

# Federalism and the Protection of Minority Rights: Some lessons for a new democratic Burma

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One of the most urgent problems in the world today is to preserve diversities either where they are worth preserving for themselves or where they cannot be eradicated even if they are not desirable, and at the same time to introduce such a measure of unity as will prevent and facilitate co-operation. Federalism is one way of reconciling these two ends.

Few political concepts have enjoyed as much attention in the second half of this century as federalism. This concept has assumed particular significance since the collapse of communism, so much so that, in the opinion of one observer, "a federalist revolution [is] sweeping the world."

In its broadest terms, federalism can best be described as "an ideology which holds that the ideal organisation of human affairs is best reflected in the celebration of diversity through unity." It has been commended as the best method of power-sharing in a democracy. The federalist philosophy has particularly influenced the architects of deeply-divided, post-colonial societies as a means of containing ethnically-based centrifugal forces which are an inherent feature of such societies.

## The essential characteristics of federalism

There is a wide variety of federal systems to be found in the continuum between true confederations (in which the constituent regional units enjoy a high degree of autonomy and the central government is the delegate of, and subordinate to, such units) and classic unitary states (where there is only one level of truly autonomous government).

This has sometimes led to difficulties in classification: should a given political system be more accurately categorised as 'federal', 'quasi-federal' or 'unitary'?; a question which has not always been easy to answer. Even so, political scientists and constitutional theorists have, over the years, devised some rough and ready tests to apply. One such test, proffered by Preston King, suggested four essential features of federalism:

1. the predominantly territorial nature of its representation
2. the existence of at least two sub-national levels on which this territorial representation is normally secured;
3. the incorporation, by electoral or other means, of the constituent regional units into the decision-making procedure of the central (or 'national') government; and
4. a requirement that any alterations to the relations between the central government and the regional units can only be achieved through resort to extraordinary constitutional measures, and not by, say, a simple vote in the national legislature or a unilateral decision of the national executive.

It is generally assumed that most federal governments are liberal democracies, because the nature of federalism involves the politics of accommodation, however this view has been contested by some commentators. Graham Smith has argued, for example, that to consider non-democratic countries such as the former Soviet Union or Yugoslavia as not 'federations' would be unwise, not least because "multi-ethnic polities whose democratic federal credentials are suspect may be capable of moving on to experiment with more democratic forms." Generally speaking, however, it would be true to say that federalism requires a high degree of co-operation, compromise and mutual toleration on the part of its practitioners - attributes which are more likely to be found in democracies than in totalitarian regimes. One observer has gone so far as to characterise federalism as "the twin brother of pluralistic democracy."

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It is not surprising that federalism has been increasingly used as a means of conflict management in divided societies. As well as moderating the use of unbridled majoritarian power which can often result in the legitimate aspirations of minorities being denied, federalism is seen as a facilitator of greater administrative and economic efficiency through its capacity to encourage and optimise the use of local talent and creativity.

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However, there can be no denying that there is an underlying tension between the federal principle and the principle of majoritarianism which is the central tenet of democracy. Those who believe in the centrality of individual liberty have argued, for example, that federal systems have a tendency to lead to 'tyranny by a minority', especially in circumstances where partisan minority groups within multi-cultural societies are allowed to exercise a veto over policy initiatives which command a broad consensus in the nation as a whole, or where such groups are allowed to assert special rights to the detriment of the freedoms and liberties of others. The language policies of the Parti Québécois, a political party governing one of the ten provinces within Canada, is a case in point.

flict, for example, the concept fails where there is no clear-cut correspondence between sizeable concentrations of the main ethnic minority groups and the boundaries of the regional units created to give them autonomy. Witness the events that followed the collapse of communism in the former Soviet bloc or the recent disintegration of Yugoslavia. Related to this, in multi-national, poly-ethnic states, there is a problem of determining which minority cultures qualify for territorial recognition - a problem which is often made worse by the potential for cultural hegemony by 'historical communities' (who would qualify for special treatment) over other, smaller, minorities within a regional unit. This gives rise to secessionist pressures within those units and sets the scene for further fragmentation of the nation - a process which, if allowed to continue beyond a point, might defeat the very purpose for which the federation was created in the first place. Most people would argue, of course, that federalism does not encompass the right to secession, but this distinction is not always easy to maintain in practice.

For a federation to succeed, therefore, it is absolutely essential that the right balance be struck between accommodating the legitimate aspirations of minorities and securing the wider national interest - a task which, obviously, calls for deep reserves of diplomacy, sagacity, patience and tolerance on the part of the political actors involved. History is replete with examples of federations, created with much promise, which have fallen by the wayside for want of those qualities in their leaders. At the end of the day, any mechanism, however well-crafted, is only as good as the people who work it.

## Institutional requirements

That said, it would be foolish to ignore the need for, and use of, appropriate institutional safeguards to underpin the smooth working of any federation. The institutional requirements may vary from country to country, and the safeguards may have to be tailored to meet the demands of particular situations, but it is nevertheless possible to identify certain basic structures and mechanisms that are indispensable to almost any form of federal government. These include:

- (a) a freely elected national legislature - whose members are directly chosen by all the people living within the nation, normally on the basis of universal adult franchise;
- (b) a freely elected second legislative chamber in the national parliament - composed of representatives from the constituent units or regions, often with equal representation for each of those units (to avoid accusations of marginalisation from the smaller units), chosen by direct or indirect elections;
- (c) freely elected legislatures in each of the constituent units (provinces, regions, states) - broadly representative of the people within each unit;
- (d) a written constitutional document - which sets out, as exhaustively and as precisely as possible, the spheres of competence of the central and regional legislatures for law-making, and which specifies the procedure for amendment of the constitutional provisions (usually involving a special majority in the national legislature and concurrence of at least half the number of constituent units);
- (e) a legally enforceable and entrenched bill of rights - with adequate protec-

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- tion for the cultural, social and customary rights of ethnic, linguistic, religious or other clearly identifiable minority groups;
- (f) adequate judicial mechanisms - (eg. a federal Supreme Court or Constitutional Court), with binding powers of adjudication, to settle disputes that may arise over jurisdictional matters or concerning individual liberties; and
  - (g) clear, equitable and legally binding financial arrangements - for revenue-raising and revenue-sharing between central and provincial governments.

In addition, some countries have, over the years, experimented with a number of other safeguards to minimise the possibility of excessive friction between the Centre and the regional units. These include: a provision for regular consultations between the federal chief executive and the executive heads of the regional units on matters of mutual interests; precise and legally binding mechanisms for resolving any inconsistency in the laws made by the Centre and by the regional units on subjects falling within both their jurisdictions ; avoidance of broadly-worded provisions which allow the Centre to legislate on subjects reserved for the regional units under certain circumstances; imposition of strict limits on the use of emergency powers by both the Centre and the regional units, with particular care being taken to ensure that, even where a state of emergency is justified, it does not impact adversely on civil liberties more than is strictly necessary; and giving the regional units an effective role in the choice of constitutional functionaries such as the national President, the Chief Justice of the Supreme Court and provincial Governors.

As for the choice of particular models of government (namely, executive president v. prime ministerial or monarchical v. republican), this is usually determined by the country's history. However, nations occasionally decide to make a clean break with their past (eg. after a prolonged period of military dictatorship) and choose systems and processes which are radically different from any that went before. This, obviously, presents opportunities for creative thinking and for the adoption of legal and administrative models that are likely to be more responsive to the needs and aspirations of the people. Given the unfortunate recent history of Burma, it is hardly surprising that those in the vanguard of the ongoing campaign for the restoration of democracy there have indicated a preference for just such a fresh start.

Whatever model is ultimately chosen, those working to shape the destiny of a new democratic Burma would do well to remember that, any system for power-sharing between the majority Burman population and the ethnic minorities should not only be fair and meaningful, but should also take into account existing realities, however uncomfortable they may be. In the first place, there must be a genuine consensus on the part of all the leading players over power-sharing. Without this consent, any resultant federation is likely to collapse, sooner or later. This happened, for example, to the ill-fated Central African Federation in the 1950s. Building up the necessary consensus may not be an easy task - it is particularly difficult in poor, strife-ridden societies - but the task must be undertaken.

Secondly, the limits of power-sharing must be settled reasonably precisely in advance, so that no one is left in any doubt about the extent of their commitment to the emerging union. A particularly thorny question that is likely to arise in the context of Burma is whether those likely to enter into a future federation would also want to reserve the

a prominent part of constitutional discourse, needs to be clarified to a high degree of precision at the outset, to avoid recriminations later on.

Thirdly, the terms of membership of the federation need to be spelt out clearly to all potential member-states, so that they are able to judge for themselves the consequences of membership. This may doubtless lead to protracted - and possibly acrimonious - bargaining at the pre-union stage. However, it is far preferable to go through a painful bout of bargaining and negotiation earlier on than to face the prospect of stalemate or collapse even before the ink has dried on the federation documents, or worse still, to have to work the union with disgruntled partners.

Fourthly, those at the helm of the constitution-making process would do well to remember that, while there is a lot they can learn from the experience of other countries, both in Asia and further afield, any attempt to blindly replicate such experience in Burma without taking into account local realities would be foredoomed to failure. In particular, they must be very mindful of the risks of heeding the glib, off-the-peg advice that some of the more ideologically fanatic foreign 'experts', whose enthusiasm for politically-correct solutions usually far exceeds their knowledge of local cultures or conditions, are bound to offer. As often as not, the prescriptions of these experts result in the disease being made worse, not better.

## The proposals of Burma Lawyer's Council

It is heartening to see that the Burma Lawyers' Council has already begun thinking ahead in terms of devising appropriate constitutional structures for a new democratic Burma and is going about the task with a degree of thoroughness and open-mindedness which is truly commendable. The draft future Constitution, published under the auspices of the National Council of the Union of Burma, reflects these qualities in abundant measure. Its provisions on federalism are generally well thought out and sensible, although, as with any such document, there will inevitably be some need for fine-tuning as the process of consultation continues. In the opinion of this writer, the NCUB and the BLC might profit from revisiting the following ten areas of the document in the next stage of their consultative process:

- (1) Separation of powers: this eminently desirable principle has been properly recognised as an integral part of the federal structure, but some more thought needs to be given to ensuring that it works effectively in practice. For example, one might question the advisability of having a provision which requires legislative approval for the appointment of judges (Art. 97).
- (2) Composition of the federal union: the provisions creating National States, Nationality States and Member States, and National Autonomous Regions and Special National Territories within Member States (Art. 34) as well as the relationship between these entities need to be clarified further.
- (3) Languages: while it is quite sensible to allow the use of native languages within Member States (Art. 6), while designating Burmese and English as the official languages of the Union, there might perhaps be some merit in also specifying: (a) the languages to be used in the courts, especially the higher courts; and (b) the link language/s to be used for intercourse be-

tween the federal and Member State governments.

- (4) Convening of National Assembly sessions: it may be helpful to clarify how many of the representatives (out of the four from each Member State) need to sign a requisition for convening a special session of the National Assembly (Art. 51).
- (5) Initiation of legislative proposals: the provision requiring all Bills relating to natural resources to be introduced only in the National Assembly (Art. 67) may be unduly burdensome on that Assembly, especially given that, even if such Bills are allowed to be introduced elsewhere, they do have to be voted upon in the National Assembly before they are allowed to become law. Perhaps it may be advantageous to drop this restrictive requirement in the interests of legislative efficiency.
- (6) Foreign investment: the need for approval of foreign investment laws by both the central and regional legislatures (Art. 76) appears too onerous and an unfair impediment on the liberty of Member States to devise their own strategies to attract foreign investment. This provision needs reconsideration.
- (7) The executive: there appears to be little rationale for barring members of the National Assembly from becoming Ministers in the federal Government (Art. 88). It is not uncommon in most democracies for Ministers to be selected from either House, as this will only maximise the pool of talent available to the nation.
- (8) Appointment of Auditor-General: it would be desirable to introduce additional safeguards to ensure the independence of the Auditor-General (Art. 124) - and indeed other key functionaries such as Supreme Court judges - by putting this appointment in the hands of a committee which includes, for example, the Leader of the Opposition in the People's Assembly.
- (9) Federal Protection to Member States: The circumstances and the terms under which the provision for central protection for regional States may be invoked needs clarification to avoid abuse of this power.
- (10) Constitutional amendment: the provisions for amendment of the Constitution (Art. 149) appear to be insufficiently stringent, and there may be some merit in tightening them. In particular, where an amendment is likely to affect 'the rights of one of the regional units', it may be desirable for it to require the approval of at least half the number of regional legislatures as well as that of the central parliament. Also, it may be worthwhile introducing some safeguards to prevent constitutional amendments unjustifiably abridging the fundamental rights of citizens.

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Federalism offers the best hope of creating a more stable and harmonious polity, especially in societies such as Burma that are deeply divided along ethnic lines. The architects of a new democratic Burma would do well to embrace this concept - with all its promise and all its challenges - but they need to work very hard to ensure that any future Burmese federation lives up to the high expectations of the Burmese peoples.

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## Conclusions

Federalism is clearly one of the most useful methods of power-sharing and conflict management in modern societies. It has been used successfully in countries as far apart as Switzerland and Australia, Canada and India, to contain the tensions that are endemic in non-homogenous societies. But it is by no means a fail-safe panacea for all the ills of such societies, as the long list of short-lived federations has shown. Indeed, an over-reliance on the federal concept as a guarantee of peace and harmony can often bring a country to grief, as the 1860 crisis in the American experiment with federalism



starkly demonstrated. In the words of one perceptive observer, "the path of federation is no more likely to run smooth than the path of true love." Federalism requires a high degree of commitment, political will, tolerance, diplomacy and patience on the part of its practitioners.

Given all those qualities, however, federalism offers the best hope of creating a more stable and harmonious polity, especially in societies such as Burma that are deeply divided along ethnic lines. The architects of a new democratic Burma would do well to embrace this concept - with all its promise and all its challenges - but they need to work very hard to ensure that any future Burmese federation lives up to the high expectations of the Burmese peoples. Not only will the balance between unity and diversity have to be struck with a great deal of pragmatism, but every effort will have to be made to secure the widest possible consensus on the terms of the new federal settlement. More importantly still, no one should be left in any doubt as to the continuing price that every man, woman and child across the land would have to pay - in terms of patience, vigilance, tolerance and co-operation - to make federalism a success. To adapt a quotation from that great American jurist, Felix Frankfurter, "Federalism involves hardship - the hardship of the unceasing responsibility of every citizen."

# Federalism:

## The best option for national reconciliation and peace in Burma

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Dr. Thaung Htun,

*This presentation by Dr. Thaung Htun, Representative of the NCGUB for UN Affairs, was made at the Panel Discussion "Can Federalism Work in Burma?" at the 51st Annual Meeting of Association for Asian Studies, March 11-14, 1999, Boston, United States of America.*

Burma is a small country inhabited by diverse ethnic nationalities. Burmans are the majority. Other major ethnic groups include the Chin, Karen, Karenni, Kachin, Mon, Shan, Rakhine. Even among the major ethnic groups there are numerous subgroups. These diverse ethnic groups have their own languages, literatures and cultures, and are accustomed to autonomy. Though Burma is rich in natural resources, it has declined to the status of 'least developing country' and is increasingly an agricultural economy.

On the eve of the 21st century, we see that nations are becoming more interdependent and nobody can be isolated from the outside world. The trend toward globalization which promotes the free flow of capital and trade demands that nations expand political as well as economic cooperation in the form of regional blocs such as the European Union, the Organization of American States, the Organization of African Unity and the Association of Southeast Asian Nations. Cooperation and integration, not separation, have become the key to competitiveness in the world market. Geographically, Burma is at a strategic location between two rival regional powers, China and India. The need to have economic strength and protection from the influence of regional powers are our common interests and unity of all ethnic nationalities is the key issue we need to address for national survival. Burma, as a small nation state that is economically weak, is unable to afford either a secession or the separation of states at this historical point, although we may have to consider the right to secede and self-determination in our constitution. We must also keep in mind that it is in the interest of our neighbors to see Burma as politically stable, economically viable, and neutral in foreign policy.



Therefore, it is best to live in cohesion within the context of our specific differences. If we want to live together within a Union, we need to appreciate our similarities as well as diversities.

Federalism has made democracy more viable by providing a way for ethnic, religious, racial and linguistic communities to benefit from political and economic union while retaining considerable autonomy, self-government and communal identity.<sup>1</sup> Our history has proven that a unitary or quasi-federal system is inefficient in bringing about peace and prosperity. Genuine federalism is the best option to bring about national reconciliation and pave the way for rebuilding Burma as a modern nation.

The first Union of Burma that we see on the world map today was established based on the political agreement that came out of the Panglong Conference on the eve of independence from Britain. It should be noted that our predecessors rebuilt the Union not by force but by the voluntary participation of all ethnic nationalities. The Panglong Conference was the focal point in modern Burmese history, laying down the fundamental concrete structure for the future "Federal Democratic Union".

The Anti Fascist People's Freedom League (AFPFL) leaders considered the status of the ethnic minorities seriously in the process of rebuilding the nation and discussed this at different levels in order to appreciate the sentiments of the minorities.

In the preparatory AFPFL convention, General Aung San expressed the doctrine of self-determination and regional autonomy:

"Thus national equality in all forms, language, schools, is an essential element in the solution of the national problem. A State law based on complete democracy in the country required prohibiting all national privileges without exception of all kinds of disabilities and restrictions on the rights of national minorities."<sup>2</sup>

In relation to self-determination, the General stated:

"The right of self-determination means that a nation can arrange its life according to its own will. It has the right to arrange its own life on the basis of autonomy. It has the right to enter into federal relation with other nations. It has the right to complete secession."<sup>3</sup>

## Mistakes in the past

Unfortunately, General Aung San was assassinated before Burma gained independence and the AFPFL failed to comprehend the "Panglong" agreements appropriately. AFPFL leaders and ethnic leaders were inexperienced and, in their hurry to finalize the first Constitution, they overlooked its shortcomings.

The structural ambiguity in the formation of the central government and regional (or 'State') governments was one of the weaknesses of the 1947 constitution. According to it, the composition of the central government was quasi-federal in nature because it was

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merely the extension of the proper Burman government, so to speak, with State ministers who were Heads of State Councils. It was in contradiction with the principle that State ministers must not interfere in affairs of the central government. The same impact has been inflicted upon States. Though the State ministers were elected by State councils, the nation's Prime Minister had the authority to nominate Heads of States<sup>4</sup>. It created a problem when the State Council elected a person as Head of the State who was not agreeable to the Prime Minister. There were instances when the Prime Minister directly selected a State minister of his preference as the head of a State council. As a consequence, there was interference in the affairs of States by the nation's Prime Minister through the Head of State he selected.

Another weakness of the 1947 constitution is related to financial affairs. Federal finance is indeed the wealth of the whole Union, which also belong to all States. It is the constitutional right of the States to get reasonable allocation of grants from federal distribution pool. However, because of the structural weakness of the 1947 constitution, these financial distributions look more like a donation than a normal budget allocations in a federal union according to a constitution. In addition, ethnic leaders claimed that grants from central government were insufficient and inequitable.

