

Environment and Law in Burma

*Peter Gutter**

Environmental law in Burma under the current military regime is very weak. One of the main problems is that there are no up-to-date laws that regulate pollution. There are also no regulations for environmental impact assessments to examine the harmful effects of projects. Reasonably effective environmental laws were enacted under the British. The democratic period in Burma, from 1948 to 1962, did not improve these laws. After 1962, the military junta repealed and replaced the British laws. The current legislation is too general and has never significantly provided for the protection of the environment. Unfortunately, the Burmese junta shows little concern for the environment.

Problems with Burma's Environment

Burma is one of Asia's naturally richest countries. Its diverse ecosystem ranges from the Himalayas to the tropical reefs along the Bay of Bengal. Fertile agricultural lowlands once made Burma a leading rice exporter. Its fishing grounds were among the world's most bountiful. Its immense native rain forests, some of the last remaining in all of Asia, are home to numerous endangered plants and animals.¹ Ruled by a xenophobic military junta since 1962, Burma missed the wave of development that brought new prosperity to its Southeast Asian neighbours—but which also scarred their environments through unregulated development. Since the 1980s, the junta has appeared intent on catching up on both counts. The junta's rush to acquire hard currency allows Thai and Chinese loggers to quickly cut down broad swaths of rainforest. The massive deforestation is causing serious problems of erosion, floods and landslides.

Deforestation is also threatening some of the last habitats on earth for endangered animals such as the Asian elephant.² Characteristic Indo-Malayan mammal species occur in most of the less disturbed forests, but populations have been greatly reduced and are continuing to decline through habitat loss and over-hunting. Of the two species of rhinoceros formerly occurring in Burma, the Javan is already extinct and the Sumatran almost. Existing forest reserves are managed primarily for timber production. Timber, principally teak, is one of Burma's main foreign exchange earners. Its exploitation is regulated by the State Timber Corporation (STC).³ The Forest Department of Burma, one of the oldest in Asia, is technically still responsible for managing the forests, but is hampered by serious shortages of staff and funds, and by the fact that it has little control over the politically more powerful STC.

The junta's agricultural policies are also creating problems. Farmers are forced to double and treble crop rice. They must then sell large quotas of their harvest to the state at prices far below market value. The junta exports the rice at world market prices and pockets the difference.⁴ These policies not only penalize farmers and distort the market economy, but they are also environmentally very dangerous. Ignoring the traditional wisdom of crop rotation, by growing additional rice crops and using harsh fertilizers, will destroy soil fertility and damage water supply, opening the way to potentially disastrous soil depletion and pestilence.⁵ Moreover, Burma's fisheries are being stripped. To crown it all, massive hydroelectric projects on Burma's rivers, and mining, oil and gas operations are being rapidly expanded with dangerous disregard to environmental impact. This destruction of Burma's environment has been documented in many international reports. But Burma's peoples today have absolutely no say in how their country's resources will be developed. The military regime allows no public discussion or dissent, and punishes anyone who dares question its development priorities or other policies.⁶

A related problem is that environmental issues are either unknown, poorly understood or misunderstood in Burma (for example, there are no words in Burmese for 'conservation' or 'preservation'). Many people in Burma do not yet see the country's environmental problems as very serious. Even among educated Burmese, knowledge about environmental problems is scarce and incomplete. The military regime closely guards all information. Hence people in Burma have little access to information, let alone information about their environment. Education and information are necessary *before* the environment becomes Burma's most serious problem. Therefore, some specific objectives of the Burma Lawyers' Council are to increase awareness among Burmese and ethnic leaders about environmental issues, to prepare a draft list of environmental rights and responsibilities for inclusion in the Burmese constitution—as these were even missing in the democratic constitution of 1947—and to lay the foundations for institutions and laws that will provide protection against environmental damage in Burma.⁷

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Environmental Law in Burma: The Forest Act

Throughout Burma's history there has been evidence of environmental problems. In the 13th century, during the Pagan period, destruction of forests occurred to make way for building the royal city. Trees were felled to provide firewood for baking bricks for pagodas. As a result there is still a dry zone around Pagan. In the 19th century, when Britain was in the midst of the Industrial Revolution, commerce was expanding and railways and shipbuilding developed rapidly. The timber needed for these activities was obtained from Burmese forests.

Following the First Anglo-Burmese War of 1824-1826, the British annexed Arakan and Tenasserim, and the British East India Company reclaimed land for agriculture. Vast areas of forest in Kyaik-khami and Tenasserim were destroyed. The aftermath of the Second Anglo-Burmese War (1852-1853) saw a further destruction of forests. Timber companies such as Bombay-Burmah, Steel Brothers, Fukar and D.T. Finlay were given logging concessions and they lost no time in cutting down the virgin forests of Burma. The British colonial authorities, alarmed by this voracity, felt the need to establish reserve areas.⁸ Hence the Forest Act of 1881 came into being.⁹ This was the first environmental law in Burma. It was also the ostensible cause of the Third Anglo-Burmese War (1885-1886), because in August 1885 the Burman royal council had ordered the Bombay-Burmah company to pay an exorbitant fine of 2.3 million rupees for allegedly illegal extraction of teak logs from Burma territory above Toungoo. The company countered by citing supplementary local agreements of 1882 and 1883 under the Forest Act. But on 20 September 1885, Burman authorities detained log rafts on the Burma side until an initial installment was paid on the assessed fine.¹⁰ The British did not accept this and sent an ultimatum on 22 October 1885, giving Burma less than twenty days to agree to arbitrate the Bombay-Burmah fine. The Burman royal council sent a negative reply, whereupon the British annexed the rest of Burma within the next couple of months.¹¹

The Forest Act¹² consisted of 82 sections, 19 of which dealt reasonably effectively with the protection of forests. Chapter 3 (sections 30 to 34) dealt exclusively with the General Protection of Forests and Forest produce. For example, section 30(1) said, "All standing teak trees wherever situated ... shall be deemed to be the property of the State and shall be reserved trees". 'Reserved' in the context of this Act meant that the President of the Union of Burma, by notification, had declared it reserved. Section 31 said, "No person shall fell, cut, girdle, mark, lop or tap any reserved tree, or injure by fire or otherwise any reserved tree or the timber of any such tree". Chapter 5 (sections 39 to 45) dealt with the control of forest produce. Section 39(1)(b) prohibited the import, export, collection or moving of any forest produce without prior written permission from the forest authorities. The Act contained specific rules for the transport of timber, the establishment of sawmills, duty on forest produce, and the seizure of cattle

or elephants trespassing in a reserved forest. Penalties under the Act were imprisonment for a term which may extend to six months, or a fine, or both. Chapter 7 (sections 74 to 82) described the duties and powers of Forest Officers, such as the power to investigate any forest offence, and the issue of search warrants under the Code of Criminal Procedure.

As economic development began to have an adverse impact on Burma's environment, the British colonial authorities decided to regulate this in more detail. As a result, the Forest Act was amended and revised in 1906, 1926, 1938 and 1941. The Regulation for the Protection of Birds was enacted in 1912, and the Wildlife Protection Act in 1936.

The Wildlife Protection Act

The Wildlife Protection Act,¹³ Chapter 2, deals with unlawful methods of hunting, the protection of reserved forests, and wildlife categories that are completely, normally or seasonally protected. Section 6 of this chapter says, "No person shall hunt any of the following animals, or knowingly possess, sell or buy them alive or dead, or any part or product thereof, ... Rhinoceros, tapir, argus pheasant, masked finfoot, and any other animal that the President of the Union [of Burma] may, by notification, declare to be completely protected animals". Section 7 says, "No person shall hunt any of the following animals ... save under and in accordance with the conditions of a license, Elephant, bison, saing, thamin, serow and goral. (...) It shall not be an offence to possess, buy or sell any domesticated elephant". Section 8 describes the close seasons during which other animals are protected. Penalties for offences under this Act (Chapter 3) include imprisonment for a term which may extend to six months, or a fine, or both. Chapter 4 describes the responsibilities of Forest Officers, Game Wardens and Police Officers.

The Fisheries Act

Other laws relating to the environment included the Fisheries Act of 1905.¹⁴ Sections 11 to 14 of this Act deal with the protection of fisheries. Section 11A (1) says, "No person shall use any dynamite or other explosive substance in any fishery with intent thereby to destroy or facilitate the catching of fish". Section 11A(2) says, "No person shall ... put or cause or knowingly permit to flow into any fishery, lime, *bónlónthi*,¹⁵ poison, or other noxious material which, when put or permitted to flow into water, kills or stupefies fish or makes it difficult for

fish to remain in or near that part of the water”. Section 12 says, “No person shall make ... any canal or channel which may affect any fishery either by reducing or increasing the quantity of water, or changing the quality of the water, or by the introduction of silt”. Section 13 describes the protection of specified species of fish, turtle and tortoise. Section 23 laid down penalties: “Any person who ... kills, captures or in any way interferes with any species of protected fish, or takes, opens or in any way interferes with a nest of eggs laid by any protected turtle or tortoise, or ... permits any cattle or other animal under his charge to enter upon or approach any bank in which turtles or tortoises lay their eggs, shall be punished with imprisonment for a term which may extend to one month, or with fine, or with both”. The Act (under section 24) ensured the accountability of Fishery Officers by laying down penalties for wrongful arrest, seizure or search.

Further regulations concerning the environment can be found in a number of other laws, such as the Municipal Act of 1898¹⁶ and the City of Rangoon Municipal Act of 1922,¹⁷ regulating water supply, drainage, sewerage and the clearing of noxious vegetation.

Agricultural Laws

Then there are a number of agricultural laws, such as the Canal Act of 1905 which regulated the application of water for public purposes, the supply of water, and drainage works.¹⁸ The Insects and Pests Act of 1914 related to damage to all agricultural or horticultural crops, and all trees, bushes or plants.¹⁹ The Underground Water Act of 1930 dealt with the conservation and protection of underground sources of water supply in Burma.²⁰ The Cattle Trespass Act of 1871 has two sections relating to cattle damaging land.²¹ The Sugar Cane Act of 1934 regulated the areas where sugar cane is grown.²² And the Dangerous Drugs Act of 1930 referred to the environment in that it regulated the cultivation of the poppy or *Papaver somniferum*.²³

Regarding another flower, the Water Hyacinth Act of 1917 said, “The presence of the water hyacinth in the Union of Burma is hereby declared to be a public nuisance”. Article 4 says, “No person shall possess or keep the water hyacinth [*Eichhornia crassipes*] and every owner or occupier shall destroy any water hyacinth growing in or on any place belonging to or occupied by him (...)” Article 6 says, “Any person who (1) possesses or keeps the water hyacinth; or (2) fails to destroy ... any water hyacinth which may be found growing in any such place as aforesaid, shall be guilty of an offence, and shall be liable on conviction thereof to a fine not exceeding one hundred rupees, or upon a second or subsequent conviction to a fine not exceeding five hundred rupees”.²⁴

Pesticides so toxic that their use is banned in Europe and the United States are still being imported into Burma by the State Agricultural Corporation. Farmers in Burma use a lot of phenoxy herbicides and other carcinogenic and embryotoxic substances. Since their use is so widespread, the most dangerous compounds such as Silvex, Weedone, Endrin, Aldrin and Dieldrin should be replaced by others less destructive to both human and wildlife. Unfortunately, the existing legislation is insufficient. Although there is a Poisons Act, this only regulates the possession for sale (and not the use) of poisons.²⁵

SLORC's Enactments and the Environment

From 1948 (when Burma gained independence) until 1988 no new environmental laws were passed, except some amendments. Although the 1974 constitution said that the State is the ultimate owner of all resources above and below the ground, it did not say anything about the protection of these resources.

Following the coup in 1988, the SLORC (State Law and Order Restoration Council, the name of the military junta at that time) made it a point to sell the natural resources of the country to get the urgently needed foreign exchange. The junta promulgated SLORC Law No. 1/92 by which a corpus of laws were repealed. The grounds for this repeal were given as "incompatibility with market economy", "long disuse" and "no anticipated need in the future". The laws as repealed by SLORC Law No. 1/92 include environmental enactments such as the Fisheries Act of 1905, the Canal Act of 1905 and the Municipal Act of 1898. Although the repealing of these laws was followed by promulgation of new laws, there were no provisions whatsoever in the new legislation to protect endangered species or the environment.

In 1988, the SLORC began to introduce market economy principles into Burma but made into law that certain economic activities are only to be conducted by the State. The State-owned Economic Enterprises Law (SLORC Law No. 9/89)²⁶ was issued in 1989. In chapter 2, section 3 of this law, the junta spelled out the economic activities that are to be carried out only by the State: "... Extraction and trading of teak within and outside the Union [of Burma]; ... All plantation of wood and its preservation and protection, except firewood plantations by villagers for subsistence; ... Exploration, trading and extraction of oil and natural gas and the production of oil, natural gas and related products; ... Exploration, trading, extraction and export of pearl, jade, ruby and other mineral precious stones; ... Production of fish and shrimps (...)" This means that the junta sees forest protection in terms of *economy*—not *ecology*. It also means that the junta is ignoring the fact that environmental preservation and protection are everyone's responsibility, and is contradicting Principle 10 of the 1992

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Rio Declaration on Environment and Development, which says that, “Environmental issues are best handled with the participation of all concerned citizens”.

SLORC’s Fishing Laws

The Law Relating to the Fishing Rights of Foreign Fishing Vessels (SLORC Law No. 11/89)²⁷ was put into force on 2 April 1989. This law grants fishing rights and concessions within Burmese territorial waters and special economic zones to foreign fishing companies. The SLORC promulgated this law in haste as it badly needed foreign currency and as a result the law has many loopholes and inconsistencies. For instance, in section 10(b) the law says that the fishing company or the owner of the vessel has accepted the rules contained in the license, but in section 12 it says, “...if it is necessary to change the rules, this can be renegotiated”. This means that one can strike out an unwanted clause and write in a new one at will. In chapter 3 of the law, the fishing company’s rights and responsibilities are described. The rights include, “the right to repair the fishing vessel in any local shipyard”. The responsibilities include regulations such as, “...in case Burmese fishermen and seamen are employed, their names should be submitted to the Fisheries Department”. Nothing is said about over-fishing or pollution. Similarly, the Myanmar Marine Fisheries Law (SLORC Law No. 9/90) does not say anything about over-fishing or pollution.²⁸

In 1993, a vague reference to the environment²⁹ was added to SLORC Law No. 11/89, stipulating that “the highest penalty of 30,000 kyats or seven years imprisonment or both shall be handed down to people who use explosives, poison, chemicals or the like in fishing”. However, section 16 of SLORC Law No. 11/89 provides that “notwithstanding any law in force, judgment passed by a court of law can be superseded and overruled by the Director-General of the Fisheries Department”. This was drafted to protect the interests of foreign companies working in joint venture with the military junta. It also means that there is no rule of law in Burma: when the economic partners break the law, they can still carry on business as usual.

Fishery concessions granted by the military junta to Thai companies in 1989 and 1993 have led to severe over-fishing by modern trawler fleets in wide areas of the Andaman Sea on Burma’s southeastern coast. That is why in 1993 SLORC Law No. 11/89 was amended by SLORC Law No. 11/93, regarding license fees, offences and penalties. In addition, the SLORC passed an emergency act (the Act Covering Foreign Trawlers) in 1993, again increasing the fees and penalties.³⁰ However, local fishermen were unable to pay the license fees and were therefore stopped from practicing the only livelihood they knew, whereas finan-

cially better off foreign fishing companies could obtain licenses easily. The depletion of a renewable resource for quick commercial gain is typical of the junta's economic policies: long-term environmental effects or their immediate impact on local residents are ignored. Many fishing villages in Burma are increasingly impoverished as their traditional source of sustenance disappears.

The Law Relating to Aquaculture (SLORC Law No. 24/89) was enacted on 7 September 1989. According to Chapter 1, Section 2(g) of the law, aquaculture is the "... propagation of fish species, and the breeding of fish through different stages of growth in natural or artificial waters". Although the term "Reserved Fisheries Waters" ("Fisheries waters in which the [Fisheries] Department has permitted the fisheries enterprise with restrictions, in order to prevent the extinction of fish species") is promisingly included in the law's list of definitions, there is no further reference to this in any section of the law, strangely enough. Chapter 8, Section 29(b) says, "No person shall ... obstruct navigation and flowing of water, or pollute the water within the fisheries' waters or abet such acts". This is not very specific and nothing is said about an inspection mechanism. Like so many other 'environmental' laws in Burma, this law merely regulates applications for either lease or license and the payment of duties.

On 10 August 1995, all fishing deals between the Burmese junta and Thai fishing companies from Ranong were scrapped after the killing of Burmese sailors by Thai fishermen. The junta also claimed Thai fishermen had violated the agreements by fishing outside the concession areas and taking more fish than they were allowed. In April 1997, Thai fishing companies complained that they were not being allowed to transport catches out of the Burmese concession areas despite new agreements with the junta.³¹ In November 1997, the junta finally agreed to grant fishing concessions for about 400 Thai fishing trawlers and about 450 Thai boats registered as Burmese trawlers.

