated. When custom prevailed, trafficking did not take place. Now custom is broken down. What custom could prevail upon home and children, State cannot do, ridden with corruption and authoritarianism as it is. Its failure to give employment and impoverishment of rural poor and urban deprived, inequality and discrimination are the direct causes of the crisis? The fact of imbalance between law and contemporary society is of a serious nature. In the past solidarity of the village had been maintained. Buddhism, Christianity, Islam, played the role to spread values and accepted norms of appropriate behavior. But SPDC by systematic policy of forced labor, forced displacement and forced relocation, forcing child soldiers, closing down of educational institutions and Border Areas policy and spreading terror in the country side have broken down the society and communities, in particular the societies of ethnic nationalities. The ongoing Civil War has torn apart the values of the old societies. If girls could access education, that would have empowered them and make them less vulnerable to traffickers. Violations of human rights were of such magnitude that the only option for them was a search for survival. Families have broken up, children and parents became separated husbands and wives estranged and economic pressures of an impoverished subsistence economy became the breeding ground of human trafficking. It has become part of underground black economy which includes narcotic drug trafficking, smuggling, and money laundering. It is estimated that there are more than 40,000 women and young girls from Burma who are forced in to sex industry in Thailand each years.<sup>9</sup>

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The root of human trafficking is the breakdown of society. Its systematic policy of forced labor, child soldier, dispeacement of persons and rule by spreading fear and terror, unemployment and frustration uprooting families result in human trafficking beyond construct.

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### **Consideration for States when anti-trafficking Law is introduced**

In combating trafficking, certain guiding principles need seriously to be

taken care of. Thereafter guidelines have to be provided which can be integrated into a human rights perspective into domestic anti-trafficking laws. The two together can hopefully break the trafficking cycle.<sup>10</sup>

The recommended principles given are seventeen under four headings of

1. The primary of human rights
2. Preventing trafficking
3. Protection and assistance
4. Criminalization, punishment and redress

The recommended guidelines are eleven under the following headings.

**Guide Line 1. Promotion and protection of human rights**

Ten steps have been recommended.

**Guide Line 2. Identification of trafficked persons and trafficker**

Four measures have been recommended.

**Guide Line 3. Research, analysis, evolution and dissemination**

Seven steps have been recommended.

**Guide Line 4. Ensuring an adequate legal framework**

Eleven measures have been recommended.

**Guide Line 5. Ensuring an adequate law enforcements response**

Nine steps have been recommended for consideration.

**Guide Line 6. Protection and suffers for trafficked persons**

Eight measures have been recommended.

**Guide Line 7. Preventing trafficking**

Nine measures given for consideration.

**Guide Line 8. Special measures for the protection and suffers of child of trafficking**

Ten steps given for consideration.

**Guide Line 9. Access to remedies**

Three arrangements are to be provided.

**Guide Line 10. Obligations of peace-keepers, civilian police and humanitarian and diplomatic personnel**

Seven steps recommended.

### **Guide Line 11. Co-operation and co-ordination States and regimes**

Twelve arrangements have been recommended.

### **Conclusion**

Migration has become a primary feature of the process of globalization . Trafficking is a regional and global phenomenon that cannot always be dealt with effectively at the national level: A strengthened national response can often result in the operations of traffickers moving elsewhere. International, multilateral and bilateral cooperation can play an important role in combating trafficking activities. Such cooperation is particularly critical between countries involved in different stages of the trafficking cycle.<sup>11</sup>

Child is the father of man. Women are half of the population of the county and they belong to a paramount sector of our society. They run home, bring up the children and they are the basic pillars which sustain the great institution of family in the society. Women are trafficked to be housemaids, sex workers or wives. The UN Special Rapporteur on violence against Women, "the illegal or semi-legal nature of the work form the basis for forced, servile and exploitative working conditions, varying from humiliating treatment, low payment and extreme working hours to bonded labor or forced labor." The pool of potential victims has grown enormously because of widespread inequalities, lack of employment opportunities, violence, discrimination and abject poverty. If in this context the human trafficking is viewed the future of our country is doomed. It is therefore immediately necessary to introduce anti trafficking legislation with human rights perspective and the legal framework to punish the violators of this law, so that the rights of the victims of trafficking are also protected. Unfortunately, the present regime is unable to respond to the needs of the situation. Its law enforcing agency is utterly corrupt and the cycle of acts and circumstances implicating a wide range of actors is beyond its capacity. The one and only conclusion that can be drawn is that there has to be a change in regime which is founded on the rule of law and also respects rule of law. Further, this problem cannot be tackled without the co-operation and co-ordination of the neighboring country namely Thailand where most of the victims of trafficking are dumped.

The relation between the junta and Thai government has been strained. Mutual co-operation is particularly critical between the two countries involved in different stages of the trafficking cycle. They may have to adopt

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The remedy is involvement of all forces including opposition/ethnics to unitedly to confront the alarming situation, failing unite action, a regime change is the only way out.

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labor migration, modes of repatriation, bilateral agreement to prevent and protect victims of trafficking. Co-operation between NGOs and other civil society organizations in country of origin, transit and destination also will be necessary. On all these counts the junta has miserably failed. They should immediately enact the anti-human trafficking law and subsequently quit to enable the people's representatives who won the 1990 May election to take charge of the problem. Only the government which has mandate of the people can tackle such a situation which has gone out of control. The Thai leaders and its Civil Society have expressed their support for dialogue between the ruling junta and the opposition which can result in peaceful regime change. Only a democratic government can have bilateral relations mentioned above to tackle such a national problem. Till the time the junta moves out, it is obligatory on its part to enact the anti-human trafficking law immediately on the ground of national emergency crisis. Thereafter it can put in place a National Coalition Forum with the opposition parties including the ethnic leaders and civil society and work out strategies aimed at preventing trafficking and developing national plans of action. This is an opportunity for the Junta to open a new chapter, to prove its sincerity. Such steps will be confidence building in the dialogue process. It has to take initiative for speedy political reforms salvaging the country from the nadir it has reached.

### Endnotes

\* B.K. Sen is an Executive Committee Member of the Burma Lawyers' Council.

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# “The Control of Money Laundering Law”

## Significance Of The Press Briefing

*Legal Aid Section*

On 17 June 2002, the ruling junta enacted “The Control of Money Laundering Law” Law No. 6/2002. Far back in December 2001 the need for Money Laundering Law<sup>1</sup> in Burma was focused in this journal thus:

“All economic activities in Burma have become instruments of drug money laundering. At least 50% of Burma’s economy is unaccounted for and extralegal: the earnings from heroin now exceed those from all of Burma’s legal exports.”

“Although the Narcotic Drugs and Psychotropic Substances Law contains some useful legal tools for addressing money laundering, to date this law remains unused as Burmese police and judicial officials have not enforced.”

“The junta has finally started drafting a counter-money laundering law. This should be seen with guarded optimism given the junta’s poor understanding of economic principles and its notorious contempt for law.”

The magnitude of money laundering activities went so far that it threatened to uproot the normal economy by replacing it with black-market economy. Partly due to the pressure of genuine investors, partly due to the criticism of academic and journals and partly due to the exigencies of its own survival the law was enacted. The law was criticized in various forums. It was characterized as Toothless Money Laundering Law.<sup>2</sup>

“In short, the Money Laundering Law is a law above the law, a law unto

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“The junta has finally started drafting a counter-money laundering law. This should be seen with guarded optimism given the junta’s poor understanding of economic principles and its notorious contempt for law.”

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itself, a whitewash that does not meet international standards on its own admission. The political situation in Burma is characterized by a lack of rule of law and ineffective law enforcement. The new money laundering law promises nothing and is likely to be seen as a hoax.”

### **Press briefing**

The quote proved to be true. After 5 months on 20/11/02 the SPDC came out with a hastily gathered press briefing to clarify the law. The Home Minister said that the law was not retroactive. In fact, there was no need for so-called clarification. When in June 2002 it was enacted everybody understood it to be enforced from the date of enactment. The Home Minister said “the objective was to prevent and control money-laundering and its multiplying effects.” Reading between the lines one can say the clarification was assurance not to use it for confiscation of property, funds, or shut down local entrepreneurs. It was a clear message that there will not be enforcement, all that was intended was to keep the business within bounds. Ironically the word “Control” was prefixed with the name of the Law. In U.S. the law is called Money Laundering Control Act of 1986 (MLCA). The Act was the result of booming cocaine trade of the 1980s and wide spread non-compliance with the banking reporting statutes. The purpose was to cover a broad range of criminal conduct. The copying of the title name of the law in Burma “The Control of Money Laundering Law” Law No. 6/2002 has been misconceived. Although 5 months have passed not a single prosecution has been launched. On the contrary assurance, euphemistically called clarification, has been given to potential offenders not to panic. The three chief defects of the law are its lack of legitimacy, its uncertainty and its complexity. The law is not one-strike law and is only purported to be a smokescreen.

The law gives a special committee headed by Home Minister wide-ranging powers including access to bank accounts and investigate personal income, property deals and money derived from ill-gotten gains. Punishment can range from seven years to life imprisonment. All economic laws that the SPDC has enacted are merely show pieces. Enforcement of Law is a vital part of the objective of any law. When it goes by default for various reasons the very object of the Law is defeated. The ruling Junta has crafted a clever device to defeat laws whenever it is forced to enact. The press briefing on “The Control of Money laundering Law” is a classic example of its delinquency.

The Money Laundering issue is a vital sector in macro-economy of Burma. Its failure to address this issue is one of the reasons why Burma



unlike Indonesia and other repressive regimes could not register any economic growth. Economic growth may facilitate democratizations, and promote acceptance of the regime, even if it is not a democracy. Suharto recruited civilian experts and technocrats who helped him out of several crises. But the Junta rules by its own decisions and has monopolized every thing. In respect of law and judiciary it surfaces every time it wants to enact law to fend off instability. The “Control of Money Laundering Law against illegal acts” is an instant case. Money Laundering envisaged under the Law is against illegal acts. Does it mean that there can be legal acts under Money Laundering? What does “control” mean? Why not, it is outright prohibition? The Junta cannot go on like this for a long time playing with rule of law.

Just over 24 hours, the local currency plunged from 742 Kyat to the dollar to 900 to the dollar and there was a wide spread panic.

The Law Journals published by Attorney General or the Supreme Court, Burma have not brought this issue in the forefront. Nor Mandaing Magazine published under editorship of Maung Maung Win supposed to be an independent lawyers’ Journal debated or gave coverage to this issue. When a law is passed without public hearing, its fate can easily be guessed. This public hearing is more important as the SPDC is the law-maker and law dispenser.

In other countries, the parliaments debate laws and legislation is the outcome of debate amongst the elected representatives of the people. The conclusion is inevitable that any law that the junta brings will be flawed and unenforceable. Honest review of its laws and enforcement and failures should have convinced it that regime change is the only sustainable solution.

Money Laundering in Burma’s context has to be viewed as an integral feature of a failed state. It is a serious problem. Money received through illegal activities such as drug sales, gambling, human trafficking are filtered through legitimate sources to make it appear to have been derived from these sources. Original source cannot be traced. For example, an organised crime organization obtains larger profit through drug sales. It will channel this money through a restaurant. Law enforcement may become suspicious of a small business earning disproportionately huge income. This will lead to investigation. To avoid this, organised criminals will disperse the money through several channels, so that smaller amount are sent out. Once this happens it is impossible to detect it as laundered money. It also enables earning high profit which cannot be taxed. Statutes have to directly target the crime and provide stiff penalties for com-

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Junta policy to prop up the drug industry is the chief cause of the problem.

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mitting the crime. In U.S. Racketeer Influenced and Corrupt Organizations Act (RICO) successfully broke down the structure and sophistication of the criminal syndicates by convicting and severely sentencing its leaders. The law was made adaptable to apply to the evolving reality of organised crime.