Having two houses in parliament, the Chamber of Nationalities (Lumyosu Hluttaw) and Chamber of Deputies (Pyithuhluttaw), the composition of the Parliament is structurally correct. However, the Chamber of Nationalities was composed of 62 representatives from Burma proper and 63 representatives from the other five states, totaling 125 representatives<sup>5</sup>. This means that five states were equal to Burma proper in terms of political status. Actually, the essence of the Chamber of Nationalities should be to make checks and balances with the House of Representatives dominated by the ethnic majority. The domination of Burman representatives in both houses damaged the checks and balances between the two houses as well as between the ethnic majority and minorities. It is in contradiction with the essence of federalism.

Discontents of ethnic leaders with this situation led to the movement for constitutional reform around 1958. The AFPFL government led by Prime Minister U Nu asked ethnic leaders to put up a proposal for constitutional reform. The Shan State Government hosted a conference of non-Burman ethnic nationalities in Taunggyi and the proposal for federal principle was adopted. The proposal had three main features<sup>6</sup>.

- (1) Burma proper would be turned into a constituent state of the Union, bringing it into parity with all other existing states.
- (2) The two chambers of parliament, namely, the House of Nationalities and the House of Deputies, would be invested with equal powers.
- (3) All constituent states of the Union, regardless of size and population, would have equal representation in the House of Nationalities.

After Taunggyi Conference, Prime Minister U Nu hosted a conference on constitutional reform on 1 March 1962 to discuss the Federal Principle. Rumors had been spread around that there would be a rebellion of all ethnic groups and Shan and Kayah States would secede from the Union in accordance with Chapter 10 of the constitution if the Federal Principle was not accepted by the parliament. It seems to me that a solution for constitutional amendments could have been reached between AFPFL leaders and

March 1962, reasoning that it had to protect the union from disintegration. The hope for federal union had been shattered and the fledging democracy of independent Burma, which was not yet well rooted, had been ended. A remark made by U Nu is a valuable reflection with regard to the factionalism of Burman politicians that finally was exploited by the military. He said, "In his career as Prime Minister, U Nu had often been taken advantage of. But offenders were always Burman, never the minority races."<sup>7</sup>

## Prospects for national reconciliation

After the 1988 democracy movement was crushed by the military regime, thousands of students and intellectuals fled to the border areas and took refuge in liberated areas of the Kachin, Karen, Karenni, Mon and PaO. That incident is a very significant political development in Burmese history. It can be said that it is the merging of the urban democracy movement and ethnic resistance movement in frontier areas for the first time in Burmese history. After the 1990 general elections, dozens of elected parliamentarians joined with democratic and ethnic forces in liberated areas and the provisional government called the National Coalition Government of the Union of Burma (NCGUB) was formed in Marnaplaw in December, 1990. In the face of hard struggles against the regime, severe military offensives launched by the regime, suffering from malaria, a shortage of medicine and food, we jointly protected ourselves and shared whatever we had with each other. These bitter life experiences strengthened the mutual understanding and belief in the possibility of peaceful co-existence. I would like to say that these political, cultural and human interactions are grounds for the evolution of the national reconciliation process in a practical field.

The Democratic Alliance of Burma (DAB), the umbrella of the entire border based democratic and ethnic forces started the process of drafting the basic law in 1990, collecting suggestions of the people and different democratic and ethnic organizations. The draft constitution proposed by the DAB was analyzed by the Constitutional Seminar in Marnaplaw in October 1994 and provided eight frameworks<sup>8</sup> for further drafting. Subsequently, a series of seminars were held and international constitutional experts were asked for suggestions. The draft constitution was approved by the fourth Conference of the National Council of Union of Burma (NCUB) in May 1996. In my view, this draft basically reflects the fundamental principles of a federal arrangement. I see the constitution drafting process, first initiated by the DAB and later, the NCUB, as a consensus building process amongst diverse ethnic nationalities. Though it may not be perfect, it is an open-ended process based on which we can continue to work.

With regard to the national reconciliation process, the NCGUB expressed its view that:

"In 1947, the Burman, Shan, Kachin and Chin people as equal partners, voluntarily signed the Panglong Agreement. This formed the basic for the 1947 Constitution and the Union of Burma which gained independence from Britain in 1948. The 1996 Federal Constitution adopted by the National Council of the Union of Burma is the model envisioned by the NCGUB. However, the peoples of Burma must decide their own future - Independence or a federal partnership with

other states."<sup>9</sup>

Apart from the proposed federal constitution of the NCUB, the National League for Democracy (NLD) and United Nationalities League for Democracy (Umbrella Organization of the 25 non-Burman ethnic nationalities organizations inside Burma) have expressed their view on the question of democratic rights and equality for the nationalities. Though there are some differences of opinion on some matters, it was found that the aspiration for national unity has been well reflected and basic principles of federal union have been agreed upon. The NLD made an appeal that, "In looking forward to national reconciliation, parties concerned should not hold on subjectively to their dogmatic views. Everyone should seek the truth by taking lessons from the weaknesses and shortcomings evolved from sincere endeavours in the interests of all"<sup>10</sup>. I hope that a just solution for equal rights and self-determination of for the nationalities and self-administrative rights for minority groups living in area of a majority groups could be found in the future National Consultative Convention envisaged by the NLD.

## Fiscal arrangements in Federal Union

As I said before, fiscal arrangements was one of the weaknesses of the 1947 Constitution and we need to make sure that future federal constitution has a guarantee for financial autonomy of States and even development of States within the union. Burma's economy has already been ruined by the mismanagement of the military regime. The country, which was once known as the rice bowl of Southeast Asia, has reached a 'Least Developing Country' status with the Human Development index of 131 out of 171, as monitored by the United Nations Development Program (UNDP). Poverty and environmental degradation can be seen everywhere, in urban areas, in ethnic minority areas and in war zones. About one third of the rural population live in what can only be described as absolute poverty with no productive assets of their own. For the urban poor, standard of living have been drastically reduced by inflation and forced relocation to the outskirts of the city. Many work in the informal sector for low wages with no job security.

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The problem of poverty in ethnic minority areas was compounded when the military regime engaged in massive forced relocation, forced labor, extortion of money, looting of properties and burning of villages and crops in the course of counter insurgency operations. This is better known in Burma as the 'four cuts strategy'.

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The problem in the hill areas of frontier states seems intractable. These regions have suffered from long periods of neglect and isolation by successive governments. They have been economically insignificant. Communication and transport with the outside world has been difficult due to natural barriers and sheer distance. The problem of poverty in ethnic minority areas was compounded when the military regime engaged in massive forced relocation, forced labor, extortion of money, looting of properties and burning of villages and crops in the course of counter insurgency operations. This is better known in Burma as the 'four cuts strategy'. Millions of villagers have been driven out from their homelands, which were later declared by the army as free fire zones. People have to leave their lands and assets and either move to new relocation sites where there are no means of livelihood and access to medical care or hide in jungles without having enough food, medical care or security. Thousands could manage to escape from military columns on their way to the border and ended up in refugee camps in neighboring countries. Traditional subsistence in an agrarian village economy has already been destroyed in many parts of ethnic minorities' areas.

The concluding remarks of Dr David Dapice in his report to the UNDP, are unmistakable warning signs with regard to Burma's future:

"If the combination of growing population, a diminishing resource base, and poor policies which aggravate existing problems continue, it is likely that some threshold will be passed in the next decade or so. Having passed this point, recovery will be difficult and increasingly expensive."<sup>11</sup>

When we think about the revitalization of Burma's economy, we have reached the conclusion that the rapid growth of the economy can only be achieved by allowing the market system to function freely, much more freely than it was allowed to in the past. However, we see at the same time that some degree of income inequality is unavoidable if a market system is to function freely. The possibility of unequal development of States can be foreseen at the beginning stages of introduction of any market economy. It is obvious that central Burma or a Burman State which has relatively better means of communication and transport and human resources than non-Burman States, would have the better opportunity to grab the benefit of a market economy.

In a political sense this can easily give rise to a feeling of injustice on the part of States which lag behind in the national development process. Here, a delicate policy question has arrived in the consideration of economic policy. Should policy, in the pursuit of national growth, give greater assistance to the more economically viable units, trusting that their prosperity will spill over to the rest? Or should policy be directed first to the poor elements, following a policy of "even development" and inter-local income equalization?<sup>12</sup> A 'least developed country' like Burma that has an urgent need for rapid growth of national income is unlikely to spend much on economically non-viable areas. There is no easy solution to this dilemma, and a combination of appropriate policies will be required.

Apart from a general system of grants, we have to formulate other devices. For instance: (1) tax base sharing (competitive exploitation); (2) revenue sharing (a defined percentage of certain national revenues is transferred to the States); (3) bypassing the constitutional allocation of taxes by (effectively) using public utility charges as taxes; and (4) transferring administrative responsibility for a service from lower-level governments to the center (taken over by the national government).<sup>13</sup>

When we look at the NCUB proposed federal constitution of Burma, we find a careful crafting to ensure a balance of fiscal arrangements. The legislative power of the People's Assembly (House of representatives) to introduce budget bills and revenue bills is balanced with the power of National Assembly (Senate) to introduce bills relating to natural resources<sup>14</sup>. As the national government has to perform its duties of foreign relation and defense, it is entrusted with the power to control taxes, which impinge on the Federal Union's international position, especially custom duties and import/export taxation. The intention to practice tax-base-sharing between central and state governments can be seen in article 74 in which the legislative powers related to purchase and sales tax, business enterprise tax, income tax, exploration, exploitation and sale of natural resources within a State and investment by foreign governments and companies within a member state are put in the realm of concurrent legislative powers.

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Though there are some differences of opinion on some matters, it was found that the aspiration for national unity has been well reflected and basic principles of federal union have been agreed upon.

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Under a free market system, incomes will differ according to levels of education, training and special skills. Differences in educational qualification are a major source of income inequality. Therefore, the education system should be expanded to all people particularly the poor. Even if the government carries out the reforms with good intentions, the impact of stabilization and adjustment programs can be severe for the poor in the short run.

The central government should focus on the special problems of areas that have limited agricultural potential and fragile ecosystems, especially those situated in the remote border regions where the problems are aggravated by poor infrastructure. Quick-impact projects should be formulated for immediate income generation and sustainable farming. A many-pronged attack is needed to open up opportunities for rural industries, to raise the level of education and to implant financial and technical aid. In order to eradicate the opium-bondage economy in some border areas, effective cooperation with international aid agencies has to be made in crop substitution schemes and border area development programs. The role of non-governmental organizations in these efforts should be recognized in the rehabilitation of border areas.<sup>15</sup>

It is unlikely that States will be able to afford to conduct measures for poverty alleviation solely with revenues collected within their own States. The NCUB proposed federal constitution provides that "When a member state, although carrying out its financial matters properly, arrives at a situation where it cannot carry out its function due to a lack of finances for some reason or where it will reach a situation where it will not be able to carry out its functions, the Government of the Federal Union shall have the responsibility to resolve such situations by either permitting the appropriate use of federal finances, or by arranging proportional assistance from other states"<sup>16</sup>.

Formulation of a financial equalization program is indeed essential. But it is a complex one, which will need creative adjustment. The Indian method of correcting fiscal imbalances also relies on a Grants (Finance) Commission to make recommendations to the Union Government both as to: (1) the total that should be transferred (in the form of percentages of central revenues from defined taxes); and (2) its distribution between the States. The recommendations hold for five years until a totally new Commission is appointed. But the principle for allocation heavily depends on relative population and this doesn't provide redistribution in favour of poor States<sup>17</sup>. The Canadian formula seems to be more realistic. First, the amount of revenue that each province could raise is calculated. Based on this data, average standard for per-capita revenue among states is set. If the revenue raising ability of a province is far short of this standard, its per capita revenues are raised through equalization payments<sup>18</sup>.

## Can Federalism work in Burma?

The narrow-mindedness and power struggles of Burma's political leaders before the coup are facts. The abuses committed by the Burmese army, applying their military capability upon our ethnic brothers, are also realities. The army operates more on a mercenary basis than for the promotion of broad national interests. But there are good leaders on both sides, with whom we have to build up our new Federal Union. We have to be awakened from these past mistakes and to have an open dialogue to appreci-



ate our differences and to concede autonomous states inside the Democratic Federation.

As Ursula K. Hicks, the author of "Federalism; Failure and Success" said, "The path of federation is no more likely to run smooth than the path of true love". We will need a lot of understanding, culture of non-violence, tolerance, flexibility, political will to compromise and readiness to make adjustment to cope with the unforeseen challenges in order to achieve success in our experiment of federalism in the future.

## Notes

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1. John Kincaid, *The Relevance of the Federal Idea in the Contemporary World*, presentation made to the Salzburg Seminar, "Perspectives on federalism", May 22-28, 1993, Salzburg, Austria.
2. Ba Maw: *Breakthrough in Burma: Memoirs of a Revolution, 1939-1946*; New Haven, Yale University Press, 1968, p 534
3. *Ibid.*, p 342
4. Constitution of the Union of Burma (1947) section 160: A member of the Union Government to be known as the minister for the Shan State shall be appointed by the President on the nomination of the Prime Minister acting in consultation with the Shan State Council from among the members of the parliament representing the Shan State. The Minister so appointed shall also be the Head of the Shan State for the purpose of this constitution.
5. Constitution of the Union of Burma (1947) section 87, Second Schedule
6. U Nu, *Saturday's Son*, Bharatiya Vidya Bhavan Press, Bombay, 1976, p 340
7. *Ibid.*, p 340
8. The frameworks for further drafting were:
  - (1) the derivation of sovereignty of the State from the people;
  - (2) the institution of Burma as a Federal Union on the basis of the intents of: the Panglong agreement reached between General Aung San and the ethnic nationalities who have been struggling for over 40 years, Bo Aung Gyaw Street declaration, agreement reached between the National League for Democracy and Union Nationalities League for Democracy (UNLD), the Marnaplaw Agreement, and the historical development of co-inhabitation of various ethnic nationalities;
  - (3) the national equality and right of self-determination of all the ethnic nationalities, with firm guarantees;



- (4) institutionalization of the multi-party democratic system and human rights;
  - (5) the proper division of power between the central and state governments;
  - (6) the system of bi-cameral legislature in which there is a National Assembly composed of representatives from the States, and the people's assembly consisting of representatives of the people;
  - (7) the system in which the legislative, executive and judicial power are exercised separately; and
  - (8) the subordination of the armed forces to the civilian control, and treatment of it only as one of the departments in the service of the State, with no right whatsoever to interfere in politics.
9. Position paper of the NCGUB on National Reconciliation, 23 July 1998.
  10. The position of the NLD regarding the Nationalities of Burma, 12 February 1996.
  11. "Prospects for Sustainable Growth in Myanmar/Burma; Tension between environmental decline and economic progress", by Dr David Dapice, 12 September 1995.
  12. Ursula K Hicks, *Federalism: Failure and Success; A Comparative Study*, p 181.
  13. *Ibid.*, p 182.
  14. Article 67, (b) and (c).
  15. Economic Development of Burma: A vision and a strategy; A Study by Burmese Economists by Research Group for the Economic Development of Burma, November 1988
  16. Article 123
  17. *Federalism: Failure and Success, A Comparative Study* (see fn 12, above) p 185.
  18. Federal Equalization Program, Finance Canada, February 1998.

# Religious Freedom in Burma:

A divisive and suppressive practice of the military regime

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**Khin Maung Win**

## Introduction

Burma<sup>1</sup>, which gained its independence from Britain on 4 January 1948, has a population of 45 million people with a high degree of ethnic diversity. While at least 50 percent of the total population is ethnic Burman, the remainder belongs to dozens of ethnic groups.<sup>2</sup> While more than 85 percent of the population, mainly Burmans, practice Buddhism, the rest of the population practice other religions, such as Islam, Christianity, Hinduism, and Animism.<sup>3</sup>

Following the country's first military coup, which overthrew a democratically elected government in 1962, there have been three periods of military rule in Burma. The first was from 1962 to 1974, the second from 1974 to 1988 and the third from 1988 to the present<sup>4</sup>. The present military regime, the third phase of military rule, is known as the State Peace and Development Council (SPDC). It came to power in September 1988 under the name the State Law and Order Restoration Council (SLORC). So in the 51 years since Burma's independence, the Burmese people have enjoyed freedom under a democratic government for only 14 years, from 1948 to 1962. Military rule since 1962 has regularly threatened religious and other freedoms. Any study of religious practices in Burma must focus to a large extent on the situation under the military rule.

The present military regime, SLORC/SPDC, rules the country without a constitution. Martial law and decrees issued by the military regime are put forward as the basis for law. According to Khin Nyunt, a prominent general in the present military regime, martial law means no law at all.<sup>5</sup> This statement by a leading member of the junta serves to confirm that all freedoms in Burma, including religious freedom, are subject to the military rule.

This article primarily focuses on the practices of division between Buddhists and non-

Buddhists and suppression of non-Buddhist religions by the military regime. This suppression appears to be an attempt to utilize religious issues for political advantage. The article also includes some background to Burma's religious situation before the military seized power.

## Religious freedom before 1962

During the period of parliamentary democratic rule, from 1948 to 1962, Burma enjoyed the most democratic system of government in the region. The right to religious freedom was not questioned, nor were religious issues abused for political purposes.<sup>6</sup>

During debate over the 1947 constitution<sup>7</sup>, Burma's first post-independence constitution, some Buddhist monks pressured the leaders of the independence movement to include in the constitution provisions recognizing Buddhism as the state religion. These demands were, however, rejected. Several members of the British government urged the Burmese independence leaders to study the experience of Ireland, where multiple religions are recognized and respected, despite the fact that Catholicism is practiced by the majority of the people. Ultimately the 1947 constitution included the following article:

"Article 21

- (1) The State recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union.
- (2) The state also recognizes Islam, Christianity, Hinduism, and Animism as some of the religions existing in the Union at the date of coming into operation of this constitution.
- (3) The state shall not impose any disabilities or make any discrimination on the ground of religious faith or belief.
- (4) The abuse of religion for political purpose is forbidden; and any act which is intended or is likely to promote feelings of hatred, enmity or discord between racial or religious communities or sects is contrary to this constitution and may be made punishable by law."

Despite continual pressure from Buddhist monks to promote the status of Buddhism, U Nu, the first Prime Minister of the independent Burma, and a Buddhist himself, managed to maintain Burma's official status as a secular state. He allocated a budget for all religions existing in the country, to allow them to be promoted. In this way, all religions were respected and promoted equally. The government arranged visits of Burmese Christian leaders to the Vatican and Burmese Muslim leaders to Saudi Arabia. The government not only encouraged the translation of Buddha's *Tripitaka*<sup>8</sup> from *Pali*<sup>9</sup> into Burmese, but also the translation of the Koran from Arabic into Burmese. The Bible had been translated into Burmese in earlier days.

While many Buddhists teachers taught Buddhism in the schools, other religions were also given the same opportunities. However, some Buddhist monks protested against the teaching of the Bible and Koran in schools. The government made it known publicly that if other religions were not allowed to be taught, the teaching of Buddhism

would also not be allowed.<sup>10</sup>

Nevertheless, a separate law was passed by the parliament in October 1961 that established Buddhism as the state religion. When this Bill was introduced in parliament, protests against it took place in some parts of the country. Leaders of other religions met U Nu and discussed the Bill. In his autobiography, U Nu wrote that as no limitations were placed on other religions, the Bill establishing Buddhism as the state religion was adopted by the parliament.<sup>11</sup> Some Buddhists argued that, although Buddhism was declared to be the state religion, other religions were not threatened, as their existence was guaranteed in Article 21 of the constitution<sup>12</sup> under which no person was allowed to utilize religious issues for the purpose of politics. They argued that the adoption of Buddhism as the state religion was not contrary to the 1947 constitution. The government continued its support for other religions, as it had before Buddhism was established as the state religion.