Between 1997 and 1999, the Burmese junta again issued a number of directives and decrees, further limiting deals with Thai fishing companies. In January 1998, the junta decided that 300 Thai trawlers would be granted 45-day fishing rights for a concession fee ranging from 250,000 to 320,000 Baht, depending on the size of the vessel. But an SPDC Order from October 1999 suddenly suspended all Thai fishing rights. Burma barred Thai fishing vessels from its territorial waters: "Any Thai fishing vessels found in Burmese territorial waters will be shot at by the Burmese navy [and] any Thai fishermen found poaching in Burmese territorial waters will be arrested".³² This revocation of fishing concessions was the fifth such ban since Thai fishermen began operating in Burmese waters in the 1970s.³³ Thai newspapers stated that the fishing ban affected some 400 licensed Thai trawlers and up to 5,000 Burmese workers normally employed on the vessels. According to the Burmese Fisheries Department, the Order was issued "by reason of environmental concern [because] the Thais have been poaching and over-fishing". The junta denied the Thai statements regarding 400

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vessels: “According to the Myanmar Ministry of Fisheries, there are altogether 106 Thai fishing vessels being officially granted concession on a monthly basis to fish in Myanmar waters. The rest are illegal fishing vessels poaching in Myanmar waters for decades. The fishing authorities of Myanmar nevertheless appreciate the information given by the Thai newspapers, since it highlighted the approximate number of illegal fishing vessels operating in Myanmar waters”.³⁴

According to Thailand, however, the SPDC Order was issued not for environmental but political reasons, in reprisal against the Thai government’s decision to release Burmese political dissidents who took hostages when they commandeered the Burmese Embassy in Bangkok in October. The Burmese junta has said that they will not lift the sanctions until the dissidents who seized the embassy are arrested and prosecuted.³⁵ It is estimated that the Thai fishing industry is losing around \$3.8 million a day as a result of loss of access to Burma’s rich fishing grounds. But the sanctions imposed on Thailand have also imposed a heavy burden on Burma itself. The cost of fuel and food in those parts of Burma that were dependent on trade with Thailand has risen sharply, adding further misery to a population that is already very poor.

The Junta’s Forest Rules: The Junta Rules the Forest

The Forest Law (SLORC Law No. 8/92) was promulgated on 3 November 1992. This law, according to section 3(a) is “to implement the forestry policy of the Government ... [and] to develop the economy of the State”, which means that it protects the timber industry instead of the forest. The Law consists of 13 chapters, of which seven are concerned with licensing industries and the extraction of forest produce. Chapter 2 (‘Basic Principles’) is the only part where the Law vaguely mentions international agreements relating to conservation of forests and environment. Wherever ‘reserved trees’ are mentioned, the Law means teak trees belonging to the State. Article 43(a) says that “Whoever fells, cuts, girdles, marks, lops, taps, injures by fire or otherwise any teak tree ... or moves or keeps in possession unlawfully any teak timber without a permit shall be punished with fine which may extend to 50,000 kyats, or with imprisonment for a term which may extend to 7 years, or with both”. However the Minister of Forestry and the Director-General of the Forest Department may reduce, waive or exempt from payment any fine or royalty due. Article 58 says, “The Forest Act of 1902 is hereby repealed”. Although according to article 55, “The reserved forests existing under the Forest Act of 1902 shall be deemed to be reserved forests constituted under this Law”, under article 57(b) the Minister and the Director-General may issue their own orders, directives and notifications “as may be necessary”. Although the SPDC (State Peace and Development Council, the current name of Burma’s military regime) published a booklet with new “forest

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rules and regulations” in 1998, this is providing mere extracts of the Forest Law without any better regulations concerning forest protection.³⁶

In theory, the military-run State Timber Corporation (STC) controls all Burma’s timber exports. But for two reasons it is unlikely that the military will be instrumental in protecting forests. First, timber is the second largest money-maker for the junta.³⁷ On paper, Burma extracts about one million cubic meters of teak logs per year with state-owned or contracted operations. But independent environmental protection organizations estimate that this must be at least three times as much. For example, from 1989 to 1992, the SLORC issued licenses to 60 Thai logging companies.³⁸ Second, in 1990, when the junta annulled the results of the election, the generals were concerned that the thousands of dissidents who fled Rangoon would be armed by insurgents who had been operating for decades along Burma’s northern border. So the junta cut a deal with the rebel forces: in exchange for permission to engage in business, the insurgents promised not to arm the dissidents. Logging concessions were a key sweetener. The junta gave the rebels access to logging machinery and milling equipment. Chinese businesses were soon working together with the rebels, bringing in lumberjacks and trucks, and cutting down forests. The Chinese have never done any business with the STC, but only with local military authorities and the rebels. In 1997, Yunnan-based environmentalists reported that Chinese loggers had cleared 35 miles into Burma. This year logging has moved 60 miles inside Burma.³⁹

Then there are the plans for a highway and a gas pipeline along the route of the legendary Ledo Road.⁴⁰ The original road was extending from railhead Lashio in Burma to Kunming in China. About 700 miles long and constructed through rough mountain country, it was a remarkable engineering achievement. Undertaken by the Chinese after the outbreak of the Sino-Japanese War in 1937 and completed in 1938, the road was used to transport army supplies landed at Rangoon and transported by rail to Lashio. This traffic increased in importance to China after the Japanese took control of the Chinese coast and Indochina. The Ledo Road (later called the Stilwell Road) from Ledo, India, into Burma was begun in December 1942. In 1944 the Ledo Road reached Myitkyina and was joined to the Burma Road. Both roads lost their former importance and fell into disrepair and disuse after 1945.⁴¹ If the Ledo Road is rebuilt, Assam will be linked with China, paving the way for the logging companies—with increasing deforestation in Burma as a tragic consequence.

SLORC’s Wildlife Laws

The Protection of Wild Life and Wild Plants and Conservation of Natural Areas

Law (SLORC Law No. 6/94) was promulgated on 8 July 1994 as the junta's response to its obligations under the World Heritage Convention and the Convention on Biological Diversity. However, SLORC Law No. 6/94 is not very effective, especially in terms of protecting wild animals and plants. It contains no provisions for air and water pollution and pollution caused by industrial waste. The section on hunting does not mention unlawful methods of hunting but only mentions the possession of a licence. Chapter 6, section 20 says, "A person who has been granted a hunting licence shall (a) pay the hunting licence fees as may be prescribed; (b) abide by the [financial] conditions of the hunting licence; (c) submit to the inspection of the Forest Department" (what kind of inspection?) Although the Law says that "Whoever is hunting without a licence shall on conviction be punished with imprisonment which may extend to 3 years, or with fine up to 10,000 kyats, or with both", the Director-General of the Forest Department can stipulate his own conditions. Section 48 says, "The Wildlife Protection Act of 1936 is hereby repealed". However, in contrast to this, section 46 says, "Before the issuance of rules, procedures, notifications, orders and directives under this Law, rules, notifications, orders, directives and circulars issued under the Wildlife Protection Act of 1936 may continue to be applicable in so far as they are not inconsistent with this Law".⁴²

On 26 October 1994, the Forest Department Notification No. 583/94 was issued in addition to SLORC Law No. 6/94. The Notification says, "In accordance with [SLORC] Law No. 6/94, the Director-General of the Forest Department, Ministry of Forestry, notifies the following endangered wildlife species as protected wild animals, in respect of their categories". Hereafter, Chapter I describes 'Completely Protected Animals' (A. Mammals, 39 species; B. Avifauna, 50 species; C. Reptiles, 9 species). Interestingly, the very first mammal listed under (A) is the Javan rhinoceros—in Burma already extinct for decades.⁴³ Chapter II describes 'Protected Wild Animals' in a similar arrangement (A. Mammals, 12 species; B. Avifauna, 43 species; C. Reptiles, 6 species). Chapter III describes 'Seasonal Protected Animals' (A. Mammals, Protected during the period of 15 June to 30 September, 2 species; B. Avifauna, Protected during the period of 15 March to 30 September, 13 species).⁴⁴ Nothing is said about penalties or licenses.

SLORC's Mining Laws

The Myanmar Gems Law (SLORC Law No. 8/95) was promulgated to enable private companies to enter into joint ventures with the junta to mine for precious stones. Previously the mining of precious stones was only done by the state,⁴⁵ and the impact on the environment had been negligible. Section 12(a) of the law however anticipated environmental issues by providing that the Ministry

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of Mines, in vetting the application to excavate a piece of land, "...must determine whether such excavation could damage nearby property and buildings, whether third party rights will be affected or not, and appoint the Myanmar Gems Trading Corporation to investigate if reserve areas, wildlife and natural habitats, highways, religious property or cultural heritage could be affected by such excavation". Although this sounds promising, 218 precious stones mines were excavated and 15 jade exploration projects were undertaken between 1989 and 1992, causing enormous damage. The use of high-tech equipment and dynamite enabled the mining companies to extract a lot in a short time but the damage to the environment, especially around Mogok and Mineshu, is extensive. Because the mining companies used water pumps, local people still face either floods or shortages of water for drinking and cultivation of crops. But as the junta is a business partner, no mining company is liable to prosecution or fines.

Similarly, under the Mines Act of 1924⁴⁶ or the Myanmar Mines Law of 1994 (SLORC Law No. 8/94, which repealed the Mines Act),⁴⁷ no mining company is liable to prosecution or fines. For instance, residents of Karen State have developed symptoms of lead poisoning and low blood pressure due to pollution from mining operations, but they cannot file any lawsuits. Section 9 of the Land Acquisition (Mines) Act of 1885 regulates the "Government to Pay Compensation for Injury Done to Mines", but nothing is said about harm or injury done *by* mines.⁴⁸

No Laws to Govern Pollution

In relation to pollution, Burma has no specific laws to govern air and water pollution. There is a general provision in Section 3 of the Public Health Law of 1972 which empowers the Ministry of Health "to carry out measures" relating to environmental health, such as garbage disposal, use of water for drinking and other purposes, radioactivity, protection of air from pollution, and food and drug safety. However, detailed provisions do not exist to ensure more effective and comprehensive regulation of these matters. Air pollution from vehicles, for instance, is a growing problem due to the increasing number of cars and trucks and the old age of most of these, but regulation exists only through an annual renewal of licenses.⁴⁹ No specific regulation exists for emission standards. In the regulations for hotels and tourism, there are no provisions whatsoever for pollution control. Although the Burma Ports Act of 1908 contains a paragraph about harbour pollution (see endnote 79), this merely focuses on the detriment to navigation. As for air pollution from industries, many small factories emit a great deal of foul smells, such as food preparation industries. The factories are governed by the Promotion of Cottage Industries Law of 1991,⁵⁰ administered

by the Ministry of Industry, but this law is only regulating licenses. It does not control air pollution and has no inspection mechanism. In addition, the main urban areas have no industrial zone systems. The only control of water pollution in the country is through guidelines issued in June 1994 by the Myanmar Investment Commission. These guidelines require that new investment projects have waste water treatment systems. River and lake pollution from sewage, industrial waste and solid waste disposal are serious problems in Burma, but are not regulated explicitly by any laws. Moreover, the waterworks and sanitation facilities in the country are not of good quality, nor are their operations coordinated by any governmental agency.

Ineffective Sectoral Laws

The current environmental laws in Burma are often sectoral laws. This greatly increases their ineffectiveness. The laws created by the military junta are administered and enforced by different ministries. This means that the responsibility of protecting the environment is divided among many agencies that do not work together. Examples are the Forest Law of 1992, administered by the Forest Department, and the Myanmar Mines Law of 1994, administered by the Ministry of Mines. Typically, these laws are concerned mainly with licensing industries and may only vaguely refer to environmental protection. Even when the laws do address the environment, they do so in a very general way. For example, the National Convention drafted by the military junta stipulates only that "the State shall protect the environment". General rules like this are difficult to enforce. There can be no substitute for concrete legal regulations and remedies which the junta has promised but failed to implement. In addition, it is unclear whether or not the environmental parts of the laws are actually enforced. There is no independent agency in Burma that has the power to ensure that environmental laws are enforced, so it is completely up to each ministry to decide how much trouble they will take over environmental protection. Since the main purpose of most of the ministries is to promote the industries under their charge, it is unlikely that they are very concerned about the environment.

Four additional factors influence the effectiveness of the sectoral laws. First, penalties for violations of these laws usually only specify maximum penalties, so even if violators are caught and convicted, they might only get extremely light sentences. Second, because of the poverty and the high rate of inflation in Burma, fines that would be heavy for the majority of the population would be viewed as ridiculously light by foreign companies. This is a major problem because the junta is actively trying to attract foreign companies to build factories and other industrial projects. Foreign companies want to invest in Burma because its few environmental regulations are so weak that even if the laws are en-

forced, it is more profitable for companies to damage the environment and pay the fine rather than take the trouble to prevent harm. Third, any law is useless if the people who are supposed to enforce the law are corrupt. Finally, under a dictatorship like the Burmese junta which has the power to ignore or overturn any of its own laws, environmental laws are potentially useless.

In addition to the sectoral laws, there are laws passed by previous governments, some dating back to colonial rule, which may still be in effect. In this regard the junta's regulations are vague. Official reports do sometimes refer to repealed laws as being in current force, especially to back up the government's claim that it has 52 laws that address environmental issues.⁵¹ At any rate, most laws are outdated and their environmental provisions are ineffective.

Burma's National Commission for Environmental Affairs

The National Commission for Environmental Affairs (NCEA) was formed in 1990. It is chaired by the Minister of Foreign Affairs, which is another sign that the junta views the environment as a tool to win international approval. The nineteen members of the NCEA are the heads of department of various ministries. The objectives of the NCEA are supposed to include setting environmental standards, creating environmental policies for using natural resources and laying down rules and regulations to control pollution, as well as to create short and long term environmental policies which balance environmental needs and development requirements.⁵² The NCEA is currently in the process of drafting two environmental laws, namely the Environmental Protection Law and the Environmental Impact Assessment Rules.⁵³ So far however, the NCEA has been severely under-funded and under-staffed and has been unable to meet its objectives. Nevertheless, it is the only government organization in Burma with a main purpose to work on environmental affairs. Although the junta has formed a Central Committee for the Administration of Uncultivated Land, Fallow Land and Waste Land,⁵⁴ this committee only controls deforested areas that are now wasteland.

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Burma's Environment Policy

In recent years the military junta has become more vocal about improving environmental laws and policies in Burma. It issued an Environment Policy in 1994 and has been working with the United Nations on a national action plan for the environment called "Myanmar Agenda 21". These acts are however no more

than a façade that makes the junta look like an environmentally concerned government. This is part of the junta's attempt to legitimize itself with the United Nations and international environmental organizations.

The Environment Policy is a one-paragraph statement, which proclaims the government's commitment to the principle of sustainable development. It says, "To establish sound environment policies, utilization of water, land, forests, mineral, marine resources and other natural resources in order to conserve the environment and prevent its degradation, the Government of the Union of Myanmar hereby adopts the following policy. The wealth of the nation is its people, its cultural heritage, its environment and its natural resources. The objective of Myanmar's Environment Policy is aimed at achieving harmony and balance between these, through the integration of environmental considerations into the development process to enhance the quality of life of all its citizens. Every nation has the sovereign right to utilize its natural resources in accordance with its environmental policies, but great care must be taken not to exceed its jurisdiction or infringe upon the interests of other nations. It is the responsibility of the State and every citizen to preserve its natural resources in the interest of present and future generations. Environmental protection should always be the primary objective in seeking development".⁵⁵

This environment policy is in fact a statement about sustainable development. While sustainable development is important and should be part of an environmental policy, a nation's environmental policy should include more than just sustainable development. It should be broader. For example, a policy should also, at least, talk about the importance of conserving natural areas and wildlife, the right of the public to participate in decisions regarding the environment, and the importance of protecting people and environment from pollution.

"Myanmar Agenda 21"

"Myanmar Agenda 21" is essentially an environmental action plan for Burma. It is divided into 4 Parts and 19 Chapters, and reviews the current state of Burma's development and environment. It suggests policies to be undertaken for improving environmental protection in Burma. Some of the major proposals of the Agenda are strengthening the NCEA, possibly turning it into a Ministry; creating a national framework legislation on the environment to improve coordination and cooperation between ministries on issues related to the environment; and creating legislation that requires that environmental impact assessments are done before any development project is undertaken. Written with the assistance of the Asia-Pacific Centre for Environmental Law and the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), it was ap-

proved by the Burmese junta in February 1997. Although the document was presented at the June 1997 United Nations General Assembly Session on Agenda 21, it is only a plan and the junta is not bound to stick to it. So far it has only been a façade. It will nevertheless be an important tool for the junta to use when it wants to convince UN agencies and international environment organizations that it is serious about the environment and should get funding and other support.

Oil, Gas and the Environment

Multinational oil development remains a key to Burma's expansion of the military. Without foreign exchange from oil investments, the junta would be much more dependent on foreign aid, which is tied to political reforms. Foreign investments in Burma only strengthen the junta and do not benefit the population. Moreover, Burma's current legal system allows foreign investors to operate free of environmental regulations. Consortium partners exert absolute decision-making control. In addition, lack of transparency ensures that oil companies will not be held responsible for any environmental damage that they cause. Oil companies usually do not trouble themselves with ecological concerns. The nature of their activity and, particularly, the race for profits are by definition counteractive to respect for the environment.

