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In Brief

In Review

News and Notes

Burma Lawyers' Council
PO Box 29
Hua Mark Post Office
Bangkok 10243 Thailand
<blcsan@ksc.th.com>
<blcms@cscoms.com>
[www.blc-burma.org]

Burma Lawyers' Council

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The BLC Publication Team

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A Brief Analysis on the Legitimacy of SPDC's National Convention and its Constitution

The Burma Lawyers' Council

Summary

The Military Regime, now known as the State Peace and Development Council (SPDC), resumed its National Convention (NC) on December 5, 2005. Many analysts presume that the regime may complete its constitution making process in 2006, force the people to approve its constitution and attempt to prolong its military rule indefinitely.

Since November 1995, the National League for Democracy, the election winning party, withdrew from the NC. The majority of ethnic leaders from the Union Nationalities League for Democracy (UNLD), the ethnic alliance inside Burma that participated in 1990 May election and won the second largest seats in the parliament, have not yet joined the NC. The Karen National Union and the Karenni National Progressive Party, the two major ethnic resistance organizations, are still standing against the NC. The New Mon State Party, one of the ethnic cease-fired organizations that joined the NC, very recently announced that they will no longer participate in the NC. These are the factors that indicate the denial of people to provide legitimacy to the military junta to rule the country in accordance with a military dominated constitution.

The current polity of Burma is, in brief, the legitimacy struggle centering on the constitution making process. This BLC's analysis paper revives its background; and also introduces the essence of the SPDC's constitution, aiming to seek support of the international community in order that democratic transition of Burma may take place through a genuine a constitution making process that guarantees the participation of its own people within and without the country for the emergence of a future democratic constitution.

The current polity of Burma is, in brief, the legitimacy struggle centering on the constitution making process.

Part (A)

A Brief Analysis on the Current Constitution Making Process of the Ruling Military Regime

Background

Over fifteen years have now passed since general elections were held to elect representatives to the Burma's Parliament. Burma's military rulers have denied the people's representatives an opportunity to convene their Parliament on the fallacious pretext that a parliament cannot be convened in the absence of a constitution. For almost thirteen years the military has been drafting a new constitution under the cloak of a "National Convention". The National Convention has been contrived by the military to legitimize an undemocratic constitution entrenching a "leading role in national politics" for the military. The degradation of the constitutional drafting process by the military denies the people of Burma an opportunity to establish a genuine democratic system of responsible government.

The 1990 General Election: Elections for the People's Assembly

General elections were held in Burma on 27 May 1990 following over two years of civil disturbance against the military's rule. The National League for Democracy (NLD), under the leadership of Daw Aung Suu Kyi, won over 80 percent of the seats in the new parliament. Political parties dedicated to the restoration of democracy, including the NLD, won all but 10 seats in the 485-seat legislature. These elections had been called "to elect representatives of the People's Assembly" (According to the introductory words of the State Law and Order Restoration Council Order Law No. 14/89 of 31 May 1989. Also referred to as the 'People's Assembly Election Law'). A "People's Assembly" (i.e. Parliament) was established by Burma's 1974 constitution and operated (under the control of the military) until it was dismissed by the military on the 18 September 1988. According to Article 41 of the 1974 constitution: "The People's Assembly is the highest organ of state power. It exercises the sovereign powers of the State on behalf of the people" While Burma's parliament and other state institutions were abolished by the military in September 1988, the Constitution of 1974 remained in effect though suspended by implication of the military's coup.

These elections had been called "to elect representatives of the People's Assembly"

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According to Article 41 of the 1974 constitution: "The People's Assembly is the highest organ of state power.

In its first announcement on assuming power on 18 September 1988, the military's State Law and Order Restoration Council (SLORC) advised that it had assumed state power, inter alia, "to stage democratic multiparty general elections". The SLORC quickly promulgated the Political Parties Registration Act and permitted political parties to register, recruit members and to engage in limited political

activities. On the 31 May 1989 the SLORC enacted the People's Assembly Election Law "In order to hold free and fair multi-party democratic general elections and to elect representatives of the People's Assembly". According to Article 3 of the Election Law: "The People's Assembly shall be formed with the People's Assembly representatives who have been elected in accordance with this law".

Although the 1974 constitution remained effective, the SLORC advised in its 43rd News Conference of the 9 June 1989: "Presently we have two constitutions in our country; that is the 1947 Constitution and the 1974 constitution … The elected representatives can choose one of the constitutions to form a government, and we will transfer power to the government formed by them. We are ready to transfer power to the government that emerges according to the constitution. If they do not like the two existing constitutions, they can draw up the constitution … The elected representatives are to draw up the constitution"

The military refuse to convene the People's Assembly

Following the stunning victory of the democracy parties in the May 1990 elections, it quickly became apparent that the military had no intention of transferring power to the newly elected Parliament. At least, it would not transfer power to a parliament dominated by pro-democracy parties. The military had anticipated a victory by the pro-military, National Unity Party, the successor organization of the former ruling Burma Socialist Program Party, which was heavily financed and backed by the military.

However the popularity of Daw Aung San Suu Kyi and the NLD had skyrocketed and the people's disenchantment with the military and awareness of democratic alternatives were at a peak.

To deflect the mounting domestic and international pressure to recognize the election results and to convene the People's Assembly the SLORC announced that a new constitution must first be approved before the People's Assembly could be convened.

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In the SLORC's first official statement of its position since the May elections, Maj-Gen Khin Nyunt, First Secretary of the SLORC, announced during the SLORC's 100th News Conference on 13 July 1990: "At the present time we should consider the choice between the 1947 Constitution and the 1974 Constitution. It is evident, because of changing times and conditions, that neither constitution is now suitable or usable. So which constitution should we use in transferring power? We should draft a new constitution. For a strong government to emerge we should proceed systematically according to the law.

…The winning parties are to work for the emergence of a resolute constitution in the long term interests of the state and the entire people. The political parties are responsible for drafting the constitution. As for our SLORC, we will not regard it as something that is of no concern to us. I would like to say that the SLORC would give as much possible assistance as possible. …it is of concern to us and we are responsible for it."

Two weeks later, on the eve of a meeting of NLD representatives elected to the People's Assembly, the SLORC issued Announcement No. 1/90.

"… a political organization does not automatically obtain the three sovereign powers of legislative, administrative and judicial powers by the emergence of a People's Assembly. These powers can only be obtained based on a constitution. … the representatives elected by the people are responsible for drafting a constitution for the future democratic state. Drafting an interim constitution to obtain state power and to form a government will not be accepted in any way, and if it is done, effective action will be taken according to the law."

The elected representatives of the people would not be permitted to convene the People's Assembly. They would, according to these announcements, be permitted to draft the constitution, but not an interim constitution.

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NLD parliamentarians, representing over 80 percent of the elected representatives of the People's Assembly, endorsed the NLD's "1990 Provisional Constitution (draft)

In its Announcement No.1/90 the SLORC also announced its three guiding tasks: "the prevention of disintegration of the Union, the prevention of disintegration of national unity and the perpetuation of sovereignty". These principles have become the guiding principles for the drafting of SLORC's own constitution. These principles of extreme nationalism are designed to deny equality and self-determination to Burma's numerous ethnic nationalities.

The demands of the People's Representatives

Despite SLORC's Announcement No. 1/90, the NLD's elected representatives to the People's Assembly gathered at Gandhi Hall in Rangoon to discuss the issue of the transfer of power and the formulation of an interim constitution.

In its Gandhi Hall Declaration of the 29 July 1990 the NLD parliamentarians, representing over 80 percent of the elected representatives of the People's Assembly, endorsed the NLD's "1990 Provisional Constitution (draft)". This interim constitution was based on Burma's 1947 Constitution and provided a solid constitutional basis for the convening of the People's Assembly. The NLD representatives announced that: "It is our conscious opinion that this provisional constitution will bring about the transfer of power in accordance with the law".

In respect of the drafting of a permanent constitution the NLD representatives declared in point 9 of the Gandhi Hall Declaration:

"Only the People's Assembly has the responsibility to adopt the new constitution. … A constitution drawn up at any time and at any place other than the People's Assembly … will not have an executive power [and] will not have any honour. It is of vital importance to convene the People's Assembly expeditiously so as to draw up a new constitution which aims at building a new democratic union aspired by the people."

It was also resolved to call on the SLORC to convene the People's Assembly in September 1990 and for the SLORC to engage in a dialogue with the NLD. In a joint statement dated the 29th August 1990, representatives from the NLD and the Union Nationalities League for Democracy (who collectively represented over 95% of all elected representatives of the People's Assembly) issued the Bo Aung Gyaw Declaration No.1. This declaration endorsed the resolutions of the Gandhi Hall Declaration and further stated that "the People's Assembly should write and promulgate a lasting constitution". A committee of suitable persons, including representatives of Burma's ethnic peoples, was to be established under the supervision of the People's Assembly to formulate principles for the drafting of a new democratic constitution.

In a joint statement dated the 29th August 1990, representatives from the NLD and the Union Nationalities League for Democracy (who collectively represented over 95% of all elected representatives of the People's Assembly) issued the Bo Aung Gyaw Declaration No.1.

Emergence of the National Convention

The SLORC refused to convene the People's Assembly or to enter negotiations with the NLD. The SLORC soon hinted that it would establish a National Convention to draw up the constitution. However over two and a half years passed before the SLORC's National Convention held its first session in January 1993.

According to the National Convention Procedural Code (1993) the National Convention was tasked with "laying down principles for the drafting of a 'firm' constitution". Theoretically, the People's Assembly remained responsible for drafting the final constitution, and once the constitution was finalized the transfer of power to a democratically elected government would be effected by the military. The SLORC's National Convention has many superficial qualities creating the appearance of a genuine constitutional drafting institution. The term "National Convention" itself is frequently used to refer to constitutional drafting institutions established by democratic nations seeking popular participation in their constitutional making processes.

The SLORC has also incorporated the terminology (but not the spirit) of Bo Aung Gyaw Street Declaration No. 1. Hence the National Convention is tasked

Hence the National Convention is tasked with "laying down principles" rather than drafting a constitution itself.

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The National Convention Procedural Code contains several features to cloak the National Convention in a veil of legitimacy.

with "laying down principles" rather than drafting a constitution itself. Also, representatives from several ethnic peoples and other appropriate organizations and individuals are said to be participating in the convention.

The National Convention also appears to be a predominately civilian organization, with delegates coming from an apparently diverse range of social groups. The SLORC therefore argues that it is engaging in widespread public consultation in its constitutional making processes. A small number of elected representatives were also allowed to participate in the National Convention.

The National Convention Procedural Code contains several features to cloak the National Convention in a veil of legitimacy. For example, one (of the six) of the aims of the constitution is the "development of genuine multi-party democracy" (Art. 1(d)). Delegates "have permission to openly discuss their ideas and suggestions …" (Art. 5 (c)). There all also vague references to "efforts for consensus" between delegate groups (Art. 30(a)).

The nature of the National Convention: Total control of the military

In reality the National Convention is a sham. It is tightly controlled by the military to ensure its acquiescence to a constitution drafted entirely by the military. In reality the representatives from the election winning party, the National League for Democracy, and those from the United Nationalities League for Democracy, the largest ethnic alliance that participated in 1990 May election and won second largest seats in the parliament, have been entirely excluded from the constitution drafting process.

The military directly controls the proceedings of the National Convention through its organizing committees (including the NCCC and the NCCWC). These committees are dominated by senior military officers and co-ordinate and manipulate every aspect of the convention. For example, every speech must be approved by the military's NCCWC committee and every session of the National Convention is chaired by a member of the NCCWC. A row of military officers (being members of the NCCC and NCCWC) sit along the front row of the National Convention creating an intimidating environment for each speaker. All delegates to the National Convention are constantly monitored by military intelligence. A delegate expressing any dissatisfaction with the military or the National Convention is quickly removed. One delegate was arrested and expelled for suggesting, in private, that the current military rulers were the same as the former ruling Burma Socialist Program Party.

The National Convention Procedural Code, on the whole, is the primary instrument for the suppression of free dialogue at the National Convention. All discus-

sions and principles derived by the National Convention must be within the aims set out in Article 1 of the code, and include the "participation of the military in the leading role of national politics" (art. 1(f)), the "non-disintegration of national unity" (art. 1(b)) and the "stability of sovereignty" (Act. 1(c)).

A delegate may only speak before the National Convention if approved by the military's NCCWC (art. 5(c), 16(c) & 37). To obtain approval a delegate must first submit a discussion paper to the NCCWC for its approval. If approved, the delegate's discussion paper may be substantially edited by the NCCWC. A delegate may only speak in accordance with the approved discussion paper (art. 45(j)). All "discussions" (i.e. recitation of the discussion paper) during the National Convention must be limited to promoting the aims set out in Article 1 of the Procedural Code (art. 5(c)). Further, delegates must not indulge in "grandstanding speeches"(art. 45(i)), nor "use language damaging to national unity" (art. 45(b)), nor speak "defamatorily against the beneficence of the State" (art. 45(a)). Delegates must not indulge in speeches "damaging the prestige of other organizations" (i.e. the military)(art. 45(i)) and a delegate must not distribute any papers on the convention premises, without the permission of the NCCWC (Art 47(e)).

All "discussions" (i.e. recitation of the discussion paper) during the National Convention must be limited to promoting the aims set out in Article 1 of the Procedural Code (art. 5(c))

Breaches of these provisions are severely dealt with by the military authorities. One delegate, Dr Aung Khin Sint, was arrested and sentenced to 20 years imprisonment for distributing a paper among delegates.

The military controls the flow of all information from the National Convention. All information in relation to the National Convention, including discussion papers, are regarded as "state secrets" (Code art. 8(j), 16(h), 47(f)). All "news" in relation to the National Convention may only be released by the military's NCCWC (Code art. 8(j)). It is theoretically illegal to discuss even the colour of the floor coverings at the National Convention. Any criticism of the military's constitution expressed by a delegate on the floor of the National Convention will never reach the ears of the Burmese public. In fact it would be very difficult to know what happens in the National convention if it was not for the information supplied by former delegates who have fled Burma.