At the same time, leaders of other religions demanded the amendment of Article 20 of the 1947 constitution<sup>13</sup>, by adding freedom of expression to it in terms of religious practices. When the amendment was made, religious leaders who had previously protested expressed their appreciation of the amendment and the efforts of Prime Minister U Nu.<sup>14</sup>

In general, despite attempts to entrench the dominant role of Buddhism within Burmese society, misuse of religion for political purposes was avoided during this period. Religious freedom prior to 1962 was not threatened. Furthermore, no division of the Burmese people was made along religious lines. The most notable aspect of religious freedom before 1962 is that repression against non-Buddhist religions did not occur, despite the fact that Buddhism was promoted as the state religion.

## Religious freedom in the aftermath of 1962: Buddhism as state ideology

The first phase of military rule in 1962 began with the abolition of the 1947 constitution, thus threatening Burma's religious freedom. In 1965 and 1966, the government sharply limited the religious freedom of Christians, especially missionaries.<sup>15</sup>

Such restrictions against non-Buddhist religions coincided with the political ideology adopted by the military regime. This was a state ideology known as Burmese Socialism, or "The Burmese Way to Socialism", developed in the aftermath of the 1962 military coup to fill an ideological vacuum. In fact, Burmese Socialism was, as Professor Josef Silverstein has pointed out, a combination of Marxism and Buddhism. A major portion of Burmese Socialist ideology was adapted from Buddhism and made specific reference to Buddhism but not to other religions.<sup>16</sup>

A totalitarian constitution was promulgated in 1974 which declared that the Burma Socialist Programme Party (BSPP) was the sole political party in Burma, responsible for governing the country.<sup>17</sup> The 1974 constitution included several provisions relating to religious freedom. However, the realization of religious freedom, like other freedoms, was subject to limitations and even punishable if the State considered that it was not in

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line with the "socialist social order", a pre-condition for the exercise of any freedoms. Under these circumstances, religious freedom was not respected, as claimed in the constitution. Article 153 of the 1974 constitution, for example, illustrates how religious freedom, along with other freedoms, are subject to the socialist order, as defined by the State.

"Article 153

- (a) ...
- (b) Every citizen shall have the right to freely use his language and literature, follow his customs, culture and traditions and profess the religion of his choice. The exercise of this right shall not, however, be to the detriment of national solidarity and the socialist social order, which are the basic requirements of the entire Union. Any particular action in this respect which adversely affects the interest of one or several other national races shall be taken only after consulting with and obtaining the consent of those affected.
- (c) Notwithstanding the rights enjoyed under clauses (a) and (b), acts which undermine the unity and solidarity of the national races, national security or the socialist social order are prohibited. Persons who violate this provision shall be punished according to law."

Throughout the period of the 1974 constitution, under the totalitarian government in power until 1988, the Burmese Way to Socialism was taught in all training courses organized by the government. Furthermore, the Burmese Way to Socialism was compulsory study for many university studies.

Implementation of the Burmese Way to Socialism in Burmese society, where many other religions also exist, was blatant exploitation by the regime of Buddhism for political purposes. This introduction of Buddhism into Burmese politics heralded the divisions between Buddhism and other religions in Burma.

## Buddhism as Burmese nationalism

Since the great majority of Burmese people are Buddhists, Buddhism is the most suitable tool for Burmese generals who wish to build up nationalism based on religion. Consequently nationalism, as promoted by the present military regime, is strongly linked with Buddhism. Many booklets and leaflets in the country believed to be published by the junta urge Buddhist Burmese to promote Burmese nationalism based on Buddhism.

For example, a booklet entitled "Be aware of losing national identity",<sup>18</sup> strongly denounces Islam and Muslims, in an attempt to promote Burmese nationalism. The aim of the publication, as the booklet states, is to awaken Burmese nationalism. All articles appearing in the 100-page booklet are anti-Islam. Stories about how Muslim men exploit and sexually abuse young Burmese young women are powerfully presented. There are many other similar publications demanding Buddhist Burmese to unite and to resist the influence of Islam. The objective of such material appears to be to en-

dorse Burmese nationalism based on Buddhism.

At the same time, the generals of the ruling junta are systematically issuing propaganda claiming that they uphold Buddhism and the interests of Buddhists. A saying among Burmese clearly explains how the military regime has been squandering Buddhism for political purposes: "Burmese television has only two colors - green and yellow". The green refers to the generals, who wear green uniforms, whereas the yellow refers to Buddhist monks in yellow robes. Most of the reports on Burmese television, which is completely controlled by the military regime, are about Buddhist religious ceremonies organized by the ruling generals. Observers believe that such propaganda may convince some Buddhists that the military regime is representing their interests. Ceremonies for other religions are very rarely presented in the state media.

Concurrently, soldiers from the Burmese army, who are mostly ethnic Burmans, are, by internal army orders, asked to marry non-Burman and non-Buddhist ethnic women. These practices have occurred widely since 1996, mostly in Chin State, where the majority of the population are Christian ethnic Chin. When a non-Burman and non-Buddhist ethnic woman marries a soldier, she must convert to Buddhism, a condition set by each army commander. Soldiers who marry non-Buddhist and non-Burman ethnic women are also honored by their commanders.<sup>19</sup>

### **Harassment of Buddhist monks**

Even though the military regime uses Buddhism as a tool in its control, it does not hesitate to suppress Buddhist monks who participate in demonstrations against it. Buddhist monks have played an important role in all political change in Burma since British colonial rule. Nowadays, the monks are among the most active of Burma's people in the struggle for the restoration of democracy and human rights. Accordingly they are under close scrutiny by military intelligence personnel and their agents.

There are several methods that the military regime uses to watch or monitor the activities of Buddhist monks. Controlling activities of the monks through *Sangha* (monks) organizations is the most common method. The military regime formed *Sangha* organizations at various administrative levels, such as the villages, townships, districts and State/Division levels. All monks are required to obey the orders of the *Sangha* organization, whether they belong to the organization or not.

The military regime issued an order in mid-July 1999, instructing all its subordinate authorities to approach Buddhist monks and monitor their activities. One of the orders was that the government authorities should use all means to influence Buddhist monks so that the monks will side with the government when anti-government demonstrations take place.<sup>20</sup>

There have been reports that military intelligent agents pretend to be monks and stay with other monks in the monasteries to monitor the monks' activities and report them to military intelligence.<sup>21</sup>

Buddhist monks at one time imposed sanctions against the military rulers by refusing to participate in any ceremony sponsored by the members of the military government, and

refusing alms from military personnel and their family members. The military regime carried out a program of massive retaliation against these monks.<sup>22</sup>

Raiding monasteries and arresting monks is also a common practice of the military regime. Within the last ten years, it is believed that more than 350 monasteries have been raided and more than 3,000 monks arrested.<sup>23</sup> Many Buddhist monks have been killed while hundreds have been detained and tortured. Such harassment by the military regime has led observers to conclude that, while the regime claims to be the preserver and protector of Buddhism, its actions actually demonstrate an opposite intention. However, although it suppresses Buddhist monks and Buddhist people, the military regime has no intention of eradicating Buddhism: this is simply its response to any opposition towards it.

The military regime has never shown any sign that it will not uphold Buddhism and the interest of the Buddhists, since it needs their support. Whenever there is a crackdown on Buddhist monks, the regime refers to the monks in question as "men in monks' dress". This usage reflects the regime's reluctance to confront the people by undermining Buddhism. Therefore, it is incorrect to interpret harassment of Buddhist monks as suppression of Buddhism. Such an interpretation may lead to misunderstandings about how the regime is trying to divide Buddhism and other religions.

## Authoritie's repression of other religions

In most cases, if the military regime faces a political crisis, it attempts to overcome it by distracting people from the political issue to another issue. The method that Military Intelligence, known as the brains of the military regime, often uses is to create riots among the people. Racial and religious riots often emerge in the midst of political crises. With precedents for communal violence, the military regime has found it expedient on numerous occasions to exploit religious and racial riots, especially when these can be directed towards Muslims, to divide the public and distract attention from other social issues.

### **Anti-Muslim agitation**

In May 1996, anti-Muslim literature appeared in several publications widely distributed in Shan State. Many believed that conflict between Buddhists and Muslims was a direct result of this anti-Muslim literature. The literature agitated Buddhists into taking action against Muslims. In October 1996, anti-Muslim leaflets distributed in Rangoon and other cities urged Buddhist women not to marry Muslims, and to boycott shops run or owned by Muslims.

During 1997 many attacks against Muslims took place throughout Burma, including in Mandalay, the second capital of Burma. An anti-Muslim campaign was run during February and March 1997 in Karen State. Several Mosques were destroyed, the Koran was ripped up or burned, and Muslims were driven out of the areas they had been living in. Muslim religious leaders suspected that Military Intelligence personnel were behind the attacks, as the military regime did not take decisive action to stop the violence, leaving Muslim communities to defend themselves.<sup>24</sup> After those riots, Muslims suffered bit-



terly because their Mosques were destroyed. By March 1997, not less than 33 Mosques nationwide had been destroyed or looted.

Rohingyas, Burmese Muslims mainly living in Arakan State, are among those who suffer most from military suppression. Hundreds of thousands of Rohingyas were driven out of their homes in 1991-1992 by the Burmese army and sought refuge in Bangladesh. Although the United Nations High Commissioner for Refugees intervened with repatriation support, the Rohingyas upon their arrival back in Burma were faced with further harassment by the soldiers.

### **Christianity in Burma: subject to suppression**

Christians in Burma are also not free from suppression, simply because they are Christian. Most of the Christians make up the ethnic groups living in the mountainous states such as Chin State, Kachin State, Karen State and Karenni State, where the Burmese army has run offensives against the ethnic armed groups fighting for greater autonomy. The military operations are carried out along with religious suppression against non-Burman ethnic Christians. The military regime believes that Christians in such states are supporters of the ethnic insurgency movements. This belief fuels their suppression.

There have been reports that the Burmese army attacked the ethnic Chins, who are almost all Christians, driving them out of their villages in Chin State gradually in 1993-1994. Later, the churches were removed and Buddhist temples or pagodas were built in their place. The local authorities of the military regime put restrictions on Christian religious ceremonies, limiting them to 3,500 people.<sup>25</sup>

In October 1994, Burmese soldiers arrived in Lashi township, Sagaing Division in western Burma, where the Christian ethnic Naga people are living. The army commander told the Nagas that Burma is a Buddhist country, and that Christian Nagas were asked to convert to Buddhism. The Burmese soldiers also persecuted most of the members of the Naga Baptist Council (NBC). In March 1995, when the NBC called a meeting of its members, the local army commander detained NBC members for two days. Moreover, all staff members of the NBC were forced to convert to Buddhism. If they refused, they were forced to resign from the NBC.<sup>26</sup>

Tension in 1993-1994 within the Karen National Union (KNU), an armed ethnic organization fighting for greater autonomy, was exploited by the military regime to create divisions within the leadership of this major ethnic resistance group. The military regime successfully turned a Karen army leadership problem into an "internal religious conflict", by setting up the so-called Democratic Karen Buddhist Army (DKBA), which sided with the military regime immediately after its formation and carried out anti-KNU military operations.

Most of the Karenni people are also Christians. Military authorities, through intimidation and threats, forced the Karenni people to construct Buddhist temples all over Karenni State, despite the low number of Buddhists in the region. Many of the Christian crosses erected in towns and villages have been destroyed. Some pastors have been arrested and tortured. Many churches and bibles were destroyed or burned during massive regime-sponsored relocations of thousands of Karenni villagers in 1996-

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... the difference between suppression of Buddhists on the one hand and Christians and Muslims on the other, is that there is no intention to eliminate Buddhism, whereas suppression against Christians and Muslims is so intended. Suppression of Buddhist monks and Buddhist Burmese occurs simply because of their involvement in politics. In contrast, the suppression of Muslims and Christians is carried out to undermine their religions, so that Buddhism will remain as the dominant, and perhaps become the exclusive, religion.

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1997.<sup>27</sup>

The regime added a Christian Non-Governmental Organization, the Christian Conference of Asia (CCA), to its blacklist and barred members from entering the country. The regime accused the CCA of being involved in political activities under the banner of religious activities.<sup>28</sup> According to a report from the S.H.A.N, an independent information group run by ethnic Shans, an anti-Christian plan has been established by the *Sangha* Council, formed under the sponsorship of the regime.<sup>29</sup>

Observers may point out that the military regime represses not only Christians but also Buddhists. The point is correct, but the intention behind the repression is different. Suppression of Buddhism, as earlier examined in this paper, is not intended to eliminate Buddhism, but just to eliminate those Buddhists who oppose the military regime.

The suppression of non-Buddhist ethnic groups coincides with the putting down of ethnic armed revolts. Elimination of non-Buddhist religions, mainly practiced by non-Burman ethnic groups, will assist in undermining armed revolts by those ethnic groups. Encouraging Burmese soldiers to marry non-Buddhist ethnic women appears intended to undermine the identity of non-Burman ethnic groups who practice non-Buddhist religions. Children born to Burman and non-Burman ethnic parents are automatically considered Burman. Therefore the strategy of the military regime in suppressing non-Buddhist ethnic groups includes eliminating the religious identity and the ethnic identity of the group concerned.

### **Censorship of religious publications**

The military regime strictly censors not only political publications, but also religious publications, including changing some words in the Bible.<sup>30</sup> The Censorship Board, formed in accordance with the Printers and Publishers Registration Act (1962), even censored the translation of some words into Burmese. Since British colonial rule, the Chapter "Proverbs" in the Bible was translated into Burmese as "*Thoke-tan-kyan*". But the Censorship Board altered this translation, as the Board refused to allow Christians to use some words used in Buddhist religious language.<sup>31</sup>

## **Report of United Nations' Special Rapporteur**

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The promotion of Buddhism by the military regime at the expense of other religions is undertaken to increase Burmese nationalism based on Buddhism.

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The United Nations' Commission on Human Rights (CHR) is the largest regular inter-governmental meeting on human rights and its recommendations on human rights issues are passed, through another body, to the United Nations' General Assembly. In 1986, the CHR created a special rapporteur on 'intolerance or discrimination based on religion or belief'. The rapporteur provides reports to the annual CHR meetings on these matters, and his report to the 1999 CHR<sup>32</sup>, contained some matters relating to Burma.

The rapporteur explained he is endeavoring to compile a basic reference source on national laws on freedom of religion and belief. The rapporteur has requested information from governments about their country's constitution or laws relating to freedom of religion and belief. The report noted replies had been received from 48 governments,

including a number from the Asia-Pacific region, however no reply has been provided from the military regime in Burma.<sup>33</sup>

The rapporteur noted that in 1998, he had sent communications to many governments, with reports of religious discrimination or intolerance in their country. The communication with Burma<sup>34</sup> noted reports of the government's religious intolerance and discrimination against Muslim and Christian minorities. The reports described destruction of places of worship and schools, revocation of citizenship, coerced conversions to Buddhism, and refusal of access to various public services and facilities. The rapporteur noted the military junta's blanket denial was not useful, and suggested it may be disbelieved:

"Without providing any explanation, Myanmar has declared the allegations of intolerance and discrimination against religious minorities to be unfounded and entirely false. It would help if Myanmar's reply were supported by suitable evidence, especially since the allegations are founded on concordant and persistent information from a number of reliable sources"<sup>35</sup>.

## Conclusion

No official proclamation has been made that Burma is a theocracy based on Buddhism. Yet religious riots and religious suppression can be seen to be a direct result of divisions between Buddhist and non-Buddhist religions. It has become clear that the ruling military regime is using religious issues for its political interests. Burmese peoples who practice other religions have suffered from repression simply because of their religion.

While there are frequent reports by international human rights organizations about human rights violations in Burma, reports about religious abuses and the question of religious freedom are rarely seen. The military regime's use of religion as a major tool in prolonging its hold on power is not well understood.

All religions in Burma are subject to the political interests of the military regime. However the difference between suppression of Buddhists on the one hand and Christians and Muslims on the other, is that there is no intention to eliminate Buddhism, whereas suppression against Christians and Muslims is so intended. Suppression of Buddhist monks and Buddhist Burmese occurs simply because of their involvement in politics. In contrast, the suppression of Muslims and Christians is carried out to undermine their religions, so that Buddhism will remain as the dominant, and perhaps become the exclusive, religion.

The promotion of Buddhism by the military regime at the expense of other religions is undertaken to increase Burmese nationalism based on Buddhism. Religions in Burma have been divided into Buddhist and non-Buddhist. There is enough evidence to conclude that as long as the military regime is in power, religion in Burma will be divisive and oppressive.

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Religions in Burma have been divided into Buddhist and non-Buddhist.

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**Post script**

In early September 1999, the State Department of the United States of America issued a report about religious freedom in Burma, as part of State Department's Annual Report on International Religious Freedom. The report specifically mentioned that Burmese military government uses force to propagate Buddhism. The State Department took particular note of allegations of abuses against the Christian Chin ethnic minority. The U.S State Department report said that, "government security forces continued efforts to induce members of the Chin ethnic minority to convert to Buddhism and prevent Christian Chin from proselytizing by highly coercive means, including religiously selective exemptions from forced labor, and by arresting, detaining, interrogating, and physically abusing Christian clergy". It also claimed that members of the Muslim Rohingya minority in Arakan State, on the country's western coast, "continued to experience severe legal, economic, and social discrimination."

The State Department's report reflects how the military rulers in Burma abuse religious issues for political purposes. Moreover, Buddhism and other religions in Burma have been divided intentionally by the military regime and the regime's repressive practices have been used for a decade.

**Notes**

1. The country's official name now is Myanmar, as the military regime changed it from Burma in 1989 without any consultation with the people. Many Burmese people have pointed out that such a change should only be taken with the consent of the people, not by order of those who illegitimately control the power.
2. Government statistics show that there are 135 ethnic groups in Burma. But independent observers and opposition groups disagree with this figure, saying that the government figures are intended to create the impression that Burma's political system cannot have multi-ethnic governance based on ethnic equality because of the large number of groups. However, everyone agrees that there are dozens of ethnic groups in Burma. For details, see Martin Smith, *Burma: Ethnicity and Insurgency*, Zed Book, London 1991.
3. The 1995 figures show 89.28 percent Buddhist, 5.06 percent Christian, 3.78 percent Muslim, 0.51 percent Hindu and 1.37 percent other. It cannot be assumed that these data are correct, however, as many areas in Burma were left out of the any census, ie where armed ethnic groups are operating.
4. Categorizing such periods is just done to examine the nature of military rule in each period. What can be easily said here is that Burma has been under military rule since 1962. For further information about these phases, see Josef Silverstein's *Burma: Historical Introduction* in Marc Weller (ed.), *Democracy and Politics in Burma*, National Coalition Government of Union of Burma, 1993
5. For more detailed information about martial law and the military regime, see Amnesty

International, *Myanmar (Burma); No Law At All, Human Rights Violations Under Military Rule*, October 1992, London.

