

# Legal Issues on Burma

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## Regular Features

Thoughts on the UN Special Rapporteur to Burma

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India's Democracy on Trial:

## Special Feature: Legal Aid

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## In Brief

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## In Review

The 1973 Interpretation of Expressions Law

The Bar Council Under the SPDC

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**Burma Lawyers' Council**

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## Some Thoughts On The Special Rapporteur Paulo Pinheiro And His 2002 Final Report To The UN Human Rights Commission ❖

*Josef Silverstein\**

As the Special Rapporteur, Paulo Sergio Pinheiro, began his 2003 fact-finding mission in Burma, he carried with him “harsh” criticism of his last report by U Lwin, spokesman for the National League for Democracy<sup>1</sup> and similar comments made by others. He saw both Gen. Khin Nyunt and Daw Aung San Suu Kyi early in his visit and although there were no published accounts of what was discussed, it can be assumed that the criticism of his last report was raised.<sup>2</sup> His mission ended abruptly on March 22, two days early, when he discovered a microphone beneath the table at which he was interviewing a prisoner in Insein Prison. Its presence in the room violated the promises and assurances he had received from the government that he was free to talk to prisoners without fear of eavesdropping or interference and assurance that there would be no reprisals by the government to the interviewee for speaking to the Special Rapporteur. He immediately halted the interview, lodged a formal complaint with the government and left the country without completing his schedule.

The first incident, the criticism of Mr. Pinheiro, marked a sharp change in the relations between the Special Rapporteur and the NLD; the second appeared more serious as it signaled a possible break in the relations between the UN representative and the military rulers which may not be repairable.<sup>3</sup> In order to put these two events into perspective it is necessary to look more closely at the Special Rapporteur and his report.

Over the years, very little has been published in the world press about Mr. Pinheiro and his mission. Only when something out of the ordinary occurs, such as the events noted above, do the newspapers in Burma's neighboring countries and the international press and radio give space and comment to his activities in Burma. Because he represents the UN Human Rights Commission and his reports go to the General Assembly, where the Third Committee pays great attention to them as they prepare their annual resolution on Burma, his observations and comments are important and deserve wider circulation in the press and study by students of international law and social and political affairs in Burma.

The Special Rapporteurs are selected by the UN Commission on Human Rights and not by the UN Secretary General, members of the General Assembly or the Security Council. As rapporteurs, they are not mediators, third participants or observers in any dialogue which might take place between the military rulers and the representatives of the Burmese people. Although there is nothing in their mandates demanding that they should or must be selected from countries outside of Southeast Asia, all have been. With the exception of Judge Rajsoomer Lallah, Mr. Pinheiro's immediate predecessor—who, because of opposition from the government of Burma, was not admitted to Burma during the period of his appointment—all have been admitted and received cooperation from the government; until the listening device experienced by Mr. Pinheiro, all appeared to have had freedom of inquiry and the cooperation of the political parties as well as the rulers. From his first visit, the Special Rapporteur established himself as independent of all parties and governments, created his own agenda and itinerary, spoke and wrote about what he saw and heard, drew his own conclusions and made recommendations. He is assisted by a staff whose members remain anonymous and in the background as he alone spoke and wrote for the mission. Until U Lwin, the spokesperson for the NLD, made his attack upon him there was no public criticism of his behavior or his work.

In April 2001, shortly after his appointment as Special Rapporteur, he addressed the UN Commission on Human Rights in Geneva and used the occasion to tell the members of that body about himself and his approach to his assignment in Burma.

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In his address, Mr. Pinheiro began by affirming that “the principal reference in fulfillment of my mandate is and will always remain the promotion of best interests of the victims of human rights violations.”<sup>4</sup> He went on to say that

“I will not fail to speak very clearly about the situation of human

rights in Myanmar. I will report in an independent, objective, fair and transparent way under the terms of my fact-finding mandate. I will aim to offer my voice to the people and the civil society of Myanmar, presenting their allegations to the government and requesting their effective action to provide redress and prevent further violations...I understand that under the terms of the resolution on Myanmar, my role is also to seize every window of opportunity to contribute to the improvement of the promotion and the protection of rights in the country. In this endeavor, I will work together with the Government of Myanmar, the opposition, members of the emerging civil society, United Nations organizations and the international community at large...the nature of my mandate is fact-finding. I take note that the Government of Myanmar released from detention a number of members of the opposition...during my visit I expressed my opinion to the Government that there is an urgent need to consider the release of the old, the mentally disturbed and those prisoners whose sentences have reportedly already expired...I intend to remain seized of this important issue and will continue following it up with the authorities.”<sup>5</sup> “I believe that the government should create the situation whereby such international assistance could be given and effectively reach the most vulnerable sections of the population, such as children, persons affected by HIV/AIDS and the poor.”<sup>6</sup>

And to the concerned international public, he said, “Any positive initiative must be acknowledged and encouraged by the international community, which must be prepared to offer positive answers to any indicators of real progress towards democratisation and strengthening of human rights protection.”<sup>7</sup>

Mr. Pinheiro has followed the path he charted and it is the standard to which he has held himself.

The reports submitted by the present Special Rapporteur are clearly written, filled with factual information, thoughtful commentary and sound recommendations. They are direct and tightly structured. They follow a set format, beginning with a brief introduction wherein the author sets forth his mandate by the Commission and, in his most recent report, he included the Commission’s request that he “keep a gender perspective in mind when seeking and analysing information.”<sup>8</sup> During 2002, he submitted two reports, an early interim statement and a final document. The 2002 Report, like its predecessors, offered at the beginning, a brief summary of his visit, starting with the meetings he had while on his way to Burma in early February, and followed by a description of his move-

ments in the country. He expressed his appreciation for the full and unhindered cooperation of the government, which he said made it possible for him to “carry out his programme in its entirety and enjoyed freedom of movement and access to private persons and others of interest.”

For the reader with time only to read the observations made during his travels, Mr. Pinheiro offered three. He found that “the political space is being gradually reopened for the National League for Democracy (NLD) to resume activities” and suggested that it should be the same for “other legal political parties”<sup>9</sup> In conjunction with that positive remark, he offered a cautionary note that restrictions on freedom of expression, information and the press were still in place.

The second observation related to political prisoners. He said that the military rulers had accepted the figures established by the International Committee of the Red Cross (ICRC) that, as of October 21, 2002, there were 1,448 political detainees and the categories into which they were divided. The government also announced a month later that it intended to release a batch of 115 prisoners. If that number was actually released, Mr. Pinheiro wrote that would mean that 950 prisoners would have been released during the past two years. He broke the total down to include 550 political prisoners and 401 pregnant women or mothers. In general, he found the conditions of detention had improved; however, physical ill-treatment of political prisoners, such as beatings, have been reduced, but not eliminated. He noted that in many prisons, political prisoners were treated worse than ordinary criminals. He suggested areas of prison life, where further attention should be paid—the quality of the food served, the beatings of common prisoners and the availability of qualified medical attention and treatment, especially in emergencies for all prisoners.

The report used the term “un-rule of law” twice: once in the discussion of the administration of law and once in the recommendations, where Mr. Pinheiro wrote,

“...in the national reconciliation dialogue. This process must be accompanied by the launching of reform of the States apparatus, which could contribute progressively towards making the rule of law prevail in the un-rule of law,”<sup>10</sup>

to define the continuing pattern of arbitrary arrest, prolonged incommunicado detention and interrogation by military intelligence, extraction of confessions and information, often under duress of torture, summary trials.

Following his departure from Burma in March and during his short stay in Thailand, he reiterated the call he made in his report, that the military rulers release all political prisoners unconditionally and demanded,

“You have to release all the prisoners. You cannot continue using the excuse that some prisoners are very dangerous...I can barely imagine that prisoners 75 years old, in terrible state of health, are a security threat. This is nonsense, this is absurd...They cannot continue piecemeal, drop-by-drop releases. This is unacceptable.”<sup>11</sup>

Mr. Pinheiro’s third observation was balanced between positive remarks about freedom of religion with negative statements on the employment of children in the military. He noted that conscription of children continues and applies both to the government and the insurgent groups.<sup>12</sup> He reported some improvement in the freedom to practice religion in some areas and made the general observation that this freedom seems to be better in places close to centers of authority and the opposite in remote and counter-insurgency areas.

The Special Rapporteur took note of the “serious problems with the way the army and armed groups treat civilians in ethnic counter-insurgency areas.”<sup>13</sup> He observed that these problems cannot be wished away nor will they disappear by denial; instead they must be acknowledged and addressed in a creditable manner. On the issue of the rape of Shan women by soldiers and officers in the minority areas which became an international issue after the release of the report, Licensed to Rape: The Burmese Military Regime’s Use Of Sexual Violence In The Ongoing War in Shan State, Mr. Pinheiro refused to undertake an immediate investigation because of a shortage of time and the need to do so within the framework of his mandate and according to international standards for such inquiries. He offered to return and conduct an independent assessment under his mandate and said that,

“It is essential that there be a clear acceptance by the SPDC of the modus operandi based on international standards and including sexual violence against Shan women in the terms of reference, and possibly including a review of the findings by the Special Rapporteur’s team in Thailand and of allegations of other human rights violations in ethnic minority areas.”<sup>14</sup>

The Special Rapporteur concluded his executive summary by reporting that in response to the precarious humanitarian conditions in Myanmar, the United Nations “country team is preparing a framework document which is expected to function as a blueprint for direct action.”<sup>15</sup>

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In the main body of his report, Mr. Pinheiro wrote that to speed up progress toward peace and reconciliation, it was necessary to call for an end to the stalemate in talks between the NLD and the government and noted that “greater progress in the promotion and protection of human rights will help create an adequate atmosphere to break the impasse.”

In the last section of the main body of the report, Mr. Pinheiro said, without fanfare or qualifying words to preface his thought and recommendations,

“The Special Rapporteur is convinced that to help enhance the dialogue between all political actors in Myanmar...it is necessary more than ever to build a rational discourse on policy and strategy alternatives that are effectively possible.”<sup>16</sup>

The Special Rapporteur followed the above statement with remarks which drew criticism from members of the press and Burmese political parties. He wrote, “It is high time to replace the high expectations of the ideal game scenario and the writing of constitutional models with a down-to-earth discussion of less prescriptive requirements which will be able to stimulate a real process of change. It is crucial to follow, understand and strengthen the internal forces within Myanmar, as in the end, only they will be able to bring about possibilities for change. To this end, instead of continuing to complain that little has changed in the past 14 years in terms of power and influence inside the SPDC, the army and society, it is time to take stock of, acknowledge and evaluate the ongoing effects of incremental change which have taken place.”<sup>17</sup>

The Special Rapporteur then wrote that it was possible to see movement on all sides and “a road map for substantive dialogue and setting out objectives for both sides is essential for progress towards democratic transition.”<sup>18</sup>

In this situation, Mr. Pinheiro declared that the international community must continue its dialogue with all sides...member states and international organizations must follow the lead of domestic actors concerning the political transition. “At the time that the NLD General Secretary and her colleagues are beginning to operate, it is of fundamental importance to be pragmatic and to work within the compromises and negotiations defined by the NLD with other political parties, ethnic groups and civil groups...Let us not refuse to acknowledge progress because the changes do not fulfill a maximalist scenario.”<sup>19</sup>

It is time, he said, to leave behind the illusion that after the political tran-

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He expressed the view that the sooner the international community is ready to assist, the better and smoother the change will be in Burma.

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sition the apparatus and agents of the State will magically disappear. He expressed the view that the sooner the international community is ready to assist, the better and smoother the change will be in Burma. “He therefore continues to urge the international community to engage with Myanmar even before the SPDC introduces democratic reforms.”<sup>20</sup> The policy option at the present time, he wrote, is principled engagement—a dialogue, support for change, empowerment of community, strengthening of autonomous civil society elements, and the enlargement of the presence and the capacity of United Nations agencies.

What he did not do was to urge the international community to step up financial support to the SPDC or to consider the suspension of economic or political sanctions; “it is not part of his mandate to advise Member States on this matter.”<sup>21</sup>

The discussion and criticism of the 2002 Report turned, in part, on the question, did the Special Rapporteur exceed his mandate in calling on the international community to become more involved; implicit in the criticism, was the question, was he asking it to favor the military over the popular opposition? In both cases, it is the opinion of this writer that he did not. His report makes clear that the present situation cannot continue and result in political change. Consistent with his mandate as he defined it in 2001, the 2002 Report speaks very clearly about the situation of human rights in Burma. As he described conditions inside of the country at that time, there is no real movement to desired change. But he sees the protagonists in the struggle to transform authoritarian rule to democracy as entering a new phase in which, “the Commission of Human Rights and the international community must acknowledge and act...”

From his perspective and consistent with his interpretation of his mandate, his role, as he sees it, “is to seize every window of opportunity to contribute to the improvement of the promotion and protection of human rights in the country. In this endeavour, I will work together with the Government of Myanmar, the opposition, members of the emerging civil society, United Nations organizations and the international community at large.”<sup>22</sup> Recommending a more active role for the international community and its impartial involvement with all sides is consistent with a condition of his mandate—to seize every window of opportunity to contribute to the improvement and protection of human rights in Burma.

Finally, what of the criticisms made by U Lwin, the spokesman for the NLD and others before Pinheiro’s February return to Burma? It was reported that in an interview prior to his return, the NLD leader said that he was not impressed with Pinheiro “even a little bit.” He accused Mr.

Pinheiro of being inconsistent when commenting on the situation inside Burma. "We don't see any improvement in the human rights conditions since he took the position. What he says varies from one place to another. He says one thing before he comes to Burma, but he changes it when he arrives in Rangoon. And when he leaves Rangoon he holds a press conference in Bangkok, his statement is different again." The NLD "does not expect anything" from his visit.<sup>23</sup> Aung Naing Oo, an exiled political analyst said, "Politics in Burma are black and white. If you aren't a friend [of the opposition], you'll be the enemy. So if he says something positive for the junta, he will be in trouble and lose his credibility [with the opposition]." Finally, Khun Tun Oo, Chairman of the Shan Nationalities League for Democracy, was reported to have said, "What he has to do is just about human rights. We will tell him to do his own task. The issue of engagement doesn't concern him at all."<sup>24</sup>

The Special Rapporteur faced other criticism as well. Most of it reflected little real knowledge of what he was charged to do, what his relations with the government were and the degree of latitude he had in carrying out his work. He has proven himself to be an independent thinker and actor. His report demonstrates his courage to speak his mind without fear of reprisal or criticism. The work he and his predecessors have done is in many ways pioneering. Sovereign states cloak themselves with the protection afforded by the international law principle of noninterference in their internal affairs. That principle is embedded in the UN Charter (Art. 2.7) and the representatives of Burma never cease to invoke it in the face of any criticism or questions about the way their government treats its citizens. As noted earlier, the Special Rapporteur is given a mandate by the Commission on Human Rights and the power to report. Because the Commission is not one of the stronger organs of the UN; it relies on the integrity and diplomatic skills of the men and women who represent it and often stand alone as they confront the governments on behalf of the people and give their time and use their energy, intelligence and determination to carry out their mandates, no matter how difficult.