Burma is a country with particularly rough terrain, and almost no infrastructure to support oil exploration and production. Most of the areas where oil exploration is proceeding remain inaccessible by roads. Heavy equipment is shipped up rivers during the monsoon season, and then used after the monsoons have passed. Many activities require the use of helicopters to by-pass the roads and rivers. Environmental impacts of oil exploration include the significant deforestation for helipads, base camps, testing sites and roads. Testing involves the use of seismic lines. Companies clear paths, one to five meters wide, one kilometer apart in a series of grid lines, and lay 10-pound dynamite charges every 100 to 150 meters. Cables with seismic meters are placed along the grid lines and when the charges are detonated, readings are taken and analyzed. The companies cut roads by hand or with bulldozers through virgin tropical forests in order to lay the grid lines. Seismic survey teams clear an average of 5,000 kilometers for grid lines per contract. Geophysical exploration service companies have blasted with dynamite and bulldozed through extensive tracts of tropical monsoon forest in Burma, causing enormous damage.⁵⁶ Once roads are constructed into these areas, further deforestation follows. The SLORC granted timber concessions in areas of virgin forest newly opened up by the oil companies. Large amounts of timber are currently being trucked to China, an unknown but significant quantity of which is coming from oil concession areas. Constructing roads also al-

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lows the military to move soldiers, heavy artillery and supplies into opened areas, thus securing their hold over the indigenous population. In addition, the Burmese army has been carrying out extensive strategic defoliation of forests in its struggle against insurgent groups.⁵⁷

Other environmental impacts of oil exploration include large-scale erosion around areas which are cleared and drilled. Flash floods occur in deforested areas during the rainy season. Pollution of streams and rivers with mud and silt from the exploration process is common. Many streams are eventually blocked by the mud, resulting in the formation of stagnant, mosquito-infested ponds. Rigs, both onshore and offshore, deplete water supplies and contaminate water by spreading of toxic wastes. These wastes can seep into ground water supplies, streams and rivers. Disruption of wildlife around the areas being explored is unavoidable due to the explosions, chainsaws and helicopters. While teak and hardwood cutting in Burma is currently more environmentally destructive, serious long-term environmental destruction will result from oil development.

The exploration, development and production of natural gas can create the same environmental problems as oil exploration. The Yadana and Yetagun gas fields in the Andaman Sea and the construction of pipelines across southeastern Burma to Thailand present significant threats to Burma's environment. Of the wastes produced during offshore exploration, the most damaging are the drilling muds which can be made up of many toxic substances. These are usually disposed of by simply dumping them into the sea, robbing the water and bottom sediment of oxygen. As a result, marine life such as shellfish is unable to survive. Another form of waste generated by natural gas exploration is that of toxic brine. This is disposed of in enormous quantities. Toxic brine is a dangerous chemical formation extracted from the gas reservoirs. The dumping of this waste has a disastrous effect on wetlands, fish and wildlife, and is polluting water supplies.⁵⁸ This is a legacy left behind by the oil industry in many countries.

Natural gas, unlike oil, is explosive, which makes gas pipelines inherently dangerous. The Yadana pipeline from Burma to Thailand may be even more dangerous due to the builders' lack of attention to this risk. There has already been at least one report that the Yadana pipeline has leaked in Thailand.⁵⁹ Led by oil companies Unocal⁶⁰ from the United States and Total from France, in partnership with the Burmese junta, pipeline projects have been pushed through without consultation or approval of local residents or independent environmental impact assessments.⁶¹ The oil companies have insufficiently acknowledged the risk of explosion, e.g. by forest fires. The evergreen forests along the pipeline route are susceptible to this, and a pipeline explosion might cause damage beyond repair. There are enough other potential causes of a gas leak or explosion (such as seismic faults, landslides, human error, or breakage from rocks back-filled into the pipeline trench) to make an environmental disaster a real possibility. In addition to this, the pipeline splits a vibrant and cohesive ecosystem into

two parts, fragmenting it, thereby seriously damaging a previously healthy environment and destroying the forest habitat home to rare animals. This division of the forest is perhaps the most harmful environmental impact of the pipeline projects.⁶²

The drilling rigs themselves also contribute to air pollution. In the United States, oil companies have been forced through the Clean Air Act Amendments of 1990 to formulate new requirements for the offshore industry. As a result, stricter air emission regulations on offshore drilling have been implemented. Since Burma has no such policy, the question is whether the oil companies adhere to the same standards in their operations offshore in the Andaman Sea. The “out of sight, out of mind” attitude makes it virtually impossible to know what is happening in an environment that is literally out of sight. Unocal’s ‘Statement of Principles’ includes a short paragraph entitled “Protect the Environment”. It says, “Take our environmental responsibilities seriously and abide by all environmental laws of our host country, as we do in the United States”.⁶³ Unfortunately (or ironically?) the existing legislation in Burma regulating the exploration of oil and gas does not say anything with regard to the environment.⁶⁴ The list of countries where Unocal is investing, as mentioned in the company’s annual reports, is dominated by countries lacking developed legal systems and environmental regulations.

None of the oil companies currently operating in Burma have disclosed any environmental plans regarding their practices in the country. Where are the drilling muds and other toxic wastes going? How is it managed? Who is responsible? These are only some of the questions that arise that need answering. Unocal and Total have never released the results of their purported environmental surveys, nor have they allowed independent ecologists to visit the region. All indicators surrounding oil and gas projects in Burma should raise major environmental concerns, both onshore and offshore. This is especially true given four factors. First, the secretive practices of the junta and the oil companies, resulting in a lack of information on the environmental impacts of their projects. Second, the lack of access to exploration and pipeline areas, preventing independent environmental impact assessments from being conducted. Third, the inability of local people to participate in decision making. And last but not least, the lack of effective laws and environmental regulations in Burma.

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Treaties as Treats for the Junta

Burma is party to several international treaties which concern the environment. Some international treaties require that the countries that sign must take specific actions. Unfortunately, this is not the case with most of the environment trea-

ties Burma has signed, as these are not very strong and do not require Burma to do anything.⁶⁵ By signing the treaties, the junta hopes to get international recognition as a government that cares about the environment. The treaties also often provide opportunities for funding and technical assistance for the developing countries that sign them.

Even when environmental treaties require countries that sign them to take specific actions, it is difficult to enforce these treaties. When countries do not live up to their obligations, there are only limited actions that can be taken against them. There are several major international environment treaties Burma has signed, including the conventions listed below.

Biological Diversity: The Convention on Biological Diversity⁶⁶ attempts to protect animals and plants by promoting conservation and sustainable use. However, it only asks countries to protect their animals and plants “as far as possible and as appropriate”.⁶⁷ Moreover, the Convention specifically says that all countries have “the sovereign right to exploit their own resources pursuant to their own environmental policies”. In view of Burma’s environmental policy, this certainly does not place a heavy burden on the junta to take care of Burma’s abundant wildlife and wild plants.⁶⁸ The appeal of the Convention on Biological Diversity for Burma is probably explained by one critic’s description of the Convention as “a vehicle to transfer funds from rich to poor in the name of biodiversity”.

Climate Change: The Framework Convention on Climate Change⁶⁹ is aimed at controlling the emission of greenhouse gases such as carbon dioxide and methane, that are believed to cause changes to the climate. One of the main sources of greenhouse gases is from burning coal. However, this treaty is also weak because it does not set any concrete standards for reducing emissions. In other words, the treaty merely asks the countries that sign to reduce the amount of greenhouse gases they emit but leaves it up to the country to decide the level of reduction.⁷⁰ In addition, this Convention does not require developing countries to reduce their emission because it recognizes that the first priorities of developing countries are economic and social development and poverty eradication. Therefore, Burma can apply for financial and technical assistance under this treaty also without being obliged to take any specific steps to control air pollution.

Ozone Layer: The Vienna Convention for the Protection of the Ozone Layer⁷¹ and the Montreal Protocol on Substances that Deplete the Ozone Layer⁷² are aimed at reducing production of gases that damage the ozone layer (a layer of gases that surrounds the earth and protects the earth from radiation). Only a few Western countries have factories which emit ozone-harming gases. Therefore while these are strong treaties, Burma does not have to do anything because it does not have any factories that emit such gases. However, these two

treaties are useful to the junta because they provide international prestige.

Endangered Species: Although Burma has accepted the Convention on International Trade in Endangered Species of Wild Flora and Fauna,⁷³ the trade in Burmese wildlife has not stopped. Throughout Southeast Asia still many birds are being imported from Burma, for which export permits are issued by the Burmese “Department of Livestock Resources”. However, only the Forest Department can legally issue such permits. Most of the birds are one species, *Gracula religiosa* or the hill myna (called *thaliga* in Burmese). Hill mynas are one of the few bird species fully protected in Burma since 1912.⁷⁴ Increasing numbers of wild orchids and rare butterflies, most of them collected in Burmese forest reserves, are also being exported, mainly to Singapore, Taiwan and Hong Kong.

Pollution by Ships: The International Convention for the Prevention of Pollution by Ships⁷⁵ is a strong treaty and although it was signed, it only partly entered into force. It has detailed regulations for preventing pollution of the marine environment by ships. It contains very specific guidelines on matters such as discharging oil from ships, storing oil on board, carrying harmful substances by ship and dumping sewage and garbage from ships.⁷⁶ However, Burma has only signed Annexes I and II, about the “Prevention of Pollution by Oil” and the “Control of Pollution by Noxious Liquid Substances”. It is not clear whether or not Burma actually tries to follow these guidelines.⁷⁷ Ironically, Burma has not accepted Annexes III, IV and V—about the “Prevention of Pollution by Harmful Substances in Packaged Form”, the “Prevention of Pollution by Sewage from Ships” and the “Prevention of Pollution by Garbage from Ships” respectively. In addition, the Burma Merchant Shipping Act of 1923 does not mention the environment at all,⁷⁸ only the Burma Ports Act of 1908 contains a (very general) paragraph about harbour pollution.⁷⁹

Tropical Timber: The purpose of the International Tropical Timber Agreement⁸⁰ is to promote the timber industry. Although it has provisions to encourage sustainable logging,⁸¹ many people feel that the main purpose of this treaty is to help the logging companies.⁸² The treaty is administered by the International Tropical Timber Organization in Yokohama, Japan.

World Heritage: Burma accepted the Convention Concerning the Protection of World Cultural and Natural Heritage (also known as the World Heritage Convention) in 1994.⁸³ This Convention asks each country that signs it to identify, protect and conserve sites which are so culturally or naturally important that they should be considered part of the world heritage of mankind. Countries are asked to set up services for the protection of sites of cultural and natural heritage, and to take appropriate legal, scientific, technical, administrative and financial measures to protect and conserve these sites. Countries which do not have the resources to carry out these obligations can request international assistance. Burma has not lived up to its obligations to this treaty. The only law that

Burma has enacted in terms of fulfilling the requirements of the treaty is SLORC Law No. 6/94 (the Protection of Wild Life and Wild Plants and Conservation of Natural Areas Law) which is not sufficient.

Most of the existing forest reserves in Burma were established towards the end of the 19th century when pressure on the natural environment was negligible. Their main purpose was to safeguard the most valuable stands of commercial timber, with little regard to the need for protecting the forest per se.⁸⁴ Today the needs are both very different and much more urgent. In 1981 the junta invited the Food and Agriculture Organization and the Development Programme of the United Nations to assist in a project to identify areas suitable for national parks and reserves. One of the conclusions of the project was that there was still a potential for the creation of new protected areas, but, "If conservation programs are to be effective, it is necessary to provide the legislation and administrative organization to administer these effectively".⁸⁵ A principal recommendation in another report was that "comprehensive new legislation based on modern concepts of environmental management" should be introduced.⁸⁶ However, legislation is still very weak, which is a clear sign that the whole concept of forest reserves and wildlife sanctuaries has never been taken seriously by the junta.

Although there are 15 wildlife sanctuaries in Burma, they are small and total only 0.5 per cent of the land area. Under the existing legislation the fauna in the sanctuaries is protected, but the habitat is not, with the result that some of the most valuable areas such as Shwe U Daung (one of the last known habitats of the Sumatran rhinoceros in Burma) have been logged. Damage to other areas has been so severe that they are now of little conservation value.

Nevertheless, the junta is now seeking World Heritage status for the newly-created Myinmoletkat Wildlife Sanctuary. The Burmese army has been clearing the area, thereby razing entire villages, killing, raping, enslaving, to make way for the sanctuary which is the biggest of its kind in the world. It is home to rare flora and fauna, tigers, elephants and the Sumatran rhinoceros. It must be a sign to the world as if the Burmese military junta, shunned because of its appalling human rights record, cares about endangered wildlife and the environment. "Burma wants a nature reserve. So do conservationists. But first they have to get rid of the villagers".⁸⁷

Conclusion

The current environmental laws in Burma are weak and vague, and enforcement is spread over many ministries. There are no up-to-date laws for some of the most important aspects of environmental protection, such as the prevention of

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water pollution, air pollution, and industrial waste. The laws that do exist are too general and often the penalties are not strong enough to deter foreign companies. There is no environmental regulatory agency that can make sure that the ministries are actually enforcing the laws under their charge. Implementation of a sound environmental policy is necessary but can only be realized in a system which responds to feedback from all those who have a stake in the environment. The presence of a ruthless military regime—resulting in a lack of transparency, lack of local participation, and lack of knowledge—has been making such an implementation impossible in Burma so far. Overall, the Burmese junta shows little concern for the environmental impact of its policies. Economic ‘development’ is proceeding without public input, clear legislation, reliable data or official accountability. Nevertheless, the military junta has discovered that environmental issues can be an important tool to gain international prestige and funding. The junta has become more vocal about protecting the environment but it has taken few steps to live up to its promises.

Endnotes

* Peter Gutter is an adviser with the Burma Lawyers’ Council in Bangkok.

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- Law), "The Burma Code", Volume III, Published under the Authority of the Government of the Union of Burma, pp. 427-455.
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 14. The Fisheries Act of 1905 (repealed by SLORC Law No. 1/92), "The Burma Code", Vol. III, pp. 455-468.
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 16. The Municipal Act of 1898 (repealed by SLORC Law No. 1/92), "The Burma Code", Vol. VI, pp. 115-210.
 17. The City of Rangoon Municipal Act of 1922, "The Burma Code", Vol. VI, pp. 211-321.
 18. The Canal Act of 1905, "The Burma Code", Vol. IV, pp. 261-290.
 19. The Insects and Pests Act of 1914, "The Burma Code", Vol. IV, pp. 294-296.
 20. The Underground Water Act of 1930, "The Burma Code", Vol. VI, pp. 332-333.
 21. The Cattle Trespass Act of 1871, "The Burma Code", Vol. IV, pp. 334-342. 'Cattle', in the context of this Act, includes also elephants and camels.
 22. The Sugar Cane Act of 1934 (repealed by SLORC Law No. 1/92), "The Burma Code", Vol. V, pp. 26-27.
 23. The Dangerous Drugs Act of 1930 (repealed by SLORC Law No. 1/92), "The Burma Code", Vol. IV, pp. 85-99.
 24. The Water Hyacinth Act of 1917 (repealed by SLORC Law No. 1/92), "The Burma Code", Vol. IV, pp. 296-297.
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 26. This law repealed and replaced the Socialist Economic Construction (Empowering) Law of 1965.
 27. This law repealed and replaced the Sea Fishing (Enabling) Act of 1954.
 28. This law, also referred to as the Burma Sea Fishing Law, was promulgated on 25 April 1990. This law merely regulated license and registration fees and did not repeal SLORC Law No. 11/89.
 29. This section was taken from the Fresh Water Fishing Law of 1991 (SLORC Law No. 1/91).
 30. In addition to this, the Law Amending the Myanmar Marine Fisheries Law (SLORC Law No. 16/93) was issued on 28 October 1993. The penalties for fishing with poisons or explosives were increased—from 50,000 kyats and/or imprisonment of up to 3 years, to 500,000 kyats and/or imprisonment of up to 10 years.
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- ever, according to the junta, "Some fishing vessels were suspended from catching and marketing of fishery products to neighbouring countries on account of the violation of fisheries laws" ("The Union of Myanmar: Review of the Financial, Economic and Social Conditions for 1996/97". Rangoon: Ministry of National Planning and Economic Development, 1997, p. 81).
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 46. The Mines Act of 1924, "The Burma Code", Vol. V, pp. 191-214.
 47. The Myanmar Mines Law of 1994 (SLORC Law No. 8/94) was issued on 6 September 1994. Similar to the junta's laws governing forestry and fisheries, the Myanmar Mines Law merely regulates the granting of permits and payment of royalty percentages.