Criminal Law “Consists of prohibitions of antisocial behaviour backed by serious sanctions”. In Burma, the leading drug lords have been legally permitted to establish public bank and carry on banking operations. The very system of financial institutions has fuelled money laundering and made it a constituent of the Economy. Only a law with far reaching reforms in financial sector, this problem can be solve. Steps like enacting “The Control of Money Laundering Law” or floating Projects cannot remedy the situation. Bt 20 million model village project to be implemented in areas controlled by Pro-Rangoon United Wa State Army (UWSA) is a sheer hoax. UWSA is world’s largest drug army operating freely in Burma with the support of ruling junta. It is high time that the ruling junta instead of press briefing seriously addresses the issue and initiate building coalitions on major critical issues facing the country.

### **Endnotes**

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# Legal Issues on Burma

JOURNAL

NO. 13 (DECEMBER 2002)

## Special Feature

Charter of Legal Reform in Burma

Burma Lawyers' Council

# CHARTER OF LEGAL REFORM PROJECT

*Thein Oo & Janelle Saffin\**

## THE LEGAL PROFESSION IS A NOBLE PROFESSION

**So says the Law Journal's motto. The Law Journal is a regular journal published by the Central Welfare Committee Office of the Attorney General Burma/Myanmar. We share this view of the legal profession and this project is our contribution to that noble profession.**

## PROJECT PREAMBLE

This paper provides a sketch or overview of legal and legal-associated institutions in Burma and seeks to identify the major issues confronting them, putting in plain words the parameters of necessary legal reform, citing, although not exhaustively, particular laws and law-areas in need of review and/or repeal. It advocates an approach to legal reform that has intellectual integrity, is flexible, and recognizes the need for reform to be a home-grown process.

This work is best understood as a scoping document, to be viewed by interested parties as a work in progress. It is necessarily at this stage more descriptive than analytical. It is hoped that the paper might motivate readers to draw them to the need for legal reform and support for that process.

The project has been germinating for a number of years. As the lawyers of the Burma Lawyer's Council worked to document the absence of the rule of law and human rights violations in Burma, our minds turned to

how we thought the “law” should operate according to the principles of justice and fairness and how that might be achieved. Such thoughts led to the consideration of how to balance the negative forces at work that impede just law with positive forces that shape just law.

That consideration fanned a burning desire to launch into immediate and comprehensive reform. However cooler heads prevailed, and action was tempered by study, especially as to how other nations that have been beset by internal conflict have transformed themselves into democratic states. It also involved looking at states that were peaceful and prosperous and how they tackle legal reform.

The project name is not meant to imply that there is no legal reform undertaken in Burma. Indeed, there is. It is meant to convey the message that there is a need to focus on legal reform and the shape that it should take, and that there is no systematic approach to legal reform in Burma.

This project is not intended to be prescriptive, nor to undermine the valuable work of lawyers working in Burma who face many hardships with considerable aptitude and courage, but rather to complement the legal profession's knowledge and experience so that all can be as prepared as possible to institute the legal changes required to consolidate the rule of law and thereby effect democratic governance.

The project acknowledges the capacity of the judges, advocates, legal academics and law students who struggle under military rule to hold fast to the tenets of the rule of law and to uphold the independence of the professions. The project will aid their work and complement their expertise. It will be done with the advantage of being able to research with open internet and email access, denied to most in Burma, and the opportunity to be able to discuss ideas freely without constraint.

Since its inception the project has developed to embrace legal, judicial, constitutional, parliamentary and major institutional reform. All are required if Burma is to build up a market economy, to institute democracy, or to engage intelligently with ASEAN, and as an international citizen. These are all stated aims of the Tatmadaw-SLORC/SPDC, the elected members of the People's Assembly (Pyithu Hluttaw), and the democratic and ethnic-based political parties such as the United Nationalities League for Democracy (UNLD), the Shan Nationalities League for Democracy (SNLD) and other groups.

All parties in Burma agree that Burma is not a peaceful, modern and democratic state. In his opening address on the 18<sup>th</sup> January 2001, speaking

on a political matter at a government training course General Khin Nyunt (at the time Lt-General) made this clear.<sup>1</sup>

Constitutional reform has also evaded Burma for many years and there has now been an absence of constitutional government for fourteen years. Constitutional government could provide the basis for an agreed political settlement. From 1948 until 2002, Burma has had only had two periods of fourteen years each of constitutional government. The first was 1948-1962 and it was constitutional democracy with a federal type constitution. From 1974-1988 it was a constitutional one party socialist system.

## **PROJECT DESCRIPTION**

The project recognizes and acknowledges the need for a comprehensive approach to legal reform in Burma that factors in institutional review, legal education, judicial reform and strengthens the inculcation of the rule of law.

The project activities are comprehensive: - to comment on and critique laws, legal practice, judicial practice; to develop a series of best practice papers as reference works that inform lawyers, judges and political leaders; to benchmark existing laws; to develop models for reference, for such institutions as law reform bodies, economic and monetary regulatory bodies, human rights commissions, ombudsman offices, local community legal centres, administrative review tribunals, public defenders offices and, environmental legal regimes.

Importantly, the project has the capacity to foster collegiate friendships with the legal and judicial professions across jurisdictions and within universities.

The need to ensure that all citizens of Burma have access to justice provides the prime motivation for this project.

## **PROJECT DESIRES**

1. That the body of work will aid the process of legal and judicial reform in Burma so that all the people can enjoy the benefits of living in an ordered society where the rule of law is valued.
2. That the body of work can be used as a reference for systemic and systematic reform to lay down the legal foundations that will help the na-

tional reconciliation-reconsolidation process underway to support democratic governance and civil society in Burma.

### **PROJECT AIMS**

1. To outline an approach to legal and judicial reform required in Burma to restore and inculcate the rule of law, so that justice, social harmony, sustainable development and economic plenty can again abound in Burma, once known as the rice bowl of Asia.
2. To share and transfer legal knowledge and to help strengthen the capacity of the judges, lawyers, legal academics and the people.
3. To produce a body of work that can be used as a reference to chart the progress of reforms undertaken by government.
4. To make the work publicly available to all actors and leaders in Burma's political and national life, who are working towards the common goals of unity, rule of law, democratic governance and peace.

### **PROJECT OBJECTIVES**

1. Establish a working programme with University Law Schools and other interested professional legal organizations, scholars and practitioners who collaborate and support this project by giving their expertise.
2. Research and map the current legal, judicial and constitutional system in Burma, outlining both form and substance.
3. Comment on the various legal traditions and developments that have been in vogue in Burma since British colonisation and the relevance of such to modern legal reform.
4. Apply a rule of law template as a benchmark to laws, orders, notifications, directives, decrees, the judiciary, any other forms that constitute the legal system, including the major institutions involved in the administration of justice, such as the Attorney-General's Department, the Police Force, the Parliament and the Judiciary.
5. Organise reciprocal visits between legal teams including legal academics to visit Burma in 2002/3 to meet with members of the profession and to research current legal and judicial operations and constraints, includ-

ing cultural, regarding legal reform.

6. Undertake and organize professional in-service in priority areas of law and then to work up proposals for further reform after consulting with interested constituencies, in-country and abroad.
7. Work in close collaboration with the legal and judicial profession inside Burma to the extent that it is possible.
8. Produce a series of international best practice papers on specific areas of law, for the information of all parties.
9. Compile a list of laws, orders, notifications, decrees, etc. that can be agreed upon for repeal and/or review.
10. Review the current legal education system including the use of high grade pleaders, and draw up proposals for legal education that includes under and post graduate need, and continuing education for practising lawyers.
11. Draw up a constitutional roadmap based on Burma's own constitutional capital that includes both design and process mechanisms, consultation elements including community consultation, that genuinely respond to the ethnically diverse nation that is Burma.
12. Prepare a reference document called a **Charter of Legal Reform** that addresses the needs of the legal, judicial and legal academic systems, which are required in Burma to re-establish the rule of law and therefore to support democratic and good governance

## PROJECT APPROACH

The project includes a large component of research of Burmese law. Lawyers with expertise in a particular area will each prepare a position paper in that area. This is to provide a wide range of international best practice papers. For example, one legal academic has agreed to prepare a paper on University governance, an area in which he has a Doctorate, another on property and property rights.

It is vital that participating lawyers be fully informed of the law as it both exists and applies inside Burma before they comment. This recognizes and acknowledges the fact that legal reform should be indigenous and home-grown and not imperialistic. The project is not designed to be cul-



turally imperialistic, nor to affect sovereignty, but to aid and support a reform process that is recognized as a major need by all parties in Burma as a matter of some urgency.

Professor Faundez cautions against the fear of legal imperialism and, whilst retaining an open mind on it, reminds us that:

...honest and competent officials as well as responsible citizens in recipient countries genuinely believe that externally funded projects are either part of an alien political agenda or pose a serious threat to their legal culture and national identity...<sup>2</sup>

We share this view but agree that it is most useful to have a series of best practice papers covering a wide range of laws, and legal areas, so that these can better inform and educate those that do have both a theoretical and working knowledge of law and culture in Burma.

It is an important part of intellectual development to read and know of legal principles and development across jurisdictions. Working papers like these are also valuable prompts for non-lawyers who are usually charged with political decision-making. Constitutional arrangements covering design (form) and process, particularly the need for community consultation, will also be included.

It is planned to attempt to stimulate debate on legal reform and to make available a substantial body of legal and judicial work prepared by a variety of legal experts, scholars, researchers and students, drawing from both common law and civil law traditions, and from international best practice developments, to inform those charged with instituting the transition to democratic governance, and the short and long term legal and judicial reform process in Burma.

## **PROJECT ACHIEVEMENTS**

1. Successfully developed a collaborative working arrangement with legal academics from the Law Schools of Macquarie University (Sydney New South Wales), Southern Cross University (Lismore, New South Wales) and the Queensland University of Technology (Brisbane Queensland). These are law schools that have previously supported our work vis-à-vis Burma.<sup>3</sup>

2. Engaged a number of practitioner lawyers who are willing to research and write and be part of the project.

3. Undertaken research on accessing law and understanding the complexity of Burma's legal system.
4. Compiled resources, including legal texts, laws, articles, etc. of seminal importance.

### **PROJECT RATIONALE: DISCUSSION**

Key international institutions such as the World Bank and the Asian Development Bank have recognized the need for legal and judicial reform as being essential for sustainable development, poverty reduction, and further that

... sound legal frameworks are prerequisites for economic growth and social development. The process through which laws and regulations are conceptualized, drafted, enacted, publicized and enforced is the foundation of a society governed by the rule of law. Legal reform is an ongoing and incremental process that involves the executive and legislative branches, law reform commissions, non-governmental organizations, and the public. For most countries, legal reform addresses new international standards, responds to social and economic, expands access to justice or improves court operations. Effective ... coherent legal reform requires a comprehensive and sustainable approach that avoids importing "models" inconsistent with national legal ... socio-economic norms. Effective legal reform also promotes opportunity, security, and empowerment for the world's poor. ...<sup>4</sup>

Legal reform has certainly been undertaken in Burma since the Tatmadaw (Armed Forces) seized power. It is not apparent, however, that the reform has had any form or rationale. The State Peace and Development Council's (SPDC) previous incarnation, the State Law and Order Restoration Council (SLORC), had by 1993 repealed over 150 laws and up until 1999 had introduced 153 laws and 27 rules, bringing in the Law for the Repeal of Laws and the Law for the (Second Time) Repeal of Laws.<sup>5</sup>

There has been no debate, no elected-representative body that informed the public and there has been no rationale given. One law repealed yet not replaced was the Patents Law. Legal author U Than Maung tells us that "Most of such old laws are defunct due to lack of legal facilities concerned and some had been repealed without substitution."<sup>6</sup> This implies that there are areas where no law exists but should.