Delegates to the National Convention are not permitted to form a collective view on any issue. Delegates are only permitted to discuss issues in relation to the constitution, which have been approved by the military's NCCWC. Delegates are not permitted to vote on any issue or attempt to form any type of consensus. The Procedural Code makes no provision for voting, secret or otherwise, on any issue before the National Convention.

In reality, delegates to the National Convention have not approved the constitutional principles emanating from the National Convention. This is not their function. Delegates to the National Convention may only express an opinion of support for constitutional principles submitted by the military.

Finally, the National Convention is being held in Burma, which has been ruled by the military since 1962. There is no freedom of speech, freedom of press or freedom of association. Human rights abuses by the military are widespread throughout Burma. Delegates to the National Convention are frequently subjected to intimidation by the military while the convention is out of session. One delegate, Sai Soe Nyunt, was severely beaten by a group of soldiers in December 1996. Suffering from severe injuries, including a broken jaw, he was bound and dragged to a military camp of Infantry Battalion 58. After further beatings he was taken to Maj. Win Thu who told him "…National Convention. It is full of whores, drug abusers, and drug runners. It is nonsense! Get out of it!". Sai Soe Nyunt received no medical treatment for his injuries, and no action was taken against his attackers.

The National Convention established by the military lacks any credibility as a constitutional making body.

The National Convention established by the military lacks any credibility as a constitutional making body. It is un-elected and unrepresentative. There is no freedom of speech or discussion. There has been no public consultation or participation. Public discussion outside the National Convention is prohibited. The National Convention is a front. The draft constitution presented to the media has been fully drafted by the military without any significant assistance from the National Convention.

The NLD and the National Convention

The National League for Democracy, elected to represent the Burmese people in the May 1990 elections, is prevented from forming a government and has been denied the opportunity of taking any significant role in the constitutional drafting process.

There were initially 88 members of the NLD invited to attend the military's National Convention. Only one member of the NLD was permitted to join the 45 person "presidium", which was given a minimal role in chairing the National Convention. During the early sessions of the National Convention the NLD members were given limited opportunities to express their opinions in relation to the proposed constitutional principles. However the views of the NLD were not subject to a free and fair vote and were not publicised outside the National Convention.

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It quickly became apparent that while the military was engaging in the pretence of hearing the views of the NLD on some constitutional issues, it was refusing to incorporate any suggestions of the NLD into its new constitution. The latest draft of the military's constitutional principles entirely exclude any suggestions of the NLD.

On 27 November 1995, the National League for Democracy sent a letter to the SLORC requesting the proceedings of the National Convention to be liberalised. The military rejected the NLD's appeal and on the 28 December 1995 the NLD withdrew from the National Convention. Almost immediately all delegates from the NLD were expelled by the military from the National Convention. Very few elected members of the People's Assembly are now participating in the National Convention.

Law No. 5/96

Following its dismissal from the National Convention the NLD announced that it would continue to work on a new democratic constitution for Burma based of respect for human rights and the equality for all of Burma's peoples. As a direct consequence the military issued law No 5/96 titled: "*The Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention Against Disturbances and Opposition*".

This draconian law provides for the imprisonment of any person for up to 20 years or the banning of an organisation who/which:

- "draft and disseminate the constitution of the state" (cl. 5(d))
- "carry out the functions of the National Convention" (cl 5(d))
- "deliver speeches or make statements to undermine, belittle and make people misunderstand the functions being carried out by the National Convention" (cl 5(c))
- "deliver speeches or make statements in order to undermine the stability of the State" (cl.5(a)).

It therefore became illegal for any person in Burma to draft a new constitution, or to discuss alternative constitutional principles or alternative constitutional drafting processes. Burma has therefore become the only nation in the world to assert that its constitution is drafted with the participation of the public while at the same time threatening to imprison a person for 20 years for criticising the constitution drafted by its rulers.

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Part (B)

A Brief Analysis on the SPDC's Proposed Constitution

The "Chief of Staff of the Defense Forces" is above the constitution

The military is effectively established as an ultra-constitutional organization. It is to be above the constitution and above the law. The "Chief of Staff of the Defense Forces" is the most powerful person under the constitution. His appointment and removal are not referred to in the constitution. It is anticipated that he will be beyond the control of a civilian government. The Chief of Staff of the Defense Force and the military will be regulated by the military's own regulations, which will override the constitution. The Chief of Staff of the Defense Forces is entitled to nominate twenty five percent of all members of the People's Assembly, the National Assembly and the State and Regional Assemblies. The Chief of Staff of the Defense Forces is also entitled to nominate the Minister for Defense (i.e. the Chief's own boss), the Minister for the Interior and the Minister for Border affairs.

Members of the Union Assembly appointed by the Chief of Staff of the Defense Forces are entitled to nominate a Vice-President of the Union. The "elected" members of the Union Assembly nominate two further vice Presidents. Members of the Union Assembly then form an Electoral College to elect a President of the Union from among the three Vice-Presidents. It is anticipated that the members of the Union Assembly appointed by the military will form a block vote and unite with the political parties aligned with the military to ensure that the Vice-President nominated by the military is elected as the President.

The proposed system is essentially a presidential system, with extensive powers vested in the President who is subject to very few limitations.

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Silence on the entire law making process.

The Union Assembly is the national legislature and will comprise of a Peoples Assembly and a National Assembly. The National Assembly, theoretically, represents the states and regions. Seventy-five percent of the membership of each Assembly is to be "elected". The constitution is vague as to the true nature and functions of each Assembly. It is unclear whether the Assemblies may exercise any "legislative" powers at all.

The constitution is silent on the entire law making process. It is unclear who can initiate laws and whether laws must be passed through the one house or both houses of the Union Assembly. It is unclear whether the President and the Ministers of the Union Government are subject to laws passed by the Union Assembly. It is unclear whether the President can veto or ignore laws passed of the Union Assembly. These discrepancies are deliberant and are designed to give the military some flexibility in controlling the government.

The Existence of Powerless State Governments and Legislatures

The Union of Burma is to be divided into seven states and seven regions (similar to the division established by the military's 1974 constitution). The President will appoint a Chief Minister for each state and region. A partially elected Legislative Assembly will also be established in each state and region. It is unclear whether the governments of the states and regions will have any administrative and legislative functions. No functions are guaranteed by the constitution. Any administrative or legislative functions must be delegated (and can be removed) by the President of the Union. The military has deliberately avoided the formation of any type of federal system of government in accordance with the demands of Burma's ethnic nationalities. However the military is attempting to create the appearance of a federal system by establishing powerless state governments and legislatures.

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However the military is attempting to create the appearance of a federal system by establishing powerless state governments and legislatures.

No Constitutional Guarantee of Democratic Procedures

While seventy-five percent of each legislature established in the Union of Burma is to be "elected", there are no constitutional guarantees of democratic procedures. There are no guarantees that the representatives will be elected by the people in a free and fair vote. There are no guarantees of free speech or political activity. There is no freedom for the media. There are no human rights protections. In fact there are no general protections for the people or at all in the constitution. There are no guarantees of equal rights or any special protections for Burma's ethnic nationalities. Freedom of association is not protected by the constitution. At present it is not possible to establish or join a political party. It is anticipated that the military will establish a Suharto style democracy in which only political parties approved by the military are permitted to contest a staged election, which will be dominated by the military's new political face, the Union Solidarity and Development Association (USDA). It was established in September 1993, under the patronage of Senior General Than Shwe, as an instrument for the mobilisation of support for the military government. The objectives of the USDA were almost identical the SLORC's own objectives, i.e. "to strengthen state sovereignty, to prevent disintegration of national unity", etc.

the military will establish a Suharto style democracy in which only political parties approved by the military are permitted to contest a staged election, which will be dominated by the military's new political face, the Union Solidarity and Development Association (USDA).

There are no guarantees for the rule of law or for the independence of the judiciary from interference from the military.

A Servile Judicial System

The constitution also establishes a servile judicial system comprising of a Supreme Court and subordinate courts. There are no guarantees for the rule of law or for the independence of the judiciary from interference from the military. Judges of the Supreme Court are to be nominated by the President and must be independent of "party politics". The are no guarantees of tenure for the Judges who may be dismissed in the discretion of the President. While the constitution provides a mechanism for the impeachment of a Judge, the President is not obliged to follow this procedure or to comply with a negative outcome of a trial held in accordance with the procedure. The jurisdiction of the Supreme Court is neither detailed nor guaranteed by the constitution. It is unclear what matters the Supreme Court may consider. It is unclear whether the Supreme Court can even interpret the constitution. It is also unclear whether there are any limits on the court's jurisdiction. There is nothing in the constitution to prevent the Supreme Court convicting a person on the basis or a retrospective law or in the absence of any law at all.

Conclusion

The National Convention has been a farce and a sham to camouflage a constitution drafted by the military to entrench its own role in the future political affairs for Burma. The military has abused the constitutional drafting process to cling to power while progressively dismantling the democratic opposition within Burma. The military's undemocratic constitution will form the basis for a new mutation of military rule to extend its control of Burma, entrenched since 1962, into the foreseeable future.

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Six Migrant Workers Murder Case and Legal Status Issue of Burmese Migrant Workers in Thailand

U Aung Htoo

On September 29, 2005, Thai Court in Maesod, Tak Province, sentenced death penalty to four accused - Mae-pa village headman and three others, local security officials - for they killed six Burmese migrant workers in 2003. This may be the first time in history of Thailand that Thai authorities were prosecuted for crimes they have committed against Burmese migrants, reducing a sense of impunity for those who commit crimes against Burmese nationals. It may also be a proof that justice can be sought within the existing legal and judicial system of Thailand which Thai nationalities can be proud of. It is remarkable that the case was successfully filed in the court only with the major assistance of Law Society of Thailand, Human Rights Commission of Thailand and Forum Asia and with the background support of the international community, including Asia Human Rights Commission.

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Having lodged a formal complaint at the National Human Rights Commission and the Law Society of Thailand, Burma Lawyers' Council (BLC) sent copies of the letters and the case report to the major media in Thailand and abroad, international human rights organizations and the embassies from democratic countries, including United States Embassy.

The first serious press hit came on Friday May 23, 2005. The French Press Agency ran a wire story about the case, which quoted extensively from the letters to the Human Rights Commission. That story mentioned the fact the provincial police had found six charred bodies in the area, suggesting that the men had indeed been murdered. In addition to Thai language newspapers, the Bangkok Post and the Nations, the leading English language news papers in Thailand, then covered the

story with photos, for five consecutive days. All four Burmese radio channels also picked up on the story. As a result, the SPDC military regime intervened and demanded an investigation, which was also covered in the Thai media.

After two weeks, it became clear that the local police had received strong messages from superiors in Bangkok, military intelligence, Crime Suppression Division, and politicians to handle this case "properly." Then, the witnesses were transferred to official police protection. If this protection had not been sought immediately, the witnesses would have disappeared. However, with the national and international attention this case had garnered, the local police were in the spotlight. In addition to safeguarding the witnesses, the police apprehended the village headman and several members of the security force.

This case underlines the uncertainty of life for Burmese migrants along the Thai-Burma border.

This case underlines the uncertainty of life for Burmese migrants along the Thai-Burma border. Despite that seeking justice for the victims has completed in its initial stage, it still requires to follow up the judicial process in appellate court of Thailand. It is wonderful that legal and human rights institutions of Thailand have been cooperating with the Burmese victims in laying down foundation for criminal justice on the basis of human rights while Thai police in Maesod area, Tak Province, effectively investigated the case and facilitated justice. More importantly, as long as the international community monitors the human rights violations, national criminal justice system will certainly be promoted.

Lack of legal status of Burmese migrant workers in Thailand caused the situation in which all six Burmese migrant workers were murdered brutally. The following legal analysis is an extract from BLC paper entitled, "**A Brief Analysis on the Situation of the Burmese Migrant Workers In Thailand After Tsunami."**

Part (1)
Issues Related to Lack of Legal Status

(1.1) Illegal Exit and Entry

Except a few number of those who entered Thailand with official passports and work permits, Burmese migrant workers do not enjoy any formal legal status under the following circumstances:

(1) They do not exit Burma in a formal legal way. As such, they are subject to be dealt with by the Burma Immigration Act, punishable for five years imprisonment.

(2) They do not enter Thailand in a formal legal way. As such, they are also subject to be dealt with by the Immigration Act of Thailand.

(1.2) Background of Illegal Exit from Burma

Under the rule of the military junta in Burma, millions of Burmese faced with crushing poverty and certain starvation in Burma are forced to cross the border and seek economic opportunities on Thai soil. Pursuant to **The Burma Passport Act1** § (2) "Without prejudice to the generality of the foregoing power such rule may – (a) prohibit the entry into the Union of Burma or any part thereof of any person who has not in his possession a passport issued to him". Furthermore, **The Burma Immigration (Emergency Provisions) Act2** states, "No citizen of the Union of Burma shall enter the Union without a valid Union of Burma Passport, or a certificate in lieu thereof, issued by competent authority". Thus those individuals who exit Burma without the possession a Passport may not re-enter Burma lawfully and face imprisonment for up to 5 years for attempting to do so.

Burmese Passports are expensive, 100,000 Kyat (more than 4,000 Baht) and difficult to obtain for ordinary citizens of Burma. For the average Burmese worker employed in urban areas his/her monthly salary is approximately 15,000 Kyat and the earnings for those fortunate enough to find work in rural areas the pay is substantially lower. Thus, for ordinary Burmese citizens a Burmese Passport is unobtainable due to the lack of money which is the same reason for the desire to leave Burma in search for economic opportunities elsewhere. In addition, the SPDC regime is rife with corruption and therefore only those who may afford the bribe money or are in some way complicit with the illegitimate regime may obtain Passports with ease. Due to discrimination and suspicions of prostitution there are additional difficulties for Burmese females in obtaining Passports. Likewise, Ethnic Burmese because of discrimination and suspicions of political activities are denied access to Passports. In addition to the discrimination and suspicion faced by the Ethnics there is the added complexity that these groups lack recognized nationality by the SPDC and therefore do not posses the official documentations and certificates required for Passport procedures.