48. The Land Acquisition (Mines) Act of 1885, "The Burma Code", Vol. X, pp. 231-235.
49. The Motor Vehicles Law of 1964 was amended by SLORC Law No. 27/89 on 27 November 1989.
50. The Promotion of Cottage Industries Law of 1991 (SLORC Law No. 13/91) was enacted on 10 October 1991.
51. Including Buddhist monastic regulations concerning the protection of trees around monasteries and pagodas.
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53. Duan Tingchang, "Myanmar Takes Measures for Environment Protection". Xinhua News Agency, 6 June 1999.
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55. SLORC Notification No. 26/94, dated 5 December 1994.
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69. Framework Convention on Climate Change (also called the Climate Change Treaty), done in New York on 9 May 1992, signed by Burma on 11 June 1992, entered into force generally on 21 March 1994, ratified by Burma on 25 November 1994, entered into force in Burma on 23 February 1995. In connection with this, on 1 January 1997 Burma acceded to the United Nations Convention to Combat Desertification, done in Paris on 14 October 1994, signed (but not ratified) by Burma on 8 October 1997. Source: Secretariat of the United Nations Convention on Climate Change, Bonn.
70. See: R.T. Watson, et al. (eds.), "Climate Change 1995: Impacts, Adaptations and Mitigation of Climate Change". New York: Intergovernmental Panel on Climate Change, 1996.
71. Vienna Convention for the Protection of the Ozone Layer, done in Vienna on 22 March 1985, entered into force on 22 September 1988, accepted (but not ratified) by Burma on 24 November 1993. Source: Secretariat for the Vienna Convention and Montreal Protocol, Nairobi.
72. Montreal Protocol on Substances that Deplete the Ozone Layer, done in Montreal on 16 September 1987, entered into force on 1 January 1989, accepted (but not ratified) by Burma on 24 November 1993. Source: Secretariat for the Vienna Convention and Montreal Protocol, Nairobi.
73. Convention on International Trade in Endangered Species of Wild Flora and Fauna (also called CITES), done in Washington, D.C. on 3 March 1973, entered into force on 1 July 1975, accepted (but not ratified) by Burma on 13 June 1997, entered into force in Burma on 11 September 1997. Source: CITES Secretariat, Geneva.
74. The *gracula religiosa* was again listed under 'Completely Protected Animals' in SLORC Forest Department Notification No. 583/94 (Chapter I, Section B, No. 44).
75. International Convention for the Prevention of Pollution by Ships (also called MARPOL 73/78), done in London on 2 November 1973, amended on 30 October 1992, but only partly entered into force. Accession of Burma on 4 May 1988, entered into force in Burma on 4 August 1988. Burma has only accepted Annexes I and II, both of which entered into force generally on 2 October 1983. "The instrument of accession of the Government of the Socialist Republic of the Union of Burma contained a statement to the effect

- that the Government of Burma does not accept Annexes III, IV and V of the Convention". Source: International Maritime Organization, London.
76. For an extensive coverage of the International Convention for the Prevention of Pollution by Ships, see: D. Brubaker, "Marine Pollution and International Law: Principles and Practice". London: Bellhaven Press, 1993.
 77. Even if Burma tries to follow all the guidelines of Annexes I and II, it still does not have to do a lot because Burma's mercantile marine of 40 ships (bulk 13, cargo 20, container 2, passenger/cargo 3, petroleum tanker 2) is relatively small. By way of comparison, Thailand has 299 ships and Cambodia 211. Source: Lloyd's Register of Shipping, London; World Fleet Statistics as at 31 December 1999.
 78. The Burma Merchant Shipping Act of 1923, "The Burma Code", Vol. VII, pp. 233-360.
 79. Chapter IV, Section 21(1) of the Burma Ports Act of 1908 says, "No ballast or rubbish, and no other thing likely to form a bank or shoal or to be detrimental to navigation, shall, without lawful excuse, be cast or thrown into any port or into or upon any place on shore from which the same is liable to be washed into any such port, either by ordinary or high tides, or by storms or land-floods, and no oil or water mixed with oil shall be discharged in or into any such port" ("The Burma Code", Vol. VII, pp. 376-402).
 80. International Tropical Timber Agreement, signed in Geneva on 18 November 1983, entered into force provisionally on 1 April 1985 and definitively on 1 February 1995. When Burma signed the Agreement on 16 November 1993, it became the 51st member of the International Tropical Timber Organization, as well as its 24th producer member. The successor agreement entered into force on 1 January 1997. Source: International Tropical Timber Organization, Yokohama.
 81. See: United Nations Conference on Trade and Development, "International Tropical Timber Agreement". New York: United Nations, 1994.
 82. Charles Arden-Clarke, "Conservation and Sustainable Management of Tropical Forests: The Role of the International Tropical Timber Organization and the General Agreement on Tariffs and Trade". World Wildlife Fund Discussion Paper. Washington, D.C.: World Wildlife Fund, November 1990.
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Women and Law in Burma

*B.K. Sen**

Women in Burma are struggling under the military regime. There is no policy, law or programme for the development of women. Instead, women are often the target of particular abuse. Rape by soldiers is common. Military officers are even involved in the trafficking of Burmese women into prostitution in Thailand.

The women in Burma are struggling, but continue to find ways to survive, nurture their communities and resist the military regime with inspiring grace and humour. The vision of women for Burma is a foundation on which a new, democratic and just society should be built. Daw Aung San Suu Kyi said, "Women are generally regarded as home-makers, tenders of the hearth around which the family gathers, weavers of the gentle ties that bind faster than the strongest iron chains".

But women in Burma have to battle against many odds: tradition, cultural discrimination, male domination, lack of access to information and education, and inequalities that have become entrenched by law. The most critical factor in the transition to a new society in Burma is the lack of provisions in law for the empowerment of women and their participation in decision-making processes.

The population of Burma is 44 million with the same ratios for men and women. A large section of the population is engaged in agriculture. Under the military regime the construction sector has been considerably expanded. Although it is maybe not always so clearly visible, the contribution of women in economic activities is substantial. In many countries, equal social, political and economic rights are provided by the respective constitutions. In Burma, however, the junta rules without a constitution. Widespread discrimination of women in Burma has become a matter of great concern all over the world.

Lack of Female Participation: Disparity or Discrimination?

The Asia-Pacific Summit of Women Mayors and Councillors, held in June 2001, released a report which highlighted the disparity in the involvement levels of women in Asian governments.¹ The issue has become disparity rather than discrimination. The disparity is directly related to quota systems for the allocation of government jobs to women which, when introduced, instantly change the levels of women's involvement. The state of affairs in Burma, in the absence of information, can be perceived in a deductive method. There is no democracy in Burma, while equality between women and men is a basic principle of democracy. Moreover, where there is no Rule of Law and no accountability, where statistics are being cooked up and policies are designed according to the sweet will of the junta, where the will of the people is bulldozed, gender equality can hardly be expected. Gender participation would expose the xenophobic military regime to 'threats' from many quarters. Hence, female representation in the central government has been brought to zero. Even female representation in the local government has been marginalized. There is no local government in Burma which is not fully staffed by military officials. The state is totally centralized. In such a context, women's representation would obviously loosen the grip of the military.

The Current Legal System and Women in Burma

The current legal system in Burma has evolved from the Common Law, which is the name given to the main system of laws and practices in England. Common Law was based mainly on judicial interpretation of local customs on judicial and royal decisions and acts of formal legislation. Its essence is that it relies on the development of legal principles as laid down in judicial rulings. It is different from the Civil Law system, in which law is deliberately laid down as a complete, codified system by means of legislation.

The current legal system in Burma comprises Customary Law, Statutory Law, and judicial decisions. There is currently no constitution. The customary laws include Burmese Buddhist Law, Hindu Law and the traditional customs of the ethnic groups. According to Section 13 of the Burma Laws Act,² the customary laws have the force of law. In matters which cannot be decided by either customary or statutory law, they shall be decided by rule of justice, equity and good conscience. In this context there is hardly glaring discrimination against women primarily because the source of law is the Common Law, which is based on the principles of the Rule of Law. Buddhist women, constituting the majority of women in Burma, have been given protection under the Buddhist Women's

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Special Marriage and Succession Act of 1954,³ the only Special Marriage Act in Asia which protects the rights of Buddhist women. Save and except this statute, Burmese Buddhist Law is not codified. However, for Christian women in Burma the law is codified, as they are governed by the Christian Marriage Act,⁴ the Burma Divorce Act and the Succession Act⁵ (regulating matters of inheritance). The Hindu women are governed by the old Hindu Law, not by the Hindu Code. Similarly, Muslim women are governed by Islamic Law. Although these laws are often perceived as discriminatory, they are not deliberately discriminatory: the snag is by and large in the traditional, cultural perception of gender inequality.

The main statutory laws which interact with the people in everyday life are the Penal Code (law relating to offences),⁶ the Transfer of Property Act (relating to the purchase, sale and other transactions of property),⁷ the Contract Act (relating to making agreements and contracts),⁸ the Partnership Act⁹ and the Burma Companies Act¹⁰ (relating to business dealings), the Bar Council Act (relating the enrolment of lawyers to practice),¹¹ and the Burma Medical Act (for practicing doctors).¹² For procedural matters the Code of Criminal Procedure,¹³ the Code of Civil Procedure,¹⁴ the Evidence Act¹⁵ and the Court Manual are the primary laws upon which the legal system is based. Apparently women in Burma are not discriminated under these laws. This is not to the credit of the junta. It is because the junta is not capable of drafting a new legal system to replace the existing one. The best they tried was the sham 1974 Constitution—clamped down on the people as a new judicial system—which collapsed like a house of cards in 1988.

Thousands of women and girls are still being trafficked into Thailand, sometimes to escape forced labour, sometimes to avoid human rights abuses. They end up in various sectors such as factory labour, domestic service and the sex industry. Burmese authorities can charge the women under the Burma Immigration (Emergency Provisions) Act of 1947¹⁶ and the Suppression of Prostitution Act of 1949.¹⁷ The legal provisions include solicitation, luring, and approaching. The maximum punishment is 3 years imprisonment. Section 12(1) of the Suppression of Prostitution Act provides detention of a woman intended to be used as a prostitute. The Burmese junta amended the Act by increasing the maximum punishment to 5 years. The magnitude of the increase of the crime was lost sight of and compared to the action taken against political offences, Burmese law enforcement has so far been openly Draconian. Sexual harassment is not addressed in any law. The Child Law of 1993 (SLORC Law No. 9/93)¹⁸ regulates punishment for guardians of the child in case of prostitution. Section 361 of the Penal Code describes the actions to be taken in case of kidnapping, Section 388(a) against procurement of minors, Section 366(b) against the importation of girls from other countries, Section 369 against the importation of children under 10 years, Section 370 against slave trade, Section 372 against minors for prostitution, Section 373 against selling and purchasing young children, Sec-

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tion 376 against sex with minors under 14, and so on. If the laws were implemented and enforced, they would certainly help to improve the current situation. Unfortunately, laws galore but zero actions.

Traditionally timid Burmese women lack a great deal of knowledge about rights, and lack information on the criminal laws that protect them from abuses.¹⁹ Obviously, such factors contribute equally to the problem. According to one of the top Burmese generals, women rights is an issue that does not need to be talked about in Burma, because, "Burmese women already enjoy equal opportunities with men under a system of universal suffrage". The meaning of women's rights in Burma has been wrongly portrayed as a potential cause of instability in Burma. In fact, rights entail a whole assortment of important duties and responsibilities necessary to establish a society in which justice prevails. Only then can genuine peace and stability follow.

Women and Religious Laws

According to the official statistics, nearly 90 per cent of the population of Burma is Buddhist. Burma has remained relatively free from the influence of Hinduism and Confucianism, and this has been the main reason for women's relative freedom. The other religions in the Union include Muslims and Christians. The laws regulating marriage, divorce and inheritance vary according to their respective customs. Buddhist laws do not discriminate women, save that bigamy is allowed for men, while women can have only one husband. Buddhist Law does not explicitly regulate the provision of maintenance, in contrast to Islamic Law. Maintenance remedies for Buddhist women are to be pursued under the Code of Criminal Procedure. Buddhist women in Burma are protected by Burmese Customary Law in case they marry men of other religions or foreigners. Burmese women of other religions do not have this legal protection. In case of divorce, Buddhist women have equal rights to men in respect of property inheritance.²⁰

The Buddhist *Dhammathat* code does not give an age requirement for men to marry. It only specifies that the man must be 'mature': if he is mature, he can marry. This was decided in a 1975 case decision. As for women, they must also be mature, which means that they must be at least 16 years old and they must have their parents' consent. (This is different from Burmese Customary Law, which stipulates that women can marry after the age of 14). If there is no such consent, parents are allowed to nullify the marriage. But if a woman and man have been living with the woman's guardian for a long time, then parents lose their power to separate them and must accept the marriage. The question remains whether guardians are different from parents in this case. If a woman is

older than 20, or when she is married, she no longer requires permission from parents or guardians.

If Christian women in Burma want to marry, they have to go through a church ceremony or arrange for court marriage. For Muslim women, Islamic Law regarding marriage and divorce is strict with male preference. For men, only maturity is required. This basically means reaching puberty. If maturity is not evident, the man must be at least 15 years old. Regarding women, Islamic Law says, "Presumption of Law" without further details. For Hindu women, Hindu Customary Law gives no limit for the age of men to marry. But this is not the case for women: the age of sixteen is defined as mature. Under the Hindu marriage law, a man must be 18 in order to marry. Hindu parents sometimes arrange marriages for their children before puberty (at the ages of 10 or 12). Such marriages are not considered void in spite of the young age of the children.

Due to the different laws for different religions in Burma, the Special Marriage Act of 1872²¹ regulates mixed marriages. According to this law, men must be 18 years old and women 14 in order to marry. If a couple share the same religion, they can follow the respective religious laws. By and large, women in Burma do not usually feel discriminated due to tradition and customs. Main issues relating to women are the imbalance in workforce participation, the labour potential of women and their role in social and economic development.

Divorce is allowed under Burmese Customary Law if one of the three following conditions are met: (a) there is mutual agreement to divorce; (b) the husband becomes a monk; (c) a crime is committed by either the husband or wife. Crimes consist of the husband committing adultery (which is a normal criminal case), the wife committing adultery (which is a serious criminal case), cheating (although the law does not describe in detail what this involves), or 'fabrication in many ways' (again, the law does not say what this involves).

The Burma Divorce Act of 1869²² is only for Christians. A husband can apply for the dissolution of marriage on the grounds of adultery, but a wife cannot. A wife may divorce if (1) her husband changes his religion or marries another woman; (2) the husband commits adultery which is incestuous, or bigamy with adultery; (3) the husband marries another woman with adultery; (4) the husband commits rape, sodomy or bestiality (although the law does not say toward whom, nothing is said about marital rape); (5) the husband commits adultery and the cruelty is so bad that it entitles the woman to divorce; (6) the husband is adulterous and deserts the wife for 2 or more years without excuse. Following divorce, financial support may be required under the Christian Law, Section 36, which says that the husband is liable for payment depending on the order of the Court. But payment cannot exceed 20 per cent of the husband's average income in the three years prior to the Court's order. The wife's money is also taken into consideration. The Court will decide what is reasonable, with provisions regu-

lated by the Code of Criminal Procedure. Regarding division of property, there are very few guidelines under Christian law. It will be necessary to look at case law, but basically it depends on the case and the reasons for divorce. The ratio in property division varies accordingly. Regarding the custody of children, customary law must follow the Guardians and Wards Act of 1890,²³ as here may be no different practices based on religious differences.

The CEDAW in the Burmese Context

Current policies of the junta marginalize the role of women. It is very important at the outset to refer to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)²⁴ resolutions. These have been formulated after a great deal of research and consultation. The basic fact that has to be kept in mind is that tradition, culture and development in Burma have consistently kept the women marginalized. If they have to be lifted from their current unequal position, some structural policy has to be initiated for transformation of the situation. The CEDAW provides useful guidelines. The Burmese military junta signed it in 1997.

However, the junta made a reservation on Article 29 (the dispute-settlement provision) of the Convention. Article 29(1) says, "Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court". The Burmese junta, however, countered, "The article 29 is not the basic article of the convention and not fundamental to the object and purpose of the treaty. Most of the articles of the convention are compatible with the articles of the Myanmar Law and prevailing practices, Myanmar feels that it is not necessary to refer the dispute to the International Court of Justice" (sic).²⁵

In July 1999, the junta submitted a 41-page initial country report (purported to outline the status of women in Burma) to the CEDAW Monitoring Committee. The report reveals the extent of the junta's deliberate non-compliance with the CEDAW resolutions. The junta stated that, "There is nothing wrong in Myanmar. (...) The status of Myanmar women is very unique as they have been bestowed equality with men as an inherent right". Such a self-righteous attitude repudiates the declarations of the Convention and is detrimental to the cause of gender equality. Although Burma has 135 ethnic groups, the report did not include any information about how the human rights of women in all those ethnic

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groups are guaranteed and promoted. There was no information on women's rights to terminate a pregnancy resulting from sexual violence, no information about the high rate of maternal mortality in Burma, no information on the situation of women affected by HIV/Aids, and no information on the trafficking in women and girls, despite the magnitude of these problems in Burma. In January 2000, at its 22nd session in New York, the CEDAW Committee heavily criticized the junta's report.

Questions were raised by the Committee regarding the junta's lack of compliance in implementing its obligations under the treaty. The Committee is concerned that the Myanmar National Committee for Women's Affairs²⁶ does not receive a budget from the junta despite its responsibilities for policy making and its roles as an intersectoral coordinating body. The CEDAW Committee is further concerned that the Myanmar National Working Committee, an operational body, is exclusively comprised of voluntary members. The Committee has urged the junta to revise existing funding allocation policies to ensure that the nation has sufficient financial and human resources to effectively carry out its mandate. The Committee considers forced labour of women to be a contemporary form of slavery and a denial of their rights, and is concerned that the Village Act and Towns Act remain effective in Burma.²⁷

The Committee is very concerned about women in custody, especially with regard to their being subject to sexual violence; and about the gross human rights violations by the military. In the rural areas of Burma, where the men have to hide in the forest when the soldiers come to the village (because otherwise they would be killed by the soldiers) the women become easy preys. They are forced to work on military infrastructure projects, to carry military supplies for the soldiers, to act as minesweepers. And, even worse, a lot of women have become the army's sex slaves. Nothing is done to stop this, and soldiers are not prosecuted. Section 5 of the Penal Code, though not specific to women, could have repercussions as it says, "Nothing in this Code is intended to affect any act for punishing officers, soldiers, sailors, or airmen in the services of the government or any local or special law". This leads to a situation where army law overrides the Penal Code, making the army law the overall law—providing impunity to the military. The junta has never given any information on how the law deals with punishment for members of the armed forces. For example, army officers guarding forced labour projects demand sexual favours in return for lighter duties or release from conscription. The army has sold many women into prostitution for as little as 35 dollars. Although Burma has signed the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, it has not ratified this Convention.

The 54th session of the Commission on Human Rights in 1998 has called to implement the Platform for Action on the Trafficking in Women. The CEDAW Committee concluded that there was due concern for the status of women in

Burma. It was obvious from the junta's report that no state funding was allocated to women's issues, while it recommended in particular the prosecution and punishment of the violators of women's rights, and gender sensitivity ("attitude adjustment") training for military personnel. There is the law in Burma to punish the violators, but law enforcement authorities will not simply enforce it as it serves a political purpose. The CEDAW Committee has requested the junta to include more information and data in its next report on the implementation process of the Convention, and urged the junta that necessary action is taken to bring perpetrators to justice.