The Special Rapporteur in Burma has demonstrated that the pen can be mightier than the sword if used honestly and well. He has not won every contest he undertook and he may not win the present one. But he has compiled a record on which his successor can build and he knows that he did his best to improve human rights for the peoples of Burma.

♦ **The author wishes to acknowledge the use of research materials given to him by David Arnott and materials made available from the Online Burma Library.**

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## Endnotes

- \* Professor Josef Silverstein is an academic from the United States of America. He is a well-known Burma expert with a long history of involvement in the issues of Burma. The Professor witnessed political changes in Burma from democratic regime to dictatorship in 1962, as he was teaching at Mandalay University in central Burma during that period. He has written and edited several books and articles on Burma, involving "Burma: Military Rule and the Politics of Stagnation" (Cornell University Press, 1977).
1. Kyaw Zwa Moe, "Human Rights Envoy Under Fire," THE IRRAWADDY, On-Line Edition, March 19, 2003.
  2. "UN Investigator Interviews Political Prisoners in Myanmar," (AP) Yangon, March 22, 2003.
  3. As this is being written, there is no resolution and it remains unclear whether or not Mr. Pinheiro will return and resume his UN assignment.
  4. Statement of Special Rapporteur on to the Commission on Human Rights, Geneva, 6 April 2001. From this point on there will be extended quotations from his remarks and report in order for the reader to have a basis for making his/her own assessment of what he said or wrote Hereafter cited as Pinheiro Geneva Statement.
  5. Ibid.
  6. Ibid.
  7. Ibid.
  8. Paulo Sergio Pinheiro, "Situation of Human Rights in Myanmar," Commission on Human Rights, 27 December 2002, Fifty-ninth Session, Item 11 (c) of the Provisional Agenda. Hereafter cited as Pinheiro December Report.
  9. Pinheiro December Report, Para. (a).
  10. Ibid, Para.(58)
  11. "UN Envoy Says Burma Making Excuses to keep Political Prisoners," AP Dispatch, March 26, 2003.in BI Weekly No. 125, march 20-March 26, 2003.
  12. For a detailed study of this problem, see Heppner, Kevin, "My Gun Was As Tall As Me: Child Soldiers in Burma. New York, Human Rights Watch, 2002.
  13. Ibid, Para (f).
  14. Ibid, Para. 46.
  15. Ibid, Para. (g).
  16. Ibid, Para. 51.
  17. Ibid, Para. 52.
  18. Ibid.
  19. Ibid, Para. 53.
  20. Ibid, Para. 53.
  21. Ibid, Para. 55.
  22. Pinheiro Geneva Statement
  23. The Irrawaddy, March 19, 2003.
  24. Ibid.

## Unocal's Destructive Engagement in Burma- the Lawsuit Ensues<sup>❖</sup>

*Danya Marshman\**

Earlier this year, a San Francisco federal appeals court continued the saga of the Unocal-Yadana Pipeline case, now stretching into its 7th year of litigation. On February 14, the 9th U.S. Circuit Court of Appeals announced that it would reconsider its earlier ruling, which reinstated a lawsuit calling question to the Unocal Corporation's involvement in the mistreatment and murder of several Burmese villagers during the pipeline's construction. Granting Unocal's request, a majority of the court's 24 judges voted for a rehearing in front of an 11-judge panel.

### **Background**

The Yadana Project was a joint legal venture between French oil giant Total, California-based Unocal, and the Burmese government. The arrangement was to build a natural gas pipeline extending from Burma to Thailand via the Andaman Sea. Prominent Burmese human rights advocates didn't initially oppose Unocal's position, seeking a compromise—for Unocal to develop an effective plan to supervise pipeline construction, ensuring that fair labor standards were applied while monitoring the working villagers. In 1994 and 1995, before the physical construction began, advocates representing the Burmese villagers met with the Unocal Board of Directors, including President John Imle, on several occasions. According to U Maung Maung, General Secretary of the Federation of Trade Unions of Burma, the Unocal executives treated the human rights advocates with “arrogant contempt.” He believes the meetings were held only to appease outside observers weary of the plan rather than to foster cooperation with the human rights advocates.<sup>1</sup>

In another meeting on January 4, 1995, President John Imle warned, "Let's be reasonable about this. What I'm saying is that if you threaten the pipeline there's gonna be more military. If forced labor goes hand and glove with the military, then yes, there will be more forced labor. For every threat to the pipeline there will be a reaction." These threats are a clear indication of his awareness of the government's barbaric practices and his willingness to condone the military's inhumane behavior for the financial gain of the Unocal Corporation.

### Material Evidence

The first legal proceedings of *John Doe & Others v. Unocal Corporation and Others* took place in the U.S. in 1996. The Federation of Trade Unions of Burma (FTUB) and the National Coalition of the Government of Burma (NCGUB) joined the victimized villagers in the arraignment of France-based Total SA, the Unocal Corporation, senior officers of Unocal, and the Burmese military. The plaintiffs held that Unocal was completely aware of the forced labor under which the construction of the pipeline took place, yet allowed this practice and several other human rights violations, to continue. Under numerous international statutes, including the Universal Declaration of Human Rights, it is illegal for corporations to allow human rights abuses to take place for the corporation's benefit, if said corporation is aware that such activity is taking place. The villagers allege that the Unocal Corporation had been aware of the Burmese government's previous records on human rights before beginning the project. In addition, they claim that executive members of Unocal knew that abuses were taking place during the construction. Despite their knowledge, Unocal's non-reluctance to continue the project exhibits behavior in violation of international law.

During and after the construction of the Yadana pipeline, many laborers came forward, insisting that they, and other workers around them, were subject to forced labor, beatings, and rape by government soldiers stationed along the pipeline. Although the government claimed that the primary purpose of the soldiers was to guard the pipeline, the villagers asserted that they also forced resident laborers to work without pay, and shot others who were too weak, or refused. These claims were denied by both Unocal and the Burmese government, despite the flood of irrefutable substantiation from lawyers, human rights organizations, and first-hand witnesses.

Some of the most incriminating evidence was found in the Robinson cable, a declassified cable sent from the U.S. Embassy in Rangoon to the U.S. State Department in 1995. The cable chronicles a meeting between

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the embassy staff and Joel Robinson, Unocal's manager for special projects. Most of Robinson's comments are denials of various problems with the Yadana gas pipeline project, such as environmental damage and the forced relocation of villagers. However, Robinson does not deny that the pipeline's security forces conscripted civilians for forced portering:

“Robinson acknowledged that army units providing security for the pipeline construction do use civilian porters and Total /Unocal cannot control their recruitment process.”

Nor does he deny that Total and Unocal gave the Burmese military access to aerial photos and other information in order to “show the military where they need helipads built and facilities secured.” The construction of these helipads, however, was left to the military.

“Robinson indicated at one point in the discussion that the military had not given Total/Unocal foreign staff access to helipad sites within many miles of the border during the period of their construction, but had allowed access after they were built. What has gone on at those sites is performe out of view of expats.”

Although Robinson noted that he didn't think that Total would hesitate to transport Burmese military commanders in company helicopters, his most legally pertinent statement concerns Unocal's relationship with the Burmese military:

“On the general issue of the close working relationship between Total/Unocal and [sic] the Burmese military, Robinson had no apologies to make. He stated forthrightly that the companies have hired the Burmese military to provide security for the project and pay for this through the Myanmar Oil and Gas Enterprise (MOGE). He said three truckloads of soldiers accompany project officials as they conduct survey work and visit villages. He said Total's security officials meet with military counterparts to inform them of the next day's activities so that soldiers can ensure the area is secure and guard the work perimeter while the survey team goes about its business.”<sup>2</sup>

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“Robinson acknowledged that army units providing security for the pipeline construction do use civilian porters and Total/Unocal cannot control their recruitment process.”

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This belies Unocal's claims that it is not responsible for the acts of the Burmese military. When Unocal and Total hire the military, tell them where to work and how to behave, and depend on them for the security of their project, they are morally and legally responsible for the abuses that their security forces commit. As the author of the cable concluded, “it is impossible to operate in a completely abuse-free environment when

you have the Burmese government as a partner.”

The August 2000 deposition by the District of California Central Court is further testament to Unocal’s prior awareness of the government’s policies before the construction of the pipeline began. According to the Control Risk Group, a consulting company hired by Unocal to assess the risks involved in foreign investment,

“Throughout Burma the government habitually makes use of forced labour to construct roads. In Karen and Mon states the army is forcing villagers to move to more secure sites (similar to the “strategic hamlets” employed by the U.S. Army in the Vietnam War) in the hope of cutting off their links with the guerrillas. There are credible reports of military attacks on civilians in the regions. In such circumstances Unocal and its partners will have little freedom of manoeuvre. The local community is already terrorized: it will regard outsiders apparently backed by the army with extreme suspicion.”

Also in the depositions are the discussions between Unocal and Total concerning the potential problems of employing the Burmese military to provide security for the project:

“...in our discussions between Total and Unocal, we said that the option of having the military provide protection for the pipeline construction and operation of it would be they might proceed in a manner that would be out of our control and not be in a manner that we would like to see them proceed, I mean, going to the excess. So we didn’t know. It’s an unknown, and it’s something that we couldn’t control. So that was the hazard we were talking about. It was out of our control if that kind of full relinquishment of security was given to the government.”<sup>3</sup>

### **Jurisdiction**

In 1997, a U.S. federal district court in Los Angeles agreed to hear *Doe v. Unocal*. The Court concluded that corporations and their executive officers can be held legally responsible under the Alien Tort Claims Act for violations of international human rights norms in foreign countries, and that U.S. courts have the authority to adjudicate such claims.<sup>4</sup> After three years of discovery, the plaintiffs presented evidence demonstrating that, in the Court’s words,

“Unocal knew that the military had a record of committing human

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The Court concluded that corporations and their executive officers can be held legally responsible under the Alien Tort Claims Act for violations of international human rights norms in foreign countries, and that U.S. courts have the authority to adjudicate such claims.

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rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing and would continue to commit these torturous acts.”

The Court also concluded that “the evidence does suggest that Unocal knew that forced labor was being utilized and that Unocal benefitted from the practice” and that “The violence perpetrated against Plaintiffs is well documented in the deposition testimony filed under seal with the Court.” Nonetheless, the Court dismissed the case, concluding that Unocal could not be held liable unless it was proven that they wanted the military to commit abuses, and that plaintiffs had not made this evident.<sup>5</sup>

Subsequently, on August 20, 2001, Unocal’s motion to dismiss the case from state court was rejected. Because the plaintiffs’ state law-based claims against Unocal were dismissed without a ruling, the plaintiffs were able to re-file the same claims in California state court. Unocal argued to the state court that the federal court’s dismissal barred the plaintiffs’ state case on the premise that federal and state law are the same. The Court did not accept the argument, noting that state law does indeed differ from federal law. Unocal also made a number of arguments based upon the decisions of the U.S. Supreme Court and the U.S. Court of Appeals for the First Circuit. In particular, Unocal argued that it would violate the U.S. Constitution for a state court to hear the plaintiffs’ claims because doing so would intrude upon U.S. foreign relations, and that plaintiffs’ claims are preempted by the federal Burma sanctions law. The court turned aside all of these arguments.

June 11, 2002 marked another precedent-setting day in the case against Unocal when the lawsuit survived Unocal’s motion for summary judgment. The decision of the Superior Court of California made the case against Unocal the first in U.S. history in which a corporation would stand trial for human rights abuses committed abroad.

In that decision, Judge Victoria Chaney held that the case against Unocal should go to trial because there are material issues of fact with respect to whether Unocal is responsible for human rights violations. Specifically, the Court found evidence that would allow a jury to find that Unocal’s joint venture hired the military and that Unocal is therefore vicariously liable for the military’s human rights abuses, and to conclude that Unocal breached California Constitutional and Statutory law in its operations.<sup>6</sup>

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Unocal documents showed the company’s knowledge of military involvement in the pipeline’s construction through independent documents from the US Embassy in Rangoon, Burmese authorities, and inter-office e-mails. The facts presented in the pre-trial phases include overwhelming evidence that the Burmese military forced villagers to work during construction of the pipeline and for militarisation of the area.

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## David vs. Goliath: The Lawsuit

The essence of the Court of Appeal's decision is that US law prohibits a company from having knowing practical assistance in, or encouragement of, practices that had a significant effect on forced labor, murder, or rape. Unocal documents showed the company's knowledge of military involvement in the pipeline's construction through independent documents from the US Embassy in Rangoon, Burmese authorities, and inter-office e-mails. The facts presented in the pre-trial phases include overwhelming evidence that the Burmese military forced villagers to work during construction of the pipeline and for militarisation of the area. The evidence shows that Unocal knew the reputation of the military, knew these abuses were likely to occur, and knowingly benefitted from the actions of the military.<sup>7</sup>

Through Unocal officers, US government reports, and most importantly, human rights organizations, the prosecution has been able to gather enough evidence to present a solid and convincing case against the Unocal Corporation. In striving to prove that Unocal was aware of the government's treatment of pipeline laborers, some of the most seemingly insignificant reports and documents have been implemented as key evidence in order to impress the validity of the case. The value these accounts are to the case and the attention they have received serves as encouragement to the human rights organizations, activists and journalists, who must track and maintain seeming it obscure records despite their lack of immediate benefit.