The dearth of legal development, hence reform since 1988 is cause for concern to many practitioners both inside and outside Burma. The International Crisis Group commentators vis-à-vis Burma reported that,

... The junta has even turned down technical assistance from ASEAN countries to improve the legal and administrative framework necessary to conform with requirements for economic integration.<sup>7</sup>

Three areas of law described in the following provide the a sketch of a model that is used to frame laws. These three areas are all commonplace areas in modern life and in a nation that wants to operate a market economy.

Burma's Computer and Science Development Law 1996 despite its commentary has the effect of stifling rather than encouraging any development in this area. This law in fact typifies to a large degree the SPDC's approach to law-making in their clumsy attempts to introduce market reforms and modernise. They introduce a 'law' firstly by a simple announcement. The Computer Science Development Law No. 10/96 SLORC 20<sup>th</sup> September 1996 provides a clear example of this desire to create law in a developing and modern area, but it is framed in such a way that any attempts at development in the said area are 'straitjacketed' from inception. So reform is both promoted and stifled in the same statute.

The Television and Video Act of the same year 1996 is based on the same premise and "prohibits and bans decadent video tapes which will undermine Myanmar culture and Myanmar tradition;." Again the question has to be put: How is Myanmar culture and Myanmar tradition defined, so as one can know what one is breaching? It implies that Burma is a mono-cultural and mono-traditional state, whereas it is a state of wide cultural and traditional diversity. Law is a very blunt instrument to bring to heel so to speak all cultural and traditional values and in fact undermines the respect for diversity of culture and tradition, which in turn fosters resentment by those not from the dominant cultural and traditional background.

Another common and popular source of public information is via the internet, a medium made illegal in the first instance, with some permissive categories of persons. In July 1999 a training workshop on the internet was, we understand, organized or supported by the World Trade Organisation (WTO) where General Khin Nyunt presided. This was a good development. However the introduction of the internet is very restricted

and whilst some have email access it is all through a government server. In itself this is not a bad thing, if the government is facilitating communications by the provision of infrastructure. However, it is not just that. Foreign missions will tell you that their email is intercepted and ostensibly read by the SPDC authorities, probably the Military Intelligence Service (MIS) headed up by General Khin Nyunt. The regulations for internet users were issued by the Myanmar Post and Telecommunications (MPT) in 1999 and they are as vague and prohibitive as provisions in the Computer Science and Television and Video Law.<sup>8</sup>

Burma's constitutional status is a major factor that negatively affects legal reform. The concern about the lack of legal reform is heightened by the fact that there is no constitutional government, no constitution or basic constitutional principles in force, no parliament or people's assembly, (Pyithu Hluttaw). Military rule is the order of the day, with the military government not complying to any clear or certain process or mechanism for the development of the "laws" that they promulgate. They are called orders, decrees, rules, notifications and indeed even laws.

The absence of an independent judiciary in Burma is a major impediment to the development of a healthy legal system and to the rule of law principle that the judiciary should be independent.

It is difficult to assess accurately the nature and form of legal education in both under and post graduate areas. However, until recent times, it has been rudimentary and given the parlous state of education and the embarrassingly little amount spent on education a gauge of it indicates that it is sub-standard by any acceptable measure. Lawyers remaining witty despite the constraints on their practice say that "Law in Burma is in a coma." There is good law they say, and this is true. The many laws contained in the Burma Code's thirteen volumes and the common law precedents demonstrate that there are good laws, but they need good infrastructure to come to life.

The law has undergone major changes since independence in 1948 and each major ideological change affected the legal system, but the basis of common law remained. It seems that lawyers, judges and the people have hung on to it. It does work in a number of regular areas, and where there are gaps or doubts lawyers and judges revert to it. An example of this is with trademarks. There is no specific law on trademarks in Burma. It is possible to register a trademark by registering a Declaration of Ownership of Trademark with the Office of Registrar of Deeds and Assurances, under Direction No. 13 of the Inspector General of Registration. This was last amended in 1962. The operative section invoked in the case of trade-

marks is Section 18 (f) of the Registration Act. U Maung Than tells us that the Ministry that administers the Registration Office is the Ministry of Agriculture and Irrigation. Its branch of Settlements and Land Records Department handles these processes.<sup>9</sup>

It would be foolish to say that the country is at a standstill and that reforms are not taking place, but when one analyses the overall situation as the World Bank, the Asian Development Bank and other key institutions have done, Burma's future as a nation is bleak.

The Emergency Provisions Act has some other sinister provisions that are used to silence political opposition, thus violating human rights articulated in the Universal Declaration of Human Rights, and other international instruments. Many politicians are gaoled by the invocation of this act for political purpose not criminal purpose.

A few local Magistrates have dealt with cases of forced labour, whereby the people forced into labour took action against the then local Law and Order Committee (LORC) officials seeking payment as agreed to. In two particular cases the Magistrates ruled in the plaintiffs favour and the Magistrates were summarily dismissed. These are unreported cases.

Legal Reform in Burma is not only a desire but a necessity. It is broader than the introduction of statutes or amendments to statutes and includes institutional reform, education, public input and judicial reform. Advocate U Than Maung in his seminal article, *Protection of Trademark Rights in Myanmar*, published in the Office of the Attorney General's regular publication Law Journal inside Burma, commented on the intellectual property laws that are to be drawn up by the OAG by 2005, and summed up what in essence is legal reform.

... Enactment alone however hardly fills the vacuum in IP field. Its byelaws such as rules, procedures and others necessary measures have to be followed up, so also establishing necessary infrastructures, training officials and staffs as well as educating the public who will deal with or relate to the subject matter. Such tremendous tasks shall have to be done not only ahead the year 2005 but also later on and on. ...<sup>10</sup>

We are concerned with legal reform as described by the author himself, a former staff officer with the then Attorney General's Office.

Legal scholar Andrew Huxley has said that Burma has been delegatised and even a cursory glance at Burma's legal system demonstrates his ob-

servation to be substantially true.<sup>11</sup>

The UN has recognised that the nation needs to undertake legal and judicial reform. The most recent UN resolution regarding Burma adopted by the Third Committee at its Fifty-Seventh Session

...Calls upon the Government of Myanmar: (a) To fulfil its obligations to restore the independence of the judiciary and due process of law, and to take further steps to reform the system of the administration of justice; (b) To take immediate action to implement fully concrete legislative, executive and administrative measures to eradicate the practice of forced labour...<sup>12</sup>

Recognising this situation ASEAN offered technical assistance for legal reform seen as necessary for economic integration. That offer was turned down.<sup>13</sup> Further comment regarding the reluctance of the military to institute changes comes from within ASEAN countries, notably Singapore. Publicly, both the Trade and Industry Minister, Lee Yock Suan, and Special Minister, Lee Kuan Yew, have complained about the economic incompetence. The latter stated that "The Myanmar have implemented policies that have aborted the process of development." Other significant parties from other ASEAN countries say the same privately.<sup>14</sup>

We submit that if the SPDC were to study legal reform and understand it in practice, that they could prepare the state to accept offers of help so that their fear of imperialism is not realized. They have accepted help for military infrastructure, with both hardware and software. They must have had to consider the terms of acceptance so that sovereignty was not affected, and the same can be said of legal assistance. Ideally, democratic changes will facilitate legal reform as they will engender institutional reform. However legal reform can still be made more effective if the SPDC is able to deal with their fears of outside interference in this area in the same way that they obviously have regarding military assistance.

There are, of course, measures to be taken domestically that can start now. The Attorney General's Law of 2001, not without problems, gives some scope for legal reform. If the Attorney General was able to establish a Law Reform Commission that was representative of the interested parties and the community and was independent, it would be a significant step in the right direction.

The question also has to be asked: Has the SPDC the governance competence to introduce the necessary legal reforms for the reorientation of the economy to a market economy? The only plausible answer thus far is that

they have been unable to do so. The state's weak institutional base further mitigates against any significant reform. Combine this with the fused three arms of government power and a military *modus operandi*, where instruction from the top is the order of the day and it is evident that good governance eludes the SPDC. This is recognized by the SPDC itself and also reported on by the World Bank, the Asian Development Bank and evidenced by the fact that the state has 'Least Developed Country' (LDC) status.

Very recently the National Unity Party (NUP) President publicly criticised the state of the economy. The NUP is the Tatmadaw-backed political party that was the progeny of the previous Burmese Socialist Program Party from the Lanzin regime (1962-1988). This process was begun when the SLORC took power in 1988. Eschewing socialist ideology they embarked on changes ostensibly to create a market economy. We laid a market friendly template over Burma's institutions and found it to be not so friendly. Professor Julio Faundez, noted expert on legal reform, reminds us that the five attributes of market-friendly systems are:

1. rules known in advance
2. rules actually in force
3. availability of mechanisms for the application of the rules
4. independent bodies to resolve conflicts over the interpretation of rules
5. procedures for amending the rules<sup>15</sup>

A simple matter like filing for bankruptcy, where the law requires that this must be advertised in a local paper, cannot be implemented without the judge saying that, as it may appear to look negative *vis-à-vis* business, thereby reflecting negatively on the military government, he would have to seek the advice of the Attorney General. This is but one example of the malaise that has afflicted the judiciary in Burma. A look at Section 5 (h) of the outmoded and prostituted Emergency Provisions Act 1950 indicates why a Judge might suggest such a course of action. It reads as follows:

...5. Whoever does anything with any of the following intent; that is to say-(h) to make the public lose trust in the State's economy, government loans, government securities, coins and legal tenders distributed wholly or partly in the country, or to hamper operational or economic success carried out by the government in order to implement the restoration of law and order successfully; or ...

The question then has to be put. How can a market economy develop in

such a legal hence cultural framework? We submit that it cannot. It is no different with the SPDC's own laws: they contain the same prohibitive provisions which do nothing, in fact the opposite, to encourage enterprise.

The combination of these examples and such odious laws as cited above, and the military's ability to affect every aspect of the legal system if they choose to, compromises the intellectual and actual competence of the judiciary.

The biggest impediment to reform however, is the military government's obsession with control, which means that the business of government becomes a lower priority.

The regular institutions of government, including its most important arm the parliament, has not functioned since the 11<sup>th</sup> September 1988. Parliament is the most active and seminal in the area of legal reform, and the people of Burma have been deprived of this most fundamental institution now for fourteen years.

The legal reform process must also be "home-grown", a common enough refrain in Burma, but one true of legal reform. The recognition of the need to have a "home-grown" process does not preclude the acceptance of assistance from friends, neighbours, and the international community. It does however mean being prepared intellectually so that when good offers come, they can be accepted with grace and on terms that equalize the parties and maintain one's own cultural and sovereign integrity.

It is normal for jurisdictions to borrow or appropriate from others. It is likely to be a sign of a strong and secure state and government when this occurs. To find something that resonates with the nation's own needs, to study it and to fashion it to accommodate their own situation is a good outcome. There is, of course, precedent with international law, by the adoption of various conventions, covering the field of commerce, drugs, children and women, war, and human rights to name a few. If you look at jurisdictions, common and civil systems, you will see that many areas that are legislated about are similar. Murder, violence, traffic, property, commercial dealings, religious matters, parliament, elections, animals, again only citing a small sample. The tenor of these laws, however, will vary dependent upon the state's system of government, cultural background, experience of statehood, conflict and the like. So whilst we can draft model laws based on universal principles with their genesis in justice, or best practice papers based on agreed primary standards of practice and behavior, their take up or acceptance can only ever be situational.



## THE LEGAL SYSTEM IN BURMA TODAY

In his paper titled “Commercial Laws of Myanmar” presented at a seminar in Rangoon in 1999, Dr Tun Shin, then Legal Advisor to the Ministry of National Planning and Economic Development and now Director-General of the Attorney-General’s Department, had this to say about the legal system in Burma:

...The legal system of the Union of Myanmar is a unique system that belongs to the Common Law family. It has the roots in the Common Law Legal System. However, as in some countries one cannot say that it is a replica of the Common Law Legal System. On the other hand it is a unique combination of Common Law and Civil Law Legal Systems. The Myanmar Legal System is a system where certain mechanisms of these two legal systems are fused together for the sake of simplicity to make the understanding of law simple for the members of the legal profession and people who are connected with the law.