A crucial point is that the Burmese junta rules the country without a constitution, while Article 2(a) of the CEDAW document says, "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake to embody the principle of the equality of men and women in their national constitutions (...)" Article 7(a) says, "States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies". Has the junta convened any election in any form? Article 7(c) ensures, "The right to participate in non-governmental organizations and associations concerned with the public and political life of the country". However, there is no Right of Association or Freedom of Expression in Burma. Except for the international organizations, all organizations in Burma are state-controlled. The women in these organizations are selected from the wives and relatives of army officers.

Another focal point in the CEDAW document is Article 4, which says, "Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved". The question is what kind of 'special measures' have been taken by the junta towards the Convention's goal. The junta has not undertaken any measure or project to enable a positive change in the societal attitudes on the role of women, or policy advocacy towards capacity building for women. The junta simply stated in its report that under the Ministry of Education "a number of activities" has been developed which meet the requirements of the CEDAW. However, these activities are all stereotyped, and none as required under the CEDAW.

The restrictions and vilifications that the junta is carrying out against Daw Aung San Suu Kyi are clear evidence of the violations of the CEDAW Convention. Similarly, in spite of the fact that the Jail Manual clearly provides special facilities

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for female prisoners such as health care and fair treatment, none of these have been observed in Burmese prisons. The main problem here is the complete lack of accountability. The Judicial Law No. 5/2001 contains an amendment which empowers the Supreme Court to visit the jails to inspect compliance with the Jail Manual regulations. But no state-owned newspaper in Burma has ever reported about the compliance of the Judiciary with this law. It is obvious that the amendment was made to create a false impression to the international community of the junta's role, and to take the intervening role away from the International Committee of the Red Cross regarding jail inspection visits. Although in 1964 the junta allowed the then imprisoned Chief Justice to attend his wife's funeral and stay at the funeral house for three days (according to Burmese custom), Daw Aung San Suu Kyi could not see her dying husband in 1999.

Women: Main Victims of Bad Healthcare and Education

Women, both in Burma and in the refugee camps along the borders, suffer from a growing lack of access to family planning and prenatal care, inadequate nutrition, increased maternal mortality, and ineffective HIV/Aids education. The few health services available are often rudimentary and have deteriorated seriously over the last decade. In its "World Health Report 2000", the World Health Organization ranks Burma next to last—190th of 191 countries surveyed—in terms of overall health system performance. According to the International Planned Parenthood Federation's "Country Profile" of 1998, only 60 per cent of the refugees have access to hospitals. Patients have to purchase their own medicines and pay bribes to receive care in a corrupt system. The estimated maternal mortality rate is 517 per 100,000 live births, compared to 80 in Malaysia. The under-five mortality rate is 114. Of 174 countries rated in the United Nations "Human Development Index" for 2000, Burma ranked 125th, barely ahead of impoverished African states such as Equatorial Guinea. 60 per cent of Burmese lack basic sanitation and 40 per cent have no access to safe water. Burma also ranks low in the UN's "Gender-related Development Index" (GDI). According to the United Nations Development Programme's "Human Development Report 2000", the Burmese junta spends over 200 per cent more on the army than on healthcare and education combined. Other analysts estimate that the disparity is actually far greater. The main victims of low spending for health and education are Burma's women and children.

The leading causes of maternal mortality in Burma are labour trauma, post-partum haemorrhage and retained placenta. Abortion is also a major cause, with a mortality ratio of 1:3. Abortion is illegal in Burma. Sections 312 and 314 of the Penal Code say that anyone causing a miscarriage will be punished with 3 years imprisonment, and in case of causing death it will be 10 years. UNICEF esti-

mated in 1992 that 58 women die every week due to illegal abortion, while 50 per cent of maternal deaths are due to illegal abortion. The World Bank has estimated that of the one million HIV/Aids cases in Burma, women are suffering most. Women are usually uninformed about HIV risks. As many as 40,000 Burmese women are believed to be employed in Thai brothels. Thousands of Muslim women from southwestern Burma have been trafficked into prostitution in Pakistan. Some are abducted, while others are lured with false promises of employment. Many contract Aids or other serious diseases. Because the Burmese junta strictly controls and censors the media, adequate information on public health is never given. The junta's restrictions on freedom of expression and community participation, and its prohibition of civil society are main obstacles that women face regarding public health and prevention of diseases. The UN working group on Human Development in Burma reported in 1998 that fewer than one-third of all girls who enroll make it through primary school. The junta spends less than 1.1 per cent of its gross domestic product on education, and has over the years systematically failed to supply information on the educational status of girls.

The junta's indifference toward these critical issues is enough evidence to indict it about its crimes against human development. The systematic military repression creates an atmosphere of fear and is a grave detrimental factor for the educational process. Traditional gender attitudes, about which the state does very little, hinder progress. There is little perceived social value in educating women beyond bare literacy. The women in Burma are the worst hit by the economic crisis. They have to leave their traditional family roles to look for paid employment. This is seriously affecting the upbringing of the children with proper values. The coming generation will be stripped of all that people in Burma were proud of. The junta created a law prohibiting women between 16 and 25 to cross borders unless accompanied by legal guardians. Although this law is supposed to protect the women, the result has been the opposite. Instead of protection it has led to suppression, while the women have been made more dependent on traffickers. Lt-Gen Khin Nyunt, the leader of the Burmese junta, stated at the Fourth World Conference on Women in Beijing in 1995, "Myanmar women are enjoying equal rights with men on political, economic, administrative, judicial and social aspects". He said that he had in view the UN Convention on Political Rights of Women, signed by Burma in 1954.

The Labour Situation of Women in Burma

The labour situation in Burma often sees different treatment of women and men. This can also be found in laws. For instance, the Apprentices Act of 1850²⁸ is clearly outdated but has not yet been repealed. According to the Work-

men's Compensation Act of 1924,²⁹ when compensation is paid for the death of a relative, no lump sums can be given to women unless this is done through a Commissioner appointed by the government. The Mines Act of 1924³⁰ regulates specific restrictions on women, e.g. they are not allowed to work underground unless they are in the health services.

There are currently hardly any women in the Burmese armed forces. Women are not allowed to apply for the DSA (Defense Services Academy), OTC (Officers' Training Course) or OTT (Officers' Technical Training). It is not in any laws or regulations that women cannot apply, but in the recruitment advertisements it says, "Only men should apply". Women can only apply for nursing in the army medical service, but even there all commanders are men. More female representation would probably transform the very character of the military government into a semi-civilian form of government. At least, it would have an attenuating influence on military rule.

The junta's open policy in trade and tourism, supposedly to boost the economy, saw the rapid construction of hotels, bars and night clubs. The sex industry soon followed. This has resulted in the growth of a new 'class'—or call it a mafia—of touts and agents with widespread networks abroad. Burma currently has no legislation to tackle this growing menace and to protect women and girls against this mafia. The old law is outdated and inadequate. There are no legal organizations, such as in the Philippines, to safeguard women from exploitation and abuse in foreign countries. The Burmese military is directly involved in the procurement and trafficking of women into prostitution in Thailand.³¹ No doubt Burmese women in Thailand, for instance, earn much less than their counterparts of other nationalities, although the amounts are usually much larger than the meager incomes under the junta in Burma. The increase of the numbers of women in the workforce is considered as a sign of development in Thailand, as the status of the woman is improved by her economic freedom. But this is not yet the case of Burma. There has been a considerable increase in the percentages of women in the sex industry but this is sheerly because of poverty. In respect of educated women the situation is even worse. Although the number of female university graduates in Burma has increased over the years, the lives of educated women under the junta is a tale of misery and struggle. There are hardly any jobs in Burma for educated women and they often worry about the education of their children, because schools and colleges are closed most of the time. And after graduating there is no job. Unfortunately, unemployment in Burma often means that women end up in trafficking and prostitution, while the men are often forced to join the army.

Along the India-Burma border there are more than 50,000 Chin women working in the handicraft and domestic sectors. The United Nations High Commissioner for Refugees has not yet come with any recognition or provisions. And along the Thai-Burma border there are more than one million refugees, mostly

More female representation [in the army] would probably transform the very character of the military government into a semi-civilian form of government. At least, it would have an attenuating influence on military rule.

women. Although volunteer organizations do a lot to improve the situation, many refugees from Burma who currently live in camps in Thailand are women and children with little access to proper health care and education—providing a harrowing tale of uprooted humanity.

Burmese Women in Politics

In India and Bangladesh, the percentage of women in local government seats ranges around 33 per cent, but in Sri Lanka only around 2 per cent. Thailand ranks eighth out of twelve countries in the region, in spite of it being a democracy. In Thailand, 18.1 per cent of local government seats (urban seats only) and 7.8 per cent of central government seats are occupied by women. There are 8 female mayors in Thailand, 44 women in the Thai National Parliament, 22 in the Senate and another 22 in the House of Representatives. Only 3.5 per cent of the world's cabinet ministers are women. Women hold no ministerial posts in 93 countries, including Burma. The United Nations' 2000 figures show that Burma is among the small handful of countries, including Iraq, Qatar, Saudi Arabia, Sudan, and Yemen, where women hold no government posts. There have been female rulers in Burma's history, the most famous being Queen Shin Saw Pyu in the 15th century. History provides evidence of women's political and social abilities. Only in the current situation of military rule are Burma's women completely deprived of social and political participation. However, Burma has not yet given any official figures.

In family decision-making, women in Burma play a prominent role, but women in the decision-making positions in the government do not exist. The position of women in public leadership is still entirely absent. According to deeply-rooted Burmese cultural tradition, women are viewed as inferior because they are considered capable of polluting the *hpon* ('power aura') of men. Burmese men find it extremely difficult to accept women as their superiors, especially in politics.³² In 1922, during colonial rule, Burmese women were granted the right to vote, and in 1935 universal suffrage. This was confirmed in the 1947 Constitution—earlier than any other country in Asia.³³ But nowadays the number of parliamentary seats occupied by women has lagged far behind the numbers in other Asian countries. The reason for this is not found in tradition or customs but in the lack of institutions. Government policies could have an impact on social norms such as the position of women and their empowerment. But unfortunately, under the military regime there is no policy or programme for the development of women in Burma. By and large this is the result of the decades of mismanagement.

In 1919, the 'Konmari' (the first All-Burma Women's Organization) was

founded to promote knowledge and appreciation of women in the Burmese culture. There were also other women's organizations, such as the General Council of Burmese Associations (GCBA), the Young Men's Buddhist Association (YMBA),³⁴ and the anti-colonial boycott movements. Throughout history, women have had difficulties in competing with men for higher positions within the government and politics. This is in spite of the fact that the number of female university graduates exceeds that of men. Women's participation in the political field has been very low. There was not a single female minister during the democratic period: from 1948 to 1962, only 18 women stood for election to parliament. Would this be because of Burma's lacking political system? Or because of the lack of political freedom? The political system of the junta does not allow women participation: the government is comprised of army officers. But there have been many female politicians in countries like India and Pakistan, despite the injustices that women face in these countries. There have been female leaders and presidents in the Philippines and Sri Lanka. Then why are there so many obstacles and difficulties placed in the way of Burmese women who want to participate in politics? We find the answers in the Burmese political system, which is completely dominated by uneducated army officers loyal to the junta. It is very difficult even for civilian educated men to get significant postings, not to mention educated women. Although there has been an increase in political awareness in spite of the repressive role of the junta, political activism is more risky for women than for men, as they are exposed to rape and other brutalities. Even Daw Aung San Suu Kyi has been subject to harassment and intimidation.

The influence of women in politics has caused unease among the Burmese generals. Daw San San Nwe, a well-known Burmese writer, is one of the thousands of political prisoners held by the junta. She received a ten-year sentence in 1995 for what the junta said was "spreading information injurious to the State". In May 2000, Amnesty International listed at least 61 female political prisoners in Burma.³⁵ In April 1988, Daw San San, a prominent member of the National League for Democracy, was sentenced to 25 years for participating in a radio interview critical of the junta. Daw Ma Thida, a leading Burmese writer and medical doctor, was released from prison in February 1999 after serving six years of a 20-year sentence under extremely harsh conditions. She had been convicted of "endangering public tranquility" by distributing information on human rights abuses in Burma. The junta has now banned all Ma Thida's writings. Daw Aung San Suu Kyi was released from six years of formal house arrest in July 1995, but today is again under de facto detention in her home. Her movements and communication with Burma's peoples and the outside world are severely restricted. Daw Aung San Suu Kyi is one of the few voices in Burma that dares publicly challenge the military dictatorship. Her support for non-violent change in Burma has made her an international hero and representative of the desire of all of Burma's peoples, women and men alike, for a government that would respect their rights and strive to meet their needs.

Not only the army, also tradition and culture in Burma have consistently kept the women marginalized. [So,] it is necessary to adjust laws *and* societal attitudes.

Female political prisoners have been put to trials that fall short of international standards, as they are tried under vague security laws and legal counsel is usually denied. The most Draconian laws amongst these are the Emergency Provisions Act of 1950,³⁶ Sections 5(e) and 5(j), and the Unlawful Associations Act of 1908,³⁷ Sections 17(1) and 17(2). Sentences under these laws are inhuman and incompatible with the nature of the alleged offence, while the prison conditions violate the Jail Manual. Most female political prisoners are being held incommunicado and are systematically being humiliated and tortured.

Conclusion

The future of women in Burma is basically founded on the restoration of Rule of Law. One can well argue that the grim stagnation and deterioration that Burma is currently facing are partly due to the denial of the role of women in national development. Women should be able to exercise their votes and elect their representatives. Women should be able to participate in legislation and other decision-making processes. They should be part of an independent and fair Judiciary with the right of review of all decisions. However, in Burma the political and judicial systems are dominated by uneducated army officers. There is no independent and fair Judiciary. Rule of Law has been replaced by rule of corrupt generals—who do not care about law and even less about gender equality or CEDAW resolutions.

The transition to democracy in Burma has to be inclusive, as it is impossible to imagine any society without women. So, democracy without women's empowerment does not mean anything and is no democracy anyway. The most critical factor in the transition to a new society in Burma is the lack of provisions in law for the empowerment of women and their participation in decision-making processes. Ironically, the Burmese male-dominated military has to negotiate the end of military rule with a woman—Daw Aung San Suu Kyi. But not only the army, also tradition and culture in Burma have consistently kept the women marginalized. In order to achieve women's participation in decision making at all levels in all fields, it is necessary to adjust laws *and* societal attitudes. To ensure that there is both legal and social equality, it is necessary to have a Constitution, democracy, accountability, and a strong civil society.

Endnotes

- * The author is an Executive Committee Member of the Burma Lawyers' Council. He wishes to thank Peter Gutter for his assistance in writing this article.

1. The Asia-Pacific Summit of Women Mayors and Councillors (Economic and Social Commission for Asia and the Pacific, ESCAP Human Settlements), held in Phitsanulok, Thailand, from 19 to 22 June 2001. The objectives of the Summit are twofold: (1) To increase the awareness of the transformative role women play in local government and the challenges and constraints they face while working with and leading local governments; (2) To discuss follow-up regional strategies and actions to promote the participation and representation of women in local governments.
2. See: The Burma Laws Act of 1898, "The Burma Code", Published under the Authority of the Government of the Union of Burma (1955), Vol. I, Section 13(3), p. 9.
3. The Buddhist Women's Special Marriage and Succession Act of 1954, "The Burma Code", Vol. XI, pp. 2-16.
4. The Christian Marriage Act of 1872, "The Burma Code", Vol. XI, pp. 43-71.
5. The Succession Act of 1925, "The Burma Code", Vol. XI, pp. 146-265.
6. The Penal Code of 1861, "The Burma Code", Vol. VIII, pp. 1-142.
7. The Transfer of Property Act of 1882, "The Burma Code", Vol. X, pp. 138-189.
8. The Contract Act of 1872, "The Burma Code", Vol. IX, pp. 3-55.
9. The Partnership Act of 1932, "The Burma Code", Vol. IX, pp. 171-190.
10. The Burma Companies Act of 1914, "The Burma Code", Vol. IX, pp. 210-406.
11. The Bar Council Act of 1926, "The Burma Code", Vol. XI, pp. 419-425.
12. The Burma Medical Act of 1915, "The Burma Code", Vol. IV, pp. 2-8.
13. The Code of Criminal Procedure of 1898, "The Burma Code", Vol. VIII, pp. 142-427.
14. The Code of Civil Procedure of 1909, "The Burma Code", Vol. XII, pp. 1-347.
15. The Evidence Act of 1872, "The Burma Code", Vol. XII, pp. 414-468.
16. The Burma Immigration (Emergency Provisions) Act of 1947, "The Burma Code", Vol. I, pp. 39-44.
17. The Suppression of Prostitution Act of 1949, amended in 1956 (in Burmese). "The Burma Code", Vol. IV, pp. 156-161.
18. The Child Law of 1993 (SLORC Law No. 9/93). See: "Laws, Rules, Regulations, Orders and Notifications, 1993" (in Burmese). Rangoon: State Law and Order Restoration Council, 1993, pp. 3-44.
19. Daw Myint Myint, "Dear Sayama". In: "Burma: Voices of Women in the Struggle", edited by the Alternative ASEAN Network on Burma. Bangkok, June 1998, p. 26.
20. Peter Gutter, "Law and Religion in Burma". *Legal Issues on Burma Journal*, No. 8, April 2001, pp. 4-5 ("Religious and Customary Law").
21. The Special Marriage Act of 1872, "The Burma Code", Vol. XI, pp. 109-117.
22. The Burma Divorce Act of 1869, "The Burma Code", Vol. XI, pp. 73-100.
23. The Guardians and Wards Act of 1890, "The Burma Code", Vol. XI, pp. 122-138.
24. On 18 December 1979, the General Assembly of the United Nations adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This 30-article Convention sets out in legally binding form internationally accepted principles and measures to achieve

- equal rights for women everywhere. Opened for signature on 1 March 1980, the Convention would enter into force after 20 States had consented to be bound by its provisions, either through accession or ratification.
25. "The Union of Myanmar Report on Convention on the Elimination of All Forms of Discrimination Against Women". Rangoon: State Peace and Development Council, March 1999, pp. 40-41 ("Reservation").
 26. The Myanmar National Committee for Women's Affairs is comprising deputy ministers of related ministries, representatives of the Attorney-General and the Chief Justice, and leaders of women's non-governmental organizations—however, all of them created by the junta. The Committee has no decision-making power.
 27. B.K. Sen, "Toward Transition With Rule of Law". *Legal Issues on Burma Journal*, No. 8, April 2001, p. 21. See also: The Village Act of 1908, "The Burma Code", Vol. VI, pp. 13-28; and, The Towns Act of 1907, "The Burma Code", Vol. VI, pp. 28-34.
 28. The Apprentices Act of 1850, "The Burma Code", Vol. V, pp. 180-185.
 29. The Workmen's Compensation Act of 1924, "The Burma Code", Vol. V, pp. 232-257.
 30. The Mines Act of 1924, "The Burma Code", Vol. V, pp. 191-214.
 31. See: "A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand". New York: Human Rights Watch/Asia, 1993.
 32. Yawngghwe, Eugene Thaike, "The Women of Burma: Holding Up Two-Thirds of the Sky". In: "The Plight of Burmese Women". Mae Hong Son, Thailand: Burmese Women's Union, 1995, pp. 41-42.
 33. Sylvia A. Chipp and Justin J. Green, "Asian Women in Transition". University Park and London: Pennsylvania State University Press, 1980, p. 21.
 34. The Young Men's Buddhist Association, with a special branch for women, was founded in Arakan in 1902.
 35. "Human Rights Yearbook: Burma 1999-2000". Washington, D.C.: National Coalition Government of the Union of Burma, August 2000, pp. 281-298 ("Women Political Prisoners In Myanmar").
 36. The Emergency Provisions Act of 1950, Act No. 17/50 (in Burmese). "The Burma Code", Vol. II, pp. 244-249.
 37. The Unlawful Associations Act of 1908, "The Burma Code", Vol. II, pp. 201-205.