The Junta's longstanding record of human rights violations has also been of continued speculation throughout the case. The court has spent ample time discussing which law should apply to the offences presented in the scope of relevant international law. The court has considered the status of forced labor in international law and found that, like slavery, the prohibition against forced labor has become a general principle of international law applicable in all countries. The court has also referenced the decisions and principles coming from the International Criminal Tribunals for former Yugoslavia and Rwanda to support the ruling against Unocal. This demonstrates the importance of such international bodies, and reaffirms the urgency with which the International Criminal Court should begin operating to assist in development of this area of the law.<sup>8</sup>

The lawsuit is of additional importance for the future of human rights advocacy and court procedure. The defendant, Unocal, is based in the US, while the events in question took place in Burma. Because of US legal doctrine, it has been very difficult to bring cases from other countries to

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The court has also referenced the decisions and principles coming from the International Criminal Tribunals for former Yugoslavia and Rwanda to support the ruling against Unocal. This demonstrates the importance of such international bodies, and reaffirms the urgency with which the International Criminal Court should begin operating to assist in development of this area of the law.

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US courts, even when US defendants are central to the case. The expanded application of the Alien Tort Reforms Act in the Doe vs Unocal decision has overcome this obstacle.

The further publicizing of the case will create a much broader awareness among the multi-nationals of the world that seek corporate profit at any expense. Though U.S. sanctions have prohibited trade relations with Burma for several years, the financial benefits of engaging in business transactions with the Junta have not fully prevented the agencies of U.S. from associating with Burma. Concern over Unocal case forces other powerful, controlling businesses to be more cognizant of international edicts, forewarned by the Unocal's experience of investment with oppressive foreign governments. As Unocal has come to learn throughout the past 7 years of litigation, the smaller parties with whom they share business interactions are very significant, despite their limited resources or capital worth. The perseverance, and relative success, of a lawsuit brought about by the seemingly harmless Burmese villagers will serve as a reminder to all formidable, authoritative corporations— international law has regard for the interests of all citizens, even if multinationals do not.

♦ **The author would also like to thank Mr. B.K. Sen for facilitating the production of this article.**

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\* Danya Marshman graduated from Princeton University in 2000 with a degree in Anthropology. She is a legal researcher with the Burma Lawyers' Council, Bangkok office.

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# CRIMINAL CASE FOR A CAUSE

## India's Democracy on Trial: The Government of India versus Ko Soe Myint & One

*B.K. Sen and Thein Oo\**

The concept of a criminal case relates to the nature of the crime and the punishment assessed for the commission of said crime. Crime has no fixed definition except for what the law prescribes. An act committed in exercise of the right of private defense, in causing injury or death of the aggressor, falls within the broad definition of "crime." In the colonial days predating Burma's nationhood, criticism of the government amounted to a crime, as did the non-violent resistance to a policeman's barraging of bullets amongst an innocent population. Indeed, the case of a youth that vindicates his dissatisfaction of the government by hijacking an aircraft is considered a crime of serious nature. One man's hijacker is another man's freedom fighter.

### **Facts**

On November 10, 1990, two Burmese university students forcefully diverted a Thai Airways DC-10, flight number TG 305, to Calcutta International Airport in India. Initially on its way from Bangkok to Rangoon, Ko Soe Myint and Ko Htin Kyaw Oo persuaded the pilot to land the plane, then peacefully surrendered to the state government of West Bengal, India. They were imprisoned for three months when they were enlarged on bail in early 1991.

Ko Soe Myint was 20 years old when he obtained refugee status under the mandate of the United Nations High Commissioner for Refugees.

The 1988 military crackdown on thousands of students protesting the governmental regime forced many Burmese students into exile in neighboring countries. Ko Soe Myint was in his final year as an International Administration student at the University of Rangoon when he fled the Thai-Burma border. A year later, he boarded a plane in Bangkok headed for Rangoon and sought to draw international attention to the plight of Burmese people living under military repression. As the hijacking was free of weapons or violent force, the two students hoped to make an open act of defiance against the military government in Burma. Ko Soe Myint was not a criminal hijacker, but a brave revolutionary motivated by a noble cause to free the people from the yoke of the Junta

After he was released from prison, Ko Soe Myint continued publicizing the situation in Burma. In New Delhi he founded Mizzima News, an internet news service that provides current information on Burma's struggle for democracy. The website currently has 1500 email subscribers and reports in both English and Burmese, and is a reliable source for monitoring the atrocities of the military government. Freedom of expression is non-existent in Burma, and the absence of international reporters prevents the international community from becoming aware of the regime's oppressive rule. In a short time, the controversial news agency became very popular, exposing the injustices of the Burmese Junta and the need for democratic reform in the socially, economically, and politically depressed nation.

In April 2002, Ko Soe Myint was unexpectedly arrested and placed under custody by the Criminal Investigation Department of West Bengal. After a 12 year gap, Ko Soe Myint is standing trial for his dramatic act of expression. The case hearing began in a West Bengal district court the same month, and has since been periodically postponed, further delaying the already overdue verdict. The case has attracted broad attention from journalists, lawyers, political leaders, and other proponents of the Burmese pro-democracy movement.

### **Law applied in the case**

The case is being tried under India's Anti-Hijacking Act, 182 NO 65 of 1982.

Section 4 reads:

“Whomever commits the offence of hijacking shall be punished with imprisonment for life and shall be liable to monetary penalty.”

Section 10 reads:

“No prosecution for an offence under this Act shall be instituted except with the previous sanction of the Central Government.”

Section 3 defines hijacking:

“Whomever is on board an aircraft in flight, and, by force or threat of force or by any other form of intimidation, seizes or exercises control of that aircraft, commits the offence of hijacking of such aircraft.”

According to these statutes, the prosecution will have to prove several elements to establish Koe So Myint's guilt for the accused offense. The evidence will not substantiate that there was threat, force, or other form of intimidation as is stated in the law. In regards to the control of the aircraft, it is respectfully submitted that the two students could not have taken control of the aircraft in the manner that they are said to have exercised— without alleged “force” or “intimidation.” Circumstantial evidence will establish that there was a willingness on the part of the pilot and the crew that caused the aircraft to changed direction and land at Calcutta International Airport.

The prosecution will also have to prove the following:

1. that the accused used force/intimidation sufficient to cause the diversion of the plane
2. that the instruments used were of such type as to induce a sense of fear of destruction or death. Chemical examination revealed that none were present
3. that the accused used language/gestures which indicated that they were potential criminals/hijackers
4. that the co-pilot was handled roughly, or terrorized, and that there was a complete state of panic inside the aircraft which jeopardized its safety
5. That there is evidence to believe that while Soe Myint was addressing the pilot, he received support from both the crew members and passengers— the issue of democracy over dictatorship was being put to the test.

When there is a conflict between law and justice, it is the responsibility of the highest judiciary to intervene, something that, to its credit, has consistently been followed. Because there is no evidence is forthcoming to establish guilt, the matter does not possess any element of criminality, and

because it involved a political cause which is endorsed by the government of India, there is no reason to proceed with a fruitless prosecution. The litigation infringes on Ko Soe Myint's human rights and dignities. The prosecution began with the sanction of the Central government. Section 10 of the act reads:

“At the time the sanction was given 12 years back, the Congress Party ran the Central government. There has been government change. Instead of reviewing the case in a way of natural justice, it has taken a regressive step to revive the prosecution. India has a Human Rights Commission whose jurisdiction it is to initiate proceedings to determine whether there have been human rights violations. Under the Act, the West Bengal government cannot withdraw the case without the consent of the Central government. Ko Soe Myint has pleaded not guilty and has demanded a trial which will enable him expound the cause of democracy for Burma.”

### **Snags in the case**

In no capacity there was a weapon implemented in the hijacking. On the contrary, records show that the so-called “threats” were carried out with a bar of soap disguised as bomb. Had the pilot and crew exercised some degree of discretion, the true nature of this assumed weapon would have become manifest. It is the aircraft employees that are guilty— of negligence within their profession. The case is analogous to one in which a passenger takes out a paper dagger and shouts at the pilot to divert the plane— and the pilot concedes under an imagined apprehension. In acting consistently with Ko Soe Myint's case, the aggressor must be charged under the same section. The intention behind the law was to stop terrorist activities. Do the actions of Ko Soe Myint amount to terrorist activity? One has only to read the worldwide reactions in the press and media for their answer. Rather than condemnation, the act was met with adulation and characterized as heroic.

“I can assure at least one thing— we never consider any law above the patriotic and democratic cause of the people...” One must now encounter the conflict of positivism of law and morality of law. This manifests justice in the administration of the law, not simply justice of the law. By itself, the Anti-Hijacking Act cannot function properly. The insertion of clause 10, officially requiring previous sanctions to have been put into practice by the Central government, shows that the enforcement of the law is assured only when proper sanctions have been employed. The authority of the State government is dwarfed by that of the Central Government, which holds all jurisdiction over legal proceedings in initiating and deciding upon the cases. The sanction-giving authority also holds the

power to withdraw sanctions given as a matter of policy, or if the circumstances of the case so require. In view of the legal hurdles discussed above, Ko Soe Myint faces a very time consuming process that will inevitably end in acquittal. The entire exercise will be exemplary of justice denied and a glaring case of the court processor's ill-treatment of the legal system. This abusive judicial process as emerged in the context of its unique circumstances must be brought to a logical end. In direct quotes from the public prosecutor, "The case should be withdrawn because after a decade, there are so many problems in proceeding with the case" and "I have received no instruction either from the State government or from the Central government regarding the fate of the case."

The case suffers from the following fatal flaws:

- (a) There was no formal complaint either from the Thai government or from Thai Airways.
- (b) None of the passengers on the flight nor members of the crew had lodged any complaint.
- (c) The government of India did not hand over the accused to the Thai government.
- (d) The accused was allowed to give two press conferences upon arrival at the Calcutta airport.
- (e) Passengers that would testify in the case are scattered all over the world, and there is no agency to trace them.
- (f) Neither the Thai nor the Burmese government is taking interest in the case.
- (g) There was no true intention to kill or cause serious bodily harm.

The only motive Ko Soe Myint had in the alleged hijacking was to bring the pro-democracy movement in Burma into the view of the international community. After the airplane landed, the Indian government allowed two public press conferences to take place. The demands set forward by Ko Soe Myint were the immediate release of all political prisoners, including Daw Aung San Suu Kyi, the withdrawal of martial law and military tribunals, a reopening of the universities, and the relinquishing of power to handing over of power to the National League of Democracy, the legitimately elected party in the 1990 election. The compromise by the Government of India to allow the press conferences acted as an acceptance of the legal status of the so-called hijackers, as well as a condoning of any offence. The permissive nature of the Indian government implied that no action would be taken against the accused. The trial, in the context of the circumstance was a clear material breach of the Indian policy on the event, rendering the trial unsustainable.

In 1994, the State government of India sent the Central government a memorandum, recommending that the criminal case pending against the two students be withdrawn on humanitarian grounds. In addition, the public prosecutor himself had written to the State government urging the withdrawal of the case. The prosecution has indicated their view that the case cannot be lawfully sustained and is morally unsound.

### **Precedents**

At the time of Ko Soe Myint's demonstration, there had been a number of serious hijacking cases where hostages had been taken, and force was necessary in overpowering the hijackers. The Indian government had allegedly been involved in one such occurrence. The present case is one which did nothing to damage the Indian government, yet represents the growth of frustration among the Burmese youth when they are stripped of their own free expression. That the students undertook such a risk to focus international attention on Burma is testament to their passion for the freedom of their country.

The first such instance in which this method was used to publicize the Burmese cause was also successful. Flying from Burma, Yin and Yea Thiha sidetracked a Burmese Airways aircraft headed to Thailand. They demanded the revocation of martial law, the release of political prisoners and a restoration of democracy. The Thai government released the students soon after they were pardoned by the Thai King. For the government of India, the situation is a similar case of exercising its sovereignty and demonstrating its commitment to the humanitarian cause. Although the Anti-Hijacking Act was the outcome of International Convention, its authors had carefully included a sanction clause to afford a state its own autonomous power. Hopefully India, the largest democracy in the world, will heed Ko Soe Myint's call, carrying on its longstanding tradition as a champion for justice and human rights.

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# Legal Issues on Burma

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## Special Feature Legal Aid

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Burma Lawyers' Council

# Need for Legal Aid Law in Burma: Problems and Prospects

*B.K. Sen\**

## **I. Problem**

The gross violation of human rights is a prominent concern in the current military-ruled Burma. As a direct result of these violations, hundreds of activists have fled the country in search of safer environs. Thousands of peaceful villagers have migrated to Thailand and other border countries to escape the forced labor which has brought Burma to the verge of expulsion from the august body of the International Labor Organization (ILO). Living in exile, the migrants must continue to earn a living to make both ends meet. However, most have fallen victim to the exploitation of employers who compensate them modestly, if at all, for their work. If lucky, the workers are provided with meager food and a dilapidated roof under which to live. The migrant laborers' work conflicts with the labor laws in Thailand, as their residence and employment within the country is illegal. In addition, there are over 1 million refugees on the border, a large majority outside the camps provided. They have no entitlement of legal protection and are defenseless to arbitrary deportation practices by the Thai authorities. To cap all these miseries, they are widely exposed to disease, including HIV/AIDS. A large number among these migrants are women and children. They are often victims of the sex trade and human trafficking abroad as they have no other means of survival. Inside Burma, suppression of fundamental rights, mock trials, arbitrary detention, and imprisonment incarnations of political prisoners on suspicion are the daily features of the system enforced by the Junta. There exists a veritable atmosphere of people living in fear. There is an

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Similarly, the concept of justice has been demonstrably defined by the government as something that belongs to the few, the loyal, and to the powerful, while being denied to the rest.

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immeasurable need for human rights and development assistance in Burma. Legal aid is one of the instruments which can, to a considerable extent, offer relief and alleviate this widespread suffering.

However, in SPDC-ruled Burma, the general public is not allowed the liberty of legal aid, though it is one of the fundamental rights set forward in the Universal Declaration of Human Rights. This crucial element aims to enable the poor and underprivileged to attain equal status and objectivity under the concepts of Rule of Law, Equality Before Law, and Right to Life. The promotion of legal aid should be a principal concern of the state. In extending legal assistance to the distressed and disadvantaged, the state must cooperate with the legal community, encouraging their participation and advice in regional human rights movements. Administered properly, legal aid could act as a successful and beneficial coordinating agency for legal forum, cooperation within human rights organizations, and issues pertaining to Burma.