The elements of the Common Law can be found in the principles of Common Law that are taken up by the Myanmar Legal System. These principles are given the legal effect through the vehicle of Codified Laws or Statutes as it is called in many parts of the world. As we all know Statutes or Codified laws have their genesis in the Justinian Code of the Roman era which was later followed by the Codex Napoleon. Thus, Myanmar legal system codifies the principles of Common Law and gives them the legal effects through Laws or Codes.”<sup>16</sup>

Curiously, he makes no mention of the people’s justice system that prevailed for twenty-six years, introduced in 1962 at the onset of the military coup and constitutionalised in 1974, that established people’s courts, and contributed to the delegalisation of Burma’s system of justice.

There is an assumption that the tradition of common law will prevail in Burma, as it has survived to this day, and even though colonialist characteristics and systems are eschewed, the people of Burma including the Tatmadaw are sensible in that they keep what works for them. The common law legal system is one such system that has worked and, as Dr Tun Shin suggests, it has been fashioned to suit the needs of the state.

There is also Burmese customary law, incorporating Burmese Buddhist law, written in law texts called Dhammathats, and other customary laws to be taken account of.

It was soon realized by the BLC that legal reform was far more than having good laws, although that is necessary. It was about having the institutions in place to support the administration of good laws, so that good law became good justice. It meant taking a closer look at how the police, the lawyers and the judges, the pivotal triangle or triumvirate, worked within the legal system to maintain law and order, to defend and uphold laws and legal principle.

In Burma the three arms of government are ruled over by one body, the SPDC, which immediately tells you that law-making, law-enforcement, law administration is both complicated and compromised. *Prima facie* and substantively, it cannot be anything else. A closer look at the effect this model of governance has on law-making, law enforcement and law administration in Burma bears this out.

Two current examples exemplify the difficulties the SPDC face where, if given the benefit of the doubt, it can be said to be serious about changing the law to stop practices that are criminal, socially undesirable and the matter of opprobrium in the international community. The examples are slave/labour portering and money laundering.

The SPDC has passed notifications, orders, supplementary orders (Order Supplementing Order No.1/99 issued by The Ministry of Home Affairs 27<sup>th</sup> October 2000) emanating from different ministries and departments; and from the SPDC itself, yet it is accepted that the practice prevails. A major difficulty is in changing the practice, and the state lacks the institutional capacity to have its orders enforced and administered. The political will is for others to comment on.

The Control of Money Laundering Law will almost certainly suffer the same fate, with both bad form and major difficulties of implementation due to the lack of institutional infrastructure and legal preparedness. Curiously, the law creates a number of different types of money laundering offences, but then says:

... Action will be taken against offences in accord with the Law only under the prior permission of the Ministry of Home Affairs. ...

Further the law provides for the establishment of a Central Control Board whose powers are broad and vague.<sup>17</sup> This is not good law. How can it be made to work when all offences punishable by law can only be initiated with the permission of a Ministry, in effect, the Minister? There are cases to be had where perhaps the Attorney General needs to concur for a prosecution, but this confusing or blurring of the executive role and the

administration of justice does not reflect well on a legal system. It is the antithesis of the rule of law.

Both attempts at reform - porterage and money laundering - suffer in that they were never subject to the rigours of regular law reform, to public acceptance and debate of the problems they are trying to fix, to a regular legal reform body like the Parliament. There was never an opportunity for both experts and lay people to have input, never an opportunity for a free media able to cover all facets of the issues.

In fact the SPDC had cause to call a press conference to dispel rumours about currency matters following its adoption of the Control of Money Laundering Law. The rumours were spurious, but this fact highlights the institutional problem of no transparent public process and no public debate. This is despite the best intentions of the Attorney General and the Office of the Attorney General who worked on the laundering law for a considerable period of time and took cognisance of the relevant UN Conventions, the UN Model Law, the forty-eight recommendations of the Financial Action Task Force and the laws of the ASEAN states.

Add to this situation a legal profession that does not have its own independent professional association, but has its Bar Council headed by the Attorney General mandated in this position by the SLORC/SPDC's Bar Council Act and a selective Council membership throwing serious doubt on its ability to be an independent participant in the debate about legal reform.

## **JUDICIAL AND LEGAL INDEPENDENCE**

It is a given in Burma and indeed instructed by the SPDC and contained in the Judiciary Law as amended by the SPDC, that Judges need to consider State policies, planning and administration in their judgments, along with the decreed national objectives. The notion of legal and judicial independence is severely compromised in Burma, most evident in the judicial system. The Chief Justice U Aung Toe, whilst a signatory to the Beijing Principles on the Independence of the Judiciary articulated by LawAsia in a document of the same name, does little to implement them.

U Aung Toe was reported in the Myanmar Alin of the 7<sup>th</sup> May 1996 as saying that lawyers (referring to those in Burma) were "corrupt, thieving and greedy". He had by then been the Chief Justice since 1988 having been appointed on the 27<sup>th</sup> September of that year by the issuance of the SLORC Order No. 5/88 which amended Order No. 2/88, the Judiciary

Law. This law was further amended in 2000 permitting the expansion of up to fifteen Judges. In 1989 62 Judges were deprived of office after failing to comply with SLORC instructions to sentence political actors to prison terms longer than those permissible in prescribed laws.

In 1998 the SPDC by Order No. 5/98 permitted the 'retirement' of five Supreme Court Justices, namely U Kyaw Win, U Aung Myin, U Than Pe, U Tin Ohn and U Tin Htut Naing. It is however widely believed that they were forcibly retired, in part due to the SPDC's nervousness about cases before the courts where the NLD was the complainant, and the alleged perpetrator the SLORC/SPDC. By the same order four Justices namely U Than Oo, U Khin Maung Latt, U Khin Myint and Dr Tin Aung Aye were appointed to the Supreme Court. The Supreme Court Justices appoint lower court judges, but subject to the SPDC approval.

Burma's Judiciary Law contains no provisions for security of tenure, and protection from arbitrary removal, therefore no legislative guarantee of judicial independence. A compromised judiciary impacts on the legal profession's ability to exercise independence. This goes to the heart of not only liberty, but to the notion of certainty at law, which in turn negatively affects commercial dealings, an area that the SPDC is attempting to show that it has instituted reforms so as to be attractive to foreign investment.

Successive United Nations reports and resolutions note and recognise this fact, as do other reports from bodies such as the World Bank.

The legal profession is not able to exercise independence even according to domestic law. A clear example is that S 340 of the Code of Criminal Procedure provides that "any person accused of an offense before a criminal court, or against whom proceedings are instituted under this code, in any such court, may of right be defended by a pleader." This is denied to those charged with offences, but who are, in fact, political actors.

## LEGAL HISTORY

In 1795 King Mindon undertook significant legal reform introducing freedom of speech, by financing the Yadanarbon Naypyidaw (The Mandalay Gazette) promulgating an eleven Article Act of the same nature, issuing an order to his Ministers and Officers in which he said *inter alia*, "If I do wrong, write about me. If the Queens do wrong, write about them. If the Judges and Mayors do wrong, write about them. No one shall take action against the journalists for writing the truth. They shall go in and out of the palace freely." U Hpo Hlaing who worked for both Kings Mindon

and Thibaw, the latter being the last King who was forcibly sent into exile in India to die there, serving mainly in the post of Minister of the Interior and advising on Foreign Affairs is seen as a reformer actively promoting democracy in Burma.

Thakin Howdahmaing was another great reformer and an inspiration for U Aung San, U Nu, Dr Maung Maung, democrats, the Armed Forces and current generations.

The rule of law and democracy is neither an alien nor new concept in Burma and it has long been a desire of the people.

Common law was imposed when Burma was colonised, effectively from November 28<sup>th</sup> 1885 when the then capital Mandalay fell to the British, with Burma being formally annexed to the British Indian Empire, and declared to be a province of India from 1<sup>st</sup> January 1886. Hence Burma shares a common law legal tradition with that of India and many of the laws used today are in fact those that had their genesis in colonial India.

It becomes necessary then to look at the discrete periods of legal development spearheaded by momentous political changes in the corresponding period to obtain an understanding of Burma's legal system and legal tradition.

Burmese Buddhist Law that incorporated the social structure of Burmese life was not completely abandoned though and as the British had adopted a policy of keeping alive some of the law that they termed "native" it then fused with the British common law that was applied by force of conquest. The key areas of customary law that survived, even to this day, despite the fundamental changes to the legal system are curiously primarily areas that most disadvantage women or have the potential to. They are marriage and divorce, succession and inheritance and religion. It is assumed that these would have been seen as non-threatening to the economic imperatives of the British colonial government and equally to the junta today.

It can be said that in essence the common law then prevailed up until Burma's reclamation of independence, becoming effective at 4.20 a.m. on the 4<sup>th</sup> January 1948. After that period it was expected that it would continue, and to a large extent it has, but dramatic ideological changes resulted from the Tatmadaw (Burma's military or Armed Forces) coup of the 2<sup>nd</sup> March 1962.

Between the 1962 and 1988 military coups Burma's legal system was

based on the Burma Socialist Program Party's (BSPP) people's justice system, (introduced by the BSPP and entrenched in the 1974 one-party state constitution) although the common law had survived in most part but radically wound back civil law, infused with elements of Burmese Buddhist law referred to as both customary law and written in law texts called the Dhammathats.

Although the changes to the legal system were not formalised until 1972, the major political changes did not bode well for the continuance of an independent and judicial legal system.

Burma's adherence to the rule of law has been eroded since 1962 due to a combination of military (Tatmadaw) rule, isolationist policies, and an absence of good governance. This erosion has been accelerated since 1988 with the onset of the military coup and the installation of the ruling military junta called the State Law and Order Restoration Council (SLORC). The Pyithu Hluttaw (People's Assembly) last met on the 11<sup>th</sup> September 1988. It was the day that the then President Dr Maung Maung, who served for only one month, gave the last speech to be given in a Parliament in Burma.

By Declaration No. 1/88 the SLORC appropriated the responsibilities of all state organs to themselves, and by Declaration No. 2/88 of the same date they abolished the state organs named as follows: (a) The Pyithu Hluttaw (b) The Council of State (c) The Council of Ministers (d) The Council of People's Justices (e) The Council of People's Attorneys (f) The Council of People's Inspectors (g) Executive Councils of each State, Division, township, Ward and Village-Tract People's Council. It further said that "The services of the Deputy Ministers are dispensed with effect from today."

Interestingly and intelligently they decreed that all laws in place at that time would stand unless or until altered. This was expressed in Declaration No. 6/88 24<sup>th</sup> September 1988 whereby it was said that: "All laws existing on 18<sup>th</sup> September 1988, the date on which the State Law and Order Restoration Council took charge of the sovereign powers of the State, shall remain in force until and unless repealed." By the same Order U Tha Tun and U Kyaw Win were appointed Attorney General and Deputy Attorney General respectively, posts they still occupy. This Order was signed by General Saw Maung as Chairman of the SLORC and was followed by Directive No. 1/88 of the 30<sup>th</sup> September 1988 advising all law officers "to continue to abide by and follow the existing laws, and directives and memorandums issued."

By decreeing a Special Limitations Law No. 9/88 as an amendment to the Special Limitations Act the SLORC closed the courts from the 1st June 1988 until the 31<sup>st</sup> March 1989. For an organization such as the Tatmadaw that prides itself on 'legality', with the actual adherence more on form than substance, it was a rather drastic action. Yet by Order No. 5/88 a Chief Court was constituted with five Judges and U Aung Toe still incumbent appointed as the Chief Justice.