The Burmese Junta's Abuse of Investment Laws

*B.K. Sen and Peter Gutter**

Burma continues to be a pariah state for its gross violations of human rights. The refusal of the Burmese military junta to honour the results of the May 1990 elections made its isolation complete: so much so that Burma was denied ASEAN membership for a long time. The junta has even gone so far as to abuse its own laws, including those regulating foreign investment. As there are already many international reports on the link between foreign investment and violations of human rights in Burma, this paper will mainly focus on the aspect of Burma's investment laws itself—what kinds of investment laws there are in Burma and how these are being abused by the junta.

Should Investors Come to Burma?

Should investors come to Burma? That depends on whom you ask. First, there are those who have few problems with investment, but do want to see evidence of political progress. Second, there are those who are less cautious, saying that whatever political game the junta is now playing, more business activity will inevitably enrich the population. Even if the generals take most of the profits, the man in the street will still benefit. Big business is the leading proponent of this line. Oil company Unocal from the United States, for example, built the Yadana offshore gas pipeline to Thailand. This is now among the junta's most profitable business operations. The American sanctions barred companies from setting up new business deals, but Unocal was allowed to remain. Although there is astounding evidence that forced labour was used to construct the pipeline, Unocal

still denies all of it. Some companies investing in Burma, such as Halliburton, say they “have nothing to do with the government. We just go where the oil is”.¹ Other companies, such as IHC Caland, simply say they are “not interested in politics, only in business”.² However, politics and business always go together in Burma. The Confederation of British Industry (CBI) has criticized the British government’s call for companies to pull out of Burma because of the junta’s bad human rights record. The CBI said, “In the absence of clear legal sanctions from the UK or UN, it should be left up to companies to make commercial decisions about where they do business”.³ In other words, where there is profit to be made, to hell with the people. And third, there are those who see compromise as impossible—investment merely strengthens the dictatorship. Daw Aung San Suu Kyi, as a major proponent of this line, sees international sanctions as most effective against the economic system put in place by the junta. The junta’s system prevents the growth of the middle class. A strong middle class has the potential to lead the country to democracy. Foreign investment (or ‘destructive engagement’) is making only the generals richer while the mass of the people remain poor.⁴

With an economy in the doldrums and biting sanctions, the Burmese generals are bending over backwards. Business interests indeed helped spur the recent talks between the junta and Daw Aung San Suu Kyi. The dialogue may lead to nothing, but the fact that it is even taking place has already warmed the international climate toward the junta. The question remains whether this is the beginning of real change for Burma, or just a tricky opening move by the junta. The generals see sanctions as obstacles to economic development and thus a threat to their future hold on power. But is the time ripe for a sustainable boom? Out of self-interest, the junta has sent signals that it is preparing to come in from the cold. However, ethical dilemmas remain, and the junta has not made life easier for investors.

Foreign investment in Burma is small compared to that in neighbouring countries. Investing in Burma is economically uncertain and politically contentious. A genuine free market does not exist. The military regime still dictates prices, wages and exchange rates. There is little credibility in administrative and legal structures. And corruption is rampant. Burmese tax laws, for instance, are meaningless—the whim of the military tax inspector is what determines how much one pays. So, will investment make a difference to the lives of ordinary Burmese? Will forced labour be used to build this new Burma? Will increased business result in a rapprochement between the National League for Democracy and the generals? China, India, South Korea, Japan and the ASEAN countries have already made up their minds and do not seem to worry much about ethics. For them, business opportunities are too attractive to ignore.

Foreign Investment Only Strengthens the Military

What would most help the citizens of Burma is the restoration of civilian, democratic governance and the Rule of Law, and an end to widespread corruption. Although that seems a big wish list, it helped convince many companies to leave Burma. Pepsi, for instance, which had an estimated 80 per cent share of the soft-drink market, sold its joint venture stake with a local company in 1996. The next year it pulled out of Burma completely by canceling supplies of Pepsi syrup. The company said its decision was “based on our assessment of the spirit of current U.S. government policy”. But as a matter of fact, its involvement in Burma had resulted in boycotts by American students (the company’s main domestic market) which soon translated into shareholder concern. Many companies have pulled out of Burma: Levi Strauss, Amoco, Shell, Compaq, Apple, Kodak, Heineken, Texaco, ARCO, Hewlett-Packard, Philips, Toyota, Carlsberg, Motorola—not only because the Burmese junta violates human rights, but also because the junta violates (its own!) investment laws. Did the withdrawal of these companies make a difference? Possibly, but for almost every company that left, another arrived. Singapore companies have hotels, garments, banking, travel services and defense supplies. A French-Burmese fisheries joint venture started operations in November 2000. Oil and gas companies Unocal, Total, Premier, Nippon and Petronas, and Japanese conglomerates Mitsui and Sumitomo, are well-established.

However, foreign investment is still only strengthening the military without any benefit to the population. Foreign investors are not at liberty to choose their business partners in Burma, just as the Burmese people are not allowed to choose their government. Some companies, such as Unocal and Total, believe that their presence in Burma is justified because it is “beneficial to the local population”. But just as the companies are not allowed to choose their business partners, they are not allowed to freely choose their employees. The companies must accept employees suggested by the military junta. The junta promulgated the following “Procedures for Recruitment of Workers” in 1992: “A private and cooperative business undertaking, employing five workers and above, has to notify the Township Labour Office of his intention to recruit workers in the prescribed form. The Labour Office will prepare a list of candidates who meet the requirements mentioned in the form and send these candidates to the employer. The employer is to select the most suitable person from among the candidates submitted by the Labour Office”.⁵

The question remains whether the junta’s shabby investment laws are bothering *all* investors. For example, according to a Bangkok businessman, current Burmese investment law is made up of two rules only: “Stick to those two and you can do business in Burma. Rule number one is to get along with the junta, so don’t talk about democracy, constitutions or Aung San Suu Kyi. Rule number

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two is that only the first rule matters”. More insight into the junta’s investment laws can be found in the following overview.

The Union of Myanmar Foreign Investment Law

The unreliable Union of Myanmar Foreign Investment Law (SLORC Law No. 10/88)⁶ was promulgated on 30 November 1988, “for the promotion of inducement of foreign investment”. The junta hoped that this law would promote exports, exploit domestic resources, acquire high technology and regional development. Chapter 4, Section 5 of the Law says, “Foreign investment may be made in any of the following forms: (a) investment made by a foreigner to the extent of 100 per cent foreign capital; (b) joint venture between a foreigner and a citizen”. Section 6 gives further details: “... if a joint venture is formed the foreign capital shall be at least 35 per cent of the total capital. (...) In forming as mentioned above, in carrying out the business and in liquidation on the termination of business, other existing laws of the State shall be complied with”. Considering the other existing laws—not necessarily inherently faulty, but implemented by a military-controlled judiciary—this means that the military has absolute control over the foreign partner too.

The junta can appoint a Foreign Investment Commission, which has wide powers under Section 8 of the Foreign Investment Law, including the power to “form such committees and bodies as may be necessary”. However, there is nothing in the section which permits the Commission to participate in the liquidation process or to appoint the specific bodies that it has formed. Consequently, if these bodies are taking part in the liquidation, it could be unlawful since the Burma Companies Act also does not provide for such bodies to participate in the liquidation. The appointments are not being made by the liquidator but by the Commission. What the Commission is actually trying to achieve by making the appointments is unclear. Making these appointments may not even be within its objectives under the Law.

Section 14 of the Law deals with the termination of the business before the expiry of the term. The section specifies that the Commission may allow the termination of the business under certain circumstances. However, the section also says that it applies when there is a “desire to terminate the business by mutual agreement”. The section describes four special circumstances that are valid reasons for terminating a contract prematurely: “(a) substantial and continuous losses by the enterprise; (b) breach of contract by one of the parties; (c) force majeure; (d) incapability of fulfilling the original aims and objectives of the enterprise”. Although all agreements under this Law are subject to the Contract Act of 1872,⁷ and although Section 22 of the Foreign Investment Law guaran-

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tees that there will be no nationalization of the enterprise during the term of the contract, under Section 32 the government may change the rules “as may be necessary”.

The State-owned Economic Enterprises Law

The State-owned Economic Enterprises Law (SLORC Law No. 9/89)⁸ was promulgated to identify the “Economic Enterprises to be Carried Out Solely by the Government”, such as banking and insurance services, post and telecommunications, air transport and railways, the exploration and production of oil and natural gas, and the extraction of teak. Under Section 8 of this Law, a state enterprise is a “corporate body having perpetual succession ... and shall have the right to sue and be sued in its corporate name”. Therefore, it would appear that a state enterprise is like any other private company. However, when one looks at Sections 14 and 15 of the Procedure Relating to State Enterprises, it says that the government can dissolve the state enterprise at any time. So there is a contradiction and the state enterprise is clearly not a completely independent entity. This is also confirmed by other sections which suggest that the state enterprise is really an extension of a state department.

The Burma Companies Act

Although the Burma Companies Act of 1914 was amended by the State-owned Economic Enterprises Law in 1989, it still regulates the constitution and incorporation of companies and the (re)organization and reduction of share capital. According to the junta, the legal requirements for companies to comply under the Companies Act are eightfold.⁹

First, (with reference to Section 73 of the Act), “The name of the company must be painted or affixed on the outside of its registered office and every place of business. It must also be mentioned on its seal and in all letterheads, notices, advertisements and other official publications”. *Second*, (with reference to Section 72 of the Act), “Every company must have a registered office in Myanmar to which all communications and notices may be addressed. A notice of situation of the initial registered office must be furnished to the Companies Registration Office when filing the incorporation documents”. *Third*, (with reference to Sections 77(c), 83 and 84 of the Act), “Every private company is required to have at least two directors. A public company must have a minimum of three directors. An undischarged insolvent is not eligible to be a director”. *Fourth*, (with refer-

ence to Sections 34, 53 and 54 of the Act), “Every company will have to give notice to the Companies Registration Office of any allotment of shares within one month of the date of allotment”.

Fifth, (with reference to Section 76(1) of the Act), “Every company must hold an annual general meeting to lay its audited accounts before its shareholders. A newly incorporated company is required to hold its first annual general meeting within 18 months of incorporation. Every company must file an Annual Return within 21 days after its annual general meeting”. *Sixth*, (with reference to the Arbitration Act of 1944),¹⁰ “Every company is required to lodge a copy of every extraordinary and special resolution with the Companies Registration Office within 15 days from the date of passing thereof”. *Seventh*, (with reference to Section 130 of the Burma Companies Act), “Every company must maintain proper books of accounts which are required to be kept at the registered office of the company”. *Eighth*, “There are offences [sic] for any non-compliance with the law”. Or would they mean ‘offences’? Anyway, this last ‘requirement’—not referring to any law—remains dangerously vague.

Vagueness is a major characteristic of the junta’s position regarding the Burma Companies Act. In some government publications it appears that the Act was completely repealed by the State-owned Economic Enterprises Law, while other publications describe the two laws as existing side by side. Section 162 of the Burma Companies Act is particularly vulnerable to abuse by the junta, as it lays down either of the circumstances in which a company may be wound up by Court: “A company may be wound up by the Court: (a) if the company has by special resolution resolved that the company be wound up by the Court; (b) if default is made in filing the statutory report or in holding the statutory meeting; (c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year; (d) if the number of members is reduced, in the case of a private company, below two; or, in the case of any other company, below seven; (e) if the company is unable to pay its debts; (f) if its licence is withdrawn in accordance with the provisions of Section 55 of the Union Bank of Burma Act of 1952;¹¹ (g) if the Court is of opinion that it is just and equitable that the company should be wound up”.¹² So, since there is no independent judiciary in Burma, the junta has total control over foreign investors.

Other Investment Laws in Burma

Other current investment laws include the Burma Insolvency Act of 1920,¹³ which regulates the power of Court to decide all questions arising in insolvency. The Private Industrial Enterprise Law of 1990¹⁴ and the Promotion of Cottage

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Industries Law of 1991¹⁵ were enacted for the consolidation and promotion of large, medium and small-scale private industries. The Myanmar Hotel and Tourism Law of 1993¹⁶ is meant to promote the development of hotels and tourism and to generate badly-needed foreign exchange. The Commercial Tax Law of 1990¹⁷ is supposed to “replace the commodity and service tax for better coverage of taxes”. The Tariff Law of 1992¹⁸ was promulgated “to streamline the customs tariff rates”. The Central Bank of Myanmar Law of 1990¹⁹ and the Financial Institutions of Myanmar Law of 1990²⁰ are “to streamline Myanmar’s monetary policy and extend banking services”. But with the junta’s notorious contempt for law, the existence of all these laws really does not mean anything.

Burma and the ASEAN Investment Agreements

After considerable lobbying the Burmese junta managed to join ASEAN on 23 July 1997. Ten years earlier, the then member states had entered into a treaty known as the ASEAN Agreement for the Promotion and Protection of Investments.²¹ By virtue of its accession to ASEAN, Burma became a party to this treaty. The junta also signed the Protocol for the Accession of the Union of Myanmar to ASEAN Agreements. There were no objections by the other Southeast Asian member states. Under International Law, accession to a treaty which has no express clause of accession happens once another nation executes an act of accession to it with the assent of other parties. Moreover, it is mentioned in the preamble to the Framework Agreement on the ASEAN Investment Area,²² “... affirming their commitment to the 1987 ASEAN Agreement for the Promotion and Protection of Investments, and its Protocol to enhance investor confidence for investing in ASEAN”.

Hence, on affirmation the treaty became binding on Burma. The military junta did not dispute the validity and legality of the treaty in respect of Burma. On the contrary, Burma was deemed to have ratified it when Brigadier General David Abel signed it (without lodging any reservations on behalf of the junta) on 8 October 1998.

The Yaung Chi Oo Case: A Warning to Foreign Investors

When the Burmese junta decided to open its doors to foreign investment in 1993, the Yaung Chi Oo Trading company (based in Singapore—another member of ASEAN) was interested in doing business with the state-owned Mandalay Beer Brewery. Unlike other countries in Southeast Asia, which have concen-

trated on industrial development, the Burmese junta wanted to promote the development of its agricultural, livestock and fishery sectors. So the junta introduced changes to encourage private sector and foreign participation in Burma's food sector.²³ Hence, the Yaung Chi Oo company entered into a joint venture for beer and soft drink production and distribution in Burma, with the Myanmar Ministry for Foodstuff Industries on 1 October 1994. The Foreign Investment Law under which the joint venture agreement was made, guaranteed "no nationalization or expropriation during the contractual period". According to the contract, the tenure was for a period of five years.

The five-year period would have expired on 1 October 1999, but on 11 November 1998 the joint venture came to an abrupt end when armed soldiers seized the brewery on the orders of the SPDC (State Peace and Development Council, which is the name of the Burmese military junta). The SPDC forcibly took over the business with all its assets and ejected all personnel, with no compensation. Yaung Chi Oo's bank accounts were frozen and the owner was threatened with arrest.²⁴ All this was totally against the contract and against the Foreign Investment Law. The guarantee of non-nationalization during the period of contract was ignored. Hence the seizure was sheer expropriation—or banditry in broad daylight.²⁵

The owner of Yaung Chi Oo has since been vainly battling in Burma's courts over the seizure. But the junta subverted the legal process laid down by its own law and relied on Section 14 of the Foreign Investment Law which deals with the termination of the business before the expiry of the term. However, the section also says that it applies when there is "a desire to terminate the business by *mutual agreement*". Here, this crucial preliminary element is missing. Yaung Chi Oo does not want to terminate, only the junta does. Moreover, there is nothing to suggest that any of the special circumstances mentioned in Section 14 have been met. Sometimes a state may have a right to nationalize or take over the assets of foreign investors, but such nationalization or take-over is unlawful if it is discriminatory or lacks a public purpose. The Burmese junta has argued that taking over the Mandalay Beer Brewery was for a public purpose and not discriminatory. But if the junta wants to succeed in this argument, they must be able to show that the seizure of the brewery was for some economic or public purpose, and not for the personal gain of some of its leaders.