Thus due to the SPDC extreme dereliction in it's governance the ordinary Burmese who are faced with the choice of starving in their homeland or facing legal uncertainty in regards to exit and return to Burma are forced to leave Burma without possessing a Burmese Passport. While the SPDC is fully aware of the hemorrhaging of Burmese people out of the nation it has neglected to address the situation by establishing a legal framework for the exit and entry of its impoverished citizens. Rather, the SPDC has chosen to exploit the situation of its own people by persecuting these persons upon their unlawful exit and entry, all the while demanding bribe money. This lack of legal procedures for the exit and entry of migrants and the forcing of the population to travel through channels outside the legal frame-work erodes the "Rule of Law" in both Burma and the destination country.

Thus due to the SPDC extreme dereliction in it's governance the ordinary Burmese who are faced with the choice of starving in their homeland or facing legal uncertainty in regards to exit and return to Burma are forced to leave Burma without possessing a Burmese Passport.

(1.3) Background of Illegal Entry into Thailand

Thailand's growing economy is fueled by cheap labor, which it receives in abundance from Burma due to the political strife in Burma. Thai society like the wealthy western nations has developed an insatiable appetite for consumer goods and Hi-Tech products which relatively low wages cannot support. Therefore, the Thai work-class has abandoned certain sectors of Thai industry and in some case left the nation to seek economic opportunities over-seas. In addition Thai employers who obtain their wealth through keeping labor cost low are resistant to Thai workers' demands to raise their salaries. Thus, the Thai employers quite cleverly substitute their work forces with Burmese who are willing to work for the most meager salaries which no Thai employee would ever accept. This replacement of Thais by Burmese only compounds the deep resentment harbored by many sectors of Thai society towards the Burmese due to a mutual history of warfare and xenophobia exacerbated by the media which interposes Burmese migration and drug-trafficking, spread of disease, and environmental destruction. Thus, Burmese migrants face extreme discrimination and intolerance in Thailand which is aggravated by the uncertain legal position of the Burmese in Thailand.

Thai work-class has abandoned certain sectors of Thai industry and in some case left the nation to seek economic opportunities over-seas.

Pursuant to the Immigration Act of Thailand provided for in 1979, section 12 interalia stipulates that "No alien of the following characteristics shall be allowed entry into the Kingdom:

Having no genuine and valid passport or document used in lieu of passport ; or having a genuine and valid passport or document used in lieu of a passport without Visaing by the Royal Thai Embassies or Consulates in Foreign countries ; or from the Ministry of Foreign Affairs, excepting if a visa is not required for certain types of aliens in special instances.

As such, with reference to the aforementioned provision, it is obvious that a legal entry may take place only when an alien enters into Thailand, holding an official passport. Thai government may use the exception under Section 17 of Thai Immigration Act as follows:

Section 17 : In certain special cases, the Minister, with Cabinet approval, may permit any alien or any group of aliens to stay in the Kingdom under certain conditions, or may make conditions, or may consider exemption from conforming with this Act.

However, the term mentioned in Section 17, 'In certain special cases' can be understood as only applicable in regards to some particular cases but not for a generalized sector of society such as migrant workers as a whole. As such, it is

obvious that there is no existing law in Thailand that legalizes the entry of alien migrant workers that existed from their mother land, as origin, illegally.

(1.4) Creation of a Semi-legal Status

According to an unofficial explanation made by the Attorney General Office of Thailand, despite the fact there is no legal mechanisms in place for lawful entrance and exit of migrant workers between the two nations, Thailand has established a semi-legal status for Burmese migrant workers. The good office continued to elaborate that this is because Thailand needs cheap labor source whereas the military junta in Burma is unable to create employment opportunities for its own citizen. The question is to which extent the migrant workers will enjoy legal rights. The labor office of Thai government also explains that the migrant workers may not be arrested by Thai police so long as they keep their registration documents. Other than this, there are no protections secured by this semi-legal status.

The semi-legal status may be acquired by Burmese if they first obtain an employer and then pay a fee of 3,800 Baht which entitles them to work officially in Thailand and receive medical insurance. In return for the fee the migrants receive registration documents which on their production in the presence of Thai authorities will prevent detention or deportation.

The semi-legal status gained through the registration purports to guard against harassment by Thai authorities but in practice it rarely succeeds in doing so. Registered migrant workers find themselves, despite the additional costs of their registration documents, in the same boat as the unregistered workers and equally exposed to discrimination and harassment in Thailand. While the Thai government has crafted a semi-legal status for migrants through regulations they're unclear as to exact status of the Burmese in Thailand and precise rights and protections the process endows to the holders of the registration. Although, the Thai officials have put into place and announced the existence of the registration process it still remains inaccessible in terms of actual paper work and information to NGOs working with migrants and the migrants themselves. Furthermore, due to the constant changes in the government's stance towards the status of migrants it is impossible to predict with any amount of certainty how the migrants' status may change. Also, even though the registration was established at the highest level of government it is put into practice in such varying degrees and forms in different areas that it makes it nearly impossible to understand from a constant overview. In addition to all the difficulties faced by Burmese migrant workers due to lack of legal status in Thailand there exists an added concern that by leaving Burma not through legal channels they might have lost their citizenship

The semi-legal status gained through the registration purports to guard against harassment by Thai authorities but in practice it rarely succeeds in doing so.

inside Burma and thus become stateless individuals. Because there is no legal mechanism between Burma and Thailand for the exit and entry of migrants and the migrants do not posses Passports the SPDC can simply choose not to recognize these persons as Burmese citizens and deny their entry to the country. Also, as it has been mentioned previously some Ethnic groups because of discrimination are denied the recognition of their Burmese citizenship within the country therefore if they leave as migrants and enter Thailand the SPDC can deny their entry and refuse to recognize them as Burmese.

Due to the lack of knowledge about the procedure and the inability to speak Thai it is usually the Thai employer who handles the process and therefore the workers are intentionally kept in the dark about their rights.

Migrant workers are woefully under-informed about the registration process and therefore they are commonly unaware of any benefits or protections they might be entitled to under the procedure. Due to the lack of knowledge about the procedure and the inability to speak Thai it is usually the Thai employer who handles the process and therefore the workers are intentionally kept in the dark about their rights. Although, the workers pay for their registration either upfront or through deductions in their pay they are rarely allowed to posses the original document, which places them at the whim of the employer and exposed to arrest by Thai authorities. Furthermore, in order to obtain registration the worker must first have retained employment and in order to change work location they must accompany their present employer to the labor office. Thus, the position of the worker is reduced to the status of chattel where he/she is merely an object among the inventory of the employer and has no independence separate from his/her employer in the choosing of work locations.

Six Migrant Workers Murder Case

The incident occurred while nine migrant Burmese females, with the assistance of three Burmese males, attempted to find jobs at Mae-Pa village in Maesod township, Tak Province on May 14, 2003.

At about 10:30 a.m., the 12 workers left their home near Mae Sot Ceramic Limited Partnership in Tambon Mae Pa to find a job at UniOcean factory in Tambon Mae Pa (approximately 6 kilometers from Mae Sot). It is a thirty minute walk from their house to UniOcean.

three middle-age Thai men, one holding a long-barreled gun and the other two slingshots, arrested all of them (none of the Thai men was in uniform).

At about 11:00 they arrived at the UniOcean factory and the owner told them that they did not need workers. They then proceeded to Ban Song Khwe about 1 hour walk on a jungle path from the UniOcean factory. At about 11:30, after few minutes walk on the footpath from the UniOcean factory, three middle-age Thai men, one holding a long-barreled gun and the other two slingshots, arrested all of them (none of the Thai men was in uniform). At this point, the migrants were not handcuffed or hit, just taken to a nearby motorcycle taxi stand at the livestock market.

At the taxi stand, the three Thai men asked the 12 migrant workers (in Thai) what they were doing and where they were going. Aye Min, who could speak Thai, responded that they were looking for a job in the wool factory at Ban Song Khwe. The man who carried the gun asked to see their registration cards. Four of them had migrant worker registration cards: Latt Latt Moe, Mar Win, Ma Zer (1), Sandar Hlaing (all female).

The Thai men agreed to release only two females, Latt Latt Moe and Mar Win, and instructed them to find 300 Baht for each of the 10 detained workers. Latt Latt Moe and Mar Win left that area to find the money that the Thai men had asked them for.

As soon as Latt Latt Moe and Mar Win left, the three Thai men forced the remaining party to leave the motorcycle taxi stand on foot for the Ban Song Khwe village's headman's house. The village headman's house is across the street from the taxi stand. Village headman's name is Boss Lun San. The Thai men brought the ten Burmese victims into the house. One of the inhabitants of the headman's house was a Burmese woman, so Aye Min asked them why they had been detained by the Thai men and if they had in fact been arrested. At this point the Burmese migrants in the party were still unclear about what had happened to them and if the three Thai men were authorities or civilians. The Burmese woman living in the house explained to them that the three men were henchmen of the headman, Boss Lun San. She also said that they had been arrested by the men under the authority of the headman Boss Lun San.

She said that if the party wanted to get free, they would have to give money to the headman. The party chose Aye Min to find necessary money. The money needed was now 2,500 baht, effectively bargained down from the original bribe of 3,000 baht. Soe Soe and Ma Zer (1) gave their earrings to Aye Min to sell. One of the village headman's henchmen took Aye Min by motorcycle to Aye Min's room in the workers' barracks behind Mae Sot Ceramic Limited Partnership in Tambon Mae Pa so that Aye Min could find money.

Once at the barracks, Aye Min tried to collect money from other Burmese workers living with her. As the Thai man, accompanied by Aye Min, was not in uniform, his Burmese migrant friends surmised that the Thai man was a drug abuser, not an official. As a result, about 20 Burmese migrant workers attempted to catch the Thai man, holding bamboo sticks and other tools used for construction work. Unable to get on the motorcycle, Thai man started to run away, with the Burmese men and Aye Min chasing behind him. This was at around 2:30 p.m. As the Thai man neared the headman's house with the pursuers chasing, some of the headman's cronies fired 1 or 2 warning shots with a rifle, dispersing the pursuers and sending them back to the factory.

As a result, about 20 Burmese migrant workers attempted to catch the Thai man, holding bamboo sticks and other tools used for construction work.

The cronies tied the 6 migrant workers hands with rope and took them to the area next to the taxi stand, across the road from and in plain view of the village headman's house. The other nine kidnapped Burmese and the village headman were inside the house.

Now with reinforcements, the headman's cronies turned to chase the Burmese migrants. They caught six of the migrants almost immediately, one of whom was Aye Min. The cronies tied the 6 migrant workers hands with rope and took them to the area next to the taxi stand, across the road from and in plain view of the village headman's house. The other nine kidnapped Burmese and the village headman were inside the house.

Then, according to each of the 9 kidnapped Burmese (from inside the headman's house), for approximately two hours the village headman's men and taxi drivers proceeded to intermittently beat the six Burmese men. The kidnapped saw the men bloodied and on the ground but still alive.

Both the kidnapped and a female eyewitness, who were standing at a shop next to the taxi stand, saw green pick-up truck take the kidnapped away. A few minutes later, the eyewitness at the shop also saw a cream-colored pick-up truck arrive to pick up the other six beaten men from the headman's house to an unknown location.

Another eyewitness at the Ceramics factory stated that at about 6:00 p.m, five Thai policemen wearing brown uniforms, four other officials wearing tan uniforms (the eyewitness was unsure whether these officers were from Thai Immigration or were militiamen), and two Thai soldiers wearing camouflage, arrived to the workers barracks at the Ceramic factory, where the 20 Burmese workers had previously attempted to catch the Thai kidnapper. The officials arrived in three pick-up trucks, one of which was an official police pick-up with maroon and white paint.

Some of the police went behind the factory to the workers barracks, returning to the front gate of the factory with 8-10 of the migrant workers who had chased the Thai man to the village headman's house. The witness was one of these men brought to the front gate by the police. Once at the front gate, next to the pick-ups, the witness saw the six men who had been beaten at the motorcycle taxi stand. They were sitting on the ground, handcuffed to each other (Their ropes that they had been bound with initially by the headman's cronies had been switched out for handcuffs). The officials made the workers brought from the barracks sit on the ground facing the 6 beaten and bloodied men. The two groups of Burmese were no more than 3 meters apart.

The Thai authorities paced between the groups asking why the workers had chased the Thai man. Some of the workers, who could speak Thai responded that their relatives were among the women initially kidnapped on the trail in the jungle. The Thai authorities asked more questions. Whatever the Burmese answered the

Thai police beat both groups of men with iron rods and with boots on their heads and bodies. The beatings drew blood. Apparently the authorities beat the six men more viciously than the group brought from the barracks.

Before the authorities released the group from the barracks they took pictures, administered a final beating and told the men that they were to leave the area within 24 hours. The group from the barracks returned to get their belongings and saw that the 6 beaten men were still handcuffed on the ground next to the pickup trucks. When the workers came back with their belongings the officials and the six Burmese men were gone.

That night (almost a full moon) a Burmese worker in the area of the beatings reported that they saw a pick-up truck with armed men pass nearby. They then heard gunshots and saw smoke in the area where the Thai authorities are thought to have brought six Burmese victims.

In the event that those six Burmese victims had been forcibly deported to Burma by the authorities, the victims would have certainly contacted their family members, still living in the Mae Sot area, from Burma. The local police and village authorities also denied their continued detention in any Thai prison.

The Burmese migrant community at the factory and the family members of six Burmese victims in Maesod believe that the Thai authorities already killed the disappeared.