The executive, legislative and judicial powers, best exercised independently to protect the liberty of the citizens, are today still exercised by the Tatmadaw Government-SPDC. Fourteen years is a long time to be controlling such power and Burma/Myanmar suffers from such concentration. For power to be used for good purposes it must be divided and shared. Division and sharing helps to make governments at least, corruption resistant.

In 1994 the SLORC representative to the United Nations assured its General Assembly that sixty-eight laws existed to protect human rights in Burma. Despite requests they have never made available such laws.

### **LEGAL AREAS MARKED FOR REFORM**

Criminal Law (Penal Code and Criminal Procedures Code)

Gaol Manual

Tort Law

Administrative Review

Judicial Review

Foreign Investment Law

National Security/Anti Terrorism Law/Options Penal Code or Specific law with definite times for detention/questioning and judicial review

Consumer Law

Heritage Law

Natural Resources Law

Environmental Protection Law

Planning Law

Land and Property Law

Landlord and Tenants Law

Media Law

Immigration Law

Pyithu Hluttaw and Administration Law

Freedom of Information Law

Telecommunications Law

Financial Institutions/Banking/Insurance Law

Commercial Arbitration Law

Transport Law

Anti-Corruption Law

Anti-Discrimination Law

Human Rights Law

Constitutional Law

Legal Education in under and post-graduate areas

Legal Institutions

**Judicial Institutions/Judicial Appointments/Options for Appointment/Process & Qualification**

Citizenship Law

Delegated legislation

Common Law Writs of Habeas Corpus, Mandamus, Certiorari, Quo



Warranto

Marriage, Divorce, Inheritance Law

The 13 Volume Burma Codes which contains the majority of Burma's laws can be systematically reviewed and we recommend that a special body be established to undertake this task, or a general Law Reform Commission be assigned this when they are established.

### **FURTHER LAWS AND BODIES RECOMMENDED FOR REPEAL AND/OR REVIEW**

There are some obvious laws that need to be immediately repealed as they are antithetical to the rule of law.

The Adaptation of Expression Law 1989

The State Protection Act 1975

The Emergency Provisions Act 1950

The Unlawful Associations Act 1908 as amended 1957

Printers and Publishers Act 1962

Habitual Offenders Restriction of Movement & Bonding Act (Law 12/1962) which replaced the Habitual Offenders Restriction of Movement Act 1957

Restriction and Bond Act 1961

SS 109 and SS122 to 130 of the Penal Code

The Burma Official Secrets Act 1923

The Computer Science Development Law 1996

Television and Video Act 1996

Regulations for Internet Use (Myanmar Post and Telecommunications)

Myanmar Wireless Telegraph Act (Amendment Law No15/95)

Unlawful Associations Act 1908 (as amended 1957)

Judicial Law No. 2/88 & Judiciary Law 2000

Burma Citizenship Law 1982 and SLORC amendment Law No 4/97

Township Act 1908

Village Act 1907

Declarations No. 1/88, No. 2/88, No. 3/90

Order 5/96

Government Boards, Agencies, and such bodies that fulfil a legal or quasi-legal role for example the Press Scrutiny Board. In 1975 the PSB as it is called had guidelines called principles, issued by the Ministry of Home and Religious Affairs to be adhered to when it was scrutinising political, economic and religious manuscripts and novels, journals and magazines. They are as follows:

1. anything detrimental to the Burmese Socialist Program Party;
2. anything detrimental to the ideology of the state;
3. anything detrimental to the socialist economy;
4. anything which might be harmful to national solidarity and unity;
5. anything which might be harmful to security, the rule of a law, peace and public order;
6. any incorrect ideas and opinions which do not accord with the times;
7. any descriptions which, though factually correct, are unsuitable because of the time or the circumstances of their writings;
8. any obscene writing;
9. any writing which would encourage crimes and unnatural cruelty and violence;
10. any criticism of a non-constructive type of work of government department;
11. any libel or slander of any individual.

This has been amended but it only increases the intensity of state censorship and where it references to socialist are now the military or SPDC.

**LAWS FOR REVIEW**

State-Owned Economic Enterprises Law also referred to as Law No. 9/89 of 31<sup>st</sup> March 1989

The Transfer of Property Act 1<sup>st</sup> July 1882 (Act IV India)

The Transfer of Immovable Property Restriction Law also called Pyithu Hluttaw law No. 1, 1987

Registration Act 1928 & Registration Manual 1946

Notification No. 1, 12<sup>th</sup> December 1991 concerning the formation of Central Committees for the Management of Culturable Land, Fallow Land and Waste Land

Directives/Notifications Nos. 3/90 18<sup>th</sup> July 1990 & 5/93 29<sup>th</sup> October 1993 concerning stipulations that Ministers and Government Departments have to follow including rental rates and powers to the Myanmar Investment Commission  
(the above are necessary to review *vis-à-vis* land law and investment law domestic and foreign)

Myanmar Insurance Law No. 10

The Trade Union Act

The Disputes Act

The Payment of Wages Act

The Dock Labourers Act

The Dock Workers (Regulation of Employment) Act

The Mines Act

The Oilfields Act

Copyright Act 1914 (India Act III 1914)

Patent & Design Act of Myanmar Act V 1945 (has been repealed but not replaced)

## RULE OF LAW

A noted Burmese jurist and politician the late Dr Maung Maung had this to say about the rule of law.

... The 'rule of law' that British rule established, and left behind as a legacy when Burma became independent...has come to mean, on the merit side, equality before the law, fair play, uniformity of laws for all-private citizen and public official alike. It also means that disputes and differences that are amenable to legal settlement will be taken to the courts and peaceably settled...These virtues of the rule of law are most highly extolled today, and kept alive, to the extent that values can be given life in statutes, in the constitution and the laws. ...<sup>18</sup>

Since the Tatmadaw's military coup d' etat of 1988, Burma can best be described as a nation beset by too much order and too little law, due to an absence of the rule of law. Many lawyers in Burma struggle to uphold the rule of law and this is commendable given that they practise within an institutional framework shaped by a military dictatorship. The military mindset and *modus operandi* is one that is in general terms both protective and prohibitive - characteristics better suited to battle, not governance.

There is no mechanism either for public input or for taking account of public opinion, resulting in a governance that does not have the support of the people and no government can govern without this. There is no differentiation between a critical approach and criticism, not that the latter is bad, but comment that is contrary to the activities and desires of the Tatmadaw Government is constructed as actual or potentially subversive, therefore damaging to unity and the state, and then criminalised. There is no separation of the Tatmadaw Government and the state, with the Tatmadaw Government being the state.

Some lawyers will also argue that the rule of law exists, as in many regular or what is referred to in the common law tradition as 'bread and butter' cases, what we like to think of as 'rice and ngapi' cases, there is no apparent absence of the rule of law. The existence or the absence of the rule of law is however not determined on a case by case basis, it is determined by institutional analysis and such an analysis shows the absence of the rule of law.

The rule of law is an idea and a practice extolled by most and this is the case in Burma. The primary political actors, the Tatmadaw, the State Peace and Development Council (SPDC) the National League of De-

mocracy (NLD), the Committee Representing the People's Parliament (CRPP), and ethnic nationalities parties and organizations all promote the rule of law. Admittedly their understanding of it or their approach to it, may differ, markedly in some cases, but it remains a constant value promoted by all, if only in rhetoric. Rhetoric though is an important feature of political life and political actors often live up to it, or are brought to account by it.

As lawyers we can engage in arcane debates about the literal meaning of the rule of law, but we accept the meaning that is commonly held by the people, which is the rule of just law. It is simple and our project is designed to give practical effect to the rule of just law.

We have a vision which is one of justice and this requires the rule of law to be a value that all citizens of Burma can lay claim to. Daw Aung San Suu Kyi, one of Burma's best known and admired political leaders and one who demonstrates a keen understanding of justice and the rule of law, has said so tellingly that; "The true measure of the justice system is the amount of protection it guarantees to the weakest. Where there is no justice there can be no secure peace."<sup>19</sup>

Given this internal desire for the rule of law combined with its almost universal desirability, evidenced by its inclusion and underpinning of many UN conventions, standards and norms, we have used it as the benchmark by which to gauge legal standards and to inform legal reform.<sup>20</sup>

## CONCLUSION

We understand that the political reform required for a democratic state, equally requires substantial legal reform. Democratic governance of necessity must be underpinned by democratic institutions and the rule of law.

Lawyers and an informed public will play an important role in bringing Burma back to the rule of law and in promoting the rights and needs of citizens, and working to foster an active citizenry. Such a citizenry is necessary to consolidate, promote and defend democracy. Such a citizenry is condition precedent of a vibrant civil society.

## Endnotes

\* Thein Oo is Chairman and Janelle Saffin is an Executive Committee Member of the Burma Lawyers' Council.

1. Kyemon Newspaper 18<sup>th</sup> January 2001
2. Professor Julio Faundez School of Law, Warwick University j.faundez@warwick.ac.uk published article Legal Reform in Developing and Transition Countries-Making Haste Slowly 2000 (Section 6.2) in Law, Social Justice & Global Development Journal (LGD) <http://elj.warwick.ac.uk/global/issue/2000-1/faundez/html>
3. See the Southern Cross University Law Review *Special Issue Restoring the Rule of Law in Burma* Volume 4 December 2000 Lismore NSW Australia
4. See the World Bank website at <http://www.worldbank.org> and in this site index go to "Law and Justice" and also <http://www1.worldbank.org/publicsector/legal/index.htm>
5. Repealed Laws and Index of Laws and Rules Enacted and Promulgated by The Union of Myanmar The State Law and Order Restoration Council and the State Peace and Development Council (1988-1999)
6. Law Journal Vol III January 2001 pl Central Workers' Welfare Committee Office of the Attorney General article titled Protection of Trademark Rights in Myanmar U Than Maung . \*Note we have not put sic after words that are not grammatically correct or spelt correctly in English, as they result from translation and there would be too many sics and it would detract from the importance of the quotes and appear too harsh.
7. International Crisis Group Report No. 28, 7<sup>th</sup> December 2001 titled The Military Regime's View of the World website <http://www.crisisweb.org>
8. Regulations for Internet Users as Broadcast on Myanmar TV in Yangon 20<sup>th</sup> January 2000.  
-Any writings detrimental to the interests of the Union of Myanmar are not to be posted;  
-Any writings directly or indirectly detrimental to the current policies and secret security affairs of the government of the Union of Myanmar are not to be posted;  
-Writings related to politics are not to be posted; and so on (offences of such are punishable with a gaol sentence ranging from 7 to 15 years gaol. licences are only to be issued by the Ministry of Communications, Post and Telegraph and failure to obtain a licence or sanction is punishable with a gaol sentence in the same terms as directly above.
9. Law Journal op cit
10. ibid
11. Andrew Huxley, The Last Fifty Years of Burmese Law E Maung and Maung Maung published in a Law Asia publication. Andrew Huxley is a Lecturer in the Laws of S.E. Asia at the Law Department, School of Oriental and Asian Studies University of London
12. See United Nations General Assembly A/c.3/57/L.48 \*0268990\* Fifty-seventh session Third Committee Agenda item 109 (c)
13. International Crisis Group op cit
14. The Nation, 5 October 1997 and Asiaweek, 9 June 2000

15. Julio Faundez op cit (Section 3)
  16. Commenting on the hierarchy of certain laws in Myanmar, Dr Tun Shin had this to say. He referred to them as Statutes from 1948 until 1962, until the present they are called Laws and are the same as Statutes or Acts, with Rules or Procedures that are made out of Laws, Statutes or Acts, and for detailed enforcement of Laws, Statutes, acts, Rules and Regulations are used. Next in the legal chain come notifications that are generally issued by respective Ministries, however the legislature in certain exceptional cases issues a notification that has the force of a Statute, Law or Act. It is presumed by legislature he means the SPDC, although it is not stated.
  17. Section 7. The duties of the Control Board are as follows:
    - (a) laying down the policies of control of money and property obtained by illegal means and taking legal action in accordance with the said policies, in co-ordination with the government departments and organizations concerned;
    - (b) supervising and directing in taking action under this Law;
    - (c) directing the Investigation Body to investigate and reveal information relating to converting, ...
    - (d) directing the Preliminary Scrutiny Body to scrutinize the report of findings submitted by the Investigation Body (e) (f) (g) (h)
- Section 8. authorises it to issue search and seize orders, a role normally that would have some legal involvement, such as police or duly authorized investigator, court ordered warrant and legal rights.
- Section 9. The Central Control Board shall:
- (a) form the Investigation Body comprising ...