The model of legal aid is completely foreign to the Junta, whose notion of rule is a localized dictatorial dominance. The SPDC acts as if their despotic authority is competent to rule the country in the name of its foreign and domestic security. Similarly, the concept of justice has been demonstrably defined by the government as something that belongs to the few, the loyal, and to the powerful, while being denied to the rest. Human rights advocates are trying to refine this flawed perception of justice and fairness by creating a specialized legal aid faction whose agenda will be oriented solely towards the pursuance of justice.

The Junta's criminal justice system is unsound at all levels. In the pre-trial stage, there are instances where enforcement authorities refuse to record occurrences of crime. In the situation when a crime is correctly documented, the investigation is often faulty or purposely weakened. Corruption erodes the system when the process of criminal trial begins. The judiciary does not play a role of independence and fairness, and suspects remain in custody while offenders may be released upon bail. Two laws, Judicial Law 5/2000 and Attorney General's Law 1/2001, were passed by the SPDC to handle conflicts such as these, but no provisions were made for legal aid. There has not been any law or act passed by the government for legal aid services, and there exists no legal aid institution run by either state or private enterprise. There are nearly 2500 political prisoners who have been convicted on various draconian laws after standing trial with no mechanism of defense.

Within the past 5 years, hundreds of Shan (ethnic) girls have been gang raped by military officers periodically entering the villages. Legal aid is

not available for the victims, allowing the offenders to stand trial without prosecution. Essentially, the military officers have committed a brutal series of crimes without prosecution or punishment. Conversely, when members of civil society are tried, punishment for those indicted for political offenses is entirely different, and usually more rigid, than crimes with similar degrees of disobedience. In addition, their defense lawyers are frequently faced with threats and intimidation for agreeing to represent the case. The government has invalidated licenses of over 50 lawyers for representing citizens accused of political offenses, and prohibited professional associations of lawyers.

In this context, legal aid leadership can hardly play an effective role. There is no channel for public opinion or media intervention, and there exists no human rights mechanism to monitor the fairness and legitimacy of the judiciary. The only semblance of legal aid is a legacy of the colonial rule, which introduced Common Law into Burma's first legal system. Since this time, the earlier benchmarks of legal procedure have been eroded by a number of special laws, orders, decrees and notifications erected by illegitimate methods within the government. Under the "G circular" law of 1949, paragraph 4 to 7 of the Courts Manual, as well as the Criminal Procedure Code in murder cases, the state appoints a lawyer for the accused if the individual is unable to do so themselves. However, this is not universal for all cases. Depending on the nature of the disobedience, the state does may or may not actually abide by their earlier precedents in providing lawyers for the poor. Frequently, cases are conducted subjectively in which the accused must stand trial without defense. The Attorney General Law and the rules framed there under are supposed to be the main focus of legal aid in Burma. By no stretch of the imagination can the provision in civil cases be classified as legal aid. Order 33 of the Civil Procedure Code reads, "subject to the provisions of this Order any suit may be instituted without payment of the court fee prescribed by law for the plaintiff if the plaintiff is a pauper, that is to say, if his property is not above 100 kyats." The amount was subsequently amended. Section 340 of the Criminal Procedure Code reads, "any person accused of an offense before a criminal court, or against whom proceedings are instituted are under discord in any such court, may of right be defended by a pleader." The Judicial law 2000 section 2 (g) also provides for legal aid in murder cases. Altogether we have a situation where legal aid is practically absent. Engaging a lawyer for the accused in death sentences is not considered "legal aid" (rather, a legal right) in other countries. The meager provision of legal aid in Burma is a mockery of justice. It is therefore good that there is a strong case for enactment of a comprehensive legal aid law, which is practical, purposeful, and result-oriented.

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Though a solid framework exists for legal aid reforms and the administration of justice, the reality of its implementation is weak in the absence of a bridge for conciliation. The execution of a sound legal aid program is a pipe dream with the current imbalance of power in the state.

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Utilizing international edicts such as the Legal Aid Act and the Legal Services Act, legislative bodies in most developed countries provide legal aid for their poor and disadvantaged populations. The widespread nature of this right has caused its application to become a universal feature of the modern legal system. Admittedly, society has become divided without borders while the gulf between the affluent and the poor has progressively increased. Due to the economic effects of inflation as well as the concentration of wealth within a few hands, the cost of litigation services has skyrocketed beyond the reach of the significant majority.

## II. Concept: Access to Justice

“All are equal before law.” “All must have equal opportunities.” However, “access to justice” in practice is found to be full of barriers. Poverty defeats these noble principles, and the right to equal protection of the laws can be viewed on paper only. Hundreds of victims relinquish their legal rights simply because they cannot afford to contract the services required to represent them in court. This is perhaps the only forum where redress can be legally obtained. In the absence of judgement and punishment, similar offenses will continue to plague underprivileged communities and the continuous pattern will be reinforced. The problem is a perpetual one which will continue unless conscious action is taken to break the cycle of injustice. Though a solid framework exists for legal aid reforms and the administration of justice, the reality of its implementation is weak in the absence of a bridge for conciliation. The execution of a sound legal aid program is a pipe dream with the current imbalance of power in the state. Military Intelligence and police are threatened by the prospect of an empowered civil society. Prevented legal aid services are almost nonexistent in Burma. Remedial legal aid is only available in court cases which involve death sentences. For those detained under the State Protection Law of 1973, that is the Preventive Detention Law is inconceivable as it has been “legally” taken out of the jurisdiction of court.

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Right to legal aid, fundamental to life and justice before the law, is a basic human right that should have no boundaries. Provision of legal aid raises a person's importance to a level equivalent to his adversary in court, allowing for fairness and objectivity despite the individual's financial or social status in society.

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## III. Historical Perspective:

The military regime began by illegally seizing power in 1962 and overthrowing the seated constitutional ruler. The military coup consolidated its power through the widespread suppression of nearly all fundamental human rights within society. There was no rule of law and the judiciary was forced to act under the influence of military intimidation. Many trials ended without defense lawyers to represent the accused in the case.

The 1972-88 period was similarly bleak. The sham BSPP constitution

was forced upon the entire country and the notion of “people’s autonomy” was constructed on the same lines as many communist countries of the time. The concepts of open and closed justice were given a new meaning so that preservation of the state was paramount and societal structures became dysfunctional. Any dissent towards the SLORC regime was unthinkable, and would be avenged. Not ironically, without the business of the general public, the independent legal profession quickly eroded.

The Junta’s eyes were opened by the revolutionary events of 8-8-88. The suddenness and enormity of the student uprising startled the government, as did the participation of hundreds of professionals within the legal arena. In fear and defense, SLORC developed a metaphorical allergy to their own laws, as the licenses of 52 lawyers were immediately invalidated. The more vocal and experienced lawyers organizing their colleagues in the democracy protest were jailed without trial. An institution arose in which lawyers could not operate within their field, leaving legal aid in the context of a pipe dream. In lieu of various other violations of human rights, the right to access of justice was also denied.

To the people in Burma, having lived under oppression and injustice for half a century, “equality” in the social and legal spheres has become insignificant. “Equality” and “equal protection” fail to achieve results in the face of socioeconomic disparities. Right to legal aid, fundamental to life and justice before the law, is a basic human right that should have no boundaries. Provision of legal aid raises a person’s importance to a level equivalent to his adversary in court, allowing for fairness and objectivity despite the individual’s financial or social status in society. This perspective portrays the reality that society has not recognized the importance of legal aid in to fairness and democracy. The concept has been in infancy for centuries because of society’s reliance on the state. Civil society needs to become conscious of the fact that it is them, rather than the state, that has hold of the steering wheel.

#### **IV. International Instruments of Relating Legal Aid:**

The concept of legal righteousness can be traced from the Bill of Rights, to the League of Nations, up to the United Nations. Equality before law finds a place in almost all written constitutions, influencing the emergence of international guidelines for the principle. Expressions of this capacity are particularly frequent in the Universal Declaration of Human Rights. Article 7 of the Declaration provides, “All are equal before the law and are entitled, without any discrimination, to equal protection of the law.” This statute reverberates throughout the entire document, and

within The International Covenant on Civil and Political Rights (ICCPR). Under these rulings, international activity in the context of legal aid became prevalent.

### **England**

The Magnacarta, Paragraph 14: The Ruscliffe committee enacts The Poor Person's Procedure, articulating the principles for equality under the law. Legal aid advice rises to prominence in 1949. Legal aid laws were enacted in 1974.

### **USA**

The 6th amendment of the American Constitution provides, "In all criminal prosecution, the accused shall enjoy the right. . . .to have the assistance of counsel for his defense." In the 44<sup>th</sup> amendment, section 1 expresses that "No state shall deny to any person within its jurisdiction the equal protection of the law."

The Supreme Court of the United States affirms the right to counsel in the Due Process Clause. In 1964, the first Criminal Justice Act is passed. The Economic Opportunity Act follows in the same year, ensuring unrestricted activity for legal aid advisors.

### **Canada**

Legal Aid Act was passed in 1967.

### **France**

The Amending Act of 1971 outlines the procedure for legal aid. The system is defined in 1975. Legal aid began its administration within civil society.

### **Germany**

The 1977 Code of Civil Procedure introduces the process of the legal aid program that is to be governed by the court. Legal insurance becomes prevalent.

### **Japan**

Working closely with local Bar agencies, the Japan Legal Aid Association was established in 1952.

### **India**

Predating India's independence, the land is ruled under colonialist Common Law. Legal aid is confined to section 340 of the Criminal Procedure Code, which states that only in capital cases should legal aid be provided. In 1923 the law is amended, giving a suspect in custody the right to communicate with a legal advisor. This freedom is also added to sec-

tion 40 in the Prison Act. After gaining independence, article 32(5) of the Indian constitution declares legal aid a fundamental right. Further affirmation comes in 1977 in the form of article 39A, elaborating on the newly established liberty. Ten years later, these developments are organized under the Legal Services Authority Act, an amalgamation of earlier precedents regarding legal aid. The Act offers concise guidelines under which legal aid must be dispensed.

### **Burma**

The state of Burma has been without a constitution for the past 50 years. After the military coup in 1962, the dictatorship reverted back to the days before the state's independence, when colonial law ruled the land. During this time, criminal cases were heard by a jury, regardless of whether or not the accused had legal representation, or if the offense carried the death penalty. The SPDC's Attorney General Law of 2001 was a feeble attempt to establish legal aid, allowing the accused to be defended by legal counsel. However, the law is framed and inconsistent, and needs continued improvement if it is to be effectively followed and enforced. In Notification 1/2001, chapter 6, section (j), legal aid is available, but only to children and others facing the death penalty. Under rule 82, a lawyer must continue their assigned case until a verdict is reached. Violation of this law will be considered criminal misconduct. Despite these shortcomings, the Attorney General Law has been compared with legal aid acts existing in other countries. The need is not to eliminate the Attorney General Law, as it still has the potential to be of value. The provision of legal aid needs to be affirmed through an independent legal aid act. Failure to take significant action on this issue will only confirm that the Office of Attorney General is a tool of the military junta, designed only to secure the regime's power.

### **VI. Implementation:**

Given the apathy of the Burmese state towards effective legal aid, civil society needs to assume responsibility for developing methods of reform. Though somewhat complex, system of court, rules of evidence, and the former idea are necessary for the proper administration of justice. Lawyers must be engaged to assure the smooth implementation of these aspects. The financial burden of the legal fees must be overlooked, as lawyers are a necessary channel for development.

The definition of legal aid should be broadened for the defense of violations that carry jail sentences. A provision for requisitioning services for every member of the bar must be established. The legal profession must share responsibilities for the administration of the new reforms, and the

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In the context of these obstacles, legal aid will act as the primary policy instrument in providing access to justice. In order for this concept to become a universal institution, laws must remain in effect despite governmental opposition.

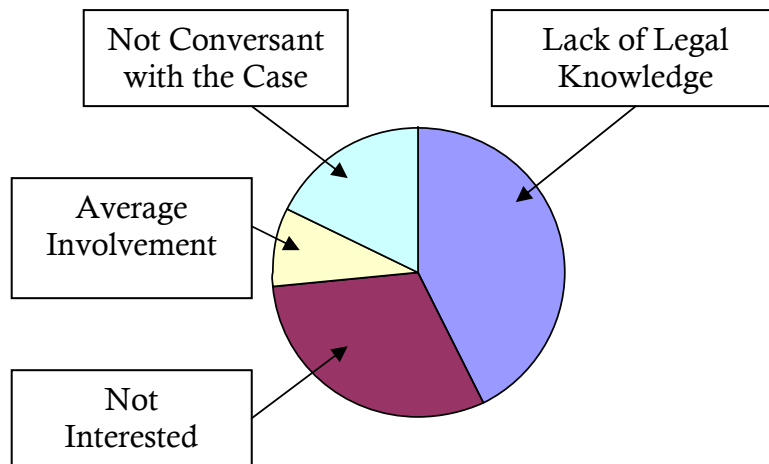
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Bar Council and Association should take immediate measures so that legal services can be rendered on a voluntary basis.

Governments are held responsible for the implementing the right of access to justice among less fortunate populations. Invariably, issues related to the contents and scope of this right have been raised as a scapegoat for the responsibility. In the context of these obstacles, legal aid will act as the primary policy instrument in providing access to justice. In order for this concept to become a universal institution, laws must remain in effect despite governmental opposition. In addition, several legal aid mandates must be considered:

1. A fundamental requirement is a working constitution. It provides fundamental rights to all citizens. Legal aid must be included as a fundamental right.
2. Section 304 in the CRPC needs amendment; all criminal cases excepting summary trials, are to be eligible for legal aid assistance.
3. In addition, legal service needs to be extended. Aid must be provided not just before the trial, but also during and after the investigation.
4. In all compoundable cases, conciliation has to be inserted into the law.
5. The civil procedure code has to be amended so that the definition of a "pauper" can be broadened.
6. Law should dictate that legal aid agencies are to be autonomous and not susceptible to government influence.
7. Income tax quotas must be amended. Donations for legal aid will be tax free, and advocates who render services will be given tax redemptions.
8. The Bar Council Act needs an amendment to include legal aid.
9. The L.L.B syllabus should be amended to include legal aid study.
10. Senior advocates must continue to appear in cases covered by legal aid.