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Names and ages of the six men kidnapped and then killed

1. Maung Maung, 24, unknown address from Burma
2. Min Hein, 28 ,
3. Thein Naing, 33
4. Aye Min, 22, (the only one killed who was a member of the originally kidnapped group)
5. Ah Nge Lay, 19,
6. Ah Nyar Thar, 22,

Kidnapped women and men (subsequently released on the 16th)

1. Ma Zer (1), 22, (female)
2. Ma Zer (2), 19, (female)
3. Soe Soe, 22, (female)
4. Thi Da Win, 16, (female)

5. Sandar Hlaing, 19, (female)
6. Unknown, (female)
7. Latt Latt Win, age unknown, (female)
8. Mar Win, age unknown, (female)
9. Mya Mya Win, 22, (female)
10. Aye Min, 22, (male)
11. Kyaw Zin Oo, 22, (male)
12. Zaw Min, 28, (male)

*** The author is General Secretary of the Burma Lawyers' Council (BLC).**

1 India Act XXXIV, 1920 (9th September, 1920)

2 Burma Act XXXI, 1947 (13th June, 1947)

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Political Offences in Burma

B.K. Sen

Introduction

This publication is produced for the purpose of raising awareness of the legal situation regarding political prisoners in Burma. Around 1100 political prisoners are being detained in Burma under various political offence laws. Burma has a long history of the use of political offences, and a number of these are still on the statute books from the days of British colonialism, such as the offence of high treason. These have also been supplemented by the SPDC's political offences laws, such as the State Protection Law. This publication provides details of the political offences under which prisoners in Burma are detained, and then discusses and critiques these laws. The present political atmosphere is impelling for analysis as to how the legal measures /laws are adopted to control legitimate political activities in the name of political offences. The conceptualisation and categorisation of political offences are necessary in view of the fact that in Burma they have been extensively used to suppress dissent. The publication attempts to document trials in terms of their legal proportions or in terms of the history of the judiciary It is to use them as instruments in the study of larger socio-political trends of history It is also a record of how Burma's Bar was bred, how lawyers were intimidated and judges employed in their approaches, the machinations and manoeuvres that led to the trials, proceedings of cases manipulated

The concept of "Political Offence"

Since the dawn of time, political trials stand out as landmarks in man's quest for truth, freedom and justice. Trials have been used for political ends by persons in power, as well as those who seek power or accountability from wielders of power. Political trials are staged to signify the establishment of a new order by usurpers of power in order to establish their legitimacy. History bears witness that whenever the ruling powers took up arms against truth and justice, the court rooms

served the most convenient and plausible weapons . For a tyrannical and repressive government, there is no better weapon for wreaking vengeance and perpetrating injustice. Next to the battle fields, it is the court rooms that some of the greatest acts of injustice in the history of the world have taken place. Holy personage like Jesus Christ was made to stand trial with thieves before a court. Socrates was sentenced to drink poison as he was the most and truthful person in his country

"Political offences" are essentially a legal mechanism by which the state justifies punitive and preventive action against individuals who it deems to be a threat to its function or authority. Laws prohibiting political offences have at their heart a justification for state action against individuals for a perceived threat or dissent against state control. It is a method or instrument in the hands of the government of a state to impose its will and to compel others to exercise restraint or to curb activities or prevent flourishing or spread of certain activities. A key feature of these laws is their vagueness, which allows their capricious and arbitrary use against citizens. Internationally, political laws have been classified at times as offences for which extradition is not available, due to the international practice that political offenders shall not be extradited. However this is of limited use in analysing the nature of particular political laws, particularly in a country such as Burma.

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International Dimension

International concern for political offences is presented by two facets. The first one, arises mainly from Western international practice that political offenders shall not be extradited. but the absence of an internationally approved criterion has led to wide variation in the response of various states to the request for extradition. The second facet is presented by the fact that there has been intervention of international law to declare certaion offences to be non-political and extraditable, some instances of which are hijacking, war crimes and genocide.

This international concern, it is submitted, is the outcome of an apprehension that any political motive whatsoever may lead some state to refuse extradition of offenders who deserve punishment after proper trial. Such test of motive, it is needless to say, puts the fugitive offenders at some advantage as against the state which makes a request for extradition and which has to prove that alleged offence is non-political. The courts of law before which extradition proceedings are conducted would perhaps rely on the statements of the fugitive as to his motive which prompted him to commit the offence he is allegaed to have committed.

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Another complication to this problem has been added by the development of the concept of "relative political offecnes", which are regarded to be ordinary offences so inextricably linked with political motive that its political character is

considered to be dominant. In reality, this has the effect of widening the categories of political offenders, who shall not be extradited, and thus accentuating the problem of controlling political offences at the national level. There are, however, understandable reasons as to why political offenders are generally extradited. Firstly, international community is not apolitically organized society. Every state; whether big or small, is a sovereign independent country free to conduct its policies to its own desire. It is natural, therefore, that a political offence, which is of gravest concern to a state against whom it is perpetrated, is looked upon differently by other states. Thus, in the past extradition has sometimes been denied even in respect of offences which are ordinarily extraditable.

Secondly, there is an absence of common cause between states so far as political offenders are concerned. An offender who is a positive danger to state A may not be so to state B. In other words, a murderer, for gain, may continue to do so in another country but a political offender accused of murder in his own state may not have any reason to repeat the offence in the state of his asylum.

Thirdly, political offences affect the sensitive desire of the demanding state for peace and security and it is natural, therefore, that a passionately hostile atmosphere often awaits a fugitive offender if he is extradited. It is natural therefore for the asylum state to suspect that a person accused of political offence would not be treated fairly if he is surrendered to the requesting state and since it is difficult and highly embarrassing for a state granting extradition to ensure fair trial to such offender by the requesting state, political offenders are not extradited as a general rule.

Fourthly, extradition of political offender is denied by the state of asylum because of its belief in human rights and personal political freedom. In other words, it is the asylum state's sense of human treatment that comes in the way of granting extradition.

As regards the second approach, namely, the intervention of international law to declare certain offences to be non-political and hence extraditable, this is more an outcome of the bitter experiences of the Second World War when some military powers or those acting on their behalf indulged in inhuman activities to the utter disregard of all those values of kindness and morality which the international community ought to hold dear to its heart. Crimes against humanity, more particularly 'genocide' and 'war crimes' are instances of this nature.

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Distinguishing Features of Political Offence from Sociological Perspective

The absence of self interest, and emotion in political offences distinguishes them

from traditional offences where these elements are present. A true political offender, it is said, does not work for himself alone. He has no malice in the sense in which the word 'malice' is understood in conventional offences. He wants a change in the political system so that what will arise out of that change will be more conducive to the well-being of the people in general. It is not unnatural, therefore, that a political offender of today may well become a hero or a saint of the yesteryear.

In most cases it is also true that a political offender seeks maximum publicity of his deeds or misdeeds so that other members of the society could understand him and his objectives better. In contrast to this, perpetrator of a conventional offence seeks to maintain utmost secrecy of what he has done in order to avoid arrest and punishment.

Another difference between political offences and other conventional offences is that the former affects the state itself or the political system that is sustained or maintained by the state, while the conventional offences mainly affect one or more ascertainable individuals in a society, though the state may also be indirectly affected.

Then again, what distinguishes a political offence from other conventional offences is the relative case with which the objective of the former could be ascertained. In the latter, it is only after a detailed investigation or trial that the objective or the motive of the offence could be established.

It is generally acknowledged that law is the formal expression of the value system of the prevailing socio-political power in a state and that so long a given socio-political power prevails in a state, its moral system is right and must tot be attacked beyond certain limits. Political offences affect the aforesaid value system to a far greater extent as compared to conventional offences and in this sense no self-respecting state will tolerate the perpetration of such offences which could jeopardize the value system which is sustained by it. However, this does not preclude one from acknowledging that political criminals are very often the most powerful source of shaping human society.

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Categories of Political Offences

When we think of categories of political offences what we seek to determine are the offences which could be classified as political within our legal system. In the light of the criterion laid down 'Waging of War' against the Government inclusive of mutiny or military rebellion of a certain magnitude, any abetment or preparation to wage war and any attempt to wage war ought to be regarded as political since any major-scale war or rebellion will have the natural consequence

of undermining the authority of an existing Government and endangering the security of the state.

The other political offence will be that of sedition in its traditional sense of causing disaffection, or an attempt to cause disaffection against the government. Needless to say that successful seditious activities may not only lead to a disturbance of law and order but even to a rebellion or civil war by those who owe an allegiance to the political authority of a state. In a sense, seditious activities amount to preparing citizens to wage a war or to rise in rebellion against the government and hence there cannot be any doubt about its political nature. Attempts to instigate a military rebellion will be a political offence since it is only a form of sedition.

The third political offence will be that of 'espionage' since successful espionage activity directly affects the government and endangers the security of its territorial jurisdiction.

Other categories of political offence are that of disruptive activities and terrorism, including hijacking of aircraft, where offences are committed with some political motive either of carving out a state out of the territory of an existing state or to compel a government to act in a way prejudicial to its interest. Besides this, large-scale counterfeiting of currency of a state, if resorted to with the motive of jeopardizing the economy of that state and weakening its government, may also be classified as a political offence.

Modes of Controlling Seditious Activities of Political Nature.

Political prisoners in Burma - a breakdown of the particular offences of which prisoners are convicted

(1) State Protection Law
(2) State Prisoners Regulations Act
(3) Unlawful Association Act
(4) Emergency Provisions Act 1950
(5) Printer and Publisher Act
(6) The Law protecting the peaceful and systematic transfer of state responsibility and the successful performance of the functions of National Convention against disturbances and oppositions
(7) Penal Code - High treason (121/1= 53 prisoners)
(8) Penal Code - other offences
(9) Official Secrets Act
(10) Seditious Meetings Act
(11) Other laws

Also note that nearly 800 MPs and NLD organisers have been detained in recent years in "Government Guest Houses".

State Protection Law	= 19 Prinsoners,
Total under 5J (Emergency Provision Act)	= 703 Prisoners
Penal Code - High treason 121/1	= 53 Prisoners
Others	= 325 Prisoners
Total	**= 1100 Prinsoners**

Analysis of the above political offences

For each law:

- History of the law
- Elements of the offence, and possible defenses
- Discussion of the major cases, convictions and sentences
- Comparison with relevant laws from other jurisdictions
- International comment and criticism

For lack of space, only a few of the laws under which political prisoners have been convicted have been taken up for discussion, they are sufficient to understand the pattern of the laws under which generally the political prisoners have been convicted

Brief History of Pre-Independence Preventive Detention Laws of Burma when it was part of India.

The first instance of preventive detention of a person by executive order is traceable in the East India Company Act, 1780, but an Act of 1784 of the same title was more comprehensive. Besides the use of preventive detention for persons whose activities endangered the security of the state, the Governor General was empowered to secure and detain any person or persons suspected of carrying on correspondence or activities prejudicial or dangerous to the peace and safety of the British settlements or possessions in India. The aforesaid Act nevertheless allowed the detenue the right to know the charge against him within five days and of putting up a defence before the Governor General in Council of Fort William. He was allowed to produce evidence and cross-examine witnesses. The other presidencies were also given similar powers within their jurisdiction.

The power of detention and arrest without trial was provided for in various subsequent Acts such as the Bengal Regulation of 1912, The Bengal State Prisoners' Regulation of 1818, the Madras State Prisoners Regulation II of 1819. The Bombay

State Prisoners Regulation XXV of 1827 and the State Prisoners' Act 1850. A prisoner under these regulations had no right to request the court for a writ of *habeas corpus* the Bengal Regulation had intended permanent suspension of *habeas corpus.* Notwithstanding this, the detenue had the right to make a representation in his defence and the right of *habeas corpus* was also conceded in 1882 through section 491 of the Criminal Procedure Code.

After the First World War, i.e., 1919 onwards, an effective movement for independence had already begun in India followed by more and more stringent legal measures. Though the Government of India Act 1935 did not specifically refer to preventive detention, nevertheless section 57 of the said Act conferred wide powers on the Governor to take active measures against political offences. For instance, section 57(1) provided that if the peace or tranquillity of a province was endangered by the operation of any person committing, or conspiring, preparing or attempting to commit crimes of violence which, in the opinion of the Governor, were intended to overthrow the government as by law established, the Governor could act and take any action at his discretion. Obviously then, the powers of the Governor were wide enough to include the imposition of the measure of preventive detention. Further it is borne out clearly from the provisions of section 102(1) of the Government of India Act 1935, that during the proclamation of emergency by the Governor General under circumstances when the security of India was threatened, whether by war or internal disturbance, the Federal Legislature could enact laws for the whole of India with respect to any of the matters enumerated in the provincial legislative list or to make laws for a province or any part thereof, with respect to any matter not enumerated in any of the lists in the Seventh Schedule to the Government of India Act 1935. Such exercise of residuary powers could well have included the imposition of the measure of preventive detention. The measure of preventive detention for preventing political offences was introduced in the Defence of India Act 1939, section 2 of which empowered the Central Government to make rules and in Rule 26 so framed, both the Central and Provincial Governments were authorised to detain a person preventively with a view to preventing him from acting in any manner prejudical to the defence of British India, the public safety, the maintenance of public order, or the efficient prosecution of the war.' Similarly, an authorised officer of the government, whether Central or Provincial, had the power to arrest and detain without warrant any person who was suspected of assisting an enemy state or acting in a manner prejudicial to public safety or to the efficient prosecution of war or in any manner calculated to foment rebellion against the authority of the government. However, no person was to be detained in custody for a period exceeding fifteen days without the order of the Provincial Government and that no person was to be under preventive detention for a period exceeding two months. Similarly the Defence of Burma Act 1939 was passed after Separation of Burma from India.

an authorised officer of the government, whether Central or Provincial, had the power to arrest and detain without warrant any person who was suspected of assisting an enemy state or acting in a manner prejudicial to public safety or to the efficient prosecution of war or in any manner calculated to foment rebellion against the authority of the government.