Some say that the basic reason for this incident is the unreliable Foreign Investment Law (SLORC Law No. 10/88) to which investors have been lured, and the arbitrary legal system in Burma. The 'joint venture' in which foreign investors are trapped is a contract between one of the Burmese Ministries and the foreign business partner, which comes under the Foreign Investment Law. Although Section 22 guarantees that there shall be no nationalization during the tenure of the contract, Section 14 of the Law gives overriding power to the Myanmar Investment Commission, i.e. the military, to decide matters and termi-

Under Burma's current investment laws, the violator of the law will be the judge. Why foreign investors agree to such laws cannot be understood—perhaps this merely represents their race for profits.

nate the contract before the expiry of the contract period. Under the Law, the investment commission is composed of the 11 ministers concerned with trade, and it decides disputes between trading partners in which the ministries have direct interests and where the foreign trading partners are not at all represented. Hence, in the instant case, the violator of the law will be the judge. Why foreign investors agree to such laws cannot be understood—perhaps this merely represents their race for profits.

Others maintain that this incident was not caused by the Foreign Investment Law but is simply the outcome of a power struggle between two factions in the military junta—one led by Lt-Gen Khin Nyunt (the Intelligence chief, who is for economic openness and favours the Singapore-based partner) and the other led by Gen Maung Aye (the Army chief, who is opposed to too much openness too fast).²⁶ According to the owner of Yaung Chi Oo, “Because we were so successful, the brewery became an easy target for greedy soldiers and bureaucrats. We fell on the wrong side of the power struggle and as a result lost our business. Unfortunately in Burma that’s what matters—political connections, not law”.²⁷

Yaung Chi Oo’s calls for help to ASEAN have so far been met with silence. It remains the question whether ASEAN is able to protect foreign investment in the region. The Yaung Chi Oo case is a compelling one. It also serves as a test of Burma’s commitment to ASEAN. The junta first saw ASEAN membership as a key to participation in economic growth. But since joining the Association, the junta sees membership as a liability: repressive policies in Burma have consistently been placed under an unwanted spotlight. ASEAN Secretariat officials in Jakarta say the Association would be charting new territory if they took on the case. So far ASEAN has shown consistent impotency in mediating regional disputes on both political and economic fronts.

Rule of Law means many things. It means that the government is subject to the same rules as the citizens, that the judiciary is independent, that contracts are enforceable in court. It should not be underestimated how important this is for the economic development of a country.

Recently, Yaung Chi Oo found a hearing for its grievances at the International Court of Justice in The Hague. The International Court is currently looking into the matter.²⁸ The seizure of the brewery tarnishes the ‘open market economy’ policy declared by the Burmese junta. While Yaung Chi Oo seems to be the first foreign investor to have been targeted for nationalization, Burma’s reputation as an attractive destination for foreign investment has already turned sour. Indictments of the junta’s business practices are coming from many quarters. The Organization for Economic Cooperation and Development has added Burma to its blacklist of countries deemed uncooperative in fighting money laundering. Ever since the 1990s, bureaucratic hassle, corruption, lawlessness and enduring worries of political instability have slowed foreign investment to a trickle. Now, the junta’s apparent unwillingness to abide by both its own and international laws protecting foreign investment will make the protagonists of constructive engagement think twice.

Political Reforms and Economic Development

After a prolonged period of stagnant mindset, the junta has shown a change by entering into talks with the leader of the democratic opposition, Daw Aung San Suu Kyi. The talks are viewed with guarded optimism. Moreover, the junta would be wise if they kept commercial disputes to the domestic forum and came to fair and just settlements acceptable to all parties. This would send bright signals to foreign investors that the junta is willing to restore the Rule of Law. Political reforms and economic development go hand in hand, with Rule of Law being the fulcrum. It would also provide an opportunity to the junta to demonstrate its commitment to ASEAN. The junta may recall that many foreign companies have already decided to pull out and close business in Burma.

The junta's honesty to put business on legal rails is being tested. This has to comply with international standards and adhere to the principles of transparency and accountability. The alternative is stagnation and ruin. Rule of Law, in this context, means many things. It means that the government is subject to the same rules as the citizens. It also means that the judiciary needs to be independent. It means that contracts and agreements are enforceable in court. It means that legislation should be well-written and never changed retrospectively. It should not be underestimated how important this is for the economic development of a country. With the current situation, apart from the international sanctions, Burma scares away foreign investors because these potential investors know that the contracts they sign are not enforceable in court.

Endnotes

* B.K. Sen is an Executive Committee Member of Burma Lawyers' Council, and Peter Gutter is an Adviser with the Council.

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2. "IHC Caland Komt Critici Maar Nauwelijks Tegemoet" ("IHC Caland Barely Addresses Criticism"). *De Financiële Telegraaf*, 5 June 1999.
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4. Tyler Giannini, "Destructive Engagement: A Decade of Foreign Investment in Burma". Bangkok: EarthRights International, October 1999. See also: "Burma: Time to Get Tough?" *BBC News*, 18 September 2000, p. 1.
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- has even published these Procedures on the Internet (www.myanmar.com/gov/trade/lab.htm, visited on 30 July 2001).
6. The Union of Myanmar Foreign Investment Law (SLORC Law No. 10/88) includes a number of Notifications. Notification No. 11/88 (7 December 1988) describes investment procedures. Notification No. 1/89 (30 May 1989) describes the types of economic activities allowed for foreign investment, supplemented by Notifications No. 1/92, No. 3/93 and No. 10/93.
 7. The Contract Act of 1872, "The Burma Code", Published under the Authority of the Government of the Union of Burma (1955), Vol. IX, pp. 3-55.
 8. The State-owned Economic Enterprises Law (SLORC Law No. 9/89) includes Notification No. 15/89 (6 December 1989) regarding permission procedures and the formation of Supervisory Committees.
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 10. The Arbitration Act of 1944, "The Burma Code", Vol. XI, pp. 373-390.
 11. The Union Bank of Burma Act of 1952 was repealed by the Central Bank of Myanmar Law of 1990 (SLORC Law No. 15/90).
 12. The Burma Companies Act of 1914, "The Burma Code", Vol. IX, pp. 210-406. The Burma Companies Rules of 1940, being the rules published by the High Court in Rangoon under Section 246 of the Burma Companies Act, were added to the Act on 23 October 1940. In 1989 and 1991, the SLORC enacted two versions of the Law Amending the Burma Companies Act.
 13. The Burma Insolvency Act of 1920, "The Burma Code", Vol. XI, pp. 335-365.
 14. The Private Industrial Enterprise Law of 1990 (SLORC Law No. 22/90) was enacted on 26 November 1990.
 15. The Promotion of Cottage Industries Law of 1991 (SLORC Law No. 13/91) was enacted on 10 October 1991.
 16. The Myanmar Hotel and Tourism Law of 1993 (SLORC Law No. 14/93) was enacted on 23 October 1993.
 17. The Commercial Tax Law of 1990 (SLORC Law No. 8/90) was enacted on 31 March 1990. On 31 March 1991, the SLORC enacted the Law Amending the Commercial Tax Law.
 18. The Tariff Law of 1992 (SLORC Law No. 2/92) was enacted on 12 March 1992.
 19. The Central Bank of Myanmar Law of 1990 (SLORC Law No. 15/90) was enacted on 2 July 1990. In addition, in exercise of the powers conferred by Section 102 of this Law, the Ministry of Planning and Finance issued the Central Bank of Myanmar Rules through Notification No. 31/91, dated 9 April 1991.
 20. The Financial Institutions of Myanmar Law of 1990 (SLORC Law No. 16/90) was enacted on 4 July 1990. In addition, in exercise of the powers conferred under Section 91 of this Law, the Ministry of Planning and Finance issued the Rules Relating to the Financial Institutions of Myanmar Law through Notification No. 32/91, dated 9 April 1991, followed by the Central Bank of Myanmar's Regulations for Financial Institutions on 28 May 1992. SLORC Law No. 16/90 was amended by the Law Amending the Financial Institutions of Myanmar Law (SLORC Law No. 7/94), enacted on 21 June 1994.

21. ASEAN Agreement for the Promotion and Protection of Investments, done in Manila on 15 December 1987, amended in Jakarta on 12 September 1996. This was based on the Framework Agreement on Enhancing ASEAN Economic Cooperation, done in Singapore on 28 January 1992, which acknowledged the importance of sustaining economic growth and development in the ASEAN member states through joint efforts in liberalizing trade and promoting investment flows.
22. Framework Agreement on the ASEAN Investment Area, done in Manila on 8 October 1998.
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25. "Constructive Engagement with Burma Sees Red Light". *Legal Issues On Burma Journal*, No. 7, December 2000, p. 64.
26. *Ibid.*, p. 65.
27. Shawn Crispin and Bertil Lintner, "Mandalay Migraine". *Far Eastern Economic Review*, 2 November 2000.
28. "Crimes Against the Economy?" *The Irrawaddy*, Vol. 9, No. 5, June 2001, p. 5.

The Burmese Junta's Impediment to Thai-Burma Relations

*B.K. Sen**

The recent border clashes between Burma and Thailand have brought the issue of Thai-Burma relations into focus. The earlier mass exodus of refugees from Burma to Thailand did not cause panic. The voluminous drug inflow into the kingdom also did not shake the Thais, although the sex trade and import of HIV and Aids roused Thai conscience. The on-and-off border clashes were taken in their strides. But the last straw in the camel's back was the intentional insult hurled at the Thai monarchy, the most revered institution in Thailand, by allegations made through a series of articles published in the state-run *The New Light of Myanmar*. The Burmese junta has shown its complete contempt for Thai policy makers. No country has ever done that before. Prime Minister Thaksin said that his government is reviewing its Burmese policy. But does it have one? The ruling political party has one conception, the opposition has another, the bureaucracy yet another, and the military of course has the prime one—hence, four different approaches. When a nation's national security is at stake, this situation is lamentable.

Thailand and Burma share a long history. There have been misunderstandings, friction and conflict. The common frontier extends for over 1,000 miles, poorly demarcated and contested. Thai-Burma relations have for hundreds of years been characterized by at the very least rivalry and often by outright hostility. A bit of the traditional animosity still remains.¹ Although Burma has border treaties with its other neighbours China, India, and Bangladesh, it does not yet have such a treaty with the Thais. The onslaught of the Cold War in Thailand and the civil war in Burma prevented the two countries from building up mutual trust. Subsequently, with the emergence of a military junta in Burma, the situation became a potential threat to Thailand's security. Slowly but steadily the Burmese

army became the second largest in the Southeast Asian region. Such a huge army is absolutely unnecessary for the maintenance of internal peace, and this created a great deal of consternation in Thailand. Add to this the fact that the Burmese junta provided sanctuary for General Sant Chitpatima after the failure of his coup. As Thailand was also undergoing a drastic change in her polity, it did not say anything. Afterwards Thailand witnessed a Burmese opium wave, but again remained complacent.²

When General Chatichai became Prime Minister of Thailand, a shift in the policy towards Burma emerged. Chatichai's policy, "From battlefields to market-places", came out with a policy of constructive engagement. He led a big delegation to Burma for talks with the military junta. For the first time border trade flourished. But would Thailand want to get rid of the junta? The existence of the junta has been very profitable for the Thais who obtained lucrative timber, fishing and mining concessions in Burma. If they supported Burma's democratic transition, they would jeopardize their concessions. Moreover, a democratic Burma could easily become a major economic competitor in the Southeast Asian region.

The 8-8-88 uprising was a landmark event in Burma's history. Although the then Thai government did not say anything about this, Thai-Burma relations took a different road. A large number of students and ethnic minorities fled Burma to escape the wrath of the junta and came to the Thai border area, and the Thais have been hospitable. Thailand's policy of constructive engagement, however, has become counter-productive. Despite repeated human rights violations the Burmese junta has won regional recognition by joining the Association of Southeast Asian Nations. And notwithstanding the fact that Thailand has been instrumental in letting Burma join the Association, the Thai government has received not a single acknowledgement from the Burmese junta. Expectations underpinning the Thai decision were belied. The decision has boomeranged Thailand's problems: from a social threat Burma has now become a security threat.

Determinants of relations between two neighbouring countries are geography, economy, political history, culture, domestic milieu and commonality of approach in foreign affairs. Save and except geography, all the other tests fail. In reviving good relations one other factor should not be lost sight of, namely the gross violations of human rights in Burma, which have been causing problems for Thailand as well. The human rights problem in Burma is due to the dictatorial junta and unless there is political reform which is reflecting a change in the thinking mould of that junta, talks will not deliver anything. But Prime Minister Thaksin paid a visit to Burma anyway, and although he pledged that "not another gunshot will be heard while [he is] in power after patching up differences with Rangoon",³ he did not address the root causes of the ongoing conflict between the two countries. Thaksin emerged from his meetings with the junta

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with promises that a Thai special envoy would be permitted to visit areas suspected of being centers of drug production. Thai politicians have openly accused the Burmese military of being involved in the drug trade. Others even asked for international intervention to end the political deadlock in Rangoon, which is seen by many as the root cause of tensions between the two countries. If Thailand were dealing with a Burmese government that was accountable, it could hope for a genuine improvement of relations. But as long as it has to negotiate with a ruthless military regime that has no credibility anywhere, the problems will remain. Thailand has had problems every time it tried to deal with the Burmese junta. Openness is not the principle of the junta's foreign relations, maybe as a result of Burma's relationship with China. Besides, Burma has been without a democratic constitution, without Rule of Law, and without an independent press for four decades. The junta is free to do as they like without any accountability. In the absence of Rule of Law, state actions become unpredictable and unstable. Relations with other countries therefore cannot be conducted in an orderly manner. The Rule of Law, being without borders, puts international relations on a rational basis. Unless the relationship between countries is founded on Rule of Law, it will be a relationship which is deceptive and unsustainable. The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations referred to the importance of the Rule of Law among nations.⁴

Today Thailand and Burma face crisis after crisis. With no Rule of Law in Burma, a new relationship based on trust, openness and honesty is not very likely. Thailand should therefore not hurry to open the door for the Burmese junta. Thailand at the moment has to stand tall. Some Thai politicians say that a harder bargain with the junta is needed, and that the Prime Minister went too far in trying to patch up relations with Burma.⁵ The possibility of war with Burma seemed almost appealing to many in Thailand as the Thai Third Army, responsible for the protection of the northern section of the border, was already taking a tough stance against Burmese troops who pursued Shan rebels onto Thai territory.⁶ But the deterioration of Thai-Burma relations has not yet reached the point of no return, and the UN Special Envoy will visit Rangoon to follow up the talks between the junta and opposition leader Daw Aung San Suu Kyi. The International Labour Organization will decide on the forced labour practices in Burma as its team has been allowed to go to Rangoon, but the Asia-Europe Forum has rejected Burma's participation.

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All in all, the junta is under siege and it certainly cannot afford to open a second front at the Thai border. The junta already has many problems with armed insurgency in Burma. Another front in the east would mean that the insurgents are going to be backed by the Thai Army. So the junta is playing a game to shift public focus away from domestic problems by creating an image of Thailand as an aggressor. In this context, to view it objectively, all that the leaders in Thai-

land have to do is to have one voice and evolve a short-time policy to contain the situation. But the debate has not yet reached the floor of the Thai parliament. Before there can be a uniform policy towards Burma, it should be debated by the parliament first. The Prime Minister cannot decide on such a policy on his own. The Thai media are against the Prime Minister's attitude in this regard. Thaksin will face criticism for his handling of the current crisis, because the unresolved issues will inevitably rear their heads again.⁷ Engaging the junta could be a positive contribution to the process of change which has seized Burma these days. This could also be for the mutual benefit of both countries. The fledgling democracy of Thailand and the emerging democracy of Burma, accountable to their respective people and with Rule of Law in place, have to sort out all outstanding problems. Only then will the two countries be able to coexist in prosperity and peace, enabling democracies to eventually converge.

Endnotes

* The author is an Executive Committee Member of the Burma Lawyers' Council.

1. For example, the Burmese junta often deliberately uses the name of Ayutthaya when it refers to Thailand. "In 1767, the Burmese completely destroyed the city and kingdom of Ayutthaya. This led to the Thai inferiority complex, because the Thais never managed to sack Burma", according to an information sheet issued by the Myanmar Information Commission. Or, another example, "Burmese Textbook Says Thais Are Lazy" (*The Nation*, 6 June 2001). On the other hand, Bangkok has long fed nationalistic sentiment by portraying the Burmese as barbarous invaders. The blockbuster film *Bang Rajan*, for example, depicts the Burmese invasion of Ayutthaya as a battle between good (Thais) and evil (Burmese).
2. Josef Silverstein, "Some Thoughts on Burma-Thai Relations". *Legal Issues on Burma Journal*, No. 6, September 2000, pp. 1-15.
3. Vorapun Srivoranart, "Burma 'Peace Talks': Prime Minister Pledges End To Clashes". *The Nation*, 21 June 2001.
4. "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations". Resolution No. 2625, adopted at the 1883rd plenary meeting of the General Assembly of the United Nations, 24 October 1970. Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18 (A/8018).
5. "A Harder Bargain With Burma Needed". *Bangkok Post*, 23 June 2001.
6. Kulachada Chaipipat, "If Thaksin Fails In Rangoon, It Could Mean War". *The Nation*, 31 May 2001.
7. "Thai-Burma Relations: Back on Track?" *The Irrawaddy*, Vol. 9, No. 5, June 2001.