So it will supervise, direct, form and scrutinise the work of the investigation body, again a confusing and blurring of roles. What role do the police or special branches play in this?

Section 16 authorises the “government to pass any suitable order for confirmation, revision or setting aside the said order or cause re-investigation to be made, upon appeal submitted by the aggrieved person...”

Section 17 goes on to say “the decision of the Government shall be final and conclusive.”

The Government than is both judge and jury and is exercising judicial power, but this is consistent with Declaration 1/88 when the Tatmadaw seized power assuming the responsibilities of the state organs, thereby taking control of executive, legislative and judicial power. It is to be read with Declaration 2/88 issued the same day dissolving the state organs. It is not unreasonable however that after 14 years at the helm the SPDC could reconsider this fusing of power in matters of law-making.

18. Maung Maung, Law and Custom in Burma and the Burmese Family pl Martinus Niihoff The Hague 1963 p 24
18. Daw Aung San Suu Kyi in Freedom From Fear edited by the late Dr Michael Aris Penguin Books London 1995 p 177
19. See Appendix 1 for the articulation of the rule of law principles from the minimalist approach to a broadened human rights approach

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## Appendix 1

### RULE OF LAW PRINCIPLES

Given the well documented recognition of massive human rights violations that take place in Burma under military rule, for this project we have chosen to subscribe to the broad view of the rule of law principles that includes human rights protections, but even on the minimalist rule of law view, so succinctly put by international eminent jurist Sir Ninian Stephen quoting Justice Barry of the Victorian Supreme Court, that:

1. the law should apply to government
2. the judiciary should be independent
3. the courts should be accessible; and that
4. the law should be “general in its application, equal in its operation and certain in its meaning”,<sup>i</sup>

The four principles reiterated by Sir Ninian in his address can be used to examine both current laws and prospective laws for the minimum requirements present to say whether or not the rule of law applies and for those who take the minimalist approach this can be applied. However it is desirable to apply a more complete template of the rule of law principles.

The template used here is that of another eminent jurist Mr Nicholas Cowdery QC DPP, President of the International Prosecutors. Drawing on Professor Geoffrey de Q Walker's seminal work on the rule of law,<sup>ii</sup> Prosecutor Cowdery and law student Mr Adrian Lipscomb in their work [see above pp 11-14] distill twelve requirements that need to be present to say that the rule of law prevails.

1. There must be laws prohibiting and protecting against private violence and coercion, general lawlessness and anarchy.
2. The government must be bound (as far as possible) by the same laws that bind individuals.

3. The law must possess characteristics of certainty, generality and equality. Certainty requires that the law be prospective, open, clear and relatively stable. Laws must be of general application to all subjects. The must apply equally to all.
4. The law must be and remain reasonably in accordance with informed public opinion and general social values and there must be some mechanism (formal and informal) for ensuring that.
5. There must be institutions and procedures that are capable of expeditiously enforcing the law.
6. There must be effective procedures and institutions to ensure that government action is also in accordance with the law.
7. There must be an independent judiciary, so that it may be relied upon to apply the law.
8. A system of legal representation is required, preferably by an organised and independent legal profession.
9. The principles of “natural justice” (or procedural fairness) must be observed in all hearings.
10. The courts must be accessible, without long delays and high costs.
11. Enforcement of the law must be impartial and honest.  
There must be an enlightened public opinion— a public spirit or attitude favouring the application of these propositions.

The requirements cited by the jurists are for lawyers easy to work with, but the most broad articulation, in lay terms, of the rule of law, and the most commonly desired, is the set of principles defined by the Conference on Security and Cooperation in Europe (CSCE) in the 1990s.<sup>iii</sup>

1. free and fair democratic elections;
2. a representative form of government in which the executive is accountable to the elected legislature or the electorate;
3. the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law;
4. a clear separation between the State and political parties;
5. military forces and the police will be under the control of, and accountable to, civil authorities;
6. human rights and fundamental freedoms will be guaranteed by law;
7. free access to the legislation adopted at the end of public procedure;
8. all persons are equal before the law and are entitled without any discrimination to the equal protection of the law;
9. everyone will have an effective means to redress against administrative decisions;
10. the independence of judges and the impartial operation of the

public judiciary service

11. protection of the independence of the legal profession;
12. clear definition of powers in relation to prosecution in criminal procedure;
13. any person arrested or detained on a criminal charge will have the right to be brought promptly before the judge or other officer authorized by law to decide the lawfulness of his (sic) arrest of detention;
14. the entitlement of everyone to a fair and public trial;
15. the right of everyone to defend himself (sic) in court in person or through prompt legal assistance, to be given free if he (sic) does not have sufficient means to pay for legal assistance;
16. no one will be charged with, tried for or convicted of any criminal offence unless the offense is provided for by law which defines the elements of the offense with clarity and precision;
17. everyone will be presumed innocent until proven guilty according to law;
18. the participating states reaffirm that their domestic legislation will comply with international laws in the field of human rights, including guarantees for the freedom of information and communication, travel, thought, conscience and religion, right of peaceful assembly and demonstration, association, private property, etc.

For lawyers who desire the rule of law and the protection and promotion of human rights, we shall endeavour to approach our work within the broad framework described above, but commend the minimalist approach as a good start for legal reform.

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- i See <http://www.rmit.edu.au/About/hot/TYPEV3/991106.html> 17.7.2000
  - ii The Rule of Law: Foundation of Constitutional Democracy published Melbourne University Press Melbourne 1988 p 5 cited in the Southern Cross University Special Issue Restoring the Rule of Law In Burma Volume 4 December 2000 published School of Law and Justice pp 1-16
  - iii See website <http://www.rol.org/htmlfiles/what.htm>

## Interview With Pado Man Shar

**(Pado Man Shar is the General Secretary of the Karen National Union (KNU). Following is a literal transcript of the interview he had given.**

**□ Question :** For restoration of peace and political reform, the core issue is Constitution. If not what?

**■ Answer :** For peaceful political reform, the first requirement is unity among all political forces. Different political parties have to come to an understanding first regarding the political transition. A guide line has to be placed first. To guarantee this, the political parties will have to agree to guideline and draw up a Constitution accordingly. Only then, the welfare of ethnics and people can be properly guaranteed.

Regarding guarantee, we will have to have an Agreement say like one as Panglong Accord. 1947 Constitution was drafted after guidelines were agreed upon by Bogyoke Aung San and others. Only after such an Accord, the guarantee in the Constitution can be incorporated. Otherwise the Constitution cannot guarantee our requirement [the welfare of ethnic groups].

**□ Do you mean that before we have a Constitution we must have an Agreement?**

**■** I think we cannot go for a Constitution direct before a prior Accord.

**□ When we have a Constitution, what do you think will be its core and suitable?**

**■** We consider a Constitution which provides democracy is a suitable Constitution for Burma. In the world situation of today, this is the best. We see that democracy and federalism can best promote the basic interests of ethnics and larger interest of the people. So we must have a Constitution of this kind.

□ **Do you then desire that 1947 Constitution should be utilized?**

■ If I have to say about Constitution, I mean a Federal Constitution with democracy but historically, 1947 Constitution is left behind. Its has its own shortcomings. I have no desire to go back to 1947 Constitution.

□ **If the 1947 Constitution had its weaknesses, can it be that they are removed and an amended Constitution is drawn up and implemented?**

■ It is better that we draw a new Constitution in line with present situation rather than amend and follow 1947 Constitution.

□ **In the 1947 Constitution, there was clause for secession. In the new Constitution do you want to have that clause?**

■ In a Federal Constitution if the right to self determination is guaranteed, I am not worried about this issue. Before it was in USSR Constitution, now it does not exist in any Constitution in the world.

□ **How will you evolve a new Constitution, what will be its process and final shape?**

■ It is necessary first that political parties and ethnic leaders have a consensus on democracy and federalism. On the consensus, a guideline has to be given in a National Convention with all ethnic nationalities to be convened. We have to form a drafting committee, all the differences have to be sorted out there. There may be for example boundary disputes. We may have to constitute enquiry commission. If we try, a draft Constitution will emerge. We have to call meeting of all ethnic nationalities and we have to take consent from them. Thereafter we have to adopt the procedure of referendum.

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At present the drafting of State Constitution is being gone into, there has to be self-determination for every State. But each will draw their own State Constitution. At that time they will have to go according to democracy and federalism. We cannot draw State Constitution which is incompatible with democracy and federalism. There are two parts in the process of drawing Constitution, State Constitution and Federal Constitution. When Federal Constitution is drawn, all the ethnic representatives have to be involved. This has to be in accordance with the federal guide line. While drawing State Constitution, there has to be also guideline. But when State Constitution is drawn only representatives of the States are to be participants. The matter related to division of power will be as follows. The federal guideline will stipulate what powers are to be given to the Centre, for example foreign affairs, Banking, Communication, Defense, the Centre will have some powers. The State will be given other powers. We have to keep relationship and links that is how I perceive drafting of

State Constitution. Both can't have same powers. Main thing is division of powers between the Federal and State Governments.

If we go for federation, we will have to be Union of States. The Burmans also will have one State. Some States will be big, some small. Burman State will be biggest. But then when big or small they are equal and that is what we mean by equality with other States. Before in Russia also, Russians were majority but there were smaller nationalities with equality of all nationalities. I think that way will be better. Re: Upper House and Lower House there must be two in federation. Similarly in the States there will be two or one. In some States, there may be other ethnics. Therefore in States there have to be parliaments. Thus there may be some differences from State to State.

**□ In Federal Constitution, how do you propose to have the Upper House?**

■ In Upper House each State will have representatives equal in numbers say ten each. After ascertaining the will of the people on population basis in accordance with the Constitution, the representatives of the Lower House will be elected. How powers will be divided between Upper House and Lower House will depend on the Constitution. We will have to find way to exercise check and balance.

**□ In Lower House Burmans will be more and in Upper House representatives will be equal. Burmans are two-third if you accept this principle, there may be problems. In 1947 Constitution, representation was not equal.**

■ If there are ten in Upper House for each State then this principle will apply.

**□ When Federal Government is formed how will it take place?**

■ When Federal Government is formed, we will try to keep the balance when we set up the States.

**□ Government is formed by Lower House and Burmans are majority. They will form the Government. How do you propose to meet this imbalance?**

■ In multiparty system, the winning party will form the Government. There is defeat and victory and respective party will have power accordingly. Important thing is the State. We have to guard that majority Burmans do not dominate or interfere in the States.

**□ You agree that Lower House will form the government. Will you**

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If we go for federation, we will have to be Union of States. The Burmans also will have one State. Some States will be big, some small. Burman State will be biggest. But then when big or small they are equal and that is what we mean by equality with other States.

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**then have a provision in the Constitution for protection of ethnics?**

■ A political party may win in the Lower House and nominate its candidates. But the approval must come from both the houses jointly. The government formed in the process will be more stable. The States must be formed on the basis of ethnicities. Regarding the principles, federation will come after the States have been formed. There will be 8 States. SLORC, SPDC have been telling there are 136 nationalities and there will be 136 States. They say that this will breakup the country into several pieces. For us that is not problem for example they say there are 4 or 5 kinds of Karens. For us all are Karens. In all States there are some other nationalities. We have to look at our specific situations.