The Defence of India Act, 1939 was passed at the initiation of the Second World War and Rules were framed thereunder, but section 491 of the Criminal Procedure Code of 1882 continued to be in the statute book and the courts of law were reluctant to give up their power to issue the writ of *habeas corpus.* In 1944, the Government of India issued an ordinance specifically taking away the powers of the court. Notwithstanding this, the courts could still order the release of a detenue on grounds of malice in fact, or malice in law, non-fulfilment of the requirement of the satisfaction by the prescribed authority. Defence of Burma Act 1939 was similarly passed to suppress political activities which swept Burma.

Defence of Burma Act 1939 was similarly passed to suppress political activities which swept Burma.

At the close of the Second World War the Defence of Burma Act ceased to operate. However, ethnic and communist activities impelled the Government to adopt its own Preventive Detention Act to deal with such matters as law and order, public security, public safety and maintenance of essential supply and services. The Public Order Preservation Act 1950 was passed by the parliament.

It is needless to say that in countries like Australia, Canada, England and U.S.A. preventive detention is not resorted to in times of peace, but this is so because such countries have stable democracy through several decades. The situation in newly independent countries of Asia and Africa are entirely different. Thus Burma, India, Pakistan, Malaysia, Singapore, Ghana etc. are instances of such countries where preventive detention has been constitutionally permitted in times of peace as also of war and emergency.

The experience of the newly independent countries and the possibility of communist subversion and communal strife had impelled the framers of Constitution to empower the Parliament of India to pass preventive detention laws even during times of peace. The need for the provisions of preventive detention even in times of peace arose in order to meet either the threat or actual incidence of internal subversion, external aggression or even to deal with such anti-national elements as were strong enough to disrupt the peaceful life of the society and even to jeopardise the existence of the prevailing form of government. The object of the Public Order Preservation Act (also known as POPA) was to provide for detention with a view to preventing any person including a foreigner from acting in a manner prejudicial to the defence of, the relations of Burma with Burma foreign powers, the security of Burma or the maintenance of public order and the maintenance of supplies and services essential to the community. Barring the last two objects, namely, maintenance of public order and supplies and services essential to the community, the former objects of the Preventive Detention Act have close relation with the prevention and control of political offences. The detention order could only be passed by the Central Government. Although the

Act was presumed to be a purely temporary measure, it was extended from time to time till it lapsed after military coup by New Win.

Preventive detention laws were revived in the form of Emergency Provision Act envisaged preventive detention by the Governments on the same grounds as those of Preventive Detention Act, 1950. It was replaced by an State Protection Law of the same nomenclature and it was subsequently amended to make it more effective by limiting the scope of judicial review which had the effect of nullifying numerous decisions of the courts in which detention order had been struck down on the basis that one of several grounds of detention was found to be vague, non-existent or unconnected with the grounds of detention supplied to the detenue.

General Principles of Law of Preventive Detention

It is generally the superintendent of police or police officers acting under his supervision who makes preliminary investigation and submits his recommendation along with history sheet of the proposed detenue to the Commissioner of Police. Such officer, if he is satisfied, makes necessary order and thereafter he is under an obligation to submit the case to his government for approval Obviously, this gives the highest executive authorities of the concerned government an opportunity to determine the necessity for detention and its legal justifiability. In a sense, this is a safeguard against arbitrary detention in those cases where the initial decision for detention has not been made by the highest executive authority. There is no obligation on the part of detaining authority to supply the detenue with grounds on which detention order has been made and to provide him earliest opportunity of making a representation against the order of detention to the appropriate government.

The so called extra judicial safe guard against arbitrary detention is the requirement that the government concerned will constitute an advisory board. A detention order approved by the government has to be submitted to the advisory board by the concerned government. The ground of detention along with representation, if any, made by the detenue and, where the order has been made by an officer other than the secretary of the Home department, also the report by such officer are to be placed by the government before the advisory board. The advisory board has to submit its report to the appropriate government. No law providing for preventive detention can authorise the detention of a person for a period longer than fixed months unless an advisory board opines that there is sufficient cause for such detention. Even when the detention is continued upon the advice of an advisory board, the same will not authorise the government concerned to

extra judicial safe, guarsl against arbitrary detention is the requirement that the government concerned will constitute an advisory board.

detain a person beyond the maximum period that may be prescribed by any law on preventive detention.

The members of the advisory board are three in number and they ought to be competent to be the judges. The advisory board is not only a reviewing body and its nature is not judicial. It has the power to ask for all matters and details relating to-the detention. The board may grant personal hearing to the detenue on its own and it is under an obligation to do so at the desire of the detenue. The detenue has, however, no right to be represented by a lawyer. The government concerned confirms the detention order, if the advisory board considers the detention justified, otherwise, the detenue is released.'' The board has nothing to do with the length of detention. It is the government which decides upon the length of detention within the maximum period prescribed by the law.

In the event of revocation or expiry of a detention order, the government has the power to issue a fresh detention order, provided fresh facts have arisen after the date of revocation or expiry and the government or an officer as the case may be, is satisfied that such order should be made.

(1) The State Protection Law

This is the most obnoxious Law not only in Burma but throughout the World. The Junta abrogated the 1947 Constitution in 1962 when it seized power in a bloodless coup. The Constitution had a provision for habeas corpus enabling anyone to move the Supreme Court against arbitary arrest. This is a time honoured right in all civilised countries given to petition the highest judiciary in order that state's power to imprison any person arbitrarily without trial can be questioned. The State Protection Law succinctly expounds how the Executive has been vested with enormous arbitrary power notwithstanding the fact that it has its own judiciary subjugated by its political systems.

The Provision of the State Protection Law analyzed section by section

S2 (a): The definition of the workd "act", the main ingredient of the offence prescribed by the Law is totally vague. It may mean anything. It has been made worse by inclusion of "to act" "preparation". This word is the core word in s7, which empowers the Board of Ministry to impose restriction on individual's rights. If I say, that the government should improve the conditions of hospital, that saying "act" may be interpreted as posing danger to public order. Compared this with the explanation 2 & 3 of S 124 A of Penal Code, it is obnoxious.

Explanation 2: Comments expressing disapprobation of the measure of the Government with a view to obtain their alteration by lawful means, without exciting of attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section. Explanation 3: Comment expressing dis approbtion of the administrative or other action of the Government, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

S 7 of State protection Law has abrogated these explanations. When Law is promulgated, explanations in footnotes as in S 124 (A), Penal Code are added to prevent any misconstruction. S 2 (A) of State Protection Law has deliberately made it confusing.

S 3 of the Law——Refers to Council of State

S 4 of the Law——Refers to Pyithuhlutaw. (People Parliament)

With the coming of SLORC, the above two ceased to exist. If Council of State means SPDC, what will Pyithuhlutaw mean? More over the legal implication is different. Council of State is creation of 1974 Constitution. So what is substituting what?

S 3 of the Law is important and can be constructed as preamble of the Law. It says about the powers to declare emergency. The Law therefore is conceived in the context of Emergency. No Emergency has been declared. Admittedly according to SPDC, peace and law and order prevails. The regime has therefore styled itself as State Peace Development Council.

preamble of the Law. It says about the powers to declare emergency.

.....

No Emergency has been declared.

S 3 : "pre-emptive action in order to protect the State's sovereignty security, and public law and order from the possible dangers of those seeking to sabotage and damage them, without affectig the fundamental rights of the citizens."

What is state's sovereignty and security? The detainees were not involved in any public demonstrations or strikes or were arrested with any arms. It has nothing to do with enforcement of law. Only fear that something may happen to disturb the rulers led them to invoke the State Protection Law. If the fear had some substance, then surely the detainees would have been put up for trial. But there was no evidence. They knew the trial would be a farce. Even though they have their own judges to convict the detainees on in insufficient evidence, they dare no risk. The only way to make the process watertight was to keep the detainees under protective custody.

Burma Penal Code provides actions, which are violence-related activities, which constitute breaches of public order. Perpetrators of violence, which hit specific provisions of the Penal Code, are Rioting(S 146), Assault (S 351), Murder (S 300), Incitement (S 153), High Treason (S 121).

The Heading of Chapter 2 says restriction on fundamental rights. The Law spells out the condition to take action in that context. It is therefore argued that there must be a prior proclamation of Emergency to give validity to rest of Law and enable enforcement of the mechanism for preservation of sovereignty, state and public order S 7, the rock bottom of the Act. Further the restriction clause 9 (2) is to be read in accordance with the principle of natural justice. It means that meaning of a sub-clause in a section has to be gathered from the main provision. The main provision of section 3 is emergency. Emergency having not been declared the entire Law stands inoperative.

It is therefore argued that there must be a prior proclamation of Emergency to give validity to rest of Law

S 7 : "If a citizen has performed or is performing or is believed to be performing an act endangering the state sovereignty and security, and public law and order," "act" "if reason to be believe " if the "act" has been done or is being done or will do and there is "reason to believe", then restriction can be put. What is meaning of "reason to believe" is stated in s 26, Penal Code. A person is said to have reason to believe a thing he has sufficient cause to believe that thing but not otherwise".

When there are true facts, there can be reason to believe. S 3 of Evidence Act explains what is fact. Non-violent opinions are facts within its meaning. Whether the facts are true or not, can be varified only when they are tested. For example the accused person is given the opportunity to explain the charges against him or to test that the facts alleged are admissible or not, or whether concocted or whether the facts could come within the principle of "benefit of doubt". The fundametal principle in criminal law is presumption of innocence. Only when there is hard evidence beyond reasonable doubt, can a person be said to have committed an offence. Under this section, there is no standard prescribed to determine "reason to believe". It is the whim or wish of the punishment giver to decide it. How critical it is that the detaining authority is given the absolute power of detention under a supposed law, which is no law. The arbitrariness is manifest. Law prescribes that to prove offence, burden of proof an alleged offence is on the person who alleges. By detention and avoiding trail, the SPDC circumvents its legal duty to discharge burden of proof.

The fundametal principle in criminal law is presumption of innocence. Only when there is hard evidence beyond reasonable doubt, can a person be said to have committed an offence. Under this section, there is no standard prescribed to determine "reason to believe"

S 9 (e): "accuse" "if sufficiency of fact / evidence"

It is argued that "if insufficiency of fact / evidence" shall not be accused" - the

person has to be released. not kept. under detention-no where this appears. In the absence of provision, priciple of natural justice applies....What cannot stand trial i.e. insufficient evidence, how can it be given legality by alternative of detention? This is a case of absurdity. Insufficiency of evidence being given a premium to hold a person's liberty to ransom.

S 9 (h): It says that arrested person after his release cannot be put under arrest for a second time on same matters. Extension of detention is prohibited. This also includes cases where the term of arrest expires but not released. Min Ko Naing Case.

S 11: "move"- travel ban. (Daw Aung San Su Kyi)

S 14: Enhancement from 6 months to 1 year. Maximum from 3 yrs to 5 yrs.

S 16: Provide Review (periodically) by detainer.

S 19: Right of review from "Head" to "Head" - Same authority to review its own decision. Accused not even informed of the right.

S 21: Right of appeal has been given to People's Judges. Council Law 11/93 abolished Article 21. The situation therefore is that there is no effective remedy at all which is contrary to Article 8 UDHR. "Everyone has the right to an effective remedy by the competent national tribuals for acts violating the fundamental rights granted him by the constitution or by law."

The law has to be taken into account together with its context. The context was that it was passed by Parliament of BSPP and the lawmaker of that Law provided right of appeal to Judges as integral part of the Law.When the integral part is torn out, the law itself is vitiated . It is argued that amendment 11/91 has rendered the Law invalid.

A Law to be a Law in its universally accepted sense has to be enacted by a body, which represents the will of the people. This is the main characteristic i.e. acceptability by people. SPDC as demonstrated by 1990 Election was voted out unacceptable. The military coup September 1988 founded the present regime on force. Its lack of legitimacy was further demonstrated by 1990 Election. It is this regime, which is extensively using the -State Protection Law.

The law has to be taken into account together with its context. The context was that it was pass by Parliament of BSPP and the lawmaker of that Law provided right of appeal to Judges as integral part of the Law.

The Internal Security Act, Malaysia provides detention for 2 years. Same with Singapore, India and Bahrain. In Bahrain, the detention order is subject to appeal

to High Court. In the event the detainee refuses to seek remedy, the prosecutor general has to do it. In India the order is appeasable to High Court, Supreme Court and Human Rights commission. The underlying principle is to make the Law as least Penal as possible. In Burma the situation is just reverse. Law has been made harsher. From initial detention period of 3 yrs it has been extended to 5 years. From right of judicial appeal, the provision for judicial review has been revoked. There is no effective remedy. Detention now is a continued process for any number of years even till death. It is an inverted death sentence without charge and without trial. 2 cases: Si Thu (aka) Ye Naing was in Tharawaddy Prison Aung Kyaw Moe was in Tharawaddy Prison too. Both of them died while under detention.

Case Study

There are 50 cases available, which are mollified and absolutely arbitrary within the ambit of the State Protection Law in as much as the original terms, under which the prisoners were undergoing, had expired. Having served their sentences, the current detention is under the extension period exercised under Section 21 of the State Protection Law. All have completed the 10 year sentences and are being held under Section 10 (A) State Protection Law.

Out of 50 cases, the cases of the legendary figure Min Ko Naing and Daw Aung San Su Kyi , the valiant prodemocracy leader have been selected for detailed analysis in the report as a focus.

Daw Aung San Suu Kyi has spent total 10 years in home arrest out of 16 years of her stay in Burma from 1988. The last house arrest expired on Nov 2005 but it was again extented for 6 months.

Min Ko Naing has been released after 16 years of imprisonmet out of which 6 years were under State Protection Law.