(margin of error 5%)

The need among civil society is to immediately call a national conference on legal aid and undertake a survey of the legal aid facilities. Predictably, the picture that will emerge from the survey will reveal limited coverage and little progress, as demonstrated in the above diagram. These findings are logical, considering the government's constricting policies. Social work institutions that are trained to work on such programs are non-existent. The "Society Registration Act," which is said to protect civil society, has been abrogated and replaced with draconian laws in which the operation of private agencies is not permissible. Burma has an abundance of legal expertise in these sectors, though the professionals representing this quality continue to be muffled by the government.

### **Prospects:**

Fundamentally, legal aid is a political problem for the Junta. Under the pressure of the International community, the ruling Junta entered into a dialogue with opposition leader Daw Aung San Suu Kyi. But for obvious reasons it has scuttled the process. For the equality of the under-represented and the virtue of legal justice, the prospect of legal aid will become brighter if there is a political settlement. Pending this outcome, it is inevitable that the Junta will be pressured to enact a legal aid law forthwith.

### **Endnotes**

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

# Institutional Legal Aid: Trends and Challenges in the Asian Region<sup>❖</sup>

*Peter B. Payoyo, LL.M., Ph.D.*

## **The Global Setting**

The provision of legal aid for the poor, especially in criminal cases, is a universal feature of modern legal systems. It is founded on the general principle that everyone must have access to justice. In the conception of modern democratic societies, everyone has the right to the equal protection of the laws, and poverty cannot be regarded as providing a reason for defeating or diluting this entitlement.

In the international context, the “access to justice principle” finds specific expression in the right of accused persons to legal assistance in criminal proceedings. This right is embodied in international instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.<sup>1</sup> Since, under these instruments, governments are held primarily responsible for the practical implementation of this right, it is not surprising to see that issues about the content and scope of this right have been raised on the basis of the varying practices of States in implementing this right.<sup>2</sup> And in spite of the well-established character of this right, it is clear that many States, whether developed or developing, still labour under much difficulty in realizing such right for their citizens.<sup>3</sup>

The principle of access to justice for the poor has also a dimension that relates to the right to legal assistance in non-criminal cases. As far back as the days of The League of Nations, countries were already in agreement

on “the principle that it should not be impossible for the man without means to set in motion the machinery of Justice”.<sup>4</sup> Thus, many States have adopted legislation to this effect, establishing provisions for legal assistance to indigent persons in order to pursue or defend their rights in civil and administrative matters. At the regional level, the efforts of the Council of Europe to develop standards and harmonize national systems of legal aid are exemplary in this respect.<sup>5</sup>

Free legal aid, or legal assistance at the least cost, for the poor is therefore the universally accepted means or policy instrument of achieving the goal of access to justice for all, or more precisely, access to courtroom justice. It is in the context of obtaining justice for the poor in judicial and quasi-judicial processes that the institution of legal aid has come to be widely understood. Under this understanding, legal aid guarantees are mandated by laws and regulations that provide for, among others: court-appointed/de officio counsel; the creation of public offices or agencies dispensing legal aid; funds and administrative provisions for legal aid; directives to professional associations tasking them to provide pro bono representation of indigent clients; and authorization to legal clinics (often based in law schools) which undertake legal aid services.

### **The Emergence of New Practices and Approaches in Legal Aid**

The “court room model” of legal aid, as described above<sup>6</sup>, has been most certainly enriched by developments in the past 40 years in the “Third World” regarding the uses of legal services on behalf the poor. These developments relate to the instrumental or creative use of law and legal resources to pursue evident ‘politicized’ agendas in order to achieve social change and national development. In the 70s for instance, the legal aid landscape in the developing world featured concepts like “new legal services”, “alternative legal services”, “innovative legal services”, “alternative law”, and “structural legal aid”.<sup>7</sup> Recently, “public interest lawyering”<sup>8</sup> and “impact litigation” have also been used to describe this practice of legal aid. The basic idea was to demonstrate an openly political inspiration to legal assistance. And because legal assistance has been developed in close association with the social movements of peasants, labor unions, women’s groups, environmental groups, indigenous peoples, human rights organizations, etc., its growth as an institution has proceeded outside the machinery of government, via non-governmental and people’s organizations. Legal services were thus uniquely employed to espouse democratic movements, oppose dictatorial regimes, fight corruption, promote socio-economic and cultural rights, and defend the rights not only of the “economically poor” but also of underprivileged,

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In the 70s for instance, the legal aid landscape in the developing world featured concepts like “new legal services”, “alternative legal services”, “innovative legal services”, “alternative law”, and “structural legal aid”. Recently, “public interest lawyering” and “impact litigation” have also been used to describe this practice of legal aid. The basic idea was to demonstrate an openly political inspiration to legal assistance.

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victimized, or marginalized groups and sectors.

This new model of legal assistance de-emphasizes the importance of facilities for representation in court proceedings and adopts the attitude of providing “legal resources” to groups so that they “can use law to change law and change their social environment.”<sup>9</sup> The modalities of legal aid are, therefore, as varied and innovative as the ways of fulfilling basic human needs or the ways of inducing subtle as well as radical transformations in the existing legal system. Not only do these “alternative” legal services fill deeply-felt gaps in State-sponsored legal assistance.<sup>10</sup> More importantly, legal assistance projects carried out by non-governmental organizations challenged the status quo through a direct or indirect critique of the law as it operates in the developing world. This is done by addressing problems like disappearances, marginality, rural education and organization, agrarian reform, environmental destruction and other “impoverishing harms”<sup>11</sup> whereby the lawyer who dispenses legal assistance “cannot be apart from the people and their daily struggles.”<sup>12</sup> Impact litigation through “social action litigation,” or judge-made innovations in the State policy process to assist the practice of alternative lawyering,<sup>13</sup> has, likewise, enhanced the understanding of this “development model” of legal assistance.

During this period, the International Commission of Jurists played a leading role in supporting the notion of “legal services” for social change and development, “legal services” being defined broadly not only as legal aid in the traditional sense but also as encompassing “training of paralegals, the production of simplified legal materials and information dissemination, counseling, mediation and negotiation.”<sup>14</sup> In the United Nations arena, the importance of this model of legal aid was endorsed in the context of the discussions on the “right to development”, especially for the rural poor.<sup>15</sup>

In view of the role of jurists in the development process, two questions arise in the context of the third world countries. First, how can one bridge the huge gap separating jurists from the overwhelming majority of the populations? Second, how can one help these populations to gain access to the legal resources necessary in order to enjoy the right to development? The answers to these questions hinge on the three components of “development, law and legal resources.”

With regard to development, the fundamental issue is that of the assistance to be given to the rural masses to enable them to

determine their priorities themselves, to identify the obstacles to those priorities and to select the methods of achieving them. In other words, the development of the rural population presupposes that they take their destiny into their own hands and from this viewpoint the contribution of the law and jurists is desirable, and indeed vital.

On the question of law, it seems that most of the countries of the third world have copied the various branches of Western law. Further, this extraverted law is often used to maintain the status quo so that it frequently proves to be incapable of reflecting contemporary society and its aspirations. The law is not static, but changes with society and may serve to bring about change and progress. From this standpoint, the law may constitute a resource for rural populations with a view to bringing about change in their conditions and for development in general.

Legal resources constitute the expertise and functional competence allowing those who work together and in co-operation with other groups to understand the legal system and to use it effectively in order to promote their objectives. They create and strengthen the incitement to and capacity for collective action with a view to promoting and defending common interests. The importance of a knowledge of the law as a vital element in the process culminating in collective self-sufficiency has been underscored. At the present time, in Africa, Asia and Latin America alike the introduction of legal assistance projects for the destitute populations of the rural areas is underway.

It is interesting to note that this model of legal aid has also been bolstered by contributions in the field of clinical legal education. Law students, whose widely acknowledged pedagogical need to learn the law in “experiential” ways, have been challenged and directly tapped to assist in confronting and overcoming the multitude of “unmet legal needs” of people, especially the poor and/or underprivileged in society.<sup>16</sup>

### **Increasing Diversity, Specialization and Cost-effectiveness in Legal Aid Services**

There is one point of agreement coming out from present-day discussions

on legal aid everywhere: there are now more people who are in need legal services and whose legal needs are unmet. State-supported legal assistance institutions and programmes all over the world, in developed and developing countries alike, as well as in countries in transition, are clearly insufficiently poised to meet these needs. The situation, by and large, is a consequence of the perennial and pervasive inadequacy of funds and resources, and low political priorities given, to sustain legal aid programmes.<sup>17</sup> Governments are well aware of this fact, and are continuously imagining ways and means of generating appropriate responses. A positive outcome of this state-of affairs has been the opening up of opportunities for the non-governmental and voluntary sector, including professional associations, transnational networks and organizations, and law school legal clinics, to step in and play an expanded role in the delivery of legal services to people in need - at local, national, regional and even global levels.

Thus, non-governmental organizations have been recognized and encouraged by the Council of Europe to provide support to the very poor in quasi-judicial forms of conflict resolution such as mediation and conciliation.<sup>18</sup> This shows that the burden of expanding the support base for “alternative dispute resolution” (ADR) in society is increasingly being shared by both governmental and non-governmental agencies. In the United States, the International Human Rights Law Clinic (IHRLC) of the American University is pioneering legal aid representation for two kinds of clients: applicants for political asylum in the United States and victims of human rights abuses who seek redress in either the U.S. courts or before international human rights enforcement bodies.<sup>19</sup> Even legal aid for the benefit of post-conflict societies in general (i.e., the “clientele” are national societies as a whole, and not merely particular individuals or groups) is currently being developed, illustrated by the mission of the International Legal Assistance Center – an international voluntary initiative for judicial reconstruction and social rehabilitation in post-conflict societies.<sup>20</sup> Also deserving of attention is how legal aid organizations and practitioners have contributed to the establishment of international criminal tribunals. There is no doubt that legal aid practices will be encouraged by a fully functioning International Criminal Court. And of course, last but not least, the diversity of the legal aid organizations which have been gathered in this Linking and Learning Conference (Novib and Oxfam partners) indicates the extent to which legal aid initiatives have evolved throughout the years in the direction of increasing specialization and even deepening dialogue and cooperation among providers of legal aid.<sup>21</sup>

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## Defense and Promotion of Human Rights as the Global Framework of Legal Aid

The two models of legal aid identified in this paper – the “court room model” and the “development model” - models developed in the Western World and in the Third World, respectively, provide a historical perspective to understanding the evolution of the principle of access to justice for the poor. While these two models could be conceptually opposed and sequentially contrasted with each other (one focuses on the individual client interests, the other on the social causes; one promotes State-centered remedies, the other on society-centered processes), it can be said that there is an ongoing, inexorable, merger of these two approaches or models of legal aid. There is sufficient evidence to assert that present-day legal aid practices, across and beyond national jurisdictions, which foster the goal of “access to justice” consciously integrate – or consciously recognize the underlying complementarity and unity of - these two models, drawing up a comprehensive analytical picture of legal aid in the 21st century.

The integration of these two models have been made possible because of the pervasive influence of human rights norms and the human rights discourse in the dispensation of legal aid services in recent years (1990s). The tools, the techniques and the terminology of human rights have given legal services providers a powerful, comprehensive and sustainable framework for understanding and doing legal aid work in a multitude of settings: inside or outside the court room; in developed or in developing countries; in intra-, inter- and trans-national contexts; or in the entire gamut of core international concerns relating to peace, sustainable development, and gender equality. This is only logical because human rights cover a vast range of norms and values - civil, political, economic, social, cultural, and gender – which are epistemologically considered as interconnected and indivisible. As the *Basic Principles on the Role of Lawyers* adopted by the United Nations<sup>22</sup> provides: the “adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession”. The awareness that human rights provides the consensual framework for legal aid undertakings will further boost the social and political priority given for the realization of the principle “access to justice for all.”

The conclusion is reached: the challenge faced by legal aid practitioners in realizing the principle of access to justice for the poor is the very same challenge that they face in promoting and defending the human rights of

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the poor and the disadvantaged. The success of legal aid institutions and the providers of legal services will then be very much gauged by the extent to which the practice of legal aid continues to provide effective results in actualizing the human rights of poor individuals and disadvantaged groups in the global village of the 21st century.

## **Legal Aid in Asia:**

### **A profile of legal aid organizations as institutional defenders of human rights**

In late March 2002, a questionnaire was sent out to Novib's "legal aid partners" in Asia. The specific purpose of the survey, as stated in the questionnaire, was "to (1) obtain some basic information about Novib's and Oxfam's legal aid partners and (2) solicit their views/comments on the prospects of, and the parameters for, a meeting/workshop involving legal aid partners in the region". Of the 15 organizations that were given the questionnaire, 12 responded.

What follows is an overview of the results of the survey. These results confirm the finding that the diversity of legal aid practices in Asia converge on, and is governed by, the unitary framework of human rights values and norms.

### **1. Background Data**

There were 12 respondents to the survey, with 11 respondent-organizations which returned the questionnaire, and one respondent-organization which chose to submit a "Concept Note". The participating organizations in the survey are the following:

1. Asia Pacific Women Law and Development (**APWLD**, regional) [Note: APWLD submitted a "Concept Note" in lieu of a filled-in questionnaire]
2. Burma Lawyers Council (**BLC**, Burma)
3. Cambodian Human Rights and Development Association (**ADHOC**, Cambodia)
4. Friends of Women Foundation (**FoWF**, Thailand)
5. Indonesian Women's Association for Justice (**APIK**, Indonesia)
6. Legal Aid of Cambodia (**LAC**, Cambodia)

7. Center for Legal Assistance to Pollution Victims, China University of Politics and Law (**CACPV**, China)
8. Movement for the Defense of Democratic Rights (**MDDR**, Sri Lanka)
9. Project Mekong Sub Regional Network on Combating Violence Against Women (**SEAMETRY**, Cambodia)
10. Shaanxi Research Association for Women and Family Legal Aid and Service Center (**Shaanxi RAWF**, China)
11. Union of Civil Liberties (**UCL**, Thailand)
12. Vietnam National Legal Aid Agency (**VNLAA**, Vietnam)

Of the 12 respondents, one is a governmental legal aid organization (Vietnam) and one is university-based (CLAPV). The majority consists of registered/incorporated non-governmental organizations. Three consider themselves as “lawyers guild” or membership associations (SEAMETRY, CLAPV and BLC).

Most of the organizations surveyed (60%) are less than 10 years old. The oldest is the UCL which traces its beginnings way back in 1973, although it was officially established as an organization in 1985. The newest organization in the scene is SEAMETRY which, as a regional project, started only in January 2000.