6. However, some debates over recognition of Buddhism as state religion in the constitution took place even during the pre-independence movement.
7. This constitution was approved on 24 September 1947, but came into force when Burma gained independence on 4 January 1948. The constitution was suspended in 1962 when the military staged a coup.
8. The sacred canon of Theravada Buddhism, written in the *Pali* language, the three baskets or collections.
9. *Pali* is the literary Indo-Aryan language of Buddhist canonical books and the language of the later Theravada Buddhist chronicles, commentaries, and other literature.
10. For more detail about this amendment and the adoption of Buddhism as the state religion, see, Tartay Sanay Thar (Saturday Son), an autobiography of U Nu.
11. *Ibid*
12. See article 21 of the 1947 constitution above.
13. Article 20 of original text stated "All persons are equally entitled to freedom of conscience and the right freely to profess and practice religion subject to public order, morality or health and to the other provision of this chapter."
14. *Supra* footnote 10.
15. Sierra Reference Encyclopedia, CD ROM Version, 1996
16. For more information about Burmese Socialism, see Josef Silverstein, *Burma: Military Rule and Politics of Stagnation*, Ithaca, Cornell University Press, 1977
17. Article 11 of the 1974 constitution
18. The booklet, no author name and date of publication, was widely distributed in the country in early 1999. Facts and statistics used in the booklet are of the type that ordinary citizens cannot know, for example, the statistics of Mosques in the whole county and Islamic religious schools are listed. Under the strict controls over freedom of expression/publication, no independent agency or individual could gather such statistics.
19. Reports from Democratic Voice of Burma (DVB) and Chin Human Rights Organizations reported in 1997.
20. A report issued by the All Burma Students' Democratic Front (ABSDF) in August 1999.
21. Further information about how the military intelligence agents monitor the activities of the Buddhist monks can be seen in *Burma: Human Rights Year Book*, National Coalition Government of Union of Burma, 1997-1998, Bangkok.
22. *Ibid*.
23. *Ibid*
24. A report from ABSDF, 1997.
25. Reports of the Democratic Voice of Burma and the Radio Free Asia (during March 1999)
26. The information were provided by Federation of Trade Unions of Burma, 1995-1997
27. Information was provided by the victims and the Non-Governmental Organization (NGO) workers
28. Democratic Voice of Burma report, August 4, 1999
29. Shan Herald Agency for News, No. 4, Vol. 16, June-July 1999
30. The Burmese version of the Bible is printed in India for distribution in Burma.
31. Information was provided by the ABSDF.
32. United Nations' document E/CN.4/1999/58
33. Report of UN Special Rapporteur on religious intolerance (*ibid*), para 5
34. Report of UN Special Rapporteur on religious intolerance (*ibid*), para 81
35. Report of UN Special Rapporteur on religious intolerance (*ibid*), para 82

# Burma and the 1999 Commission on Human Rights

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John Southalan

## 1 Introduction

The 55th session of the United Nations ('UN') Commission on Human Rights ('CHR') was held over six weeks in March and April 1999, in Geneva, Switzerland. This article provides an assessment of the CHR's 55th session and its relevance to Burma: what human rights issues were raised and what did relevant governments and NGOs say and do. Summarising the relevant parts of the 1999 CHR discussions and decisions, this article presents an overview of the meeting's deliberations on Burma. The article does not analyse every matter discussed but mainly summarises or extracts statements made, and documents distributed, at the CHR. This practice is followed even where the accuracy of the information may be questioned, for example, the military junta described Burma to the 1999 CHR as a "country experiencing peace and tranquillity [Sic]<sup>1</sup>".

The CHR is a committee-like body of, and reports through the UN Economic and Social Council ('ECOSOC') to, the UN General Assembly. The CHR is the largest regular inter-governmental meeting on human rights, and is the only forum in the UN system which exclusively considers human rights. As a subsidiary body of ECOSOC, the CHR's recommendations are passed on to the superior UN bodies. The CHR is made up of 53 State members elected on a rotating basis and with a regional proportion<sup>2</sup>. Most of the 'major players' from each region are members of the CHR, however all other governments are permitted to observe and intervene during the CHR's meetings. Non-Government Organisation ('NGO's) with ECOSOC status are permitted to observe, and have limited rights of intervention during, the CHR.

Some readers may find the coverage of particular issues in this article is too brief. Throughout the document, references to the relevant UN documents and resolutions are provided and the full text of these can be obtained from the internet<sup>3</sup>. Unfortu-



nately, this article cannot promise to note every Burmese issue discussed during the CHR. Specific apology is made to any NGO whose statement to the CHR about Burma is not addressed below. The article endeavours to cover all the relevant statements made, and articles released, by Asia-Pacific governments and NGOs. In addition, some statements or documents by other parties (for example: special rapporteurs, non-regional governments, international NGOs) are noted where relevant to Burma. It should also be stated here that, without the generous assistance of the International Service for Human Rights, an NGO based in Geneva, this article would not have been possible.

The remainder of this article is divided into 11 sections:

- 2 review of United Nations' previous dealings with Burma;
- 3 report by special rapporteur on Burma
- 4 junta's general statement to 1999 Commission
- 5 general economic, social and cultural rights
- 6 general civil and political rights
- 7 women
- 8 children
- 9 displaced persons
- 10 regional human rights arrangements in Asia-Pacific
- 11 1999 Commission's resolution on Burma
- 12 conclusions

## 2 Review of United Nations' previous dealings with Burma

Before considering the detail of the 1999 CHR's dealings regarding Burma, it is useful to review preceding UN treatment of the human rights situation in Burma.

The 1998 UN General Assembly requested the UN Secretary-General to continue his discussions with the military junta about human rights and restoring democracy, and to report to the 1999 CHR on any developments. The Secretary-General's resultant report<sup>4</sup> noted various meetings between his envoy and the junta's representatives in late 1998, including the envoy's visit to Burma where he also met representatives of the National League for Democracy ('NLD'). The report noted that in the four months since the UN General Assembly's resolution, it had not been possible to arrange senior level contact with the military junta.

Within the UN human rights procedures, there are many countries and issues in relation to which the human rights situation is so critical, that the CHR has created an additional mechanism (like special rapporteur, working group, or similar) to ensure particular attention is paid to the country or issues. A special rapporteur on Burma was created in 1992. The 1998 CHR extended the mandate, for a further year, of the special rapporteur on 'the situation of human rights in Myanmar'. Additionally, the thematic procedures (rapporteurs, working groups etc considering specific issues including torture, extra-judicial killing, judicial independence, violence against women, right to development) drew material extensively from Burma.



### 3 Report by special rapporteur on Burma

The special rapporteur on Myanmar (Burma) provided the 1999 CHR with a report<sup>5</sup> divided into four sections: rapporteur's activities; civil and political rights; mission to Thailand; and conclusions and recommendations.

In his speech presenting his report, the UN's summary record noted<sup>6</sup> the rapporteur highlighted a number of issues, including: lack of democracy and increased repression of opposition, authorities' disregard for basic human standards in the country's east, displacement of 100,000 people to Thailand, call for increase of international aid to ethnic people and refugees abroad, and forced labour.

The report explained that, since his appointment in June 1996, the rapporteur has not been permitted to enter Burma despite repeated requests by the rapporteur, the CHR and the UN General Assembly. The rapporteur explained that although prohibited from visiting, he had received extensive information from governmental, inter-governmental and non-governmental sources. The report noted attempts to convene parliament in accordance with the results of the 1990 general election and the authorities' harassment and arrest of members of the parliament and others involved. The report summarised various concerns raised by UN officials, including the High Commissioner for Human Rights ('HCHR') who stated, after raising human rights issues with the junta's foreign minister, that she "received no satisfactory response"<sup>7</sup>. The report described the military regime's continued repression and harassment of political parties and opposition groups. The rapporteur discussed prison conditions and stated that the many allegations, plus the denial of access to him and the International Committee of the Red Cross, "indicate that...prison conditions fall far below the minimum international standards"<sup>8</sup> (since the CHR, the International Committee of the Red Cross has been allowed access to the prisons in Burma). The report also noted numerous detailed allegations of torture by the authorities. The rapporteur visited Thailand in December 1996, meeting with Thai authorities, NGOs and Burmese ethnic groups and refugees. The rapporteur made many comments on the problems, causes and consequences of population displacement. The report contained many details of the violations carried out by the military, specifying the villages or areas and the military units involved. These violations included: forced relocations, forced labour and portering, restricting agriculture, and confiscating land. The rapporteur noted particular effects of these violations on women and children. The rapporteur stated: "The problem of displacement in Myanmar is complex...[and] the role of the army...is paramount...Violence against civilians would appear to have been a fundamental component of the overall military strategy of the Myanmar army...[T]he army has not only undertaken systematically to destroy most of the villages but also...forcibly to displace the rural population...to disrupt agricultural production"<sup>9</sup>.

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"The problem of displacement in Myanmar is complex...[and] the role of the army...is paramount...Violence against civilians would appear to have been a fundamental component of the overall military strategy of the Myanmar army"  
**Special rapporteur on  
 Burma**

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The rapporteur's conclusions noted:

- the junta's laws violate basic freedoms, including the freedoms of expression and association;
- "The Government of Burma continues to intimidate its citizens and prevents them from exercising their fundamental rights...citizens are still being arrested for peaceful expression of their ideas"<sup>10</sup>;

- conditions in Myanmar prisons fall short of international standards; and
- impunity remains a very serious problem.

The UN's summary record<sup>11</sup> showed the military junta's delegation criticised the rapporteur's report. The delegation "regretted that the Special Rapporteur had filled his report with baseless allegations made by a few dissidents...while at the same time disregarding information from authoritative government sources"<sup>12</sup>. The junta was unhappy with what it saw was the report's focus on civil and political rights and superficial treatment of the right to food, clothing, shelter and to development in peace and security: "The report...read like a propaganda document for the...handful of...dissidents"<sup>13</sup>.

#### 4 Junta's general statement to 1999 commission

The delegation representing the military junta in Burma arranged for the UN to distribute a document entitled "Memorandum concerning the situation of human rights in Myanmar"<sup>14</sup> which it explained, "...has been prepared for the ready reference of the members of the Commission on Human Rights and observer delegations...to understand better the true situation prevailing in the Union of Myanmar"<sup>15</sup>. The junta's document endeavoured to respond to many of the expected criticisms, explaining the junta's views on: opposition to the government, difficulties in border areas (lack of infrastructure and presence of drugs), government opposition to the drug industry, development of a new constitution, right to development, children's and women's rights, traditional contribution of labour, and the rule of law and judicial system.

The document stated, "The present Government was compelled to assume the responsibilities of State in 1988, in order to save the country from a rapidly worsening anarchic situation where...mob action began to rule and innocent people were being beheaded in the streets. The Government...laid down clear objectives aimed at re-establishing a multi-party democratic state"<sup>16</sup>. The document's author may have forgotten the 1990 election which the junta organised because it is not mentioned throughout the document. The military junta referred to the actions of the NLD, which the majority of Burmese people elected to govern the country: "The NLD secretly and systematically plotted to convene a parliament on its own...the NLD [took action] to convene a parliament. If the NLD took this line of action, the party could then become some sort of 'parallel government', which no government could ever countenance...To forestall such a situation from arising, the Government [ie. military junta] had to take appropriate measures in the supreme national interest. In order to maintain stability and national security, representatives-elect and some party members of the NLD have had to be called in temporarily at guest houses for the purpose of exchanging views on the consequences of the actions of the party for the peace and stability of the State"<sup>17</sup>. The military junta considered Burma is a "country experiencing peace and tranquillity [Sic]"<sup>18</sup>.

The Australian government stated, "The on-going repression of the NLD and the continuing detention of opposition members and others for merely expressing their political opinions is unacceptable"<sup>19</sup>.

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"The Government of Burma continues to intimidate its citizens and prevents them from exercising their fundamental rights...citizens are still being arrested for peaceful expression of their ideas"

**Special rapporteur on Burma**

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The NGO, Worldview International Foundation, urged the CHR to recall previous resolutions on Burma by the CHR and the UN General Assembly on Burma, and urged the 1999 CHR not to focus only on civil and political rights, but to also consider other rights which are declining as well because of the military government's practises. These practices, the NGO stated, are leading to poverty, environmental degradation, lack of medical care, landlessness and loss of livelihood. The military junta's statement had explained the "standard of living of the majority of the population has markedly raised by the new...policy laid down by the government"<sup>20</sup>.

*"implementation of Economic, Social and Cultural rights has...been declining...largely due to mismanagement and the unjust economic and development policy of a regime whose main interest is to build up the armed forces"*<sup>21</sup>

Worldview International Foundation

*"[the] standard of living of the majority of the population has markedly raised by the new...policy laid down by the government"*

Burma military junta

Worldview International Foundation provided many examples of confiscation of land and forced labour, leading to some deaths. Other NGOs addressed the issue of forced labour. NGO, Anti-Slavery International, reported the forced relocation of over 300,000 people from just one area in Burma alone, and stated this is continuing. The NGO also explained there are many extrajudicial killings of people who return and often there is no punishment of rape by military, even where reported.

The delegation of the military junta warned: "Attempts from outside to hasten the process [of democratisation] or to set the direction in which Myanmar should move would only hinder the pace of democratisation and prove to be counter-productive"<sup>22</sup>.

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"...the Government had to take appropriate measures in the supreme national interest. In order to maintain stability and national security, representatives-elect...have had to be called in temporarily at guest houses for the purpose of exchanging views on...the peace and stability of the State"

**Burma military junta**

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## 5 General economic, social and cultural rights

The situation in Burma was not specifically addressed in the discussions on economic, social and cultural rights. However, two of the items covered, foreign debt and extreme poverty, are relevant to Burma.

The 1998 CHR created, for three years, a special rapporteur on 'the effects of foreign debt on the full enjoyment of economic, social and cultural rights'. No report was provided to the 1999 CHR, which the rapporteur reasoned was due to the "lateness of his appointment" and instead he orally presented his proposed direction for the next two years of the mandate. The CHR resolution on foreign debt<sup>23</sup> was adopted against the vote of 15 delegations. The resolution noted, "foreign debt burden remains one of the most critical factors adversely affecting economic, social, scientific and technical development and living standards in many...countries". The CHR cautioned both developing and developed countries. To developed countries: a clear statement that the current unfair situation cannot continue - the CHR affirmed a permanent solution to the foreign debt problems lies in establishing a just and equitable international economic system guaranteeing developing countries better market conditions. The CHR also emphasised the need for new financial flows to debtor developing countries, in addition to

debt relief measures. To developing countries, the CHR cautioned that a focus on foreign debt problems cannot excuse inaction on various measures; and affirmed people's basic rights to food, housing, clothing, education, health services and a healthy environment cannot be subordinated to economic reforms arising from foreign debt. The CHR also recognised the need, in international financial institutions' deliberations and actions, for more transparency and consideration of CHR resolutions. The resolution also indicated there should be more participation by governments in international financial institutions.

*"foreign debt burden remains one of the most critical factors adversely affecting economic, social, scientific and technical development and living standards in many...countries"*

UN Commission on Human Rights, resolution 1999/22

The 1998 CHR appointed, for two years, an independent expert on 'human rights and extreme poverty'. The expert's report<sup>24</sup> to the 1999 CHR was divided into eight sections: extreme poverty as a human rights violation; UN action on extreme poverty; national-level action; case studies; technical cooperation; women in extreme poverty; conclusions; and recommendations. The expert explained that 20% of the world's population, the majority of them women, live in absolute poverty, and this number is increasing. The expert noted the Sub-Commission's special rapporteur's work and relevant provisions of international human rights treaties, and observed, "poverty is the principal cause of human rights violations in the world"<sup>25</sup>. The expert explained the relevant obligations on States, particularly under the International Covenant on Economic, Social and Cultural Rights, and also considered the relevance of the right to development. The report summarised various UN conferences, programs and reports addressing poverty and noted the research and statistics demonstrating poverty alleviation is easily affordable by the world economy. The expert considered that "Lack of political commitment, not financial resources, is the real obstacle to poverty eradication"<sup>26</sup>. The CHR resolution addressing human rights and extreme poverty<sup>27</sup> was passed by consensus. The 1999 CHR reaffirmed: (1) urgent national and international action is needed to eliminate poverty and exclusion from society; and (2) States must involve poorest people in all aspects of political, economics and social life, particularly in planning and implementation of policies which affect them.

*"poverty is the principal cause of human rights violations in the world...[and] lack of political commitment, not financial resources, is the real obstacle to poverty eradication"*

Independent expert on human rights and extreme poverty

## 6 General civil and political rights

The 1999 CHR received a report from the UN Secretary-General on the issue of deprivation of nationality<sup>28</sup>. The CHR's resolution on this matter<sup>29</sup> was passed by consensus. The CHR reaffirmed every person has a right to a nationality, which is an inalienable human right, and recognised arbitrary deprivation of nationality is a human rights violation. The CHR called on States to refrain from discriminating against persons by restricting their right to a nationality because of race, colour, gender, religion or na-

tional or ethnic origin.

The 1999 CHR received a report from the special rapporteur on 'torture and other cruel, inhuman or degrading treatment or punishment'. The comprehensive report<sup>30</sup> was divided into four sections: mandate and methods of work; rapporteur's activities; information on various countries; and conclusions and recommendations. The report detailed cases from the majority of countries in the Asia-Pacific region. Cases in Burma<sup>31</sup> involved allegations of deaths in custody, torture during investigation to extract confessions, and military abuse of civilians (including rape and murder). The rapporteur's conclusions and recommendations were drawn from his presentation to the UN General Assembly in November 1998. One of the main problems the rapporteur perceived was the problem of impunity, both through formal legal protection and the informal shield provided by inadequate investigation and judicial systems. In summarising three recommendations, the rapporteur recommended: (1) incommunicado detention (present in many torture cases) should not be permitted beyond 48 hours; and governments should (2) ratify the International Criminal Court Statute, and (3) introduce legislation specifically to prohibit and punish torturers. The CHR's resolution on torture<sup>32</sup> was passed by consensus and urged all governments to promptly implement the Vienna Declaration and Programme of Action, particularly regarding freedom from torture and removing impunity for torturers. The CHR reminded governments that corporal punishment and prolonged incommunicado detention can amount to cruel, inhuman or degrading treatment or even torture (and, therefore, breach international standards). The CHR emphasised to governments: (1) all allegations of torture or cruel, inhuman or degrading treatment should be promptly examined by a competent, impartial, national authority; (2) all persons who order, assist or perform torture must be held responsible and punished; and (3) national legal systems must provide fair compensation for torture victims. The resolution also emphasised various obligations on States that have ratified the 'Convention Against Torture', and urged governments which have not ratified the convention to do so.

The working group on 'arbitrary detention', comprising five experts, provided various reports to the 1999 CHR. However, only the group's main report<sup>33</sup> was relevant to Burma. The main report was divided into an introduction and three sections: working group's activities; immigrants and asylum seekers; and conclusions and recommendations. The group's report explained that over the last year it communicated, sometimes jointly with special rapporteurs, with governments regarding 135 'ordinary cases' (14 from Burma) and 'urgent appeals' regarding 763 individuals (55 in Burma). The report noted no reply from the Burmese military junta to any of these reports. The working group stated, "impunity...[is] one of the most serious human rights problems and a fundamental reason why human rights violations continue to be committed"<sup>34</sup>.

*"impunity...[is] one of the most serious human rights problems and a fundamental reason why human rights violations continue to be committed"*

Working group on arbitrary detention

The CHR's resolution on arbitrary detention<sup>35</sup> addressed states of emergency and the CHR "encouraged" governments not to extend legislation or activities beyond that strictly required by the situation, and to restrict existing laws to this degree. The CHR also requested the UN Secretary-General to assist governments, as well as special rap-



relevant international instruments relating to states of emergency.