Min Ko Naing

Detention absolutely arbitrary because:

1. SPDC, detaining Authority has no legality. It is a regime based on no rule of Law or Constitution for the last 14 years. Its forced seizure of power does not stand the test of International Law. The "doctrine of necessity" has ceased to operate due to flux of time and due to the Election it held in May 1990. The Election was a massive demonstration of people to end the military Rule. The SPDC prior to holding Election made public declaration of multiparty democ-

racy and its intention to transfer power to the elected representatives of the people. The Election having been held, SPDC became functus-officio except the duty to convene the Parliament. In such a context, SPDC's wielding power under State Protection Law is not only highly arbitrary but also immoral. Any law passed by such a regime without legal basis is invalid.

2. According to response of SPDC sent by UN 22- 10- 2001. Min Ko Naing was convicted under S 124 Burma Penal Code and 17 (1) Printing Act. Prison term expired in July 1999. He was placed under detention thereafter under State Protection Law. This detention is totally illegal. If he was to be put under further detention, it could have been done only after releasing him and on fresh evidence of his illegal activities during the period subsequent to his release. A prisoner who is in prison cannot be inflicted with punishment under State Protection Law, which requires evidence "acts" for detention. Infact, by continuing to keep Min Ko Naing in prison after he has served his term, the Authority virtually nullified the order of commutation to 10 years, which it had passed. The continued indefinite detention can ironically extend up to death of the prisoner. It is a tragic case of a prisoner subjected to death sentence without trial. It is hard to imagine. how obnoxious it is..

3. Min Ko Naing is in prison from 23- 3- 1989. Present detention order was on 21st July' 1999. That is when he is in prison for 15 years with hard labor. During this long period of being in prison, how could he have committed "acts" which constitute grounds for detention under State Protection Law. The absurdity of the situation adds to the degree of the arbitrary action. It is reported that Min Ko Naing has been kept under detention from 21- 7- 1999 under S 10 (A) State Protection Law. The issue is simple. Could it be done? It violates S: 9(h) of State Protection Law, which prohibits extension. Further the extension has been made for alleged subversive activity against the State. How can a person who has been in prison from 23- 3- 1989 till 21- 7- 1999, do anything to warrant further detention. Through out this long period with no contact with outside world being practically kept in solitary confinement, with broken health, it is inconceivable how such allegation could be made. The allegation is patently false, devoid of any sense. The detention squarely comes under the category of arbitrary detention as discussed above.

During this long period of being in prison, how could he have committed "acts" which constitute grounds for detention under State Protection Law. The absurdity of the situation adds to the degree of the arbitrary action.

The analysis here is confined to State Protection Law.
The laws Emergency Provision Act (1950), Unlawful Association Act, fair trial, due process of laws and other abuses, which Min Ko Naing suffered, have not been made subject matter in the above analysis as .he has already served his term under these laws and criticisms of these laws are available elsewhere in this report and also from different sources. The focus here is on State Protection Law under

which Min Ko Naing is prime victim. The domestic Law namely Penal Code, Criminal Procedure Code, SPDC's own law of reduction of 10 years, the Jail Manual all have been flouted. He is not even an NLD leader. He is student crusader of human rights. SPDC should put its head down in shame when such a dedicated person is depicted as villain, a threat to the State.

Daw Aung San Suu Kyi

Daw Aung San Suu Kyi is presently kept under house arrest since 22nd September' 2000 without trial on grounds of alleged breach of travel ban Sectionl 1(c) of the State Protection Law (1975)".

She is a citizen exercising her human right of freedom of movement UDHR "Article 13".

Secondly she is the leader of a political party duty registered by the SPDC. Her party NLD contested Election 1990 with land slide victory. The Election was held by SPDC and results announced by SPDC's head of the Party acclaimed by the people. It is incumbent on her part to meet the people and her party workers to honor the mandate given to her...Freedom of association and assembly., freedom of expression and political freedom are rights guaranteed under UNDHR. .Daw Aung San Su Kyi was exerting her human rights when she went out on travel., The fact that her Party was not banned is further evidence that there was no threat to the State The SPDC has no legal authority to invoke SPL. If these had been breaches of Law, she could have not put up in a trial where they could put up defense. The punishment that SPDC has given to defenseless person, a woman and an internationally famed personality, is barbaric. As head of the party acclaimed by the people, it is incumbent on her part to meet the people and her party workers to honor the mandate. Freedom of association and assembly, freedom of expression and political freedom are rights guarantees under UDHR.

The action under S11(c) is to be read with S 10

In other words traveling is an " act endangering state sovereignty and security and public order." If that be so, the UDHR provision is a fraud. Under S 10 (a) State Protection Law, a person has to be a " potential danger to the state". Suu Kyi cannot be "potential danger" as is now evidenced by the talks that SPDC carried on with her. It could be that she wanted implementation of 1990 Election Result but that could not be constituted as being " potential danger " to the state. It is a clear case of a politically motivated detention of a political opponent.

Travel ban itself is illegal and noncompliance of the order cannot constitute " breach" of law, far less a punishment of indefinite detention. The travel ban is a

total defiance of Rule of Law Under Art 5 UDHR. The punishment is in human and degrading.

To sum up, Suu Kyi 's house arrest is grossly arbitrary for among others, the following reasons. Torture is defined according to the convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as:

> *"…….. any act by which server pain or suffering whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."*

1. The detaining Authority is SPDC. It has lost its legal authority to detain as it had lost the Election Under 1990 Election held by SPDC, Su Kyi's Party (National League for Democracy) came out with massive mandate. The SPDC became functus officio except that it was to convene the people's parliament. Instead of that it has made law unto itself. Detention is not only arbitrary, it is absolutely malafide and politically motivated to ensure remaining the country's rulers.
2. There is no legal basis for their detention after the sentence has been served. Article 10 (B) " the accused shall be detained up to one year "; Su Kyi was put under restriction on September 2000. One year period has expired. Yet she is kept under restriction. This is simply illegal.
3. Detention is contempt of political/ human rights ideas proclaimed in Article 9 of UDHR.
4. Detention has denied the right of fair trial enshrined in UDHR. The detention is malafide and renders it in an arbitrary character.
5. They have not been detained for any opinion or expression. Nor for any peaceful activities or for violence related activities which are threat to state. SPDC did not specify the violence related activities.
6. All issues of detention, trial and release are determined by due process of law. The penal code says that there is no arrest without warrant and criminal procedure code has the requirements. The State Protection Law is a clear case of scrumptious circumvention of due process of Law. It says a person is to be brought before Court within 24 hours, then remand for 14 days.
7. There is no provision for representation at review and Judicial review.
8. Contrary to Article 13 and Article 21 (3) of UDHR
9. The working group (UN) held that previous detention (20th July 1989 to 1995) was unlawful and arbitrary. This precedence lends support to the argument that the present detention was malafide.

Detention has denied the right of fair trial enshrined in UDHR. The detention is malafide and renders it in an arbitrary character.

10. The detention constitutes "torture" defined above.
11. The most important point is that the term of Daw Suu Kyi's detention period has expired .She was put under house arrest in September 2000.Under Section 11(3) of the Law there can be only 1 year house arrest; it cannot be extended .The present detention is beyond 1 year and is absolutely illegal.)

(2) State Prisoners Regulations Act

There is a law called State Prisoners Regulation Act 1890. It is still in force although passed in colonial days. The object of the law is to put in detention in prison those freedom fighters against whom colonial rulers could not put op a criminal case for lack of evidence.

Read: State Prisoners Regulation-
Preamble 1:
Whereas reasons of State, embracing the due maintenance of the alliances formed [with foreign powers and the Union of Burma] and from in term commotion, occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, for other reasons be unadvisable or improper;

and whereas it is fit that, in every case of the nature herein referred to, the determination to be taken should proceed immediately from the authority of the President of the Union; and whereas the ends of justice require that, when it may be determined that any person shall be placed under personal restraint otherwise than in pursuance of some judicial proceeding, the grounds of such determination should from time to time come under revision.

It squarely classified such prisoners as political prisoners. The present State Protect Law has some resemblance to the "State Prisoners Regulation Act. But, there is a fundamental difference.

It squarely classified such prisoners as political prisoners.

Read: State Prisoners Regulation Act –
Section 4:
When any State Prisoner is placed in custody, the President of the Union will instruct a Judge or some other public officer, not being the person in whose custody the prisoner is placed, to visit the prisoner at stated periods and to submit a report to the President of the Union regarding the health and treatment of the prisoner.

Section 10 (a): of State Protection Law given above.
In both the case although admittedly no" offence" has been committed, the vic-

tim are political prisoners without conviction. Ironically, there is "sentence"- the detention in prison although there is no conviction. Criminal justice system prohibits sentencing without conviction.

This law has not been put into use because the SPDC will recognize a class of prisoners as political if they are put in prisoner under this Act. According to SPDC perception, all prisoners are criminal although it is motivated by political reasons to put them in imprisonment.

(3) The Unlawful Associations Act 1908

Overview

This Act provides that the President of the Union of Burma may make a declaration that a particular association is an "unlawful association". Such a declaration may be made if the President is of the opinion that the association "interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace" (s16). A wide range of consequences flow from the notification of this declaration, including liability for imprisonment and fine for people promoting, organising or assisting the association. The declaration also enables search and seizure of property, eviction from premises and disposal and forfeiture of property.

The Act has very serious consequences for those affected, and inadequate procedural rights to prevent abuse, particularly regarding the manner in which a declaration is made.

An unlawful association

Section 15 provides that an unlawful association is one which:

- encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or
- one which has been declared unlawful by the President of the Union.

The Declaration

Section16 of the Act sets out the circumstances under which the President may declare that an association is an unlawful association. He must be of the opinion that the association:

- interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that
- it constitutes a danger to the public peace.

No limitations are placed on this power to protect political parties, NGOs or any other civil society organisations. The SPDC has used this power to declare a range of groups to be unlawful associations, and it seems that the cease-fire groups or, in fact, the NLD would fall within its ambit if the junta chose.

Recently some more organizations have been alelared illegal:

1. NCGUB (National Coallation Government of the Union of Burma)
2. ABSDF (All Burma Students Union of Burma)
3. SSA (Shan State Army)
4. FTUB (Fedaration of Trades Union of Burma)

Breadth

(a) Imprisonment

s17(1) of the Act provides that imprisonment of at least two years and no more than three years, plus liability for a fine, will be the punishment for any person who:

- is a member of an unlawful association, or
- takes part in its meetings, or
- contributes, receives or solicits any contribution for the purpose of the association, or
- in any way assists the operations of the association s17(2) provides that imprisonment for at lease three years and no more than five years, plus liability for a fine, will be the punishment for any person who:
- manages or assists in the management of the association, or
- promotes or assists in promoting a meeting of the association or any of its members as members.

This is a law which casts a very wide net, affecting persons who "in any way assist" the operations of an association of people. Presumably assisting "in any way" could conceivably include such things as printing documents or delivering messages, even preparing food for a meeting. There is no limit set on the type of assistance that is forbidden, so it would seem that this section could apply to any type of help at all.

A further factor which makes it a very broad provision is that no requisite intent is set out. The assistance that is prohibited is not required to be given "knowingly", or with the intention of assisting an unlawful organisation. Any defence of this nature would have to be raised from the provisions of the general criminal law of Burma. An explicit acknowledgement within the statute that the requisite intention is required would provide a safeguard, particularly given the very wide scope of the words "in any way assist".

(b) Eviction

Section 17A(1) provides that the President of the Union may notify that any place is used for the purposes of an unlawful association. This is referred to as a "notified place". A notified place can include a tent, a house or a vessel. Upon the notification, the authorities are authorised to take possession of the notified place and "evict therefrom any person found therein". The only limitation in the law is that if the place contains any apartment occupied by women and children, "reasonable time and facilities shall be afforded for their withdrawal with the least possible inconvenience" [s17A(2)].

The place is then deemed to be in the possession of the Government as long as the notification remains in force [s17A(3)].

Again, this law has a wide breadth and affects all persons who happen to live or use a place which has been notified. There is no provision for compensation for those summarily evicted, even if they have no connection to the declared unlawful association.

Denial of natural justice

Declarations that an association is unlawful or that a place is used for purposes of an unlawful association are made by the state with no provision for rights of natural justice by those affected. There is no right to be heard on the matter, no right to know the ground on which the declaration is made, no right to challenge the declaration and no review mechanism available. Yet the consequences are extremely serious for those affected.

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There is no provision in the law that before or after the declaration is made, the affected persons should be informed. Notification is only made by gazette, so it seems unlikely that ordinary persons would be aware of any declaration. No public process is available for people to scrutinise such decisions, and no method is set out in the Act which describes how the decision-maker should reach the decision. The process is non-transparent, non-accountable and non-reviewable.

Search, seizure and forfeiture of property

A further consequence of a declaration that a place is a notified place is that the District Magistrate may then take possession of all moveable property within it (s17B(1)). If the District Magistrate forms the view that any of the property may be used for the purposes of the unlawful association, he or she can order that this property be forfeited to the state (s17B(2)). Otherwise the District Magistrate

must give the property to the person whom he or she considers to be entitled to it, or otherwise dispose of if such a person cannot be found (s17B(3)).

In the case of forfeiture of property there are many more safeguards in place than for the making of the initial declarations. With forfeiture of property a procedure is in place which allows for people to be heard. A notice describing the property must be published which enables people who object to make submissions against forfeiture within 15 days (s17B(4)). The District Magistrate may accept the submissions in relation to articles of property and dispose of them in the same way as is described above in s17B(3). If a submission is rejected by the District Magistrate, the decision goes before the District Judge to review the decision (s17B(6)). Forfeiture of funds of the association.

s17E(1) provides that the President may satisfy himself, "after such inquiry as he thinks fit", that "any monies, securities or credits are being used or are intended to be used for the purposes of an unlawful association", and may then declare that these are to be forfeited to the state.

In this case the persons affected have some procedural rights to be informed and to be heard.