There is a wide divergence in the size of these organizations from the viewpoint of personnel employed. A majority has over 30 staff, with AD-HOC counting the biggest number of personnel (78). FoFW has the least number of personnel (4) followed by UCL (9). The representation of women staff and women professionals within each organization also varies widely. At one extreme is the Shaanxi RAWF, which consists entirely of 40 women professionals, and at the other extreme is the MDDR whose women professionals account for 10% of the total number of staff.

## **2. Nature and scope of legal services provided**

Taken together, the organizations surveyed offer a full range of legal services to their clientele. These services include legal aid (legal advice and representation); training and deployment of paralegals; human rights education and awareness-raising campaigns (“advocacy”); information dissemination; counseling; negotiation and legal research. As a lead activity, legal aid is undertaken by the VNLAA, ADHOC, LAC, CLAPV, APIK, MDDR and Shaanxi RAWF. The primary focus of the BLC, FoFW and UCL is on human rights education and campaigns, while the APWLD’s main concern is training.

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Many organizations see legal aid, including their role as legal aid providers, as an instrument in bringing about basic political reforms and social/developmental change in a national setting.

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The delivery of legal services must be seen in the context of the stated goals or purposes of the organizations involved. Many organizations see legal aid, including their role as legal aid providers, as an instrument in bringing about basic political reforms and social/developmental change in a national setting. The promotion of rule of law, democratic institutions and democratic rights is thus central to organizations like the UCL, the BLC, ADHOC, APIK, and the MDDR. Legal aid in the broad arena of combating gender discrimination, or promoting gender rights and defending gender equality, is practiced by APIK, FoWF, SEAMETRY, APWLD, and Shaanxi RAWF. LAC conceives its legal aid activities in light of the objective of reforming the judicial system of Cambodia. The CLAPV's would consider its legal aid activities as also having the objective of improving the practice of environmental law and increasing environmental awareness in China. The VNLA is the only organization that does not state a broader goal for its activities other than the provision for effective legal aid itself.

The "politicized" or "developmental" context of legal aid is further seen in the kinds of clientele who benefit from the legal services provided by the organizations involved. Beyond the indigency/poverty criterion that usually gives to individuals the entitlement to legal aid in most legal systems, the organizations surveyed variously provide legal services to "human rights victims", "grassroots organizations", "women workers", "parties who are economically, politically and culturally weak", "pollution victims", "democratic forces", "human rights trainees", and NGOs. In an instance that radically breaks away from tradition, even a "foreign investor" became the beneficiary of legal aid services.

Given perennial constraints in resources, it is not surprising that, in practice, these same organizations give priority to clients who dramatize representative cases, or cases which generate significant impact from the standpoint of social, political and policy consequences. The "success stories" cited by the respondents, which illustrate their organization's *raison d'être*, prove the instrumental or "structural" use of legal aid to achieve wider developmental or human rights objectives:

1. The UCL launched action to help Karen people displaced from their land because of a dam construction project by the government.
2. The BLC extended legal aid to a foreign investor, not only to protect economic enterprise for national development but also to fight corruption.
3. ADHOC successfully prosecuted a case involving extra judicial killings.

4. After losing every court remedy, LAC successfully negotiated with the king the settlement of a case involving the eviction of an indigenous people from their land.
5. The heroic difficulties of helping pollution victims in China enabled CLAPV to win an award from the Ford company.
6. APIK successfully exposed the case of sexual harassment in the workplace.
7. FoWF provided legal aid to a woman who killed her abusive husband in self defense.
8. Shaanxi RAWF assisted a woman obtain a divorce. The woman was paid compensation and the husband who assaulted his wife was sent to prison.
9. The training project of the APWLD, which highlights the need for “feminist litigation” strategies, led to an important court ruling which redefined the rule of corroboration of evidence in rape cases.
10. The sustained campaign of the MDDR led to arrest and conviction of the perpetrators of a crime, involving the politically-sanctioned disappearance of school children.

The legal services practiced by the organizations surveyed are consistent with, and even advance, an understanding of “access to justice” that is defined within the overall framework of the right to development.

### 3. Needs, Barriers and Opportunities in Legal Aid

Ten respondents gave answers to the survey questions on needs, barriers and opportunities. Among the **needs** articulated, capacity-building is a major reiterated concern, expressed as “lack of skilled staff”, inadequate “organizational capacity”, “human resources development”, “lack of lawyers that stay long-term”, “lack of experience and expertise”, “lack of resources and facilities”, and the usual “lack of funds”. Also prominent is the identified need to network or establish cooperation with other stakeholders to support an organization in the delivery of its services.

The barriers identified, preventing the organizations from meeting their priority needs, either originate from within or from outside the organization. The **internal barriers** include insufficient budgets, “lack of team spirit”, “lack of time”, “inactive Board members”, “legal staff who do not have a good understanding of gender issues”, and “lack of information”. Most of the **external barriers** relate to the immediate environment of legal aid (“high cost of litigation”, “corruption”, lack of support from governmental institutions or else government agencies siding with the oppo-

site party, absence of a legislative basis to carry out legal aid, and the organization not having been given an independent status to raise funds or hire new staff). One respondent indicated that the absence of sustainable support from donor agencies is a serious barrier.

The opportunities which the respondents identified as sources of remedy or amelioration to meet their priority needs are, likewise, either internal or external to the organization. **Internally sourced opportunities** include an organization's long experience in supporting human rights victims; presence of networks or working relationships with other actors in the field; and capacity-building projects, e.g., staff members who are currently undertaking, or are expected to undertake, training. **Opportunities that come from outside** the organization include growing support and encouragement from government authorities and from the general public for the legal services provided; support from international donors; favorable national atmosphere for legal reform; and increasing support from clientele (e.g. women and women groups).

It will be noted that two respondents (LAC and CLAPV) were categorical in their view that **gender** issues and perspectives were **not** at all relevant in their consideration of needs, barriers and opportunities.

#### 4. Networking and transnational cooperation

Except for the BLC, which did not provide any reply to the three survey questions relating to networking, all the respondents believed that **networking between and among legal aid institutions/organizations is important** as a means of addressing their needs. In fact, each of the respondent organizations maintains regular contacts and already has well-established working relationships with various governmental or non-governmental organizations, at the local and national levels. The crucial and indispensable role of these national networks in the effective delivery of legal services is acknowledged by many respondents (UCL, ADHOC, LAC, CLAPV, APIK, FoWF, SEAMETRY and MDDR).

While the critical importance of local and national networking is recognized by the organizations surveyed, **the role of transnational networking in achieving legal aid objectives is generally less clear**. A majority of the respondents have had contacts with legal aid organizations outside their country. (Only SEAMETRY, MDDR and Shaanxi RAWF indicate that they are not familiar with any legal aid organization outside their countries). These contacts notwithstanding, the main value of transnational networking is perceived to lie in the general exchange of experi-

ences and sharing of insights and strategies among legal aid organizations. Some organizations see networking as useful for very specific purposes, e.g., networking to help in the campaign for the ratification of the International Criminal Court treaty (ADHOC); or a sub-regional campaign against gender discrimination, and fund-raising (SEAMETRY). And some organizations (UCL, CLAPV) are not so sure how networking can be of particular advantage to their legal aid programmes, in view of the differences in national legal systems and traditions.

Finally, it is interesting to note that several respondents gave convergent views on the kind of transnational or supranational issues (at regional or sub-regional level) which they would like to deal with as legal aid organizations: **human trafficking, especially of women** (VNLAA, LAC, APIK, FoWF, SEAMETRY and Shaanxi). The identification by the respondents of trafficking and/or migration of women as the proper subject of legal aid initiatives suggests that the issue deserves serious if not urgent attention. Other topics of potential trans-border interest include environmental issues (as proposed by the UCL), “feminist litigation strategies” (APWLD) and comparing strategies to cope with national security laws (MDDR).

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### Acknowledgement

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### Endnotes

\* Dr. Peter B. Payoyo (LLM., PhD.) is a consultant with Novib.

1. Article 11 (1), UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948); Article 14 (3) (b) and (d), COVENANT ON CIVIL AND POLITICAL RIGHTS (1966). *See also* Article 6(3), COUNCIL OF EUROPE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND

- FUNDAMENTAL FREEDOMS (1950); Article 8 (2), AMERICAN CONVENTION ON HUMAN RIGHTS (1969); Article 7 (1), AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS (1987).
2. See C. Marasinghe, *The Right to Legal Assistance in International Law* in 5 ASIAN YEARBOOK OF INTERNATIONAL LAW 15-44 (1997).
  3. See e.g. V. Terzieva, *Access to Justice in Central and Eastern Europe* (Public Interest Law Initiative Project, November 2002)
  4. *League of Nations Report* (1925).
  5. See e.g. Resolution no. (78) 8, "On Legal Aid and Advice", adopted by the Committee of Ministers of the Council of Europe in 1978, and also Resolution no. (76) 5, "On Legal Aid in Civil, Commercial and Administrative Cases". See also Recommendation no. (93) 1 of the Committee of Ministers to member States regarding effective access to the law and to justice for the very poor.
  6. "Access to justice" as developed under this model especially in western legal systems is presented in M. Cappelletti, J. Gordley & E Johnson Jr. (Eds.) *Towards Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (NY: Dobbs Ferry Oceana, 1975)
  7. "Structural legal aid" is a term borrowed from the Indonesian conceptualization of legal aid practice that goes beyond the traditional / individualistic approach to legal aid. See the contributions of Buyung Nasution and Mulya Lubis in HM Scoble and LS Wiseberg (Eds.) *Access to Justice: The Struggle for Human Rights in South East Asia* (London: Zed Books, 1985). See also D. Lev, *Legal Evolution and Political Authority in Indonesia*, Chapter on "Legal Aid in Indonesia" (The Hague: Kluwer Law International, 2000).
  8. E.g. MF Leonen (Ed.), *Lawyering for the Public Interest* (proceedings of the "First Alternative Law Conference" (Alternative Law Group: Nov. 1999).
  9. Paul, J. and Dias, C. *Law and Legal Resources in the Mobilization of the Rural Poor for Self-reliant Development*. (International Center For Law in Development, 1980). See also, *The International Center for Law in Development Who we are, What we seek to do, How we work, The past years, Our program* (1979); *Development and Legal Services in Africa* (1983); and *Law in Alternative Strategies of Rural Development* (TWLS, 1982).
  10. See German Palacio, "Servicios legales y relaciones capitalistas: un ensayo sobre los servicios juridicos populares y la practica legal critica" EL OTRO DERECHO 3 (1989) & Jesus Antonio Munoz Gomez' "Reflexiones sobre el uso alternativo del derecho" EL OTRO DERECHO 1 (1988) both in *Alternative Uses of Law Summaries of Articles: BEYOND LAW: STORIES OF LAW AND SOCIAL CHANGE FROM LATIN AMERICA AND AROUND THE WORLD* (February, 1991) See also Kaburise, "The Unrecognized uses of Legal Education in Papua New Guinea" VII BOSTON COLLEGE THIRD WORLD LAW JOURNAL 1, 8 (1987).
  11. Dias, C. "Alternative Law for People's Empowerment" in Aspiras (ed.) *Law as Weapon: Alternative Approaches to Distributive Justice* 19, 23-26 (Process, Manila 1990)
  12. T. Miguel Pressburger, "A Proposta do Instituto Apoio Juridico Popular" DIREITO INSURGENTE No. 1 (Brazil) in BEYOND LAW, note 15 above.

13. PN Bhagwati, "Judicial Activism and Social Action in Asia" in LAW AS WEAPON, note 23 above at 103.
14. International Commission of Jurists, *Legal Services in Rural Areas in Africa* (Geneva: ICJ, 1997)
15. *Report Prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45 on the Question of the Realization of the Right to Development, Global Consultation on the Right to Development as a Human Right*, 26 September 1990, UN Doc. E/CN.4/1990/9/Rev.1 pp. 36-37. See also UN General Assembly Resolution A/RES/46/121, 75th plenary meeting, 17 December 1991, on "Human rights and extreme poverty".
16. Richard J. Wilson, *Clinical Legal Education As A Means To Improve Access To Justice In Developing And Newly Democratic Countries* A Paper Presented at the Human Rights Seminar of the Human Rights Institute, International Bar Association Berlin, Germany Oct. 17, 1996.
17. See the summary of the conference *Partnerships Across Borders: A Global Forum on Access to Justice*, held at the Association of the Bar of the City of New York in the spring of 2000: David Goldstein, Matthew McGough, Molly Murphy, Jessie Rose, *Improving Access to Justice: Legal Services Funding and Private Bar Involvement in Public Interest Lawyering Around the World*.
18. Recommendation No. R (93) 1 of the Committee of Ministers to member states regarding effective access to the law and to justice for the very poor.
19. R. Wilson, in note 15 above.
20. See ILAC Website.
21. An internet search on the subject "legal aid"/legal assistance" initiatives will yield numerous results, e.g., links in Pine Tree Legal Assistance homepage. See also websites of the International Commission of Jurists and the Public Interest Law Initiative.
22. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990.



### **Publisher's Note:**

The article written by the Director General of the Office of the Attorney General of Burma on "Workshop on Mutual Legal Assistance" (law journal volume 4, issue 1; April 2002) has been published verbatim. The object is to focus on the callousness of the military regime towards national legal aid. The article is a show piece. In the international arena, it enables the regime to earn foreign money by way of funding, etc. The test of the sincerity behind this law is its implementation. As far as information goes, the drug kingpins freely move about in the capital city itself. The interpol issued a warrant against Khun Sa, the arch drug trafficker. The SPDC refused to act on the pretext of national sovereignty. Mutual legal aid, as explained in the article, does not concern poor people. In the international arena, national legal aid is a completely different concept. The article only demonstrates how the SPDC shies away from national legal aid. Hundreds of people are victims of economic depravity, frustration, and political vendetta. It is by enacting legal aid law that an attempt to tackle the problem can be made.