The special rapporteur on 'extrajudicial, summary or arbitrary executions' provided two documents to the 1999 CHR: a main report and an addendum with notes on country situations. The main report<sup>36</sup> contained an introduction and six sections: mandate; rapporteur's activities; situations involving violation of right to life; issues requiring attention; issues of special concern; and concluding remarks. The report stated the rapporteur "is particularly disturbed by the growing number of report of killings by government security forces in Myanmar. The Special Rapporteur is not aware of any attempt by the Government of Myanmar to...end...these abuses, nor...investigate the crimes committed"<sup>37</sup>. The rapporteur explained that in the year to 31 Oct 1998, urgent appeals and regular communications were sent to more than 40 governments regarding over 2,400 persons. The main report analysed the cases investigated by the rapporteur to consider violations of the right to life of specific groups including women, minors, refugees and internally displaced persons. The rapporteur provided the 1999 CHR with a second document<sup>38</sup> containing the details of her communications with governments. The cases relating to Burma described killings associated with military action and deaths in custody<sup>39</sup>. The report showed no response from the Burmese military junta to the rapporteur's communications. The rapporteur's observations on Burma noted: dismay about the large number of allegations of government killings; abhorrence at the military's impunity; and regret at the targeting of ethnic minorities<sup>40</sup>. The CHR's consensus resolution on summary or arbitrary executions<sup>41</sup> was an encouraging, strongly worded, resolution. The CHR condemned all extrajudicial, summary or arbitrary executions that occur and demanded all governments act to ensure any such practices stop. The resolution reiterated governments' obligation to conduct "exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions"<sup>42</sup>. Governments of States where the death penalty exists, which includes Burma, were called on to comply with their obligations under international human rights instruments and the safeguards contained in relevant ECOSOC resolutions of 1984 and 1989. The CHR urged governments to: (1) take all necessary and possible measures to prevent loss of life during situations of public demonstrations, internal violence, disturbances, armed conflict etc; and (2) ensure police and security forces receive thorough training in human rights matters in particular with respect to restrictions on use of force and firearms. The CHR also strongly urged all governments to cooperate and assist the rapporteur (by issuing invitations when requested, and by replying to communications) and expressed concern at the number of governments which hadn't replied.

The CHR also passed a resolution on the death penalty<sup>43</sup>, although 11 countries voted against this including, from the Asia-Pacific: Bangladesh, China, Indonesia, Japan, Pakistan, Qatar and South Korea. The CHR called on all States to move toward abolition of the death penalty. The CHR urged States maintaining the death penalty to: (1) comply with their relevant international obligations (including that the death penalty can only be sentenced for the most serious crimes and after a fair trial; and is not to be sentenced against minors nor pregnant women); (2) ensure the death penalty is not imposed for non-violent financial or religious practices or expressions of conscience; (3) not impose the death penalty against, or execute, persons suffering from mental disorder; and (4) move toward completely abolishing the death penalty.

The 1998 CHR considered the question of impunity and, through the UN Secretary-



other action they had taken to combat impunity for human rights violations. The Secretary-General collated information provided by governments and provided this to the 1999 CHR<sup>44</sup>. No response was reported from the military junta in Burma. The CHR's consensus resolution on impunity<sup>45</sup> noted it was important to take all necessary and possible steps to hold human rights violators accountable and urged all States to take action in accordance with the due processes of law. The CHR also called on States to provide victims of human rights violations a fair process through which these violations can be investigated and made public. The CHR welcomed the publications of findings of truth and reconciliation commissions which has occurred in some countries and encouraged other States to establish 'appropriate mechanisms' to expose serious human rights violations. The CHR continued the Secretary-General's reporting procedure on impunity to the 2000 CHR.

## 7 Women

The UN Secretary-General provided the 1999 CHR with a report on integration of women's human rights and the gender perspective<sup>46</sup>. The Secretary-General noted: "the principle of non-discrimination is a widely accepted norm [however] some aspects have proved easier to implement than others. The elimination of [sexual] discrimination...still remains far from being attained despite gains made in the field of human rights"<sup>47</sup>. The report noted various attention given to, and activities on, women's human rights, including by the World Conference on Human Rights, 4th World Conference on Women, UN General Assembly, OHCHR, treaties bodies, and various UN bodies and special rapporteurs/working groups etc. The Secretary-General explained the HCHR has identified trafficking in women and children for sexual exploitation as a priority issue and decided to focus attention on this problem particularly in South East Asia and areas of Europe. The Secretary-General's recommendations included his call that clarification is needed of States' obligations to prevent and redress violations of women's' rights.

*"the principle of non-discrimination is a widely accepted norm [however] some aspects have proved easier to implement than others. The elimination of [sexual] discrimination...still remains far from being attained despite gains made in the field of human rights"*

UN Secretary-General

The special rapporteur on 'violence against women' provided five documents to the 1999 CHR, however only the main report on 'violence against women in the family'<sup>48</sup> was directly relevant to Burma. The main report contained an introduction and six sections: methods and activities in compiling report; defining 'family' and 'violence'; evolving legal framework; funding (including general trends and analysis of submissions from NGOs and governments); and conclusion. The report also annexed a table showing various measures taken (or lack thereof) by every government in response to domestic violence. Burma was one of the many countries listed as having no specific criminal law nor protective services against domestic violence. The report reviewed States' actions to combat violence against women in the family. The introductory sections of the report explained that international human rights guarantees are not restricted to the public sphere, but also apply to the private realm and States are obliged

to act to prevent, investigate and punish human rights violations within the family. The report explained examples of such violence include: woman battering, marital rape, incest, forced prostitution, violence against domestic workers, violence against girls, sex-selective abortions and female infanticide, forced marriage, son preference, female genital mutilation and honour crimes. The section on an 'evolving legal framework' contained a useful analysis and explanation of factors to be considered in determining whether a government has "exercise[d] diligence to prevent, investigate, and...punish acts of violence against women" which is required under the 'Declaration on Elimination of Violence Against Women'. In the findings section, the rapporteur observed many governments: (1) seem motivated by outdated views of a woman's role in family and society; (2) continue to make erroneous links between alcohol and violence against women, while ignoring the underlying cause of the male patriarchal ideology; (3) are avoiding responsibility for positive, anti-violence action by claiming it is culturally inappropriate in their country; and (4) classify women, children, the elderly, disabled etc. as one social group, and provide a 'social welfare' approach to discrimination against women rather than 'social justice' and empowerment. In relation to Burma, the rapporteur noted encouragingly the inclusion of violence against women in the Burmese August 1997 National Action Plan for the Advancement of Women, which addressed general training on violence against women for the military and legal officials<sup>49</sup>. However, the rapporteur regretted no information was provided by the military regime about domestic violence: "There is no indication that domestic violence has been admitted by the Government to be a problem...Official denial of the existence of the problem may serve as an obstacle to victim reporting of such violence"<sup>50</sup>. The rapporteur concluded: "Overwhelmingly, States are failing...their international obligations...[on] violence against women in the family", and the violence is generally "viewed as a 'womans' issue rather than a serious human rights issue which affects a large percentage of any country's population"<sup>51</sup>. The rapporteur contained the detail of her communications with governments in a separate report<sup>52</sup>.

A speaker from the delegation of the military junta in Burma "wish[ed] to apprise the Commission of the fact that the status of women in Myanmar is among the highest in the world"<sup>53</sup>, and also informed the CHR that "violence against women is not a major problem in my country"<sup>54</sup>. The statement explained various government activities as the "Government...assuming a leading role in coordinating and monitoring the progress made for the advancement of women in the country"<sup>55</sup>.

The military junta's role was seen differently by the NGO, Aliran, who informed the CHR that in Burma, "widespread violence against women by the military has been recorded in the UN documents as well as [NGO] reports published...across the world. There has been no adequate action taken by the regime to cease these...abuses"<sup>56</sup>. Aliran expressed concerns regarding military violence against women and that male soldiers may become more violent in their civilian lives (with wives, daughters etc). The NGO explained, "the regime needs to allow the development of independent women's organisations and NGOs - the existing ones...appear to be no more than a first wives' club of military men"<sup>57</sup>.

Asia Pacific Forum of Women, Law & Development, an NGO, explained "[It is] essential that all violations are in the first place correctly documented and acknowledged as violations. Violence against women, whether committed in the family, in the commu-

human rights and fundamental freedoms"<sup>58</sup>. The NGO emphasised the rapporteur's work is important, but attention must be given also to governments' actions in response to the rapporteur's reports and recommendations.

*"[It is] essential that all violations are in the first place correctly documented and acknowledged as violations. Violence against women, whether committed in the family, in the community, or by the state of the army...needs to be declared again and again...as violation of human rights and fundamental freedoms"*

Asia Pacific Forum of Women, Law & Development

"There is no indication that domestic violence has been admitted by the [Burmese military] Government to be a problem...Official denial of the existence of the problem may serve as an obstacle to victim reporting of such violence"

**Special rapporteur on violence against women**

The CHR passed two resolutions, by consensus, in relation to women's human rights. The first resolution dealt with trafficking in women and girls<sup>59</sup> and urged governments to: (1) take measures to eliminate trafficking including legislating for better protection against, and punishment of, trafficking; and (2) address root factors contributing to trafficking in women and girls. The CHR encouraged government-NGO cooperation in campaigns to assist migrant females to better protect themselves from trafficking. The CHR called on governments to resource comprehensive programs for victims of trafficking.

The CHR's consensus resolution on violence against women<sup>60</sup> welcomed and commended the special rapporteur's reports. The CHR requested all governments to cooperate and assist the rapporteur's activities. The CHR emphasised the rapporteur's conclusions and recommendations that States have an affirmative duty to promote and protect the human rights of women, and called on States to: (1) condemn violence against women and not excuse these because of custom or religion; (2) ensure legislation and government actions prohibits, prevents and punishes violence against women; and (3) consider effective information campaigns about violence against women.

## 8 Children

"Violence against women is not a major problem in my country...I wish to apprise the Commission of the fact that the status of women in Myanmar [Burma] is among the highest in the world. [The] Government...assum[es] a leading role in...the advancement of women in the country"

~~Burma military junta~~

The 1999 CHR received two documents from the special rapporteur on 'sale of children, child prostitution and child pornography'. However, only the rapporteur's main report<sup>61</sup> was relevant to Burma. The main report contained five relevant sections: working methods and activities; international developments; child sale & trafficking; international developments on trafficking; and conclusions and recommendations. The rapporteur explained her previous reports focussed on child prostitution and pornography, and the 1999 report focuses on sale of children. The report noted, "children in virtually all areas of the world are being sold...[and] in most cases where there is sale there is also trafficking involved"<sup>62</sup> and so the rapporteur dealt with sale and trafficking together. The rapporteur observed, "international law concerning...trafficking of human[s]...has been evolving throughout the twentieth century, but...recent widespread reports of women and children being trafficked for prostitution...demonstrate the inadequacy of the current legal regime and response mechanism which purport to address such atrocities"<sup>63</sup>. The rapporteur sent a general circular requesting relevant information from governments and other organisations and received many replies, but none were reported from Burma. The report provided details on various international treaties and their obligations against trafficking and related practices. The rapporteur explained she received information about Burmese military drugging children and

transporting them to China where their organs are used in operations<sup>64</sup>. The rapporteur concluded: "most countries do not have response mechanisms in place to extricate children from exploitative situations arising from sale or trafficking"<sup>65</sup>.

*"international law concerning...trafficking of human[s]...has been evolving throughout the twentieth century, but...recent widespread reports of women and children being trafficked for prostitution...demonstrate the inadequacy of the current legal regime and response mechanism which purport to address such atrocities"*

Special rapporteur on sale of children

The CHR's resolution on the rights of the child<sup>66</sup> was passed by consensus. In this resolution, the CHR called on all States to: (1) take all necessary measures and to institute legal reforms to ensure girls' full and equal enjoyment of all human rights; (2) take all appropriate national and international action to prevent abduction, sale, or trafficking of children for any purpose or in any form; (3) develop and implement strategies for eliminating child labour contrary to accepted international standards giving special attention to specific dangers faced by girls; and (4) seek comprehensive solutions to problems causing children to work and/or to live on the street. The CHR noted the high number of States which have ratified the child's rights convention, but called on States to implement it fully and ensure the rights contained in the convention are respected. In relation to armed conflict, the CHR called on States and all parties to armed conflict to: (1) fully respect international humanitarian law and to end use of children as soldiers; and (2) bear in mind refugee and internally displaced children are particularly exposed to risks in connection with armed conflict. The resolution also addressed juvenile justice, disabled children, and children's rights to health.

## 9 Displaced persons

In 1992, a special representative of the UN Secretary-General was created to consider internally displaced persons. The 1998 CHR extended the mandate, for a further three years, of the UN Secretary-General's representative on 'internally displaced persons'. The representative's report<sup>67</sup> to the 1999 CHR contained five sections: guiding principles; institutional framework; country focus; research agenda; and conclusion. The report stated, "...the problem of internal displacement remains one of the most pressing challenges facing the international community. Some 20 to 25 million persons in at least 40 countries worldwide are internally displaced"<sup>68</sup>. The representative explained the 'Guiding Principles on Internal Displacement' which endeavour to identify, reaffirm and consolidate specific rights for protection of internally displaced persons, and the five year process leading to the development of these principles. The representative noted the CHR and other international bodies had commended the principles. The report summarised UN and other efforts on internally displaced persons, both in setting up a protective framework or system and also in relation to specific cases. The representative also made an accompanying statement to the CHR, in which he emphasised "in any situation of internal displacement, the primary responsibility to provide protection and assistance rests with the State"<sup>69</sup>. The representative explained his activities in publicising the guiding principles. The representative commended some institutions' responses to the problems of internal displacement as strengthening in the last five years. However, the representative warned that nations must go beyond indi-

vidual responses to each crisis and establish a clear legal and institutional framework for protecting internally displaced persons.

*"...the problem of internal displacement remains one of the most pressing challenges facing the international community. Some 20 to 25 million persons in at least 40 countries worldwide are internally displaced. ...[I]n any situation of internal displacement, the primary responsibility to provide protection and assistance rests with the State"*

UN Secretary-General's special representative on internally displaced persons

The NGO, Anti-Slavery International, addressed the issue of internally displaced persons in Burma. The NGO explained the widespread repression of ethnic minorities and the nationwide practice of forced labour (as noted by the International Labour Organisation) which caused unprecedented displacement of the population. The NGO informed the CHR that in western Burma, where there is little or no opposition justifying a large military presence, there is a large military presence to enforce 'development projects'. The NGO stated, "so called 'development programmes' consist mostly of projects carried out with unpaid forced labour...New roads are built to facilitate military penetration and to control border trade for the [military's] economic interests... These projects have...provided little improvement to the inhabitants of these regions, but rather persecution and impoverishment"<sup>70</sup>, and the NGO provided numerous examples from rural areas in Burma. "These military practises have meant that many [local] people are no longer able to grow enough food or otherwise earn enough income to support their families. They have been impoverished to such an extent that they have no other option than leaving their homes in search of a means of survival"<sup>71</sup> added Anti-Slavery International. The NGO explained the military government's attempts to assimilate diverse ethnic peoples into mainstream Burman culture and noted the UN Development Program estimates between 5 and 10% of Burma's entire population was displaced between 1988 and 1994.

"It is common practice for the military to force villagers to go and work on military bases or constructing or maintaining barracks, bunkers or fences, or performing menial tasks like cleaning...and fetching firewood or water. Even children are forced to do this kind of work"

**Special rapporteur on  
Burma**

*"[In Burma] so called 'development programmes' consist mostly of projects carried out with unpaid forced labour...New roads are built to facilitate military penetration and to control border trade for the [military's] economic interests... These projects have...provided little improvement to the inhabitants of these regions, but rather persecution and impoverishment"*

Anti-Slavery International

As explained earlier<sup>72</sup>, the delegation of the Burma military junta issued a general statement on various human rights matters as a "ready reference" for delegations. This statement also addressed allegations of forced labour, explaining, "The Government is systematically implementing regional infrastructure development projects. Without international aid, the Government has to utilise all limited resources...Hence there are times when the people of less developed areas are requested to cooperate in efforts designed to raise their standard of living"<sup>73</sup>. The statement continued, "A review...of the regional development projects in which the authorities have been unfairly accused of employing so-called 'forced labour' will clearly reveal...", NOT that the accusations of employing forced labour are wrong, but "...that there will be long term economic...benefits"<sup>74</sup>! And, still on this issue: "A unique Myanmar tradition, which per-



wards...construction and maintenance of...roads, bridges as well as in the digging and clearing of...wells...and irrigation systems. Myanmar people believe the contribution of labour is...meritorious and conducive to mental and physical well-being"<sup>75</sup>.

*"The Government is systematically implementing...development projects... [T]he Government has to utilise all limited resources...Hence there are times when the people of less developed areas are requested to cooperate in efforts designed to raise their standard of living"*

Burma military junta

The NGO, Aliran, stated that in South East Asia about 200 thousand people are officially recognised as refugees but there are millions more internally displaced persons arising from military aggression, political repression and harmful government practices. The NGO stated the Association of South East Asian Nations, which includes Burma, needs to incorporate a human rights perspective in its policies and activities.

The CHR's consensus resolution on internally displaced persons<sup>76</sup> welcomed the 'Guiding Principles on Internal Displacement' being used in dialogue with governments, inter-governmental bodies and NGOs, and requested this continue. The CHR commended the UN Secretary-General's representative for his efforts to promote a comprehensive strategy focussing on prevention as well as protection and assistance for internally displaced persons.

## 10 Regional human rights arrangements in the Asia-Pacific

The UN Secretary-General provided a report on Asia-Pacific regional cooperation in human rights<sup>77</sup>. The Secretary-General's report contained three main sections: 7th Asia-Pacific workshop on human rights; relevant UN programs; and adherence to national covenants. The OHCHR has organised a series of workshops for the promotion and protection of human rights in the Asia-Pacific region<sup>78</sup> and these workshops were explained in the Secretary-General's report. The workshops commenced in 1990 (Philippines) and have been held annually since 1996. The most recent regional Asia-Pacific workshop in this series was in February 1999, in New Delhi, India. The workshop in New Delhi reviewed Asia-Pacific progress on four areas (national plans of actions on human rights; human rights education; national human rights institutions; and strategies for economic, social and cultural rights) and identified next steps to be taken. The Secretary-General's report provided details of the New Delhi workshop including participants and notes on proceedings. The report showed the New Delhi meeting was attended by the Burmese military junta together with 28 governments, but no specific Burma-focussed NGO participated. The concluding statement of the New Delhi meeting is annexed to the Secretary-General's report.

The Secretary-General also noted the OHCHR's projects with many Asia-Pacific countries on various issues including: administration of justice, penal system, establishing human rights commissions, increasing public human rights awareness, incorporating international human rights standards, implementing national action plans, and children's rights. However, the report did not mention any OHCHR project with the Burmese military junta.