For example there may be 10, 11 or 12 States. I see that ethnics will not be adversely affected if they go for Federal Union. We can protect our rights. If Burmans say that they will be affected then the answer is that they have self-determinations. In Karen State if there are 1 million and outside its State they are 4.5 million how to protect their interests. If the Constitution goes according to democracy and federalism the rights of all nationalities whether they are inside their own State or outside, so long as they are in the country where the Federal Constitution prevails, the rights are guaranteed.

It will be to the common benefit of the country if all nationalities help each other. Whether population is more or less is not the question. The Federal Constitution can guarantee this.

□ **There are several points for example the 1947 Constitution, National Convention Constitution, 1990 election where NLD won, how do you think best Constitution can be given to Burma?**

■ We think it is good to honor the election result. Whether 12 or 15 years have passed the best way is to convene the parliament. What Constitution will be there, I have already stated, federal and democracy Constitution. Whether you call the National Convention or otherwise, democracy and federation have to be the foundation.

□ **The ruling Junta has drafted a Constitution and has reserved 25% of seats for armed forces, what have you to say to that?**

■ Army also wants to be in Government. We have no reason to accept it. It is contrary to democracy. Army like other countries should not go for official posts, this all give them better image. They want to do politics. In practice they cannot do, they have held National Convention but they do not know how to proceed. So it is better that they are not in politics. They can exercise vote. Thereafter they have to give help to the Government according to the policy for national defense, national security as

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laid down by Government. It is now 50 years, they have not succeeded in politics. The country has suffered badly because of its interference in politics. The view of KNU is that army should not get involved in politics.

□ **Can there be transition without sharing power with Army?**

■ It is better that Army is not in Constitution drafting we have demanded a tripartite dialogue. Then, we may accept army in the interim government. But there has to be timeframe for example two or three years. Thereafter army should not involve in politics.

The NLD must be a constituent of interim government and head the government as it is the winner of 1990 election. If army heads the government, it should not be acceptable. If NLD forms the interim government ethnics have to be included. The army will be a constituent in the interim government under NLD. Best is to draft the Constitution under interim govt. In drafting committee army cannot be part of it. It can give advice. If after talks with SPDC and NLD, an interim government is formed it is not good. There has to be tripartite dialogue before interim government is formed.

□ **How do you see the deadlock of the dialogue?**

■ That is because of SPDC; the ethnics are ready for talks for peaceful solution of the problems.

□ **How to push the dialogue?**

■ Pressure has to be built up.

□ **How?**

■ Inside the country workers and peasants, students, monks, political parties have to put pressure on SPDC. The international community has also to give pressure. Pressure has to be political, economic, diplomatic. Without pressure SPDC will not do anything.

□ **There is no pressure inside. Whether dialogue therefore has stopped?**

■ There is no united international pressure. EU, US are giving pressure but not neighboring countries and Asean. Inside also same. No street demonstration after 1988. But there is non-co-operation. There is no co-operation with SPDC in politics, economic matters, cultural activities. There is great deal of non-co-operation because of which SPDC has become bankrupt.

□ **What is the best way to solve the root of civil war?**



■ The political problems have to be solved justly KNU has stated its stand. SPDC has to declare national cease-fire immediately. Thereafter immediate talks have to take place. The situation will then rapidly change.

□ **The present cease-fire has not given peace to the country?**

■ According to SPDC there are 14/15 cease-fire groups. But there has been no political talks and they have to do as it tells. That is why the political problems could not resolved and the civil war has not ceased.

□ **Whether legal reforms will be necessary after new government comes.**

■ After Constitution is promulgated, it is necessary to have rule of law and strong civil and criminal laws. Some laws need to be revised. Some new laws to be introduced. The repressive laws have to be withdrawn immediately otherwise there is no meaning in democratic transition.

□ **What is your view on the political situation?**

■ Political situation is not good. Also cultural and economic, education/health. If reform is not introduced, things cannot improve. The internal situation of SPDC is also not good. There is no sign for SPDC to reform. This is the best time to do. It is trying for legitimacy, for example, it exploited Razali, Daw Aung San Suu Kyi and NLD, release of prisoners, the Drug Eradication Programmes. It also signed the anti-terrorist activities. In reality they are terrorists. It also utilized the NGOs, when the complaint of licence to rape Shan girls was published. It is important to build internal pressure otherwise there will not be any change.

□ **SPDC has become accused therefore it will think it is better to hold on to power rather than become accused.**

■ We are not seizing power from SPDC. We are returning power to the people. It will continue its defense duties.

□ **Will not they be prosecuted?**

■ They may have anxiety. It will be for the people to decide this issue.

□ **Will you give blanket amnesty?**

■ In my opinion we may have to forget the past and do what is best in the present situation.

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seizing power from SPDC.  
We are returning power to  
the people. It will continue  
its defense duties.

*(The Interview was given to B.K. Sen and U Min Lwin Oo of Burma Lawyers' Council. Earlier interview with Shan leader Sao Seng Suk had been published in our journal No. 11)*

## Sri Lanka Peace talks: Comparative Reflections on Burma

For those interested in democratic transition in Burma whether as activists, analysts or policy makers, there is a great need now than ever before to reconsider the legal means to push its democratic transition. Gen. Khin Nyunt had said, "Such a transition cannot be done in a haphazard manner because the world is full of examples where a hasty transition has led to unrest and instability." What is the "haphazard" and what is the "hasty" which he had referred to? Forty years of junta's rule - is it hasty? Two years of confidence building talks, with UN Special Envoy as facilitator. Is it hasty? In 1990 in order to straighten things, the junta held General Election, was it half-hazard? Khin Nyunt's rhetoric is a cruel joke. Not haphazard/hasty process but betrayal by the junta to honour the election result has caused "instability" and it has put "unrest" on national agenda. Burma's transition may be reflected in the perspective of Sri Lanka, now focus of international attention. Since independence in 1948, the Buddhist Sinhalese majority dominated and discriminated against the Hindu Tamils. In 1983, the Hindu Tamils took up arms and have been waging war for 19 years, Asia's bloodiest civil war. It has left 65,000 dead and eight hundred thousand refugees. The central question is a separate state for ethnic Tamils that are to secede from Sri Lanka or allow high degree of autonomy. At long last Norway, acceptable to both, has brokered peace talks between the parties. The talks have made substantial progress and promises to provide role model in the process of negotiation for national reconciliation.

What are the differences and similarities in the situations of the two countries, Sri Lanka and Burma? There are fundamental differences although apparent similarities. First, in Burma the conflict is not ethnic per se. It is basically a political power struggle. The parties are differently placed. In Burma, the power is in the hands of military dictatorship,

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Gen. Khin Nyunt had said, "Such a transition cannot be done in a haphazard manner because the world is full of examples where a hasty transition has led to unrest and instability." Forty years of junta's rule - is it hasty? Two years of confidence building talks, with UN Special Envoy as facilitator. Is it hasty? In 1990 in order to straighten things, the junta held General Election, was it half-hazard? Khin Nyunt's rhetoric is a cruel joke.

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which overthrew the constitutional government. The military rulers compounded its legitimacy by holding General Election in 1990. The people gave a landslide victory to the opposition led by Daw Aung San Suu Kyi and her National League for Democracy. In the case of Sri Lanka, the opposition ethnic force unlike Burma is not in a position of legitimacy. The power that be in Sri Lanka is a duly elected government unlike Burma. The result is that the motivations of the two governments differ. In the case of Burma, the motivation and only concern is survival and in the case of Sri Lanka, the driving force is the constitutional mandate to end the civil war. Secondly, the difference is also in respect of the balance of forces between the parties. In case of Burma the ruling Junta is in a position of strength. The commitment of the opposition to non-violence is regarded by the junta as its strength. The success in getting cease-fire from 16-armed ethnic groups has made the generals swollen-headed. The momentum of the pro-democracy movement has also eroded. This is not to suggest that Burma's opposition can engage the junta by going back to armed struggle. This course had been experimented but has not yielded results. Opposition has to search for a new model. Thirdly, the ruling junta in Burma is die-hard power hungry elite. It has rebuffed global pressure time and again. The issue is not skill of Razali as a negotiator or his losing face internationally. The generals do not listen to anyone. International community has voiced its growing impatience.

If any lessons have to be taken from peace talks in Sri Lanka, it is that the party in power has to soften. The opposition's response in Burma for peace talks is based on its faith in Rule of Law. Basically, Rule of Law is a conflict resolution mechanism with malice to none. The generals must realize "The longer it delays to enter a substantive dialogue with Daw Aung San Suu Kyi, the harder it will become for the international community to provide a framework within which the process of national reconciliation can move naturally towards its logical conclusion" Secretary-General Kofi Annan.

## "Regime change" Burma and Iraq

"Regime Change" in Iraq as enunciated by US President George W. Bush has raised lot of debate and controversy. However it has provided an interesting case study in law specially in the context of Burma. US case was that Iraq regime was a threat to world peace arising out of Saddam Hussein's refusal to allow inspection of alleged nuclear/chemical installations.

UN charter has defined what constitutes threat to world peace. The right to take pre-emptive strike is authorized in such an event. Under pressure from international community. US agreed to place the matter before UN Security Council. After 8 weeks of wrangling over the language of the resolution relating to inspection, refusal/failure and the consequences unanimous decision was reached. World is awaiting anxiously as to how the matter evolves. Under intense international pressure which was overwhelming, Iraq has yielded to inspection without any term and condition within a time frame. The fate of Iraq hangs on the inspection report.

The issue of regime change in Burma has come into a focus as dialogue for peaceful transition has grounded. Many have raised questions. UN has failed in its mission in Burma and yet it does not take pro-active steps towards regime change in Burma. The situation of Iraq and Burma differ fundamentally. And yet, the regime in Burma has caused instability and regional threat. The regime is guilty of gross violation of human rights, torture, rape, forced labor. It has systematically displaced millions of ethnic minorities. The neighbouring country has problems of illegal migrant population. Human trafficking along with illegal trade in methamphetamine pills have caused social unrest. There are 70,00 child soldiers. Disease like HIV/AIDS has become rampant. There is real humanitarian crisis. They have posed serious problems and are crucial to the interests of a significant majority of world population.

The regime has also breached the covenant which states that the will of

the people shall determine the form of government of a country. 1990 election was a vote against the regime and a clear mandate for the winning party to form the government. Question arises how can this mandate be enforced on the regime? In the case of Iraq, the international law allows regime change by external intervention. In the case of Burma, international intervention in different form has to be innovated UN General Assembly has passed several resolutions indicting the regime. UN Assembly Resolution however is a means of codifying norms of intervention on humanitarian ground. This has been done in Bosnia, Kosovo, East Timor.

*“Atrocities within a sovereign state are a matter for international law because they upset neighboring states in a manner likely to disturb world peace” Article 55 of the charter*

*“A state’s respect for human rights was a pre-condition of international peace”*

*“Provided legal mechanism which could later be triggered to challenge the sovereign rights of state to oppress groups of their own people”*

Quote from “Crimes against Humanity” by Geoffrey Robertson.

“In recognizing the promotion and respect of human rights and fundamental freedoms as one of its principal objects, the charter marks a further step in the direction of elevating the principle of humanitarian intervention”

Addressing the issue in the context of Burma is important. Citizens are powerless to influence the policy of the ruling junta. None seems to be able to persuade, force or otherwise influence the government into changing its policy. The Secretary-General’s report to General Assembly dated 16<sup>th</sup> October 2002 on human rights situation in Myanmar is a robust indictment of the regime. But that will not result in regime change. Majority of world’s regimes are electoral democracies. Burma also needs such a regime. Only pro-active actions by the international community can be catalyst of change in regime in Burma. A different model is the need of the hour and a concerted action based on the model is the only way to restoration of rule of law in Burma .