The article states, "The Office of the Attorney General is geared to make advancement not only in its basic conventional legal matters but also in legal arenas of international legal aid." The phrase "Basic conventional legal matters" can only tangibly mean legal aid for the poor and victims of human rights abuses. The article boasted that it is giving a new dimension to the concept of legal assistance. The Child Law of 1993 was the product of these efforts. After 9 years (indeed a very short time), the Law was the enchanting legal subject of 2001 in Burma, generating enough interest to present a government-sponsored mutual legal aid workshop, provisions of domestic law are already in our midst...section 188 of the Code of Criminal procedure is there. "it concludes more workshops of national and international legal issues will continue to be held." A caveat is raised. Will the Office of the Attorney General convene a workshop on Legal aid in Burma and end up with a conclusion recognizing the dire necessity of the Legal Aid Law?

# Workshop on Mutual Legal Assistance and the Office of the Attorney General

*By Dr. Tun Shein*

## Introduction

The office of the Attorney General (hereinafter referred to OAG), under the Attorney General Law of 2001 is geared to make advancement not only in its basic conventional legal matters but also in the legal areas of the international legal arena. Such international areas and the role of the Office are interlinked. They not only form an extraordinary step forward but also an intellectual game of legal gymnastics. Thus, these areas that are undertaken throughout the years in the history of the Office, are given a new dimension through the new activities of the Office. One of such activities commenced as early as 1992. It concerned the holding of the national seminar on the Convention of the Rights of the Child (hereinafter referred to as CRC). This national seminar was conducted for the first time after Myanmar had ratified the CRC. The product of the seminar was the promulgation of the Child Law in 1993 and later followed by the Rules to which the Office was privileged to participate in its central role in drafting, scrutinizing, and translation under the then Attorney General Law, 1988.

The seminar of January 1992 was conducted with the cooperation and coordination of the Attorney General's Office (predecessor of OAG), the Ministry of Social Welfare, Relief and Resettlement and the United Nations Children's Fund. The legal aspect of the seminar proved to be a success story as mentioned resulting in the Child Law of 1993 promulgation. Again, it is the privilege of the author of this article to have taken

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A caveat is raised. Will the Office of the Attorney General convene a workshop on Legal aid in Burma and end up with a conclusion recognizing the dire necessity of the Legal Aid Law?

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part in the seminar which was held under the leadership of the Attorney General, the Deputy Attorney General and the then Director General. Indeed, it was a tedious task as organization in both law and logistics were made by the Office. However, efforts were indeed worthwhile.

The events of history gave the Office another chance in the new era after nine years. Under the new Attorney General Law of 2001 and its Rules, a workshop was held on an enchanting legal subject of 2001. This legal subject happens to be the fascinating subject of Mutual Legal Assistance (hereinafter referred to as MLA).

The subject of MLA has been given birth as far back as 1988. However, the events of legal history did not demand it as an interesting and demanding legal subject until it was brought into the limelight through the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Law, 1993. There includes a special area in the Convention, namely, MLA which is to be made between states that have ratified the Convention. It is in the light of this MLA that the workshop on the subject was born. The assignment to hold a workshop on MLA was given to the Office with the cooperation of the Central Committee for Drug Abuse Control (CCDAC) and the United Nations Drug Control Programme (UNDCP). The Office has the honour to work in coordination with these agencies to conduct the workshop. Indeed, the office has been given a second opportunity of another milestone, opening a new chapter and turning a new page in its history. The workshop was held from 10-12-2001 to 12-12-2001 with the theme "Toward a Deeper Understanding of Mutual Legal Assistance (with Special Emphasis on the Regional Context)."

It is the purpose of this article to explore the concept of MLA and the benefits the Office has obtained through this workshop.

### **The Concept of MLA**

The concept of MLA is indeed a very interesting one. As the name signifies, it is a mutuality of giving legal assistance to one another amongst the states that have ratified the 1988 convention. This concept creates more understanding and cooperation, working together to combat crime as embodied in this Convention. It also has links to other crime-related Convention, i.e., Convention on Transnational Organized Crime.

The basic concept of MLA is three-fold, namely investigation, inquiry, prosecution and judiciary. These three aspects are all interlinked. The other concept in MLA is for each state to give help to each other in mat-

ters as mentioned in Article 7 of the 1988 Convention. The concept is far-reaching and demands cooperation.

The details of the 1988 Convention mentioned in Article 7 spell out the fact that this Article is indeed a treaty by itself where the three concepts are put into legal practice.

### **Discoveries of the Workshop**

The resource persons of the Workshop consist of four UNDCP experts--- Dr. Gerasimos Furlanos, Dr. Stefanos Kareklas, Mr. Kevin Glubb and Mr. Wanchai Roujanavong. Each resource person gave an interesting oversight of MLA through the following subjects respectively:

- The Conceptual Framework of MLA;
- The MLA Mechanism in the 1988 Convention;
- Best Practices on Designated Authorities; International Confiscation; Money Laundering; and
- The new Convention on Transnational Organized Crime (MLA Mechanism; International Confiscation; Money Laundering).

On the part of the participants, their participation was represented through various offices and ministries reflecting at the same time the concept of MLA above. Thus, they consist of the investigation/inquiry ministries, the prosecution office and the judicial office that make the machinery of the MLA. Active participation was encouraged by the three chairmen who chaired these three days. Participants in contributing the workshop added the findings of the resource persons with provisions of domestic law which are already in our midst but rarely quoted regarding MLA concept, namely, Section 188 of the Code of Criminal Procedure. These also added to the discussions presented by the resource persons. Case studies were also made by the two groups where all participants from different offices and ministries participated for the benefit of the workshop.

It is discovered that the concept of MLA has already been present in the national laws to some extent. But, a new dimension could probably be given through a new law which could deal with the subject in a more comprehensive legal matter. Points of interest such as areas of cooperation between offices and ministries from various countries on this matter came out and the creation of a central authority for this cooperation became a very interesting subject. Thus, at the end of the third day when the Chairman concluded the workshop, the remark of the resource per-

sons was that it was the best legal workshop they had conducted in the region. Indeed, it was a creditable success.

### **Conclusion**

On the creation of this productive workshop of the Office, it is intended that such workshops and seminars will create new thoughts and new activities not only with domestic legal institutions but also with law-related international institutions. Though it is the second workshop conducted by OAG, one can surmise happily that it is a workshop which is a modern follow-up of the one held in 1992 where the foundation of seminars/workshops was laid for OAG. With the promulgation of the Attorney General Law 2001, it is envisaged that more workshops of national and international legal issues will continue to be held under the sponsorship of the OAG.

## Interview With President of the Karenni State Khu Bya Reh

○ **Question:** Is the Constitution a core issue in the peaceful political-transition in Burma?

● **Answer:** The Constitution is not the core factor in a peaceful political transition; however, it has an important role. Because the Constitution establishes future guarantees for the parties in conflict and it can persuade them to search for peace. In fact, it is the solution to the conflict using dialogue as political means.

○ **Which constitution will be suitable for our country?**

● Since Burma is a country in which multi-ethnic nationalities live, a federal constitution based on democracy, equality, justice and self-determination will be suitable for our country.

○ **Do you want to utilize the 1947 Constitution?**

● At present there have been major political, social and economic changes throughout the world. Therefore, even if the 1947 Constitution is considered, it would be necessary to amend and update before it is used. For instance, there is a provision that the Shan and Karenni States will be allowed secession after ten years. If the old Constitution is to be followed, then secession would have to take effect immediately. Besides in economic sector, amendments and additions would have to be made. Also, rights for ethnic nationalities need to be amended and added.

○ **Do you have any intention to use the 1947 Constitution with amendments and additions? Or, what kind of new constitution do you**

**feel should be used?**

● I think we could use the 1947 Constitution with amendments and additions as a real federal constitution based on democracy, equality, justice and self-determination. It is necessary to draw a federal constitution like the one I have just stated above and ratify it.

**○ What kind of constitution do we need for Burma in the context of the 1990 election?**

● When the 1990 election was held, there was no constitution in Burma. It had already been abolished by the military. In that election the National League for Democracy (NLD) won a landslide victory. In my opinion, the military should then have allowed all members of Parliament from the NLD and ethnic national groups to draw a Constitution which is appropriate for Burma. It is the Federal Constitution that is currently the most appropriate for Burma.

Since Burma is inhabited by several different ethnic nationalities, a group of people representing each of these factions should be present in the constitution-making process. In addition, the Constitution should not take side of the interests of only one ethnic nationality or one group of people. Also, there should not be a state religion. Individual institutions should conduct all religious matters within their own faith. State and religion should stay completely separate.

**○ What is your opinion on the role of Tamadaw in the constitutional drafting process?**

● The Tamadaw has a duty to defend the country only. It should not involve itself in politics or the constitutional drafting process. As of now, if the Tamadaw is involved in the constitutional drafting process it will continue to hold on to state power.

**○ What do you think of role of Tamadaw to be during the transition period?**

● In the transition period, the Tamadaw should relinquish power and return to their barracks. As long as the Tamadaw is holding power, they will try to cover up the crimes they have committed. They will also obstruct the process of transition.

**○ Do you think that the Unitary State Constitution could solve the**

**problem?**

● I think that the Unitary State Constitution could not solve Burma's problems. I think that all problems facing Burma today are due to the Unitary State Constitution. Because the 1947 Constitution was only Federal in form. The 1974 Constitution enacted by the Burma Socialist Programme Party was the Unitary State Constitution. The ethnic nationalities who disagreed to adapt that Constitution took to arms against BSPP government. Hence, we have Burma's present day problems as the roots.

○ **Does secession need to be included in the future constitution?**

● In my point of view, if a constitution can be drawn that is based on equality, self-determination, justice and democracy, it cannot be violated or eliminated by having a system of protection. For instance, Shan State and Karenni State had been guaranteed secession; however they cannot practice this right after ten years, although fifty years had passed. It is more important that there is equality for all states and that they share equality. No States will secede if the big majority does not want to dominate the smaller. At present the military government is oppressing the smaller nationalities as a majority nation.

○ **Like the current formation of states and divisions, should a Burman State be comprised to represent their people? If so, what should the Upper House and the Lower House consist of?**

● If the Burmans consider themselves an ethnic group they should then form a State of Burmans to be one of the states in the Federation. As of now, if federal is formed as majority and rest of ethnics there is no possibility for equality or the ethnic groups' satisfaction. However, only Burman people have the right to decide whether they are a separate ethnic group, and whether or not they want a Burman State to take part in the Federation. That is said to be the right of self-determination of Burman. The political parties and organizations have the right to persuade the ethnic groups, but do not have the right of decision. If such a Constitution is not formed, there will be doubts and mistrust between ethnic nationalities and Burman. Burmans need to be altruistic and act with foresight and broad mindedness, if they want to cohabitate peacefully with the other ethnic groups. If the Burmans have a state of their own they will have self-determination and equality. Regarding the two Houses, the Upper House, which is comprised of equal representatives from states, should be given more power for decision-making in regards to the new constitution. The President shall be given executive power. The rule shall be included in the Constitution that the election results should present an equilibrium



between Burmans and the other ethnic nationalities. For instance, the vice-president shall be a Burman national if the president is from any other ethnic nationality. In reverse, the president shall be a Burman national if the vice-president is of an ethnic nationality.

**○ What is your opinion on power sharing between the Tamadaw and the National League for Democracy (NLD)?**

● The power sharing between the Tamadaw and the National League for Democracy (NLD) is in fact a compromise by two sides of the same Burman ethnicity and is not related to the interests of other ethnic nationalities. As a result of the NLD's struggle for democracy and desire to govern Burma as a democratic country, other ethnic nationals feel some relief. On the other hand, there is no doubt that the Tamadaw will try to block ethnic national movements. It is not expected that the NLD would be able to prevent such obstruction by the Tamadaw. For instance, a member of NLD who is originally of a particular ethnic nationality is helpless once jailed and tortured, and the NLD can do little about this. Hence, there is no hope for those ethnic nationalities who are not members of NLD.

**○ Your opinion on emerging tripartite dialogue?**

● There are many problems in which the ruling Burmese government illegally oppresses the ethnic nationalities. It is now globally known that the military's violence and repression towards ethnic minorities is one of the major problems facing the country. Thus, the United Nations is encouraging tripartite dialogue. Today, 40% of Burma's population is comprised of ethnic nationalities who possess 60% of the land. Thus, there is no way to solve the ethnic problems if there is only bilateral talks between the government and the Burmans. It seems that to solve this problem, the Tamadaw will then expand military forces to attack ethnics in an attempt to gain control. As a result, the military dictatorship will still dominate and act as an obstruction in the transition to democracy in Burma. Therefore, engaging in tripartite dialogue is the best solution for ethnic nationalities and democratic forces.

**○ What are the most effective methods to begin dialogue?**

● After nearly two years of talks between Daw Aung San Suu Kyi and the State Peace and Development Council (SPDC), Daw Aung San Suu Kyi was released from her second house arrest sentence. However, since her release the SPDC has not allowed her to travel freely. Such delay

caused by the SPDC will harm the progress of the nation. Thus, I believe the following guidelines are necessary to resume further talks:

- ✧ bringing the SPDC to negotiating table through international pressure, spearheaded by democratic forces working together with ethnics to alert the world of the present situation in Burma.
- ✧ collecting information and exposing the SPDC's human rights violations to international community.
- ✧ organizing the public to put pressure on the SPDC to resume talks.

**○ Which is the best solution to bring an end to the civil war?**

● In my view, the civil war in Burma is the war between the ethnic nationalities and Burma's rulers, and not against the Burmans as a whole. To bring the civil war to an end, the current ruling Junta must end their policies of systematic ethnic cleansing hold talks to resolve political issues. Besides, if the military government get changed and a new government comes, it should not continue suppressing ethnics and Burmese people like Burma Socialist Programme Party (BSPP) and SPDC government. The need is that we all willingly head to peace building path.

*(The Interview was given to B.K. Sen and U Min Lwin Oo of Burma Lawyers' Council. Earlier interview with Shan leader Sao Seng Suk and Karen Leader Pado Man Shar had been published in our Journal No. 11 and 13.)*

## The SPDC and Burma's Constitution

In his Union Day message, Junta leader General Than Shwe urged the nation “to strive in harmony for the emergence of a new State Constitution that would pave the way for the building of a new discipline— a flourishing democratic state.” Two legal issues arise from this hopeful, yet dubious, message to the nation— the type of state constitution he has in mind, and his definition of “discipline” and “a flourishing democratic state.” For the emergence of a state constitution, it is absolutely necessary for the participation of all classes, races, and nationalities. The entire population must be represented within each state, division, etc. Yet at this point, there is a ban on talking, and even reading, about the constitution. A breach of this law carries a lofty 25-year prison sentence.