"A unique Myanmar tradition, which persists to this very day...encourages labour contribution by the local populace towards...construction and maintenance of...roads, bridges as well as in the digging and clearing of...wells...and irrigations systems. Myanmar people believe the contribution of labour is...meritorious and conducive to mental and physical well-being"

**Burma military junta**



The Secretary-General's report contained a table listing every Asia-Pacific country and seven international human rights covenants, showing which countries have ratified these, and when. This shows Burma has ratified only two of the nine main international human rights treaties<sup>79</sup>. In the Asia-Pacific, from Pakistan to Western Samoa, Burma's neglect to agree to human rights treaties is surpassed only by four countries<sup>80</sup>, none of which have a population exceeding 300,000 people. Certainly, compared to all its neighbours, Burma's backwardness is apparent: Laos has ratified 3 of these treaties, China - 4, Bangladesh - 6, India - 5 and Thailand - 3. Also, compared to the other UN 'Asia-Pacific' countries for which the CHR has considered human rights sufficiently troubled so as to appoint a special rapporteur or similar, Burma is lagging: Afghanistan has ratified 5 of these treaties, Cambodia - 6, Iran - 4, Iraq - 5, and Cyprus - 7.

The CHR resolution on regional human rights cooperation in the Asia-Pacific<sup>81</sup> was passed by consensus and provided little encouragement for development in this region. The resolution stated the CHR, "recognizes the importance of an inclusive, step-by-step, practical and building-blocks approach towards enhancing regional cooperation... [on] human rights in accordance with the pace and priorities to be set by the Governments of the Asian and Pacific region by consensus". Unfortunately, this sets a brake on regional human rights development through the current process, with the very clear message that any such progress will be at the pace of the most reluctant, recalcitrant government.

## 11 1999 Commission's resolution on Burma

... Burma has ratified only two of the nine main international human rights treaties. In the Asia-Pacific, from Pakistan to Western Samoa, Burma's neglect to agree to human rights treaties is surpassed only by four countries, none of which have a population exceeding 300,000 people. Certainly, compared to all its neighbours, Burma's backwardness is apparent.

Although many of the resolutions noted above apply to Burma, there was one resolution passed specifically on the problems in Burma<sup>82</sup>. The concerns of the Special Rapporteur on Burma were reflected in CHR's resolution on Burma which was adopted by consensus.

The CHR, while encouraging the military junta for acceding to some international conventions, was highly critical of the junta's actions. The resolution "notes...significant increase in the number of political prisoners during 1998"<sup>83</sup>. The CHR's resolution criticised:

- the unrepresentative process for drafting a new constitution;
- widespread and systematic use of forced labour;
- the junta's refusal to cooperate with the special rapporteur;
- extrajudicial executions, enforced disappearances, torture, abuse of women and children by government agents;
- violation of the rights of minorities, women and children; and
- escalating persecution of the democratic opposition.

The resolution urged the junta to cooperate fully with the rapporteur and strongly urged the junta to "implement fully the recommendations made by the Special Rapporteur"<sup>84</sup>. The CHR strongly urged the government to ensure the establishment of de-

mocracy in accordance with the democratic elections in 1990. The junta was also strongly urged to "investigate and prosecute alleged violations committed by government agents in all circumstances"<sup>85</sup>.

Importantly, the CHR ignored the junta's pathetic allegation that "the status of women in Myanmar is among the highest in the world [and]...violence against women is not a major problem in my country"<sup>86</sup>. The resolution stated that the CHR, "deplores the continuing violations of the rights of women...in particular [through] forced labour, sexual violence and exploitation, including rape, as reported by the Special Rapporteur"<sup>87</sup>.

The CHR continued the mandate of the rapporteur on Burma and, unlike most other rapporteurs, requested he provide a report not only to next year's CHR, but to the UN's General Assembly later in 1999.

A comparison can be made between the 1999 CHR resolution on Burma with that passed by the CHR in 1998. This comparison indicates the twelve months leading to the 1999 CHR were worse for human rights in Burma than the similar period a year earlier. The 1998 resolution<sup>88</sup> welcomed or noted more positive developments, including: holding of various meeting by the NLD; some contact between the military junta and the NLD; and the military junta (1) cooperating with the UN High Commissioner for Refugees and NGOs in returning refugees from Bangladesh, (2) acceding to international human rights treaties, and (3) meeting with the UN Secretary-General and his envoy. There was less to commend in the 1999 resolution, and the majority of the resolution criticised the junta's actions and called for action.

## 12 Conclusions

Unfortunately, the Burmese military junta continues to deny human rights problems in the country. These denials indicate the military junta's statements are either drafted with ignorance of the situation, suggesting incompetence; or a desire to mislead the CHR, suggesting dishonesty. One of these two choices must be attributed to much of the junta's input to this year's CHR. A far more commendable attitude was seen in parts of the statements from government delegations like Bangladesh, South Korea, Indonesia and India. These governments appeared more prepared to acknowledge some problems. Without a government's acknowledgment that a problem exists, very little improvement will ever occur. This whole situation provides a sad reason for NGO involvement in the CHR, but it appears critical for NGOs to correct the junta's inaccuracies, either by making statements directly to the CHR, or by providing accurate information to governments, special rapporteurs and UN officials.

The military junta's obvious reluctance to commit to common human rights standards in various international treaties indicates the junta's statements about its respect for human rights are not genuine. It appears unlikely the current UN-sponsored regional process on improving human rights in the Asia-Pacific will assist the situation inside Burma. The CHR's resolution accepted the regional process must be "in accordance with the pace and priorities to be set by the Governments of the Asian and Pacific region by consensus". The requirement for consensus presents the military junta with an

opportunity to keep any regional improvements through the current process at a speed, and on matters, limited to the junta's choosing.

*The military junta's obvious reluctance to commit to common human rights standards in various international treaties indicates the junta's statements about its respect for human rights are not genuine.*

The prevalence of impunity and the lack of accountability of government officials' human rights violations was a consistent theme throughout this year's CHR. Impunity in general, without specifically mentioning Burma, was a problem noted by many speakers and also in the reports of the special rapporteur on torture<sup>89</sup>, the working group on arbitrary detention<sup>90</sup>, and the UN Secretary-General<sup>91</sup>. There were a number of CHR resolutions which noted and called for action against impunity including the resolutions on torture, and on extrajudicial or summary executions. The CHR also passed a specific resolution against impunity. Global observations aside, however, impunity was seen as a particular problem in Burma. This was noted many times including in the reports of the special rapporteurs on extrajudicial and summary executions<sup>92</sup> and on Burma<sup>93</sup>. The CHR's resolution on Burma specifically directed the military junta to end impunity<sup>94</sup>. As the special rapporteur on torture explained, impunity can arise both from formal legal protection and through an informal shield created by inadequate investigation and judicial processes. To this should also be added the illegal impunity gained through corruption. Following the CHR's various resolutions covering impunity, the military junta must, and must be pressured to, act against all these forms of impunity.

...the military junta's statements are either drafted with...incompetence or...dishonesty. One of these two choices must be attributed to much of the junta's input to this year's [commission].

The military junta, along with some other Asia-Pacific governments, refuses to permit UN officials to visit their country, or parts of it, and then accuses the officials of inaccuracy. It is important the CHR better respond to and control these government games in future years, but in the interim it is important the governments be questioned at every opportunity to explain their reasons in restricting UN human rights mechanisms. The government delegation representing Burma should seriously consider the logic of their government restricting access to information by rapporteurs and working groups and then questioning the accuracy of the resulting report. Other governments from this region, including Yemen and Malaysia, were noted as fully assisting visits by some special rapporteurs or working groups.

...impunity was seen as a particular problem in Burma. This was noted... [by] special rapporteurs... The CHR's resolution on Burma specifically directed the military junta to end impunity... [T]he military junta must, and must be pressured to, act against all...forms of impunity.

There is still considerably more attention to civil and political rights than economic, social and cultural rights. This situation is also magnified by this article because the current treatment of civil and political rights tends to identify particular countries (which were then summarised and noted in this article) whereas economic, social and cultural rights are dealt with more generally. It appears that this bias is slowly correcting, which is positive for Burma because economic, social and cultural rights require more attention in the region than they currently receive. However it seems likely that while the United States of America ('USA') remains dominant in so many areas, its preference to focus on civil and political rights (rather than addressing the inequities of the international financial system and countries' indebtedness; inequities which favour the developed world and many companies based in the USA) will keep the CHR skewed toward civil and political rights. There are signs, however, that more attention is being devoted to economic, social and cultural rights. The 1999 CHR received the

right (the right to education) and created a new rapporteur on one of the more obvious symptoms of the developing / developed divide: migrants. Additionally, increasing attention is being devoted to the right to development, which is also encouraging for Burma. Now, more than ever, the importance of inter-relatedness of human rights is apparent. Encouragingly, the CHR appears alive to this issue, with one resolution noting: "promoting and protecting one category of rights should...never exempt or excuse States from the promotion and protection of other rights"<sup>95</sup>.

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The government delegation representing Burma should seriously consider the logic of their government restricting access to information by rapporteurs and working groups and then questioning the accuracy of the resulting report.

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## Notes

1. note verbal by military junta to UN dated 15 March 1999 (see fn 14 below), p13
2. there were twelve CHR members from the Asia-Pacific this year: Bangladesh, Bhutan, China, India, Indonesia, Japan, Nepal, Pakistan, Philippines, Qatar, South Korea, Sri Lanka
3. many UN web-sites lead to each document, however the easiest starting point may be the search site for UN human rights documents: [www.unhchr.ch/huridocda/huridoca.nsf](http://www.unhchr.ch/huridocda/huridoca.nsf)
4. document E/CN.4/1999/29
5. document E/CN.4/1999/35
6. document E/CN.4/1999/SR.13, para's 53 to 58

7. report of Special rapporteur on Myanmar (see fn 5 above), para 10
8. report of Special rapporteur on Myanmar (see fn 5 above), para 20
9. report of Special rapporteur on Myanmar (see fn 5 above), para 30-33
10. report of Special rapporteur on Myanmar (see fn 5 above), para 73
11. document E/CN.4/1999/SR.13, para's 59 to 64
12. document E/CN.4/1999/SR.13, para 59
13. document E/CN.4/1999/SR.13, para 62
14. document E/CN.4/1999/129
15. note verbale by military junta to UN dated 15 March 1999 (see fn14 above), p3
16. note verbale by military junta to UN dated 15 March 1999 (see fn14 above), p3
17. note verbale by military junta to UN dated 15 March 1999 (see fn14 above), pp11-12
18. note verbale by military junta to UN dated 15 March 1999 (see fn14 above), p13
19. statement by Australian government delegation under CHR's agenda item 9, page 4.
20. note verbale by military junta to UN dated 15 March 1999 (see fn14 above), p12
21. statement by Worldview International Foundation under CHR's agenda item 9, page 1
22. note verbale by military junta to UN dated 15 March 1999 (see fn14 above), p14
23. resolution E/CN.4/RES/1999/22
24. document E/CN.4/1999/48
25. report of independent expert on human rights and extreme poverty (see fn24 above), para 9
26. report of independent expert on human rights and extreme poverty (see fn24 above), para 65
27. resolution E/CN.4/RES/1999/26
28. document E/CN.4/1999/56
29. resolution E/CN.4/RES/1999/28
30. document E/CN.4/1999/61
31. report of special rapporteur on torture (see fn30 above), para's 491 to 525
32. resolution E/CN.4/RES/1999/32
33. document E/CN.4/1999/63
34. report of Working group on arbitrary detention (see fn33 above), para 49
35. resolution E/CN.4/RES/1999/37
36. document E/CN.4/1999/39
37. report of special rapporteur on extrajudicial or summary executions (see fn36 above), para 68
38. document E/CN.4/1999/39/Add.1
39. report of special rapporteur on extrajudicial or summary executions (see fn36 above), para's 166-167
40. report of special rapporteur on extrajudicial or summary executions (see fn36 above), para 168
41. resolution E/CN.4/RES/1999/35
42. CHR resolution on extrajudicial, summary or arbitrary executions (see fn41 above) para4
43. resolution E/CN.4/RES/1999/61
44. document E/CN.4/1999/57
45. resolution E/CN.4/RES/1999/34
46. document E/CN.4/1999/67
47. report of UN Secretary-General on integration of women's rights (see fn46 above), para5
48. document E/CN.4/1999/68
49. report of the special rapporteur on violence against women (see fn48 above), paras 52-54
50. report of the special rapporteur on violence against women (see fn48 above), para 52
51. report of the special rapporteur on violence against women (see fn48 above), para 242
52. document E/CN.4/1999/68/Add.1

53. statement by Myanmar government delegation under CHR's agenda item 12, p5
54. statement by Myanmar government delegation under CHR's agenda item 12, p3
55. statement by Myanmar government delegation under CHR's agenda item 12, p2
56. statement by Aliran under CHR's agenda item 12, p1
57. statement by Aliran under CHR's agenda item 12, p2
58. statement by Asia Pacific Forum of Women, Law & Development under CHR's agenda item 12, p2
59. resolution E/CN.4/RES/1999/40
60. resolution E/CN.4/RES/1999/42
61. document E/CN.4/1999/71
62. report of special rapporteur on child sale, pornography and prostitution (see fn53 above), para 5
63. report of special rapporteur on child sale, pornography and prostitution (see fn53 above), para 6
64. report of special rapporteur on child sale, pornography and prostitution (see fn53 above), para 86
65. report of special rapporteur on child sale, pornography and prostitution (see fn53 above), para 149
66. resolution E/CN.4/RES/1999/80
67. document E/CN.4/1999/79
68. report of special representative on internally displaced persons (see fn67 above), para 1
69. statement by UN Secretary -General's special representative under CHR's agenda item 14 (c), p1
70. statement by Anti-Slavery International under CHR's agenda item 14(c), p1
71. statement by Anti-Slavery International under CHR's agenda item 14(c), p2
72. see section 4 "junta's general statement to 1999 commission" above
73. note verbale by military junta to UN dated 15 March 1999 (see fn14 above), p19
74. note verbale by military junta to UN dated 15 March 1999 (see fn14 above), p19
75. note verbale by military junta to UN dated 15 March 1999 (see fn14 above), p19-20
76. resolution E/CN.4/RES/1999/47
77. document E/CN.4/1999/94
78. see document E/CN.4/1999/93, para's 26-30
79. Burma has ratified only the first two of: International Covenant on the Rights of the Child; Convention on the Elimination of All Forms of Discrimination Against Women; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights ('**ICCPR**'); First Optional Protocol to the ICCPR; Second Optional Protocol to the ICCPR; International Covenant on the Elimination of All Forms of Racial Discrimination; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
80. the following Asian countries have ratified less than 2 of the main international treaties: Brunei (population 290 thousand), Marshall Islands (54 thousand), Micronesia (104 thousand), and Palau (population 17 thousand)
81. resolution E/CN.4/RES/1999/69
82. resolution E/CN.4/RES/1999/17
83. CHR's resolution on Burma (see fn82 above), para 1(c)
84. CHR's resolution on Burma (see fn82 above), para 7(a)
85. CHR's resolution on Burma (see fn82 above), para 7(m)
86. see text from fn53 to fn55
87. CHR's resolution on Burma (see fn82 above), para 4(d)
88. resolution E/CN.4/RES/1999/63
89. see following fn30
90. see text re: fn34



91. see text re: fn44
92. see text from fn36 to fn40
93. see text following fn9
94. see text re: fn82
95. resolution E/CN.4/RES/1999/25, para 3(d)

# Transitional Burma

## Where to from here?

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### *An interview with Professor Josef Silverstein*

Professor Josef Silverstein is an academic from the United States of America. He is a well-known Burma expert with a long history of contact with, and involvement in the issues of, Burma. The Professor witnessed political changes in Burma from democratic regime to military dictatorship in 1962 as he was teaching at Mandalay University in central Burma during that period. He has written / edited several books and articles on Burma. His book *Burma: Military Rule and Politics of Stagnation*, Ithaca, Cornell University Press, 1977, is well-known.

The Professor, in an interview with Democratic Voice of Burma (DVB), provided his views on many of the problems facing Burma and his hopes for what the future might hold. This article, a summary of the interview, is reproduced with kind permission of DVB and is divided into five sections:

- 1 elections;
- 2 dialogue with military;
- 3 constitutional reform;
- 4 education; and
- 5 international and regional perspectives (including economic reform)

## 1 Elections

A recurring theme in Professor Silverstein's interview was the 1990 elections and how their outcome must be reflected in the resolution of the current problems in Burma. The Professor cautioned against the suggestion another election should be held to 'update' the results from 1990. For another free and fair election to be held, he explained, there would need to be many international observers and also considerable change in the military's rule. Without these, there is no point to holding new elections.

*"We have to stand by the 1990 results because we know what they were.*

*We have the vote in every constituency. We know how the people felt. There is no indication...[from] what's going on inside of Burma that the people have changed.*

...

*I don't think a new election will work any better than the last election if the military will not accept the outcome of the election. ...[T]he military was so badly defeated in 1990 [and therefore] we can assume that...[unless there is] dialogue, there are no ground rules, ...[and the military] will intimidate the people in such a way that the people will either stay away from the poll, or they will do things to the vote that will make it appear differently than the way people voted...*

*The thing about the last election [1990], that cannot be repeated, is it was a fair election, because the military thought they could win a fair election. Now they know they can't win a fair election. ...[T]o hold another election is just playing into the military's hands to give them a chance to intimidate the people, to load the outcome, to say "you see, the people really love us", when we know that's not true. There was a clear voice of the people expressed in 1990. There are elected officials waiting, have been waiting now for almost ten years, to take their seats. Even though the military has intimidated, and arrested, and done other things to the people, they are prepared to do the duty they accepted when they stood for election.*

*Therefore, anybody that says we have to have a new election has to answer three questions. One: how can they guarantee that it will be free and fair? [Two] How can they guarantee that the military will accept the outcome this time? And...[three] how can they make certain that it will be a peaceful environment? Do you realize how many observers would have to be sent in to a country the size of Burma? ...[I]f you don't have international observers everywhere, how are you going to be sure it was free and fair?*

...

*[T]here...[are] no modalities for a new election. No means for a new election. There is no way to guarantee that there will be fairness and freedom and there's no assurance that there is going to be a change. And if there is no change, why waste time when the people who were elected and are waiting patiently to take their place are prepared to sit down tomorrow and begin to fulfill their function?"*

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No means for a new election. There is no way to guarantee that there will be fairness and freedom and there's no assurance that there is going to be a change. And if there is no change, why waste time when the people who were elected and are waiting patiently to take their place are prepared to sit down tomorrow and begin to fulfill their function?"

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## 2 Dialogue with military

Professor Silverstein discussed the importance for all major groups to be involved in the planning for Burma's future. The Professor identified the main groups as the National League for Democracy ('NLD'), ethnic groups and the military; and viewed any move from military to civilian rule as problematic unless these three groups are properly involved in that process. The Professor discounted the local 'cease-fire agree-

ments' as having any role in the long-term resolution of Burma's problems.