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In the case of Iraq there is no internal pressure for change. On the contrary the regime has the support of the people. The regime has been characterized as evil. Whatever be the reasons the international community has swerved round the idea that a regime change is the only viable option to promote democracy and rule of law. Admittedly for Burma a regime

change has been widely accepted by the international community. Yet it cannot prove its effectiveness. For the larger cause of democracy and rule of law it is incumbent for it to find the way for an early end to the military rule in Burma.

## In Review

*Beijing Review in its Vol. 45 No. 36, September 5, 2002 carried a news item in its Forum column. It is published verbatim and acknowledgement is duly made of its source. This is interesting as China has opened up and is serious about emergence of rule of law. Hopefully the ruling junta in Burma may draw lesson.*

### **Last-Minute Salvation**

In April the execution of Dong Wei, a criminal sentenced to death in the Yan'an Prefecture, Shaanxi Province, was suspended at the last minute, and gained much attention.

Last year, Xi'an lawyer Zhu Zhanping became the defense attorney of Dong Wei, who was sentenced to death by the court of first instance for an alleged deliberate murder. After intensive investigation, Zhu presented as detailed report to the court, in which he pointed out some suspicious aspects in the case and insisted that his client should not be condemned to death, as he acted in self-defense. He went to court many times for any fresh information about the case, but on April 27, was told that the second trial upheld the original verdict of the death penalty.

Zhu immediately went to Beijing to appeal to the Supreme People's Court (SPC) on behalf of Dong. He submitted relevant material to the criminal court of the SPC in the morning of April 28. At 5 p.m. that day, Dong Wei's father called to tell him that Dong would be executed at 10:30 the next morning. On April 29, Zhu arrived at the SPC early in the morning. He met Li Wuqing, Vice President of the No.1 Criminal Court, and briefed him on the case and his appeal. After browsing through the appeal material, Li called the executive judge by mobile phone, requesting a suspension of execution. The case is still in progression.

Report of the case soon aroused wide concern. Some praised Zhu and the judges of the SPC; other think that they not only spared Dong Wei's life,

but also exposed defects with the country's litigation procedure, especially that of criminal lawsuits.

### **The Have Done A Good Job**

**Li Wei (a middle school teacher in Shaanxi Province):** Because of Zhu Zhanping and Li Wuqing, and their attitude toward the law and life, I have full confidence that a mature legal system soon be established in China.

After watching the news report of the case, I just couldn't hold back my tears. I was indeed moved by their actions and feel proud of them, not because they spared their lives but their sense of responsibility and loyalty to law. We still can't decide whether Dong is guilty or not, but I believe the final verdict will be fair and convincing. They make me believe China's legal system is getting better.

### **Grateful to Whom and for What?**

**Wei Wenbiao (staff reporter with *Jiangnan City Post*):** We have but one life and life is precious. Our lives should be entrusted to the law, not to the sense of responsibility of a lawyer or judge. In that case, we are gambling with our life as a bet. Judicial officials must have a strong sense of responsibility, but that is not countable. A sense of responsibility is not sufficient, though it is necessary to make a fair judgment. But, our legal system must be able to guarantee fair judgment.

Dong's case shows that we are still counting on a few responsible and upright lawyers and judges. In other words, it reflects the fact that those who are irresponsible are more in number, and there is also much room for improvement within our judicial system. This is a grave problem we cannot deny. There is still a long way to go for China to establish a perfect legal system and be ruled by law instead of by man.

### **Judicial Flaws Exposed**

**Chen Weidong (professor at the Law School of Renmin University of China):** Dong's case exposes several problems with our judicial system that legislatures should concentrate on for solutions.

To begin with, the second trial procedure, in fact, exists in name only. In China, the court of second instance is also the court of last instance. The defendant can appeal to a higher court if he pleads not guilty after the first trial, and his right to appeal must not be taken away by any excuse.



This regulation is aimed at reducing the possibility of a partial verdict and guaranteeing the fairness of the legal system. With this in mind, legislator, when amending the Criminal Procedure Law in 1996, regulated expressly that the court of second instance should hold hearings with a collegiate panel in an appeal case. But under special circumstances, it can be handled through interrogation without opening a court session. In actual practice, most local courts of second instance are wasted. They seldom hold hearings when handling an appeal, except in some special cases. Take Dong's case as an example, it's easy to see that the court of second instance held no hearings at all, and Dong's lawyer did not even know how the verdict was brought about. This case is about life and death, and they handled so carelessly. You can just imagine what they do with other appeals.

There is another common practice that makes the court of second instance redundant; the court of first instance always asks a higher court for instructions before a verdict. It means that the higher court agrees with the first trial, so the defendant could seldom win an appeal. This is really ridiculous.

Some cases involving the death sentences are never reviewed. The review procedure is a special procedure required in criminal lawsuits after the first and second trials. It is aimed at preventing the execution of the innocent, but local courts seldom do it. Even they do, the procedures are unsatisfying. The following facts will clearly show this.

Both the Criminal Procedure Law and the Criminal Law set forth that cases involving capital punishment must be reviewed by the SPC. This regulation is seldom fully and satisfactorily implemented. The higher court usually cancels the review when examining such cases. According to relevant laws, only an intermediate court or a higher court has the right to issue a death sentence. Once the defendant in such cases appeals, the SPC will conduct the second trial and therefore it combines the second trial with the review procedure. In fact, the review is neglected. Departments concerned should pay attention to this problem.

In addition, criminals under a death sentence are treated differently. The SPC grants the higher court the right to independently handle cases of murder, rape, robbery, explosion and other crimes that severely harm public security and social order, as well as some drug-related cases. But those involving embezzlement, bribery and swindling must be dealt with by the SPC. This means some criminals may have a better chance than others. This violates the equality principle.

It's a basic right of the defendant to ask for a lawyers' help, and this is especially important for those sentenced to death. In view of this, the current Criminal Procedure Law and the SPC's rules stipulate that the courts of both the first and second instances should designate defense lawyers for a criminal if he or she doesn't already have one. In Dong's lawsuit, the Higher People's Court of Shaanxi Province neither held hearings to let Zhu defend his client nor immediately informed Zhu of the verdict. The lawyer did not even know his client would be executed until very late. This case exposed a big flaw in the judicial system. If this practice continues, not only are defendants' rights harmed, but the credibility of the judicial system of our country will be also be greatly undermined.

The stay of execution in Dong's case was obviously not conducted in accordance with judicial procedures, which state that the lower court should execute the criminal within 7 days from receipt of the SPC's capital punishment order. But if the verdict is wrong, or if the criminal disclosed some important facts about a crime, or a woman criminal is pregnant, the execution should be stayed and immediately reported to the SPC for Further instruction. Is any person, a judge, for example, entitled to call for a stay of execution under emergency circumstances? Personally, I think much more study should be conducted about this matter before a reasonable solution is reached.

## Attorney General or Prosecutor General (Burma) ?

Law Journal Vol. 2 January 2000 Issue No. 1 published by the Office of the Attorney General's Office, Union of Myanmar.

The Law journal issued by the Attorney General's office, Myanmar is first of its kind. It says that it has been launched since January 1999 as a biyearly journal. Never before the Attorney General's office had published any Journal simply because the State publishes Burma Law Reports (BLR) once in a year. The tradition has been to keep a distance from the Executive. BLR contains the leading decided cases by the Supreme and it provides guide to the evolution of Law. However this Report has reduced itself as a propaganda tool of the ruling Junta and it cites cases selected under the scrutiny of the Home Ministry. The present Journal is toward the same object namely consolidation of its power base. The Journal is priced K 200 and 2000 copies are printed. The Editorial Board is composed of persons working in the office of the Attorney General. There is not a single Lawyer who is in legal practice. In fact the name Attorney General is a misnomer stolen from parliamentary lexicon. Its proper name should be the Prosecutor General.

The Journal is not independent. In fact the Rangoon lawyers used to publish their Law Journal even under military rule. But subsequent to 8.8.88 it had to be stopped as the Junta enforced the Press Act. There is no Ministry of Justice or Ministry of Law. In Burma the Attorney General is directly under the Home Ministry.

The objective of the Journal is to make the legal community aware of all the laws of the country, and also laws outside the country and the legal system. It has compiled all the Laws, Orders, Notifications, Rules since 1988. It has also published the Laws from 1955 to 1961 of the parliamen-

tary regime updated in the issue under review, the Burmese section ten articles and in the English section nine articles have been published. That appears to be fine. But when you look at the contents. The articles published to say the least are poor in quality and they defeat the objective proclaimed. In our later issue an in-depth analysis will be given. For want of space the review is confined to the article named "The role of the Attorney General's Office regarding legal rights of the Child in Myanmar" as this is more in line with the article "Anti - Human Trafficking Law in Burma" published in this journal. The article in Attorney General's office journal states that on 14 July 1933 the Child: Law was promulgated and became the law of the land. It totally suppresses the reservations and the Reports of CRC 1995 which the SPDC submitted to UNCRC. The article states that under S.3 of the Attorney General Law it files appeal or revision to the Supreme Court From 3-7-92 unto 30-6-99, a total of 1792 cases have already been adjudicated. The types of cases are murder, culpable homicide, rape, theft, hurt, prostitution, etc.. Nothing is revealed about the facts of the cases so that readers can understand the socio-economic causes of the crimes. It includes a period of 7 years and yet no analysis as mandated under the Child Convention was given. The trafficking of child, use of child soldiers and child forced labor, nothing appears in the article. Its bombastic claim "that active participation has been made for the ratification of an international convention, promulgation of the national law and future enhancement of child protection" can easily be proved false from the Report SPDC submitted to UNCRC in June 2002 All its failures it has euphemistically named as "constraints". It is really sad that the Office of Attorney General which has been entrusted with overseeing the noble duty of the welfare of the child, has abused the trust. The child issue, hundreds of them homeless, migrating to neighboring countries, victims of human trafficking, has become a grave national issue drawing international attention. And yet the Honorable Attorney General says everything is fine. Buddha smiles and the Journal gathers dust in the waste paper baskets of offices in Burma.

# AN APPEAL

## “ Legal Issues In Burma Journal”

Since its inception in 1994, the journal has become a forum for analysis and competing legal views on current situation in Burma. Its articles have been cited in some lively essays written by prominent authors. Focussing exclusively on rule of law and democracy in Burma, the journal monitors and analyses democratic regimes and movements in countries around the world, relevant to Burma’s democratic transition. Each issue features a blend of analysis on ethnicity, constitutional dilemmas, democratic transitions migrant workers, and civil society. Also various laws and its court decisions by which the ruling junta has entrenched itself in power. Contributions have included Burma experts, activists and commentators.

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#### **Why BLC needs your support?**

The Journal “Legal Issues” on Burma (ISSN 1513-9174) is a tri-yearly publication without subscription. It has relied for its budgetary expenses entirely on the magnanimous funding from Friedrich Naumann Stiftung (F.N.S.). Altogether 12 issues have been published, every issue with 500 copies Free distribution has been made to activists, nonprofit making organizations. Individuals, institutions, Embassies and academics. For future needs of the publication external support is essential. Democratic transition has thrown many challenges to all those who are committed to restoration of Rule of Law in Burma. It is necessary to broaden the spectrum of academics who have been in good grace contributing to our journal participation of professionals to improve its quality and out put are also necessary. The ruling junta has been bringing out two legal journals Bi-yearly under the office of the Supreme Court and the Attorney General respectively. Only recently a few copies have crossed the iron curtain and reached us. The materials and legal issues contained therein have to be confronted and exposed. This needs information collection, research and writing. Our journal hopefully can become the voice of good governance in Burma.

The journal encourages the reproduction of articles and other materials in its pages. It is the organ of BLC, a private non-profit making body of lawyers living in exile. Its main objective is to promote legal awareness in the democratic transition of Burma. The views expressed in the journal are those of its authors. This is an appeal for generous donation to the above fund.

Published in April, August and December for Buma Lawyer' Council

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