As for the second issue, General Than Shwe's avenues for establishing his stated goal must be clarified so that the constitution-making process will be free from governmental roadblocks. The process must not be restricted to discussions of the National Convention-drawn Constitution. Only the free will of the people will contribute to the emergence of a desired constitution based on specific conditions of the country, in essence an all-inclusive constitution. General Than Shwe must set in motion an assembly of the people composed exclusively of members elected in the 1990 election, as well as members of cease-fire groups, ethnic leaders, and other under-represented communities. This said, the Junta's influence should extend no further in the conference. Surely there has to be freedom of expression so that different voices and interests can be vented and a common agenda is allowed to evolve. If and when the process gains momentum, political parties interested in erecting their own constitutional models should be granted freedom of association and allowed space and exposure in the media. These are the minimum legal requirements to catalyze the emergence of a legitimate, justifiable constitution. In addition, other legal issues should be addressed, such as the release of political prisoners and the legalization of political parties to add to participation transparency and credibility of the constitution making process.

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The other question relates to the “disciplined, flourishing democratic state” that General Than Shwe proposes. What, particularly, does this mean? The Burmese Socialist Program Party (BSPP) ruled the state from 1974 to 1988 under the General's idea of an effective constitution. Before asserting discipline among the masses, the leadership needs to stop speculating and look within its own ranks. The historical record shows a continual failure on the part of the generals to rebuild a functional state constitution. Their constitutional creation in 1974 stood only briefly before collapsing to the ground, while another attempt in 1996 also proved futile. The clear message is that representatives of civil society should also be involved in this matter.

The 1990 elections were based on the principle of multiparty democracy. When the Generals were mandated, they refused to honor the results on the excuse that the election was not for transfer of power, but for the process of drawing up a constitution. This was an obvious ploy to uphold the dictatorship, as the representatives of the people were the only ones qualified to draw up the constitution. In the backdrop of elections, only the elected representatives of the State population possess the legitimate authority to construct the new constitution. Whether this will display General Than Shwe's idea of “discipline flourishing,” it is for the people, and their elected representative, to decide. Generals must gracefully retreat and play a positive role to facilitate democratic transformation. Rule of law can be defeated today, tomorrow, but not in all time to come. The dialogue which the generals have grounded must continue if General Than Shwe's message is to have any meaning, and not simply be a comic case of the devil quoting scripture.

## The Bank Run in Burma...A Legal Issue

The Junta's move from a planned economy to the free market has been beset with formidable obstacles. The transition process is wrenching and complicated, and the state is uncertain of how much reform it must tolerate. The conflict is compounded by the repression of investigative media, which acts as a multi-faceted watchdog for sound development. Yet in Burma, freedom of expression continues to be suppressed by the government-run Press Scrutiny Board (GSB), regularly cutting news stories to divert public attention from national crises. In instituting any type of law reform, freedom of press is a fundamental need. In addition to the press, the government has failed to acknowledge the importance of transparency within their capital markets, one of the most essential prerequisites for economic reform. Companies and banks have been overstating their profits to attract potential investors, only catalyzing problems that will reappear later.

The recent run on several banks in Burma should be a lesson to the Junta. Since the initial frenzy for currency withdrawals began in early February, the SPDC has ameliorated the crisis by ensuring the public that the problem is small and will be easily resolved. Blame is placed on dissidents in exile who are said to be spreading false rumors, causing concern in depositors and their subsequent rush to withdraw their savings. A statement from an anonymous Asian Wealth Bank (AWB) representative indicated that the recent crisis had actually been triggered within the previous month by a massive 60 billion Kyat withdrawal made in one transaction. Further speculation circulating within Burma suggests that the AWB's sudden currency shortage was due to their involvement in an awry investment deal with a private China-based company. Public anxiety arose in the second week of February when private banks refused to allow customers to make withdrawals after the announcement that more than a dozen general services enterprises had declared bankruptcy.

The inside story of planned management is investment fund management companies trading illegally and irregularly. Without a stockmarket to

indicate economic activity, the public is unaware of the declining economy. There is no media freedom, and bank officials use press conferences as opportunities to rebuff concern over the financial sector and falsely assure the public that the banks are secure. In September 2002, Aik Htun reported to the Myanmar Times that, like the AWB, all private banks were experiencing an increasing pattern in deposits and loans. Yet in the same month, the Junta threatened the same institutions not to declare bankruptcy as it might induce social unrest. Though Burma does possess valid licensing systems, perhaps their only viable monitor of industry, the wobbly state of banks' balance sheets depress prices and constrict the financial system.

Within the power structure, the cabinet has taken few measures to improve the situation. The Money Laundering Law issued in June 2002 was a positive step to help secure the market, but it was poorly enforced. Aik Htun, the Vice-President of the AWB, has long been known to play a role in the drug trade, while Secretary-1 General Khin Nyunt also has close connections to the bank. Press conferences given to other potential offenders served only as encouragement to money launderers.

Closing bank branches, the current approach, will not alleviate the problem. Burma's financial structure consists of a central bank, three major specialized banks, and various non-banking financial institutions such as Myanmar Insurance. The Union of Myanmar Bank acts as the central bank of the state. The other three major banks are the Myanmar Economic Bank, which is a commercial bank for domestic banking, The Myanmar Foreign Trade Bank, which deals with international transactions, and the Myanmar Agricultural Bank, which provides agricultural credits. The banks are out of economic capital, causing this flurry of activity amidst the fears that the financial system will collapse. Due to the depth of the predicament, financial woes have spilled over into neighboring countries, and continue to threaten others. Both Burmese and Indian traders have experienced losses, while Thai border merchants brace for the economic impact of losing Burmese business. Banks' non-performing loans need scrutiny, and lawmakers must come to the forefront to address the problem through law reform. During this crisis fatigue, investors want to see lasting results through economic reforms, but the country is in a grade of deflation, making it harder for borrowers to repay their debts. The banks must move effectively, intervening where necessary to make investment more attractive and less risky.

### **Non-bank financial Institutions**

Apart from the state-run institutions are the private banks, on which the

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present bank run is focused. Private banks are by and large dependent on capital laundered either under drug or human trafficking, and small investors are attracted by the high interest received. The financial system becomes deficient when the sources of credit are concentrated in the banking system. A legal framework must be constructed that allows a creditor to take a security interest over a debtor's movable property. Private banks are likely to possess less immovable property (land and buildings thereon) that will act as collateral to secure loans from creditors. In this way, the economic potential of movable property as collateral can be used advantageously, leaving it in the hands of the debtor for protective use. Only when sources of credit are diversified outside of the banking system will the financial sector regain stability. The ability of the legal system and secured transactions law reform can eventually foster a more robust financial system. The difficulties facing Burma's financial sectors do not arise from deep and complex cultural, economic or social roots. They emerge from outdated laws that no longer match modern financial realities. The country requires a detailed analysis of its laws governing relations between its debtors' securities. These laws include secured credit, bankruptcy, security interest, and other statutes that affect enforcement and priority. They should set out the economic logic of each key element in the law, relating these provisions to other broad public policy issues.

## The 1973 Interpretation of Expressions Law

The Interpretation of Expressions Law (Law no. 22/73) was enacted by the Revolutionary Council of the Union of Myanmar on May 12, 1973. Regarded as a modern revision of The Burma General Clauses Act (1898), which continued to be in use after independence, the Expressions Law relates to the definitions of powers, functionaries and provisions for orders and rules made under enactments. While chapter III of the law is said to be a general revision of the General Clauses' definitions, Miscellaneous sections 25-28 conspicuously diverge from the corresponding sections of its predecessor. Section 27 of the Expressions Law reads, "The Revolutionary Council of the Union of Myanmar shall **interpret** the laws for the purpose of uniformity."

When this law was enacted in 1973 by Ne Win's Revolutionary Council, the subsequent regime, the Burma Socialist Program party (BSPP) continued to apply this law without amendment. In section 29, the Expressions Law states, "The Burma General Clauses Act is hereby repealed." The legal position, therefore, was that the Interpretation of Expressions Law was to be enforced in its place. The publication of the newer law in the Attorney General's Journal in 2000 also confirms its existence. Section 2 of the Expressions Law reads "This law shall apply to the following laws:

Acts, laws, ordinances, rules, regulations and proclamations made by any legislative authority prior to the commencement of this law;  
Laws, rules, regulations, orders and proclamations made by any legislative authority subsequent to the commencement of this law.

Note that the "acts" mentioned in clause (a) have been omitted in clause (b), while the ambiguous concept of a "legislative authority" is introduced. Essentially, this allows the SPDC, while maintaining executive authority, to retain the legislative authority as well. This clause allows for the Junta to have a centralized grip on all laws, making no separation of power between the executive and legislative authorities. At that point,

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This clause allows for the Junta to have a centralized grip on all laws, making no separation of power between the executive and legislative authorities. At that point, the peculiarity of the situation becomes evident. As written, the statute allows for the interpretation of the law by the same authority that breaks it.

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the peculiarity of the situation becomes evident. As written, the statute allows for the interpretation of the law by the same authority that breaks it. Chapter 2 follows with similarly fuzzy guidelines for interpretation. Guideline 9(b) reads, “Any provision of law shall be interpreted in **conformity with the intention** of the legislative authority which enacted the said law.” In clause (c), the law indicates that in interpreting any provision of the law, the circumstances occurring that cause the new law to be enacted, may be taken into account. Section 4 continues that in interpreting any provision of the law, the proceedings of the drafting commission or of the legislative authority before the new law may be considered. Note that proceedings of the drafting commission of the SPDC are state secrets and are inaccessible to others.

From the above, three elements emerge— intention, legislative authority, and situation. This should be viewed in the context of a government lacking both a parliament and constitution, apart from its legitimacy. In as much as this, the SPDC possesses the power to manipulate laws, even to overlook its own violations that would be considered unlawful if committed by any other party. The Interpretation of Expressions Law was clearly and invariably constructed to promote the interests of the SPDC while limiting the rights of others.

A comparative study of the 1898 Burma General Clauses Act and the Interpretations of Expressions Law shows that there was no legitimate need for the newer revision to be written— many of the new clauses are trivial, or else re-affirm concepts in the General Clauses Act. The only alteration made in the Expressions Law was the formalizing of legal direction so that laws could be influenced in conformity with the intentions of the SPDC, the so-called legislative authority. The enactment of this law marked a flagrant erosion of independence by the standing judicial authority. Given the turbulent and corrupt history of the military Junta, it is not an ironic admission that there is no law in Burma except that intended by the SPDC. Their intention is to safeguard the power and authority of the State by the oppression of the public and the systematic violation of human, political, and social rights.

Instead of manipulating the law, the SPDC should seek ways to reconcile the contradictions which are the result of its evil mode of enactment. Law is sacrosanct and respect of law should be of greater concern to the ruling Junta.

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## The Bar Council under the SPDC

In the law journal published by the SPDC's Office of the Attorney General (issue no.1, 2000) there was a discussion regarding the increasing number of court cases in Burma, and the newly diversified appearance of both government and private advocates involved in the litigation process. In Burma's legal arena, private lawyers tend to constitute higher grade leaders and advocates. The general qualification for this more established rank is a passing score on a legal examination, whereupon one can then intern for a practicing lawyer. When the above criterion are satisfied and the specific rules laid down by the Bar Council are agreed upon, the professionals are admitted as advocates within the Bar Council. The Council supervises admission of advocates on lines laid down under section 4 of the Bar Council Act.

In 1988, after the SPDC assumed power, the Junta took the opportunity to revise and rewrite several of the country's existing laws and regulations. One of the statutes of concern to the government was the Bar Council Act, which was swiftly replaced by the newer Bar Council Law no. 22/89. Under Section 4 of the Law, the Attorney General acts as the Chairman of the Bar Council and is assisted by a Deputy Chairman. The Chief Justice nominates an additional Justice and six advocates of the Supreme Court. The Director General of the Supreme Court is the Secretary of the Bar Council. The Council reviews the admission applications of lawyers and conducts inquiries on the conduct of lawyers, forwarding all acts of misconduct to the Supreme Court. Under rule 8 of the Council Law, higher grade "pleaders" must be practising for three years before attaining the rank of advocate. In other words, the potential lawyer must practice 3 years for legal advocate eligibility. Previously, the lawyer needed to serve only 1 year to attain this title. Judicial officials must serve at least 5 years, up from the previous 3. Under rule 15, members of the Bar Council must pay an admission fee of 2500 kyat and a yearly subscription rate of 120 kyat to receive their Bar Council identification card. Up to 1999, 6,841 advocate licences had been issued.

In the journal article, several crucial facts have been omitted. Under section 4 of the original Bar Council Law,

“The bar council shall be composed of fifteen members, of whom-

- (a) one shall be the Attorney General;
- (b) four shall be persons nominated by the High Court, of whom not more than two may be judges of that Court; and
- (c) ten shall be **elected** by the advocates of the High Court from amongst their number. Two of the elected members of the bar council shall be persons who have for not less than ten years been entitled as of right to practise in the High Court.
- (d) The Attorney-General shall be the Chairman of the Bar Council and a Vice Chairman for the said Council shall be elected by the Council in such manner as may be prescribed.”

Section 4 has been abolished and replaced in the new section:

“The Bar Council shall be constituted as follows-

- (a) the Attorney General; Chairman
- (b) the Deputy Attorney General; Vice-Chairman;
- (c) a judge of the Supreme Court nominated by the Chief Justice; member
- (d) six advocates **nominated** by the Supreme Court; members
- (e) the Director General, Supreme Court; Member
- (f) the Director General, Office of the Attorney General; Secretary”

The linguistic modification is minute and masked by the surrounding clauses within the section, though the significance of the change is immense. Therein lies evidence of oppression within the Bar Council. Previously, the advocates were elected entirely by practicing advocates on roll of the High Court, free of government intervention. Presently, it is the SPDC who ultimately decides the list of those that will fill the positions of the advocates. The Bar Council as it stands today is essentially hand-picked by the SPDC. Currently, all six advocates nominated by the Supreme Court have a track record of loyalties to the SPDC, and not a single one practices independently, outside the government. The Attorney General’s journal should have reported on the arbitrary alteration and further pressured the SPDC to justify and replace the clause. Yet the journal which professes to represent the cause and interest of the Burmese legal profession is only a mouthpiece of the force which oppresses it.

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