*"[T]he idea of a tri-partite talk which would be between the democratic forces in Burma proper, the minorities in the rest of the country, and the military, has been an idea that has been pushed now for several years. Aung San Suu Kyi [and] the leaders in the ethnic minorities have all called for this...because they believe that the settlement of Burma's problems can only be achieved by talking. ...If talks can begin, that will be the first step of how to set a plan in motion to get a transfer of power from the military to the democratic forces.*

*Now, there have been bi-lateral talks for many years: the minorities talk to the NLD and, indirectly, the military talks to the minorities in the border region. This isn't going to create a movement to change. A movement to change is to be demonstrated by an act of faith: that the military is ready to honestly talk with the democratic forces and the minorities and, in turn, the democratic forces and the minorities are ready to talk to each other and to the military. ...[T]here has to be cross dialogue as well as oppositional dialogue.*

*The whole cease fire process under, first, the SLORC and now the SPDC, was one to get each individual opposition force to stop fighting. No discussion of politics. No discussion of anything other than, "there will be no fighting between the military and the other side". Therefore, this has no relevance to creating an environment for a genuine dialogue. A genuine dialogue can only take place when the military declares a national cease-fire and then disengages from those opposition...they are fighting with along the border. [A] dialogue is all about...set[ting] the ground rules for the future of Burma. 'Open and honest discussion' means there is no agenda dictated by any one side. And that there is an environment where the members can talk to one another, they can visit each other, they can create a common program and discuss it generally. These are all things that the military has not permitted under the cease-fire agreements. Therefore, the cease-fire agreements are meaningless as a basis for peace in Burma.*

*[To involve, in any negotiations, groups that are still fighting and others who agreed to a local cease-fire, can be achieved by the military] declaring a national cease-fire. When the army says: 'We are putting out weapons down. We are withdrawing from our engagement and everyone is free to come in and talk openly and honestly'. The army did that many, many years ago. If you look back, in 1963, when [General] Ne Win invited the minorities to come to Rangoon to discuss with the military an end to the war at that time. ...There was a true open environment. The military did this in '63. There's no reason they can't do it in '99.*

...

*I think dialogue could come at any time. I think that the country is near*

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[A] dialogue is all about... set[ting] the ground rules for the future of Burma... .... in 1963, when General Ne Win invited the minorities to come to Rangoon to discuss with the military an end to the war at that time. ...There was a true open environment. The military did this in '63. There's no reason they can't do it in '99.

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*the end of its rope under the military. It has no money. It has high inflation. It is short of rice. Everything that's crucial in Burma, is absent. As a result, the only way that the international community will open up and allow Burma to borrow money, to give them humanitarian and social aid, is if there is a peaceful environment that will not favour any one side. And so, therefore, if you look at what the military has done: they did not produce their annual economic report this year because the economic conditions are so terrible that they don't want to reveal it. But we all know what they are. We know that their money is worthless. We know that they can't borrow money anywhere in the world. We know that they're deep in debt to the Chinese and others for all the weapons they have and, in this situation, they have no friends in the world. ...*

*So, the situation is such that I think that some members of the military leadership are going to awaken one morning and say, 'it's time that we talked to the democrats and see if we can make an agreement so that we can live, and let live, with them and how we can peacefully transfer power'. I think that could come this year. I hope it'll come this year. But I think, certainly, it will probably come by next year".*

### 3 Constitutional reform

The Professor explained why the military's action in attempting to draft a new constitution is illegitimate, and also condemned the military's hypocritical claims that it is legally unable to relinquish power at this stage.

In 1992, the SLORC said, "we are going to form the national convention and we're going to draft the principles". It was against the election outcome of 1990. The action that they have taken and have announced, that they want to permanently be in control of the government by holding 25% of the seats, have the president, and so forth, is not a democratic system.

*"[Any] new constitution should be drafted only by the representatives of the people. The people, or their elected officials, ... choose a constituent assembly which shall have a mandate to write a constitution for the people. The military's constitution has no popular mandate. In 1992, the SLORC said, 'we are going to form the national convention and we're going to draft the principles'. Nobody asked them. Nobody approved. It was against the election outcome of 1990. The action that they have taken and have announced, that they want to permanently be in control of the government by holding 25% of the seats, have the president, and so forth, is not a democratic system.*

*The only way that there can be free and fair writing of the new constitution, is if the people, through their representatives, do this. And if they don't, it won't be free and fair. Therefore, all this nonsense the military has been doing where they don't allow free speech, where they don't allow people to engage in dialogue or contribute to it, but must accept...the [views of the] military, is a fraud. And the world should not be a party to a fraud.*

...

*[W]hen the elected assembly is seated and is running the government of*

*Burma, they should then decide how they want to form a constitutional assembly and we should listen and follow them. If they think it's best to have delegates re-elected, or if they believe that it's adequate to have nominated representatives, that it is for them to decide.*

*[In response to the claim the military can't hand over power because there is no new constitution...] Let's not fool ourselves. The military has never done anything legally. From setting the constitution aside - even their own constitution, they set it aside. So, all this nonsense about the military is so legal-minded and that 'it must be a proper; legal', is an affront to what they do. ...[W]ho are they to say, 'it must meet legality'? They destroyed legality. They don't honour the rule of law so, therefore, they are in no position to dictate this.*

*...[I]f we go back to 1990, there was the Ghandi Hall conference of the victorious NLD and they agreed it was possible to use the old 1947 constitution, through modification, until a new constitution was written. After all, the 1947 basically is a very democratic constitution. There are 20 articles on human rights at the very forefront, which the military put aside in 1962 and never restored. ...[T]he NLD has [indicated]...they can operate under the 1947 constitution. ...[The Ghandi Hall conference showed the NLD] assume it will take about nine months to write a new constitution. Therefore, the constitution is flexible, it is workable, and the NLD understands this very clearly. It should have been put into effect in 1990 and we should be a decade further along".*

## 4 Education

In relation to the education system, Professor Silverstein agreed it had been destroyed. His comments on this matter addressed the loss of education, the military's destruction of previous education materials, and priorities in what reforms might be taken.

*"This is such a terrible problem... You have hundreds of thousands of students since 1988 that have not been able to complete their education. Burma is missing a whole generation of intelligentsia to succeed the present generation and it's going to be a poorly educated group because the military destroyed education.*

*I think what has to happen is there has to be a recovery of education on two levels. There has to be the beginning of genuine education for younger people who are emerging from the secondary schools, and there has to be a temporary system where people who are partially educated at the university can complete their education. [These goals can be achieved in a range of ways, including] by correspondence...[or] by setting up temporary classes... But you must hastily complete the education of those Burmese who still can be*

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educated. Meanwhile, you have to start the proper process.

*But the bigger problem is in developing the education for children. All the books have to be re-written. The military has destroyed the history of Burma. They have destroyed the sociology of Burma and so therefore there is a major task to rewrite the educational materials, going back to the materials of 1962 and updating them so that they're relevant for today. The young people have no idea of their history because the military has so corrupted it. So I see this as a major, long-term, problem. No short-term solution to this".*

## 5 International and regional perspectives

Burma's position in the global context was discussed by Professor Silverstein, addressing both the economic situation and what 'lessons' should be drawn from other South East Asian countries.

*"[E]conomic recovery can be stimulated once the international community allows the Burmese to borrow money from the monetary fund and allows countries to give direct aid for economic development and humanitarian development. The international community has said repeatedly that they are prepared to help the Burmese in this transition and so I don't think see this to be a problem. I think that the first thing that they will do: the monetary fund will put money in to stabilise the kyat so that you will have a single currency. Once you have a single currency, then your money will be valuable, and you can deal with other countries and not be this game of the barter or the foreign exchange certificates and all the other confusion. ... [T]he international community is on record saying they are prepared to immediately begin to help the Burmese once Burma is genuinely on the way to democracy.*

...

*[Comparing the role of the Burmese military and the role of militaries in different countries in this region] Let's recognize that in some countries military accept civilian supremacy. Even though Malaysia is authoritarian, the civilians run the military: they choose the leaders, they set the rules, and the military accepts the guidance and direction of the civilians. Thailand: the military, since 1992, accepts the leadership of the civilians, from the King through the prime minister, through the legislature and the like. Singapore, another authoritarian government, but the military is under the hand of the civilian. The Philippines, the military, since the restoration, is under the hands of the civilian. In South East Asia, alone, civilian supremacy is the rule, not the exception. In Burma, it must be the same way. There can be no separate military budget, there can be no separate community called the military to rule itself. All must come under the legislature, under the civilian authority, and that will be within the South-East Asian tradition.*

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... Yes, they [the military regime] say, 'we are now a member of ASEAN'. Yes, they are a member of ASEAN but ASEAN isn't rushing to help them in any way. They're not investing. They're not giving them food.

...

I think, right now, Burma has to look at Burma. I think Indonesia's problems are different and the Burmese do not have to take any lessons from the Indonesians. They could take lessons from the Thai - how Thailand has made its transition from 1992 until the present time. They can take their lessons from the Philippines since the revolution at that particular time. I don't think Indonesia is an important model for the Burmese at this time. ... [I]n Indonesia, even though you had a very strong authoritarian government which had the military under its control, there was an allowance for freedom of the press, to a degree. There was a semi-free educational system. There was an ability for people to communicate with each other freely, and so there was a tradition. This tradition was well established in Burma until 1962, but the military rooted it out in 1962. So it's going to be very difficult to get people to begin to talk with one another and not worry, 'is this man part of the intelligence [or] is what I'm saying to you going to be reported to the MSI [Military Intelligence Service]?' or the rest of it.

It's going to be a long time before Burmese people trust one another because that's the legacy of the military: not to trust your neighbour for fear that he's working for the enemy - the government. So, if you don't have trust, it's very difficult to begin to establish local organizations, civil society, political parties, and the like. So, Burma has a longer road to follow than Indonesia has, or, in many ways, even Cambodia has. But, I think the Burmese will make rapid strides. They have a democratic tradition. If they recover their democratic tradition, they learn about how it worked between 1948 and 1962, they can quickly recover the mould that was broken by the military".

# Burma's Future Constitution

## Comparing and contrasting democracy and human rights provisions in two draft Burmese constitutions from an international perspective

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### Introduction

Burma, or Myanmar, has been undemocratic for many years. The military government has been responsible for many human rights abuses. Thousands of people have been killed, injured, tortured, forcibly relocated or detained without trial, while others have fled the country. The rights of free speech, the press, assembly, association, and privacy are largely absent. The government has repressed various indigenous ethnic minorities, such as the Karen, Shan, Mon, Chin and Kachin. The regime also has a policy of forced labour that specifically targets ethnic minorities.

Burma's first constitution of 1947 is perceived to have been a failure because it did not resolve the issue of the rights of ethnic communities, and as a result tensions escalated.

Burmese history over the last 40 years is a litany of military coups. The first coup occurred in 1958. Elections, however, were held in 1960 but in 1962 the military again seized power. Many people particularly of Indian and Pakistani descent were expelled and all foreigners were denied citizenship. Various insurrections have occurred. In 1974 a second constitution was enacted after another coup by the military. This constitution was seen by many to be an instrument of authoritarianism. As a result of the growth of the opposition forces mass demonstrations occurred all over the country in 1988. A great many people were killed by government troops. The insurrection grew

and again the military intervened and took the country. The new government announced that they would negotiate with the opposition and that there would be elections.

Democratic elections were finally held in 1990 and were won by the opposition, the National League for Democracy (NLD). However, the military refused to accept the result and demanded a new constitution before handing over power.

The military government was formerly known as the State Law and Order Restoration Council or SLORC, and is now known as the State Peace and Development Council (SPDC). The SPDC established a National Convention to write a new constitution. The National Convention is seen by many in Burma as a tactic to delay handing over power to a democratic government. It does not meet for long periods of time and the appointments to it and its procedures have been criticized as undemocratic.

After the 1990 elections, the opposition groups also began drafting a constitution to ensure that when a democratic government is finally established, democracy and human rights will be entrenched and that there will be checks and balances on the exercise of state power.

This article will examine both the government and opposition draft constitutions to determine which provisions are more likely to create a workable democracy, protect and promote human rights, permit economic growth, inspire confidence from international investors and ensure internal stability. It also locates the drafts within international constitutional practice.

## Process

There are two vital components of drafting a constitution. The first is the process by which it is done and the second is the substance of the text itself. Not only must the constitution contain provisions that enhance democracy and build respect for human rights, but the process of designing and drafting the constitution must also be democratic. Otherwise whatever constitution is drafted, no matter how democratic it is in reality, it will not be owned by all the people in the country. This is critical because respect for the law and the legal system is crucial if the success of a peaceful, democratic, human rights-based society is to be assured.

A legitimate drafting process is crucial because a constitution and bill of rights can constitute a major force for national unity. They are instruments that can assist in nation building and achieving national reconciliation. The symbolic importance of such instruments and their potential to foster common goals and aspirations depends greatly on the degree to which the drafting process has been inclusive and legitimate. Inclusivity can inspire a sense of national ownership, whereas a constitution resulting from a non-inclusive process can be a source of tension and further division. Thus a carefully planned inclusive constitutional drafting process must be designed. It must as far as possible seek to obtain consensus and should not be rushed.

At present the National Convention drafting process in Burma is highly problematic.

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It is seen to be a "farce and a sham to camouflage a constitution drafted by the military to entrench its own role in the future political affairs of Burma". The representatives elected in 1990, as well as other true leaders of the people, have been excluded from the process. The few participants in the National Convention who are representative of the population have little opportunity to express their true views. This is because the rules of the Convention limit free expression. Various other institutional constraints on criticizing the Convention ensure that the military remains in control of the Constitution drafting process.

The National Convention issued its draft (constitutional principles) in 1998. Entitled 'Detailed Constitutional Principles Approved by the National Convention'. It is modeled on the failed Indonesian experiment.

However, instead of trying to cling to power, the National Convention should negotiate a real transition to democracy with the opposition parties in Burma. In the first phase of transition all parties could agree on a process for governing the country while representatives elected in a free and fair election draft a constitution for the country. In the second phase of the transition, the new constitution would come into effect.

Already such an opposition constitutional drafting grouping and process exists. It has already embarked on a constitutional drafting process. This alliance, made up of a wide range of groups, is called the National Council of the Union of Burma (NCUB). They published their Proposed First draft of a (Future) Constitution of the Federal Union of Burma in December 1997

## Electoral system

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

The type of electoral system is probably one of the most crucial aspects of a democracy. Various types of electoral systems exist, from individual constituency systems to those where there is proportional representation. In proportional representation, a particular party enjoys the percentage of representation in the legislature in accordance with the percentage of the national vote that it has received.

The NCUB principles in article 29 provide that every citizen shall have the right to vote, to be elected in periodic elections. It is provided that the elections shall be "general, free, equal, direct and secret." Representatives shall serve for four years with half being elected every two years.

The National Convention model proposes that 75 per cent of each legislature should be elected, with the remaining 25 per cent of all seats being reserved for the military. This is completely undemocratic. In addition, the Chief of Staff of the Defence Force, who is not even appointed, or accountable, in terms of the constitution, determines which members of the military receive seats.

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Furthermore, neither draft Constitution makes mention of which electoral system is proposed to ensure free and fair elections. There is no protection of the rights necessary to ensure that free political campaigning and organising can occur. This is crucial because elections in transitional societies are often the source of major difficulties for a variety of reasons. A key question is whether there is sufficient trust in the process itself and whether the body responsible for organizing and counting the votes is perceived to be independent and capable. A system that appears faulty or non-independent could lead to chaos and violence and could compromise the legitimacy of elections. There is also a need to ensure an election is free, fair and open. Thus, the independence of the body (or commission) that runs the election is vital to ensure that the electoral process is legitimate and fair. This independence should be provided for, and safeguarded, in the constitution. In particular it is vital that the Commission's appointment and dismissal procedures are carefully designed to ensure independence and that there is no room, or even a perception of room, for political manipulation of the electoral process. If either the process of establishing the electoral commission, or the structure of the commission itself, is seen to lack credibility, the consequences should not be underestimated.

A decision ought also to be taken, and constitutionalised, in regard to registration of voters, to avoid the possibility of electoral fraud or vote rigging. There are three general models of voter registration systems internationally: (1) where the onus of responsibility to register voters falls entirely on the government, and a universal list of voters is drawn up from identity documents or through a census; (2) where government agencies such as welfare bureaus or driver's licence offices register voters and update registrations automatically; and (3) where citizens must register themselves. Of the three systems, automatic registration through a list of citizens (option 2) is the most comprehensive and the least expensive to compile and update. It is also cost effective because the list may be used for other governmental purposes in addition to voter registration (e.g. census keeping, health care benefits, statistical analysis, etc.). Lists are permanent, and are constantly updated as citizens become eligible, move, or become ineligible. Some countries using automatic registration systems include Mexico, Finland, Germany, Switzerland, and Sweden. These countries have achieved nearly universal voter registration. Whatever registration system is agreed on must be constitutionalised to avoid dispute, litigation and possible violence.

## Constitutional supremacy

Unfortunately, the National Convention draft has no section dealing with the operation of the law and whether it is proposed that parliament or the constitution be supreme. This omission, whether purposeful or not, is problematic and ought to be rectified, as clarity is crucial. Obviously, in a state that has experienced as many problems as Burma, constitutional supremacy is needed. However, that cannot occur unless the structure and appointment processes to the courts are redesigned. This question will be examined later.

In the NCUB draft constitution, the supremacy question is dealt with by a number of provisions. It is mainly dealt with in Article 13, which states that the constitution "shall

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be the supreme law of the Federal Union." However, it is not clear whether the courts will be able to strike down laws or actions inconsistent with the constitution and the rights contained therein. The supremacy of the constitution and the rights it contains over other laws and administrative actions ought therefore to be clarified and stated more forcefully and directly. Thus, an additional provision ought to be added in Article 13 stating: "All laws and actions taken inconsistent with the constitution shall be invalid".

The independence of the judiciary from the executive and legislative arms of government is fundamental to the separation of powers and therefore to the establishment of a democratic system of government. This principle is particularly important in a constitutional democracy, where a court has the power to overturn legislation and declare executive acts unlawful.

## Constitutional amendment

A Constitution should not easily be susceptible to amendments. If parliament is able to make changes easily this effectively makes parliament supreme. Such a practice could be used to manipulate the result of court cases which parliament is unhappy with and thus undermine the democratic process. A process to amend the constitution ought nevertheless to be included, but it should ensure that amendments are not rash and easily achieved.

Again the National Convention draft is silent about constitutional amendments. On the other hand the NCUB draft constitution provides in article 149 for such a process. Procedurally the amendment must be introduced in either the People's Assembly or the National Assembly by at least one third of the representatives of that Assembly. The other Assembly, the Federal Government and all Member States must then be notified and may submit their comments within 45 days. The amendment will then pass if "at a joint session...the amendment...[is]...carried by a vote of two thirds of the representatives of each assembly." While the different states in the federation are permitted to comment on the amendment, they have no role to play in the adoption of the amendment. Thus, the process is not sufficient to guard against hasty constitutional amendments when a particular problem is perceived to exist.

In the United States, for example, a process to amend the constitution involves both special majorities in Congress and the agreement of 75 per cent of the 50 states.

Thus, it is recommended that, in addition to the two-thirds majority the supporting vote of a number of states (two thirds or three quarters) should be required in the constitution. Other mechanisms that should be included are procedures for eliciting the views of the public and mandatory time lapses.

## Appointment to and function of the courts

Independent and impartial adjudication is essential to a free and democratic society. Without the independence of the judiciary the rule of law and the protection of funda-

mental rights will be jeopardized. This independence should preclude any interference by the executive, legislature or political parties, because the safety and happiness and peace of every community depend[s] largely on the confidence that people have in the judiciary. Citizens should feel that their rights are safe under the law, and that the judiciary hand down wise and impartial judgments. Thus, a country must have a dynamic and independent judiciary, selected by an independent process. Judges must enjoy security of tenure. Legitimacy and respect for the courts must be nurtured, for without it the rule of law cannot operate. Where governments do not respect the judgments of the courts, human rights will not exist.

The judge's political independence is crucial in the outcome of a particular case, particularly in constitutional adjudication. The question of how, and by whom, judges are appointed is therefore of utmost significance.