Federalism and Burma

*Khin Maung Win**

Despite the fact that Burma has a highly centralized unitary government system, the issue of federalism has been a major source of debate for decades. Ever since the formation of the independence movement, the various ethnic groups in Burma have wanted to transform the country into a federal union based on equality. The Panglong Agreement¹ provided the basic foundation for this, but post-independence Burma did not become a federal union in spite of the urgent need for this.

The non-Burman² ethnic groups in Burma have not given up their demands for federalism. Most of them are still engaged in insurgency movements against the central government,³ which has been dominated by Burmans since 1948. The ethnic insurgency movements emerged as a result of the government's failure to deal with the demand for federalism peacefully. The non-Burman movement for federalism and political equality (the 'Federal Movement') has consistently tried to resolve the issue peacefully. The non-Burman ethnic groups even participated in the 1990 elections, with federalism as their main motive. In the elections, the UNLD (United Nationalities' League for Democracy, the alliance of ethnic parties in Burma) occupied the second largest number of seats after the NLD (National League for Democracy). However, federalism does not mean anything to the non-Burman groups unless the right to self-determination, including the right to secession, is part of it.

Following the second military coup in 1988, the democracy activists (mostly Burmans) joined the non-Burman insurgency movements in their struggle to restore democracy and human rights. The non-Burman groups managed to convince Burman politicians and activists that the only solution to Burma's ethnic conflicts and civil war is the creation of a federal system of government. Hence the issue of federalism is no longer limited to ethnic groups, while at the same

time the NLD has expressed a willingness to accept it—even though most non-Burmans see the NLD as a Burman party. So far, however, no NLD manifesto has been specific about ‘federalism’ and Daw Aung San Suu Kyi has been criticized by ethnic leaders who consider her too reluctant to use this word. The problem is that one cannot yet freely use it as many people in Burma still have a poor understanding of the issue and would consider it as disintegration. This is mainly due to military propaganda: the junta is dead against federalism. But most opposition politicians in Burma are ready to go for federalism as they consider it the most reasonable solution to the ethnic conflicts.

Military Versus Federalists

The issue of federalism has become a major political problem in Burma because the successive military governments have failed to address the issue properly. The junta has always maintained that federalism leads to disintegration of the country and mentioned the existence of the Federal Movement as the main reason for the coup of 1962. Many Burmans, especially young people, tend to believe the junta’s propaganda. This makes it difficult to educate people regarding the real aspects of federalism. Constitutional principles proposed by the junta include two major points against federalism. First, the junta’s constitutional principles do not favour the division of power between the national government and the respective state governments, which is an essential aspect for any federalism. Although several artificial arrangements were made to show that constituent units were given a certain amount of power, in reality there is complete centralization of power at all levels. Second, the junta does not want to reduce the privileges of the Burman majority group. Because there are many constituent units for the Burmans alone, they are over-represented in the legislature. The junta should come closer to the views of the opposition to give federalism a chance.

Federation or Federalization

The non-Burman groups want a federation in which the federal government is not superior to but rather a partner of the state governments. The states should be independent with the right to secession. The power of the federal government should be fairly limited. The powers of the constituent states of a federation are, in principle, derived from the people of the respective states. A federation is formed when a number of states agree for some reasons to live and work together under one flag. Because there is an agreement among the member

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states to band together as equal partners, there arises a need for another level of government to handle matters of common interest. Accordingly, this federal or national government is given some powers by the member states. In federalism therefore, the federal or national government is not a superior government that holds all power. The various powers held by the member states are spelled out clearly in their respective constitutions. It might also be said that there are two 'sovereignties' which are intertwined, yet separated. Hence, in federalism there are two constitutions. If an existing country is divided into constituent units, these units cannot become independent. This could only be possible if they were to some extent independent prior to the creation of the federal union, for example in Australia and the United States of America.⁴

In contrast, 'federalization' is applied to transform an existing country into a federal union. The member states in this system cannot determine the role of the central government. Instead, the central government determines the roles of the member states. Limited powers for the states are granted by the federal government. Hence, the emerging federal union is the result of a strong central government. The various ways in which a federal union can be created form the basis of the conflicting ideas on federalism in Burma.

The most difficult task for the Burmese federalists will be the demarcation of the constituent states. Since Burma is a multi-ethnic country, the people agree that the formation of the constituent states should be in line with ethnicity. All constitutional drafts made by the NCUB (National Council of the Union of Burma), the military junta and the NLD proposed the names of ethnic groups as the names of their respective states, but there are still different ideas in terms of demarcation. And there is the problem of the current demarcation of Burma. There are seven States and seven Divisions, all with the same rights and status. The constitutional principles as proposed by the military junta recognize the seven States for non-Burman ethnic groups, the seven Divisions would be called 'Regions', and there would be additional units called 'Union Territories'.⁵

The basic principle for the formation of ethnic states is that in an area where the majority of the population belongs to the same group, this area can be formed into a state for this particular group. However, there are many areas in Burma where there is no ethnic majority, for example Tenasserim in the south and the Irrawaddy delta in the southwest. Although it is suggested that these regions be formed into states on a geographical basis, this idea is not appreciated by the ethnic groups as they consider such a construction too closely associated with the Burmans. In contrast, the draft constitution of the NCUB proposes new titles (such as 'Nationalities State') for the States with more than one ethnic group.

The advocates of the federation theory favour the idea of "One State for One Ethnic Group". According to them, such a policy would strengthen equality.

They do not recognize the existing Divisions for at least two reasons. First, they maintain that these areas are not independent units like other ethnic areas but rather created by Burman politicians. Second, the current Divisions are inhabited by a Burman majority. Many ethnic minority groups fear that in such a situation a federation will not be based on equality.

The Role of the Federal Army

The ethnic groups do not want to see the present army as a federal army. Re-establishing a federal army with a new formula is a popular idea among the non-Burman politicians in exile. They see the present army as oppressive, as too much dominated by the Burmans, as the destroyer of democracy. A new formula for the formation of a federal army is proposed in the NCUB draft constitution. Others think that it is not the army that is suppressing the people, but militarism led by some generals, and that total reform would be necessary for the army leadership and system, not for the army itself. It is important to take into consideration the response of the present army concerning the ideas for a future federal army. The role of the federal army should be positive but it should not replace civilian rule. The army should not have a double role, it should only sustain (the transition towards) democracy.⁶ Unless there is some form of consent from the present army, any initiative for political change would be difficult, if not impossible.

The Right to Self-Determination

Self-determination in the context of Burma is more than self-government. Non-Burman groups maintain that self-determination includes the right to secession. The 1947 Constitution allowed some states of the Union of Burma to exercise the right to secede from the union. The term 'self-determination' also appears in the text of the NCUB draft constitution and is defined as follows, "In the Burmese context it is (...) the right of States to be able to exercise utmost autonomy in their internal affairs and freedom from undue interference from either the Federal Government or from the Governments of other Member States". At international level, there are several other definitions. First, the established right to be free from colonial domination, or the opposite—the right to remain dependent, if it represents the will of the people. Second, the right to dissolve a State, at least if done peacefully, and to form new states on the territory of the former one. Third, the disputed right to secede. Fourth, the right of divided States to reunite. Fifth, the right of limited autonomy, short of secession, for

In Burma, the issue of secession derives from the right of self-determination and not from the federalism described by the junta. But as long as the majority of Burmans believe that federalism is the same as secession or disintegration, there is little chance for transformation into a federal union.

groups that are either territorially, ethnically, religiously or linguistically defined, as in autonomous areas within confederations. Sixth, rights of minority groups within a larger political entity, as recognised in Article 27 of the Covenant on Civil and Political Rights and in the United Nations General Assembly 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Seventh, the internal self-determination freedom to choose one's own form of (democratic) government.⁷

In reality, the issue of secession derives from the right of self-determination and not from the federalism described by the Burmese junta. But as long as the majority of Burmans believe that federalism is the same as secession or disintegration, there is little chance for transformation into a federal union. Federalism and self-determination must be clearly distinguished. Separating these issues will be useful for understanding and accepting federalism. Another important aspect is that there should be no rivalry in the constitution drafting process. A federal constitution would be a vital part of the creation of a Federal Union of Burma. There are currently three rival constitution drafting processes, the most important one (based on federalism) being initiated by the NCUB in 1989. The second process was initiated by the military junta in 1993. The junta's sham National Convention laid down 104 constitutional principles, none of these in favour of federalism. The third process is sponsored by the National League for Democracy. When Daw Aung San Suu Kyi was released from house arrest in 1995, the NLD called upon the junta to reform its National Convention in order to involve the NLD in the constitution drafting process. The junta refused, whereupon the NLD delegates boycotted the National Convention. So far, the NLD has not yet released any of its constitutional principles as most of its leaders have been under house arrest for long periods. It is essential to combine all three drafting processes in order to come to one federal constitution.

Endnotes

* The author is an Executive Committee Member of the Burma Lawyers' Council.

1. The Panglong Agreement was signed by General Aung San—the architect of Burma's independence—and leaders of various ethnic minority groups in Panglong on 12 February 1947. Most ethnic groups maintain that if the 1947 Constitution had been based on the principles of the Panglong Agreement, Burma would have become a genuine federal union.
2. 'Burman' is the designation of the ethnic majority in Burma, comprising at least 60 per cent of the population, while 'Burmese' refers to the inhabitants of the country as a whole.
3. For an overview of the possible approaches minority groups might adopt

- toward the state, see: Ted Gurr, "Minorities at Risk: A Global View of Ethnopolitical Conflicts". Washington, D.C.: United States Institute of Peace, 1993. For an overview of the possible approaches a state might adopt toward minorities, see: Anthony Giddens, "The Nation-State and Violence". Berkeley: University of California Press, 1985.
4. Chao-Tzang Yawngwe, "State Constitution, Federalism and Ethnic Self-Determination". Paper for the Inauguration Conference of the United Nationalities' League for Democracy, Thai-Burma Border, 15-19 January 2001.
 5. "Burma: The Military and Its Constitution". Bangkok: Burma Lawyers' Council, May 1999, pp. 13-15.
 6. B.K. Sen, "Burma's Transition to Rule of Law in Different Contexts". *Legal Issues on Burma Journal*, No. 8, April 2001, p. 69.
 7. Frederic Kirgis, Jr., "The Degrees of Self-Determination in the United Nations Era". *American Journal of International Law*, Vol. 88, No. 304, 1994, p. 306.

About Constitutions, Economics, and Talks

*B.K. Sen**

Peace Talks in Burma and Sri Lanka

There are similarities and differences in the negotiation scenarios of Burma and Sri Lanka. Both countries emerged out of colonial rule and became sovereign independent republics. They framed their respective secular constitutions although both countries are predominantly Buddhist. Both entered into a course of democratic change with a constitution and a parliamentary system of governance. Burma eventually succumbed to military rule, while Sri Lanka wavered before the change and managed to forestall seizure of power by the military. Sri Lanka switched over to a presidential system that preserved democracy. But unfortunately, both countries plunged into ethnic turmoil.

In Burma, the ethnic unrest was compounded by political turbulence. In Sri Lanka, the ethnic revolt took a turn for secession in the name of self-determination. The current movement in Burma is essentially political, aimed at the removal of the military junta. This movement has earned its legitimacy by its landslide election victory in 1990. Ironically, those elections were held by the junta. The current movement in Sri Lanka is one of armed struggle. It has broad support but has yet to earn legitimacy, while its demand for separation has been widely criticized. On the other hand, the Burmese struggle for democracy led by Daw Aung San Suu Kyi is a non-violent one, while her party is in place as a legally registered political party under the junta.

In Sri Lanka, after years of struggle, the contending parties are about to come to the negotiating table. In Burma, after decades of harsh military rule, the junta has finally started talks with the opposition. But the basic issue—a flawed constitution—is common to both. Centralization was the hallmark and denial of the

identity of ethnic minorities. There are some common questions that arise in relation to the talks, such as about agenda, time-frame, facilitation and confidence building. Regardless the answers to these questions, it is clear that the special rapporteur should finalize a memorandum of understanding which will envisage guidelines before the talks start. There has to be commitment by the parties regarding the normalization of everyday life. It has to arrange for an international committee to monitor the process of negotiation. The core issue is the political resolution of the conflict which should form the main substance of the negotiations. A new constitution would form the bedrock of a political solution to the aspirations of the people inclusive of ethnic minorities, although there has not yet been any consensus on even a provisional constitution.

There are many uncertainties. In the current process in Burma, the National League for Democracy has emerged as the primary and main representative of the people. This has been rightly done because of its massive victory in the election. This has given immediate priority to ending the political impasse. Whether the parties can live with the fast-emerging reality is the crux to finally deciding shape and substance of the negotiations.

About the Constitution of Future Burma

Every nation-state should have the primary framework to organize most of the affairs of the state and should be reasonably successful in providing a binding social order. However, in the situation of Burma, there have been failures in crucial areas. One of these is the area of aspiration of local ethnic minorities' culture and rights. The centralized, repressive state system too often tends to either ignore or suppress this. There is a worldwide struggle to rediscover the notion of 'state'. Nationalist groups, trying to reclaim cultural identities by creating autonomous or separate polities, are increasingly looking for supportive structures. Self-determination, secession, federalism, to name just a few structures, are the outcome of this yearning. The moderating position in the above dilemma may be the solution of some sort of centralization which is neither disintegrating nor burdensome. It is important to consider this in the current constitution-drafting process in Burma.

If we consider the constitution of future Burma, the un-federal and anti-federal features of the 1947 Constitution could be delineated, because under these features the various states of the Union of Burma have no right to have their own constitutions, parliaments, and sovereignty over state resources. Other flaws of the 1947 Constitution are that the executive heads of state and judiciary are appointed by the central government and that they remain under the central government's control; that the heads of state are not duly elected by the people and

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can be thrown out of power at any time; and that the central government has been provided with too many revenue resources, making the individual states fall in line with its policies and principles. The 1947 Constitution also does not address the issue of decentralization. In a nutshell, the legal and constitutional issues of the constitution-drafting process in Burma have to be seriously sorted out. The exercise of this process, initiated by groups in exile, is time-consuming and progressing gingerly. The ongoing talks between the military junta and the leader of the democratic opposition have added urgency to evolving an agreed constitution.

The Balkans, Burma, and International Law

The Balkans, in southern Europe, provide a 600-year tale of division and multi-ethnic conflict. Reunification seems a near-impossible dream. This region is now to witness one more questionable act by the Western nations, led by the United States. Many in the rest of the world will have come to wonder why the Cold War friends and allies, such as Chile's Pinochet, have been treated with kid gloves. The double standards in the treatment of these criminals is contrary to the basic concept of Rule of Law. All are not equal before law because Pinochet was an active collaborator of the U.S. in the Cold War. The aim of the Cold War was the elimination of the 'evil ideology of communism'. So, since all is fair in love and war, the end justifies the means—never mind the Rule of Law.

By forcing Yugoslavia to surrender its former president, whatever his crimes were, due process of law was somehow flouted. The action of the West in linking badly needed economic aid to the extradition of the leader is seen as an act of humiliation. The time-honoured rules of conflict resolution were ignored. The extradition could have been carried out in a dignified and transparent way. It was indeed a moment of singular triumph for the international community to bring before its international court a top leader charged with war crimes, thereby vindicating the long arm of international law.

The Balkans have been torn apart by the destructive forces of hate, vengeance and multi-ethnic conflicts. The instant humiliation will only deepen bitterness and set the region back on the path of revenge and destruction, while Kosovo will provide a new chapter in the study of international law. The outcome of the ultimate scenario in different countries depends on the composition of the respective national governments which emerge out of national transition. All concerned forces in the conflict in Burma have to resolve the conflict and come to a settlement in the larger context of justice, reconciliation and Rule of Law. The Burmese transition partners may draw some lessons from this on their path of peaceful democratic change.

Religion, Economics, and Law under Military Dictatorship

In Burma, the military junta has not only rewritten the rules of economics, but also changed the tenets of religion and subordinated law to its dictates. A similar case study is available, namely Pakistan. The similarity of the hard-line military dictatorships is striking. In Pakistan, the Supreme Court Shariat Appellate Bench directed the government to adopt an interest-free economic regime by July 1, 2001. This is supposed to be in line with the Shariat law which Pakistan has adopted after declaring itself an Islamic State. According to that law, accepting interest in any form is un-Islamic: "Any amount, big or small, over and above the principal in a loan or barter transaction, whether obtained for consumption or for commercial or productive activity is prohibited by the Holy Koran". The rulers had little concern that the Shariat law, in the context of globalization, would bring ruin to the country and that it would bring about fundamental changes in the banking and investment laws. The question is who is going to change the laws as there is no working legislature in Pakistan since the army intervened in October 1999. The attack on the interest system is basically an attack on the very foundations of the capitalist order on which the current economy of the country, indeed that of the whole world, is based. The confidence of potential investors has been shaken. Pakistan is drowning in debt. Its internal debt is \$ 28 billion, external debt \$ 35 billion. In a dictatorial state, the law-making power is in the hands of dictators who twist and turn the law to make it serve their interest, irrespective of the fact that in the long run they will be the first victims. The dictators in Burma are no exception. They abuse law to which they have to resort, but by and large they avoid resorting to law. They generate lawlessness and create an atmosphere of fear to perpetuate their rule. Fortunately they belong to an endangered species.

Endnote

* The author is an Executive Committee Member of the Burma Lawyers' Council.