- Before the order to forfeit is made, they should receive written notice of the intention to make the order (s17E(2))
- They will then have 15 days to apply to the District Judge that the monies, securities or credits are not liable to be forfeited (s17E(3))
- The District Judge will investigate and rule on the matter, following the procedure in the Code of Civil Procedure (s17E(4))
- If the person is found to be liable to forfeit the property, it must be paid to the state and if not paid will be recovered by the state (s17E(9))

The declaration confers a right on police to enter and search premises and to ask questions of the owner of the monies, securities or credits (s17E(6)). The President may also issue an order preventing the person from paying, delivering, transferring or otherwise dealing with the monies, securities or credits (s17E(5)).

No open process for finding of continuation of association

Section 18 provides that an association shall not be deemed to have ceased "by reason only of any formal act of dissolution or change of title, but shall be deemed to continue so long as any actual combination for the purposes of such association continues between any members thereof".

Again, no process is set out for how a finding that an "actual combination for the purposes of the association" is to be made. It appears that this would be made in

the same manner as the initial declaration, that is, by executive decree. There is no capacity for those affected to be heard on the matter or to seek judicial review of the decision.

The Unlawful Activities (Prevention) Act (comparision may be between this Act and , 1967 of India

It was passed by Parliament for more effective prevention of certain unlawful activities of individual and associations. Unlawful activities include any claim or support to bring about the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, disclaiming, questioning or disrupting the territorial integrity of India, promoting enmity between different groups on grounds of religion, race, place of birth, residence, language etc., and doing acts prejudicial to maintenance of harmony and imputations or assertions prejudicial to national integration.' The measure of prevention envisaged under the Act is to empower the Central Government to declare an association with any of the aforesaid objectives unlawful by a notification in the official Gazette.'- Of course, the Central Government has to refer the notification to a tribunal for the purpose of adjudication whether or not there is sufficient cause for declaring an association unlawful.

Continued membership of an association declared unlawful at-tracts an imprisonment extendible to two years besides a fine." Further, taking part in or committing or advising or inciting any unlawful activity attracts the penalty of im risonment which could extend to seven years besides fine.

(4) Emergency Provisions Act.

It is one of most draconian laws which the junta uses to suppress dissents. It provides for the death sentence for minor offences like "informing the movement, numbers, circumstance, condition, position of the state armed forces". The law is vague, indefinite and all short of international standards. "If anything is done intentionally to encourage or incite a person to refuse payment of land revenue" it shall be punishable with imprisonment for a term which may extend to 7 years or with fine or both. In fact the law classifies the entire gamut of dissent by a citizen as treason, which is liable to the death sentence according to this dubious interpretation.

In fact the law classifies the entire gamut of dissent by a citizen as treason, which is liable to the death sentence according to this dubious interpretation.

Section 5, (d) to alarm the people or a group of people in away that would created panic amongst them; or What is the defination of alarm and panic has not been laid down and will depend on the interpretation of the judges and wide scope has been given to give arbitrary decisions. Its vagueness attracts the mischiefs laid down in ingredients of law.

Similarty Section 5 (e) to spread false news, knowing, or having reason to believe that it is not true; or What is take news is not defined. "Knowing of having reason to beleve also no defined"

The burden of proof is placed on the accused. There is no standard or yard strike to know what is true or not. In fact it is violation of the fundamental right of freedom if expression.

The following cases 5 (j) of the Act:

Giving information	U Aye Thar Aung	serving 21 years
Distribution	U Do Htaung and	
	U Hkun Myint Tun	7 years
Slandering	U Kyin Thein	7 years
Causing Misunderstanding	U Min Soe Lin	7 years
Demonstrations	U Saw Naing Naing	21 years
Disturbances	U Toe Po	7 years

(5) Printer & Publisher Act

(a) The Press and Registration of Books Act, 1867. (Background)

If the political offence of sedition within the meaning of section 124-A of the Indian Penal Code is committed through speech or writing or any other visible representation, prosecution of the perpetrator of the offence is one of the remedies. However, when the seditious matter is reduced to writing and published, the publication itself may be banned and forfeited by the government besides punishing the person disseminating seditious matter. Since forfeiture of published material can be effectively done only when the name and location of the press and the persons owning and publishing seditious literature in the form of a book, newspaper or magazine is known to the government, a legal instrument becomes necessary for the purpose of licensing and registration of printing press, their owner and publisher.

It is interesting to note that the British Government in India had not been apprehensive of the press for several decades after the modern mode of printing was introduced in India and even the licensing of the press was not in vogue. The step towards regulation of printing presses and registration of books and newspapers was taken for the first time by the Press and Registration of Books Act, 1867, which become opplicable to Burma after its annexction to India. It was the foundation of the present day press Act.

The Act *1867 inter alia* provided that every book or paper printed within India shall have printed legibly on it the name of the printer and the place of printing,

and if the book or paper be published, the name of the publisher, and the place of publication.

Besides this, the keeper of a printing press is under a legal obligation to declare before the district, Presidency or Sub-divisional Magistrate within whose local jurisdiction the press was situated, that he was owning or keeping a press at a certain specified location or address.

Similarly, every publisher of a newspaper was under obligation to print the names of the owners and editor on each copy of the newspaper as also the date of publication. The printer and the publisher of every newspaper was to declare the name of the newspaper before any one of the aforesaid Magistrates besides declaring that he was the printer or publisher or both of the newspaper.

Provisions were made in the aforesaid Act for the delivery of printed copies of the whole of every book printed to an officer specified by the State Government by notification in the official Gazette. Such delivery will be gratis. Similarly, the publisher of every newspaper is under an obligation to deliver free of expense to the Press Registrar one copy of each issue of every newspaper published.

Penalties for violation of sections 3 and 4 of the Act relating to printing of names and declaration as also for non-delivery of the copies of the books and newspapers etc. have been provided for in the Act.

Obviously, the aforesaid provisions of the Act have the objective of maintaining a record of the various printing presses, their owners, as also of every book or newspaper printed so as to enable the Government to ascertain and verify their contents whenever required.

Subsequent to the Act of 1867, what was enacted was Vernacular Press Act of 1878, introducing drastic restriction on the press. Publication of objectionable matters entailed forfeiture of the publication. However, there was to be a warning at the first instance not to repeat the printing of such paper. In the event of repetition, the printer was required to deposit a security money. Such security could be forfeited if the printer persisted in the publication of the matters and finally the press itself could be forfeited by the executive. There was no provision for judicial review. An appeal lay only to the governor general in council, whose decision was final.This Act was repealed in 1882.

Another enactment on the subject was that of the Press Act of 1910 which had substantially retained the scheme of the Vernacular Press Act but had imposed restriction on publications, made in English as well. Under section 17 of this Act, power of review was given to High Court but the burden of proving that the

publication in question did not contain any objectionable matter was placed on the applicant. The Press Act of 1910 was repealed but some of its necessary provisions were included in sections 99A to 99G of the Criminal Procedure Code 1898 by the Press Laws Repeal and Amendment Act of 1922."

U Sein Hlaing, publisher of the magazine Pe Phit Hlwer detened to 7 years in prison jailed for publishing a perpled features a sataical poem. " Bar Dwae Phyit Kor Byi Lae" (What is happening to us) extened to another 7 years. U Win Tin arrested in July 1989. All printer and publishers are requesed to register with Press Secutriy Board power to publication. No appeal lies to Count against the decision of the Board. It lies only to Ministry of Information.

section (2) give definations of "printed materials" journal magazine, book, newspaper, printing press, print, publisher, distributors. Printed materials include copies partly or wholly of printed materials.

Section (18) says that any verification made falsely or believed to be false in permistable. The sentence of imprisonment is 7 years.

(6) The Law protecting the peaceful and systematic transfer of state responsibility and the successful performance of the functions of National Convention against disturbances and oppositions

This draconian law provides for the imprisonment of any person for up to 20 years or the banning of an organisation who/which:

- "draft and disseminate the constitution of the state" (cl. 5(d))
- "carry out the functions of the National Convention" (cl 5(d))
- "deliver speeches or make statements to undermine, belittle and make people misunderstand the functions being carried out by the National Convention" (cl 5(c))
- "deliver speeches or make statements in order to undermine the stability of the State" (cl.5(a)).

In Burma, none of these freedoms and safeguards exist, so the use of political offences by the state is not tempered or checked. Any dissent is euphemistically given the name of political offence so that any semblance of dissent is effectively wiped out.

This is an area of law and jurisprudence which relies, perhaps more than others, on the context in which the purported offences occur. We are thrown back onto the legal and political context of Burma in order to give a meaningful analysis. If we were discussing a liberal democracy, with a free press, independent judiciary and active political parties, and where freedom of expression, association and movement were allowed, then an analysis of the nature of political offences would require a different approach. In Burma, none of these freedoms and safeguards exist, so the use of political offences by the state is not tempered or checked. Any dissent is euphemistically given the name of political offence so that any semblance of dissent is effectively wiped out.

The Burmese situation is occurring in a global context in which there is growing international concern, particularly after September 2001, about the use of laws against political offences to detain people in the name of fighting terrorism (see, for example, UN General Assembly resolution A/RES/59/195 and the appointment of an Special Reporter on "the promotion and protection of human rights and fundamental freedoms while countering terrorism"). Amnesty International has criticised the "vaguely worded definitions of new offences; sweeping powers to hold people without charge or trial, often on the basis of secret evidence; provisions to allow for prolonged incommunicado detention, which is known to facilitate torture; and measures which effectively deny or restrict access to asylum..." (Amnesty International 2004 "Building an international human rights agenda: Resisting abuses in the context of the 'war on terror'" http://web.amnesty.org/report2004/hragenda-1-eng).

The junta justifies its use of political offences to silence political opponents on the grounds of protecting national security, stability and public order, yet without safeguards to prevent abuse. The laws fall well short of the Siracusa Principles, the international guidelines regarding the use by states of laws limiting human rights on the justification of "national security", "public safety", "public order" and the like. Paragraph 31 of the Siracusa Principles, for example, states that "National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse." (UN Economic and Social Council, The Siracusa Principles on the limitations and derogation provisions in the international covenant on civil and political rights, UN Doc E/CN.4/1985/4 (1985) Annex).

When the judiciary, law enforcement agencies and government officials are not independent, and the state adopts a highly repressive regime to stifle dissent, the law operates as a partisan institution. It is worth noting that for this reason, the way in which prosecutions are carried out may give a political dimension to cases which would not normally be considered political. For example, there are a number of cases in Burma where NLD members appear to have been targeted for prosecution on the basis of their political activities, such as teachers with an NLD background who are prosecuted for giving private tuition without a licence (give case reference). This is a separate issue to that of the political offences, and will not be dealt with in this publication. However any discussion of Burmese law cannot ignore the fact that the legal institutions and authorities in Burma do not operate in an independent manner, and therefore no clear line can be drawn between "political" and "criminal" offences in Burma. The irony in the Burmese situation is that the ruling junta is committed to multi-party democracy and the 1990 Election has put in place 400 Members of Parliament recognised by the

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junta government, yet there is total abrogation of parliamentary privileges and blatant defiance of rule of law. The only crime that the prisoners have committed is that they hold political beliefs different from the ones accepted by the authorities. They are not offences, far less criminal, by any defination accepted universally in civilized worlds

Conclusions and suggestion

1. "Control" through "laws" is the one instrument in the hards of the junta to tell individuals of the consequences that will follow in the event they become suspect. It is not in the interest of Society.

2. "Political offence" is committed when there is attempt to overthrow the government itself by violence. There is absences of mens rea.

3. To remedy the apprehended perception of the junta facing a threat of immediate overthrow, restrictions and oppressions are restored. Restoration of Freedom of Expression will make the junta see what are the expectations of people. The fear of people is like fear of ghost. People are basically peace loving. They want development. Abrogatoin of the State Protection Law and all other dracomain laws are the need of the hour.

4. Judiciary must me kept out of reach of the executive and be independent Adequate evidence to formulate the opinions of judges must be the key point in decision making.

5. Legal profession must assert its rights and independence.

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*** The author is a member of the Executive Committee of the Burma Lawyers' Council (BLC).**

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The Administration of Justice and Court Procedure in Myanmar

U Ba Kyaing

This article is published verbatim with comments at the end of each theme. This will be a fair appraisal and enable readers to understand the mindset of the so-called legal reformers inside the junta ruled country.

Introduction

Every independent sovereign State has its own administration of Justice and Court Procedure. The Administration of Justice is carried out by the Courts of different levels. The establishment of Courts in Myanmar is prescribed in the following laws : -

(a) By the provisions contained in the Constitutions of 1947 and 1974. At present, the said Constitutions are suspended and a new constitution is on drafting process.
(b) By the provisions contained in the Judiciary Law 2000.

It is mentioned that the establishment of courts in Myanmer is prescribed in the following laws :

(a) By the provisions contained in the Constitutions of 1947. At present, the said Constitutions are suspended and a new constitution is on drafting process.
(b) By the provisions contained in the Judiciary Law, 2000.

In (a) that is law no. 5/2003 it is mentioned that "at present, the said constitution are suspended". Question arises: constitutions are suspended then what is the basis of establishment of courts. The answer indirectly given is that (b) provisions in the Judicial

Law 2000 apply. This is not a law. It is an order couched as law and proclaimed by the higher of Executive organ, the SPDC when the very basis is flawed how can Justice be administered. Here is also an admission, "a new constitution is on drafting process", means there is no constitution. It is the rule of man which is the hallmark of administration of Justice and that is conspicuously absent.