The National Convention draft states that there shall be a Supreme Court, High Courts of the Regions, High Courts of the States, Courts of the Autonomous Divisions, Courts of the Autonomous Zones, District Courts, Township Courts, other Courts, established according to law, military Courts and the Constitutional Tribunal. It is also stated that the Supreme Court, "without prejudice to the Constitutional Tribunal and the Military Court, is the Union's highest Court". What is meant by this provision is unknown as no powers are laid down for any of the courts. No delineation is made as to whether constitutional supremacy exists or not, or which court has what jurisdiction. All that is provided is that "the duties, powers and rights of the Chief Justice of the Union and the Justices of the Supreme Court of the Union shall be regulated by law".

As far as the Supreme Court is concerned, the draft provides for the appointment of a minimum of seven and a maximum of eleven justices. More precision about the number of judges is needed to avoid problems and the perception of executive interference in the courts. It is further provided that the State President shall appoint the Chief Justice and other justices of the Union, with the approval of the Union Assembly. The National Convention draft states that the Union Assembly shall not have the right to reject candidates for Chief Justice or Justices of the Supreme Court submitted by the State President, unless there is concrete evidence to prove that the candidate fails to possess qualifications specified by the Constitution. This provision places a large burden on the legislature and is very problematic. It attempts to ensure that a nomination will be accepted except in very unusual circumstances. This completely undermines the independence of the judiciary and goes against every notion of separation of powers.

A similar situation exists in Canada, where the government is solely vested with the appointment power for the Canadian Supreme Court. Discussion on judicial nominees happens behind closed doors and increases the politics in the selection of Supreme Court judges. The Canadian appointment process has been criticized because the lack of transparency and accountability clouds merit selection. The benefits of such a system are that appointments can be made speedily and efficiently, without divisive public hearings. However, the judicial appointment process receives no review either by an independent judicial selection committee or by the legislature and/or electorate. With these safeguards absent, the risk of political patronage remains high. This can undermine public faith in the credibility and independence of the Court and increase the likelihood that lesser qualified candidates will be chosen.

It is critical to remember that constitutional systems must take into account the circumstances of a particular country. Thus, even though the Canadian model of appointment has its flaws, it works in Canada because of the Canadian context. Canada is largely a homogenous country, where the only major division is around language rights for the minority French speakers. This division is recognised and appointments to the Supreme Court ensure that French speakers from Quebec are represented.

Burma, on the other hand, has a large ethnic diversity. Its legacy of ethnic tension means that methods need to be found to de-politicize the court. In a democratic Burma, the appointment of judges directly by the executive could exacerbate the tensions that already exist. It is an essentially undemocratic appointment method, which violates the separation.

Thus, the model set out by the National Convention is highly problematic.

The model, on the other hand, employed in the NCUB draft is a much more democratic alternative. NCUB draft Article 97 provides that there shall be nine Federal Supreme Court members appointed by the Federal President proposed by the Federal Prime Minister and approved of by the Federal Congress. This model follows to a large degree the process used in the United States, where the President nominates a candidate and then confirmation occurs after senate hearings. An advantage of the American system is the public interplay of the legislature and the executive, as both critically evaluate the merits of Supreme Court candidates chosen by the President. However, this is a problematic process because it allows politicians to select candidates based on the candidates' attitude to particular policy issues. The American appointment process, and therefore the NCUB model, inevitably becomes highly politicised, with political considerations playing a part in judicial restructuring. This may lead to a decrease in public confidence in the legitimacy of the court's decisions. For example, in the United States, Ronald Reagan appointed almost only conservatives to the court during his eight-year presidency. This conspicuous attempt to redirect the court was understood by Supreme Court Judge Harry Blackmun, author of the *Roe v Wade* abortion decision, who noted in June 1992 in *Planned Parenthood v Casey* that

"I am 83 years old. I cannot remain on this court forever, and when I step down, the confirmation process for my successor may well focus on the issue before us today [abortion]".

Such an overt politicisation of the appointment process ought to be avoided in Burma.

One model to consider is the German one, where judges serving on the constitutional court serve for a non-renewable twelve-year term. The German Court (Bundesverfassungsgericht) is divided into two senates, each with their own jurisdiction. The First Senate rules upon the constitutionality of legislation and, through the process of *Verfassungsbeschwerden*, citizens may petition constitutional complaints directly to the court. The Second Senate's jurisdiction covers all constitutional issues dealing with criminal and civil procedures, as well as jurisdiction over political cases (i.e. disputes between government branches and political parties as well as election complaints) and all issues of substantive law.

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The National Convention draft states that the Union Assembly shall not have the right to reject candidates for Chief Justice or Justices of the Supreme Court submitted by the State President, unless there is concrete evidence to prove that the candidate fails to possess qualifications specified by the Constitution. This provision places a large burden on the legislature and is very problematic.

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ferent process is employed in each house. The Bundestag has a twelve-person Judicial Selection Committee (Wahlmännerausschuss) whose composition is relative to political party strength in the house. Eight votes are required to approve a justice for the Court. The Bundesrat operates as a whole to elect justices, with two thirds of the house needed to appoint. Constitutional Court Justices often represent a wider variety of life experiences than other German judges. Each candidate is further expected to have scholarly publications. The advantage of the German system is that value is placed on diversity and legal scholarship. In addition, the media attention that the process generates ensures that the process is politically accountable to major interests of German society.

Another model is that used in South Africa, where are appointed by the President from a list supplied to him by the Judicial Services Commission (JSC). Unfortunately, the legislature and executive make up a large percentage of the members on the JSC, with representatives of the judiciary and lawyers' bodies making up the balance. This system carries the danger of political appointments, particularly in view of the fact that decisions in the JSC are taken by simple majority. The public may also be excluded from JSC hearings. A far more democratic method would be to decrease the number of politicians on the JSC and increase the role of civil society.

From this overview, it is clear that in a democracy judicial appointment procedures should be designed to prevent undue political influence. Political parties in parliament clearly have an interest in which judges are appointed as parliament itself is subject to the scrutiny of the court. If the provisions rely on the goodwill of the decision-makers, without providing adequate checks, decisions might be made for reasons other than merit. Thus, the NCUB should rethink its proposed appointment procedure.

While the NCUB constitution states that judges shall be appointed regardless of race, religion, colour or sex, the grounds upon which discrimination ought not to be permitted could be made much more explicit. A useful section in the South African Constitution, which could be imitated in Burma, is the section which enjoins the JSC to "have regard to the need to constitute a court which is independent and competent and representative in respect of race and gender". This is obviously crucial in ethnically-diverse Burma.

Article 104 of the NCUB draft provides that the term of judges expires when judges request it, when they are permanently incapable of performing their duties, if they commit an act of gross misconduct, or when they reach the age of 75 years. However, the danger of such long terms is that the law may not keep in line with the rest of society. It is far preferable to set a term limit of about 12 years for the highest court. This term should not be renewable. Judges should also retire in rotation, so that new judges can learn from judges with experience.

Civil society should play a role in appointments and this role should be constitutionalised. The public's involvement in the process is crucial for the legitimacy of the process. Holding appointment proceedings in public ensures that appointments are conducted without fear, favour or prejudice and constitutes a fundamental check to the exercise of power. In practice, the public should be given the opportunity to make nominations, attend interviews, recommend questions and lodge objections to pro-

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Article 104 of the NCUB draft provides that the term of judges expires when judges request it, when they are permanently incapable of performing their duties, if they commit an act of gross misconduct, or when they reach the age of 75 years. However, the danger of such long terms is that the law may not keep in line with the rest of society.

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principles should be constitutionalised to ensure that they are adhered to at a later stage when the euphoria of the transition subsides.

## A bill of rights

In an ethnically diverse country such as Burma, which has experienced major human rights abuses, a bill of rights provides important safeguards. As Judge Jackson of the United States has said, the purpose of a bill of rights is to:

"withdraw certain subjects [issues] from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections".

Given the challenges presented by Burma's transition to democracy, it needs a constitution that offers maximum protection for human rights to ensure that there is no discrimination on the grounds of ethnic, religious or other differences. While the entrenchment of constitutional supremacy is a useful method of safeguarding a democracy, a bill of rights is a necessity to protect individuals and groups against human rights abuse.

The National Convention's draft contains no human rights protections.

The NCUB draft does, in chapter 2, contain a chapter on Basic Rights. However, the rights section ought to become more detailed and contain greater specificity. The division between those rights that belong to Burmese citizens and those that belong to people in Burma who are not citizens, is far too rigid and too heavily weighted against people who are not citizens. While most countries have rights that are not available to individuals who are not citizens (such as the right to vote), the NCUB draft constitution permits only citizens to form and participate freely in associations, to move freely in Burma, and to choose their residence, trade or employment. At present in Burma there are people who are not citizens of a state who reside in a state lawfully. These individuals should also be entitled to the protections of the majority of rights enshrined in the Constitution.

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The NCUB draft states that, with regard to the right to a fair trial, a person charged with an offence shall have the right to be informed quickly of the specific charge, to be tried within a reasonable time, not to be compelled to be a witness in proceedings against a person in respect of the same offence, to enjoy a defence in accordance with the law or through legal assistance of his or her own choice, and to be tried in a language which he or she understands or have the proceeding interpreted. The draft constitution also provides that all proceedings shall be open to the public, and that a person shall only be tried for an offence which existed when it was committed. No penalty that is degrading to human dignity is permitted, and a person acquitted of an offence shall not be retried, nor can anyone be punished more than once for the same



offence. However, the constitution should lay down more rights for people arrested, detained, or accused of a crime. Firstly, the right to remain silent is absent from the draft. Individuals must have the right to be informed promptly of the right to remain silent and must be informed of the consequences of failing to remain silent. The constitution should also provide that they an accused may not be compelled to make any confession or admission that could be used in evidence against them. Accused persons should have the right to challenge the lawfulness of the detention in person before a court. If a court finds the person's detention to be unlawful, the person must be released. The person must be informed of the charge with sufficient detail to reply to the charge. He or she must also have access to sufficient time and facilities to prepare a defence. The accused should have the right to be present at the trial. Some countries provide that there is a right to have a legal practitioner assigned to an accused person by the state at the expense of the state.

At present the NCUB draft in article 21(b) provides that "no person in the Federal Union shall be detained or imprisoned save pursuant to a law." This provision is too wide, and could allow the state to detain individuals for the wrong reasons for long periods. The constitution should also provide that an accused person should be presumed innocent until proved guilty, that they are entitled to apply for bail and must be allowed to adduce and challenge evidence. A convicted person should have the right to the least severe of the proscribed punishments if the punishment for the offence has been changed between the time at which the offence was committed and the time of sentencing. An accused person should have the right of appeal to, or review by, a higher court. Any evidence obtained in a manner that violates the rights contained in the Bill of Rights should not be admitted if its admission would render the trial unfair.

The right to equality should be a key provision of Burma's constitution, given the previous lack of equality. At present the NCUB draft constitution prohibits discrimination on the basis of national or social origin, religion, social status, political opinion, language, sex, age, colour or race. It is recommended that a much wider group be protected by this article, including discrimination on the grounds of gender and sex, pregnancy, marital status, ethnic, national or social origin, sexual orientation, disability, conscience, belief, culture, and birth.

At present the NCUB draft reads that "no person shall be subjected to torture, cruel, inhumane or degrading treatment". The word "punishment" should also be added to this sentence. Punishment that contravenes any of these provisions ought to be outlawed. While there is a provision that states that "no penalty degrading to the human dignity of the individual shall be imposed" this applies only to penalties imposed by the courts, not to punishments which may be meted out elsewhere.

Also absent from the NCUB draft is a limitations clause. In essence a limitations clause provides that there may be circumstances that require the limiting of rights and attempts to provide strict limits to the manner and extent of any such limitation. This is an important provision as all rights are not inalienable or absolute. The NCUB draft seems to state that certain rights are inalienable. The draft provides that "these rights shall under no circumstances be encroached upon or withdrawn". These rights include equality before the law, the right to life, freedom of thought and belief, human dignity, the right not to be enslaved or suffer forced labour or torture, cruel, inhumane or de-

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section which is relevant is article 15(d) which states: "If the implementation of the basic freedoms mentioned in this article contravenes basic democratic principles or affects public health or morality, the Congress of the Federal Union may enact laws restricting these rights." Article 15(d) is problematic, because it places too much emphasis on parliament rather than the courts. It does not provide a mechanism for deciding how and when rights can and should be limited.

A limitations clause is intended to address situations that require rights to be limited in relatively minor ways to facilitate the normal functioning of society. The most likely instance where the limitation clause would come into effect would be a situation where two or more rights are in conflict, and some aspect of a right or rights might have to be limited in order to ensure maximum protection of all rights. Thus, the right to life is limitable in cases of self-defence, or police use of deadly force or even possible for issues such as abortion and euthanasia. A limitations clause safeguards rights from undue limitation, particularly by the government.

The limitations clause should state that rights may only be limited in terms of a law of general application, and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Any limitation must take into account all relevant factors, such as the nature of the right, the importance of the purpose of the limitation, the nature and the extent of the limitation, the relation between the limitation and its purpose, and if there is a less restrictive means to achieve the purpose.

## The Human Rights Commission

In contrast, the NCUB draft contains a provision establishing a human rights commission. Article 31 states that "Every person whose human rights have been violated shall have the right to seek protection by the Human Rights Commission." The establishment of a Human Rights Commission would be an important step towards the promotion of human rights in Burma. However, the draft gives the Federal Congress the power to establish the commission. This is problematic as the functions ought to be constitutionalised to ensure that the commission is not subject to the will of the legislature and its ability to amend the functions of the commission. The major function of such a Commission should be to promote human rights through a variety of methods: education and raising community awareness; making recommendations to parliament; reviewing legislation; and, importantly, investigating alleged violations of fundamental rights and assisting those affected to secure redress. These objectives and the powers of the Commission ought to be contained in the constitution as the commission plays an oversight role over parliament and thus it is likely that parliament will not be robust in granting vast functions and powers to such a body.

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Again unfortunately the National Convention draft is silent on the question of a state of emergency.

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The process to appoint commissioners in the NCUB draft should also be revisited. At present Article 129 states that the "Federal Prime Minister shall establish Human Rights Commission consisting of seven members whom the Federal Congress has consented to". How this is to happen is not stated. If an independent procedure before the parliamentary procedure is not established then there is the likelihood that commissioners whose political leanings broadly represent those of the political parties in parliament

will be appointed at the expense of individuals with a human rights commitment.

A far better approach would be for parliament to appoint an independent panel, comprised of non-political individuals from the human rights field, to make nominations to the Federal Congress. After the panel has made its recommendations, Parliament must appoint the individuals. Only if there are sufficient human rights reasons for not appointing a candidate should a candidate be rejected. Parliament should vote on candidates by a simple majority support. If a high degree of support for the candidates is necessary then political trading between parties occurs so that each party can obtain candidates that reflect its ideological positions.

## State of emergency

It is imperative that the Constitution explicitly make provision for when, how and what safeguards there ought to be before a state of emergency is declared. This is because the state has extensive powers to limit human rights during an emergency and because human rights violations are more likely to occur in periods of war or revolt.

Again unfortunately the National Convention draft is silent on the question of a state of emergency.

Article 142 of the NCUB draft provides that "on request of the Federal Government, the Federal President shall declare the state of emergency for the territory either of the whole Federal Union or part of it". Here the meaning of the term "the Federal Government" is unclear. Which particular structure? The cabinet? Because of the extreme nature of this event it is important that such a provision should not permit one individual on his or her own to declare a state of emergency. The declaration should require at least a consultation with the cabinet or a few senior members of the cabinet, if convening parliament is not possible. Admittedly, there will be times when the state of emergency has to be declared quickly (for example, in attack by another country). However, many governments use states of emergencies for the wrong reasons, in order to undermine and negate the democratic process. Therefore, sufficient safeguards must be built in to protect the state and its citizens against its misuse.

Thus provisions in the constitution ought to state that any legislation enacted during a state of emergency in consequence of the state of emergency may derogate from the Bill of Rights only to the extent that the legislation is "consistent with Burma's constitution and Burma's obligations under international law applicable to states of emergency." While the declaration of a state of emergency may allow for the passage of laws or other actions that may derogate from aspects of the Bill of Rights, there ought to be specific restrictions on the nature and extent of any derogation. Derogations should be permitted to the extent strictly required by the emergency. Rights, and sections of rights, which cannot be derogated from, ought to be specifically listed in the constitution to guard against rights being derogated that are not necessary for the circumstances that the country faces.

The constitution should also require that a court interpreting the Bill of Rights apply international law including customary international law when reviewing laws or actions

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taken which limit rights or derogate from rights usually protected during times when no state of emergency exists.

The constitution should also provide that a state of emergency only be declared under limited circumstances. At present a state of emergency is permitted in terms of Article 140 when the Federal Union is attacked by external armed forces or such an attack is imminent, when massive destruction, death and injury resulting from natural disasters have occurred, or when the peace and security of the population are seriously threatened. This last clause dealing with peace and security could be widely interpreted and thus the circumstances required for a state of emergency should specify that the life of the nation must be threatened by general insurrection or disorder. There should be a provision that a state of emergency can only be declared if it is clear that such a declaration is necessary to restore peace, law and order.

Legislative oversight must be provided both in terms of the declaration of a state of emergency and over actions taken during the emergency. Article 142 provides that:

"the period of the state of emergency shall be stated in the aforesaid declaration and shall not exceed six months from the date of the declaration. Any prolongation, which may neither exceed six months, affords the approval of the Federal Congress."

This is highly problematic, as a declaration should only be effective for a maximum of 7 days after the declaration, or 14 days if, for example, the Chief Justice of the country also agrees that 14 days are necessary and that parliament cannot be convened. The state of emergency should only be extended beyond the 14 day period by Parliament and then only for a maximum of three months at a time. A resolution passed by two-thirds majority in both houses, sitting separately to avoid any problems, should be required for an extension. A public debate in the Federal Congress should also be required before the adoption of any resolution extending a state of emergency.

The draft fortunately does allow for judicial oversight of actions taken by the state during the state of emergency. The constitution states: "in any state of emergency judicial power shall remain with the courts" and that "courts for special jurisdiction shall not be admissible". It should be clearly stated in the constitution that the Federal Supreme Court is allowed to rule on the validity of a declaration of a state of emergency or on any extension of the state of emergency. In addition, the court should be able to rule on the validity of any legislation enacted, or any other action taken as a result of the declaration of a state of emergency.

The constitution should also provide that all legislation must be published in national and state publications as soon as reasonably possible after the enactment of the legislation. The constitution should prohibit any Act of Parliament declaring a state of emergency, or any legislation enacted or other action taken as a result of the declaration to permit or authorise the indemnification of the state or any individual in respect of an unlawful act. During an emergency, the detention of an individual must be able to be reviewed by a court within 10 days. Unless the person's continued detention is necessary to restore peace and order, the court should be required to release the detainee.

To conclude, the NCUB's provisions on states of emergency could be substantially im-

## Conclusion

This article has discussed the draft constitutions for Burma proposed by the National Convention, the body established by the ruling party, and that proposed by the opposition National Council of the Union of Burma. It has reviewed aspects such as the process of constitution of drafting, the electoral system, constitutional supremacy and amendments and appointments to and function of the courts, as well as a Bill of Rights, a Human Rights Commission and declarations of states of emergency.

The National Convention's constitution contains many strongly anti-democratic provisions and is silent on several key issues. In contrast, the NCUB's constitution attempts to create a democratic system, but includes several provisions that should be reworked to strengthen democratic checks and balances and prevent future state abuse of power.