Establishment of courts in Myanmar

At present different levels of Court are formed under the Judiciary Law, 2000. At the apex, there is a Supreme Court. The State Peace and Development Council shall constitute the Supreme Court with a Chief Justice, 3 Deputy Chief Justice and minimum of 7 Justices to a maximum of 12 Justices. (see section 3 of the Judiciary Law, 2000 and section 2 of the Law Amending the Judiciary Law, 2000.) The Supreme Court shall sit in Yangon and Mandalay respectively, provided that, if necessary, it may sit at any other appropriate place. (see section 4 of the Judiciary law, 2000.) The Supreme Court shall form the State or Divisional Courts, the Township Courts. (see section 12 of the Judiciary Law, 2000.) The Supreme Court shall appoint Judicial Officers and confer upon them appropriate judicial powers to act as Judges at the State or Divisional Courts, the District Courts and the Township Courts and prescribe their functions and duties. (see section 13 of the Judiciary Law, 2000)

At present in Myanmar different levels of Court are formed as follows : -

(a) The Supreme Court (constituted by the State Peace and Development Council) It is regarded as the highest Court in Myanmar.
(b) The State or Divisional Courts (formed by the supreme Court)
(c) The District Courts (formed by the Supreme Court)
(d) The Township Court. (formed by the Supreme Court)

"The SPDC shall constitute the supreme court". SPDC is not Parliament. When parliament appoints Supreme Court, it represents the will of the people. Accountability of the Judges is to this parliament. Here accountability of the Judiciary is to coterie of Generals styled as junta. There can never be any independence of Judiciary the S.C shall appoint Judicial officers. The S.C Judges are selected by Junta and when they appoint judicial officers, it is on the direction of the Junta.

Judicial Principles

The administration of justice shall be based upon the following principles : -

(a) administering justice independently according to law;

(b) protecting and safeguarding the interests of the people and aiding in the restoration of law and order and regional peace and tranquility ;
(c) educating the people to understand and abide by the law and cultivating in the people the habit of abiding by the law ;
(d) working within the framework of law for the settlement of cases ;
(e) dispensing justice in open court unless otherwise prohibited by law ;
(f) guaranteeing in all cases the right of defence and the right of appeal under the law;
(g) Aiming at reforming moral character in meting out punishment to offenders (see section 2 of the judicial law, 2000)

(a) administering justice independently according to law *stated above two questions are: (1) what is "independently" and (2) what is "Law" As there is no separation of powers between the Executive and Judiciary, on the contrary judiciary is the creation of the SPDC, there cannot be any independence.*

Secondly, "according to law", this law is the one that has been promulgated by SPDC as orders calling them as laws. Therefore administration of justice is eroded from top to bottom. It is a fraud on justice that the SPDC is perpetuating.

(b) "protecting and safeguarding the interests of the people and aiding in the restoration of law and order and regional peace and tranquility"; *stated above. According to the author administration of justice shall be based on the above principle. How law and order and regional peace and tranquility be based on the above principle. Justice is different from "law and order". When the two elements are clubbed, justice becomes causality. "Law and order" is the domain of the executive, the police force. How can the judiciary aid the police for enforcement of law and order. No doubt this has resulted in Burma becoming a police state. All the trials that are held are framed on the ground that they are threat to "law and order" and end in conviction with total disregard to justice.*

(c) "educating the people to understand and abide by the law and cultivating in the people the habit of abiding by the law" ; *There have been so many trials. None are reported in the media which the State Controls. The only way to educate is to lay before the people the judgments of the trials so that they can understand how law was breached. Even the detention of Daw Aung San Suu Kyi has not been reported in any newspaper not to say of publishing the reasons for the detention. Freedom of Press and freedom of expression are the only means of education the people.*

(d) dispensing justice in open court unless otherwise prohibited by law ;
"Open Court" is anathema to the Junta. Hundred of trials have been held in Insein Count in accessible to the public. Even the trial of its own point man Khin Nyunt was held secretly and he was given 40 years imprisonment. Of recent date is the trial of Khun Htun Oo, a respected and elected Shan leader. He has been sentenced to 40 years imprisonment, nobody knows where the trial was held. "Open Court" means transparency. For military clique which is holding to power for over decades. transparency is the last thing. There is no accountability. There is no rule of law and rule is by the coterie.

(e) guaranteeing in all cases the right of defence and the right of appeal under the law;
In many cases no lawyers have been engaged and no appeal allowed. The "right of defence" is a false statement.

(f) Aiming at reforming moral character in meting out punishment to offenders (see section 2 of the judicial law, 2000)
There is no question of "reforming". The entire policy is directed to vindictiveness. It is fundamental in criminal law that punishment has to be in consonant with value in society. The Eight Amendment to the U.S, Constitution forbade cruel and unusual punishment. Punishment which is cruelly disproportionate to the crime offends humanitarian concepts. Al the political trials that had been held have ended in maximum punishment in contravention of the time honored practice in criminal justice.

Jurisdiction of the Supreme Court

The jurisdiction of the Supreme Court shall be as follows:-

(a) adjudication on original criminal and civil cases;
(b) adjudicating on a case transferred to its by own decision;
(c) adjudicating on transfer of a case from any Court to any other Court;
(d) adjudicating on a appeal case against any judgment, order and decision passed by the State or Divisional Court;
(e) adjudicating on a revision case against any judgment, order and decision passed by any Court;
(f) confirming death sentence passed by the State or Divisional Court or the District Court and adjudicating on an appeal case against the death sentence;
(g) examining any judgment, order and decision of any Court, which is not

in conformity with the law relating to the Legal rights of a citizen and altering or setting aside as may be necessary;

(h) examining any order and decision which is not in conformity with the law relating to the legal rights of a citizen and altering or setting aside as may be necessary; adjudicating on an admiralty case;

Powers of the Supreme Court

The Supreme Court shall supervise the respective Courts. (see section 6 of the Judiciary Law, 2000).

A case finally and conclusively adjudicated by the Supreme Court exercising its original Jurisdiction or a case finally and conclusively adjudicated by the Supreme Court on the final and conclusive decision of any court may, on being admitted for special appeal by the Special Bench in accordance with the procedures, be heard and adjudicated the Special Appellate Bench consisting a total of 3 Justices including the Chief Justice, the Deputy Chief Justices and a Justice of the Supreme Court or a total of 3 Justices including the Deputy Chief Justice and 2 Justices of the Supreme Court or a total of 3 Justices including the Deputy Chief Justice and 2 Justices of the Supreme Court. (see section 7 of the Judiciary Law, 2000).

With the exception of a case adjudicated by the Special Appellate Bench, in any case adjudicated. by the Supreme Court if the Chief Justice is of the opinion that any substantial question has arisen in the interest of the public he may cause such question to be heard and adjudicated again by the Special Appellate Bench. (see section 8 of the Judiciary Law, 2000) The Supreme Court may, in exercising its jurisdiction, hear and adjudicate on cases by a single Justice or by a bench consisting of more than one Justice as determined by the Chief Justice. (see section 9 of the Judiciary Laws, .2000).

The Supreme Court may direct that cases in the State or Divisional Courts, the District Courts and the Township Courts be heard and adjudicated by a bench consisting of more than one judge. (see section 10 of the judiciary Law, 200) The Supreme Court shall prescribe as may be appropriate the jurisdiction of the State or Divisional Courts the District Courts and the Township Courts for enabling adjudication on criminal and civil cases. (see section 11 of the Judiciary Law, 2000).

Two instances are given as to how the powers are abused. In Burma law report, a case has been reported. The Special Appellate bench reversed the judgment of the its own Court on

the question of admissibility of evidence. The earlier Court held that statemens taken by military intelligence were not admissible under Evidence Act. The Special Appellate Court however over ruled and held it is admissible. The decision is not only contrary to law but a gross abuse of the fundamentals of law.
(Refer Burma law report 1993)

Another instance of glaring abuse of power is the case of Daw Aung San Suu Kyi. She has been kept under house arrest without trial and it is being extended arbitrarily. The Supereme Court did not exercise the power vested under (h) above, which empowers the court to examine the order of Daw Aung Sann Suu Kyi arrest's and set it aside.

Appeal, Reference, Review

The supreme Court has inherent power of superintendence to review any decision of lower Courts. There have been convictions in cases related to elected member of parliament, noted personalities and journalists. In none of these cases the supreme court exercised its power even to look into the proceedings.

Jurisdiction and Powers of Courts other than Supreme Court

The jurisdiction of the State or Divisional Courts, the District Courts and the Township Courts are as follows :-

(a) adjudicating on original civil cases;
(b) adjudicating on original criminal cases;
(c) adjudicating under any law. (see section 14 of the Judiciary Law, 2000).

The State or Divisional Court may adjudicate on appeal or revision case against any judgment, order and decision passed by-the District Court.(see section 15 of the Judiciary Law, 2000).

the State and Divisional Court may:-

(a) within, its State or Division, adjudicate on a case transferred to if by its own decision;
(b) within its State or Division, adjudicate on the transfer of case from any Court to any other Court; (see section 16 of the Judiciary Law, .2000)

The State or Divisional Court may. in exercising its jurisdiction, adjudicate on cases by a single judge or by a bench consisting of more than one judge as determined by the State or Divisional Judge in accordance with the directive of the Supreme Court, (see section 17 of the Judiciary Law,2000).

The District Court may adjudicate on appeal or revision case against any judgment, order and decision passed by the Township Court, (see section 18 of the Judiciary Law,2000).

The District Court may:-

(a) within its district, adjudicate on a case transferred to it by its own decision.
(b) within its district, adjudicate on the transfer of case from any Court to any other Court, (see section 19 of the Judiciary Law, 2000).

The District Court may, in exercising its jurisdiction, adjudicate on cases by a single Judge or by a bench consisting of more than one Judge as determined by the District Judge in accordance with the directive of the Supreme Court, (see section 20 of the Judiciary-Law. 2000).

The Township Court may, in exercising its jurisdiction, adjudicate on cases by a single judge or by a bench consisting of more than one judge as determined by the Township Judge in accordance with the directive of the Supreme Court, (see section 21 of the Judiciary Law, 2000).

The Courts and their Jurisdiction in Myanmar

The Jurisdiction of a Civil Court is as follows:-

(a) as regards its local limits;
(b) as regards its pecuniary limits; and
(c) as regards the subject matter of suits.

With regards to pecuniary limits of Judges:-

(a) State or Divisional Judges is empowered with unlimited amount;-
(b) Additional State or Additional Divisional Judge is empowered with unlimited amount. (see Notification No. 355/2000, dated 28-6-2000, issued by the Supreme Court)
(c) District Judge is empowered up to the limit of 3000000 Kyats;
(d) Additional District Judge is .empowered up to the limit of 1500000 Kyats; (see Notification No. 356/2000, dated 28-6-2000, issued by the Supreme Court)
(e) Township Judge is empowered up to .the limit of 500000.Kyats;
(f) Additional Township Judge is empowered up to the limit of 500000 Kyats;
(g) Deputy Township Judge is empowered up to the limit of 300000 Kyats; (see Notification No. 357/2000, dated 28-6-2000, issued by the Supreme Court).

The subject-matter of suits empowered to the Courts contained in the provisions of various existing laws. - .

The Three Rules of Civil Jurisdiction

1. No Court shall entertain any suit the amount or value of the subject-matter of which exceeds the Pecuniary limits of Jurisdiction, (see section 6 of the Civil Procedure Code)
2. No Court shall entertain any suit which, as regards the subject-matter thereof, has been excepted, from its cognizance.;
3. Every suit shall be instituted in the court of the lowest grade competent to, try it. (see section 15 of the Civil Procedure Code)
4. Another important rule is, that Court has no Jurisdiction to try any suit unless it is of a Civil nature, (see section 9 of the Civil Procedure Code),

In trying Civil Suits or Civil Litigation Courts have to abide Code of Civil Procedure

Substantive Law deals with rights and liabilities, adjective law deals with practice and procedure.

The existing Code of Civil Procedure came into force on the 1st day of January of 1909. The Code consists of two parts, the first containing provisions which are more or less of a substantive character, and the second containing provisions which relate to procedural matters.

The Code of Civil procedure contains 153 sections, 54 Orders, under each Order there are rules prescribed.

"Procedure" means the manner and form of enforcing the law, the channel and means whereby law is administered and justice reached.

"Proceeding" means a measure taken in Court, a prescribed course of action for enforcing a legal right.

"Civil proceeding" may be defined as a judicial process to enforce aright and covers every, step in an action and is equivalent to an action.

The law of procedure is based on the principles of natural justice, which requires; *inter alia* -

(a) that men should not be condemned unheard,
(b) that decisions should not be reached behind their backs;

(c) that proceedings, which affect their rights and property, should, as far as possible, not be continued in their absence, and;
(d) that they should not be precluded from participating in them.

Practice means uncodified procedure. Practice supplements the procedure, in matters on which the Code or statutory law is silent, as usages supplement the codified law.

The Court rests under a duty to deserve rules of procedure.

Statutes prevails over general rules of practice and procedure.
One of the first and highest duties of all Courts is to take care that their acts or decisions do not injury any of the parties.

The law. of procedure is grounded .on natural Justice and wherever reasonably possible, it must be construed in the light of justice, equity and good conscience.

The inherent powers of the Court, Section 151 of the Code gives the Court ample power to follow a procedure not provided for by the Rules, if the ends of justice demand -it.

The theme relating to civil law is narrative. Nothing has been mentioned of the short comings of the Civil Procedure Code which had been brought in by Colonial rules in 1-1-1909. It needs lot of amendments and simplification. For example under of the Civil Producer Code, no legal action can be taken against the governing state without having given a statutory notice of the intended suit with all the grounds. Only after expiry of the notice period that is section 80, two months, can the suit be filed. Therefore the provision for interim orders related to the various section and orders of the Code are rendered ineffective for citizens. Daw Aung San Suu Kyi could not file a suit for injunction against the government for its restraining activities regarding NLD. Also when an affidavit was to be sworn to because of refusal of the authority administering oath, the matter was brought before the Supreme Court which slept over the matter. The provisions of Civil Law against government or public official have no meaning under the SPDC rule.

Civil Appeals

Appeals from original decrees -A person aggrieved by a decree is not entitled as of right to appeal from the decree. The right to appeal must be given by statute.

A litigant has independently of any statute, a right to institute a suit of a civil nature in a Court of Law.(S.9 of the Code of Civil Procedure) And he has no right to appeal .from a decree or order made against him, unless the right .is clearly given by statute. Section 96 of the Code gives a right to a litigant to appeal from an original decree. That is called first appeal. Section 100 gives him aright to appeal, from an appellate decree in certain cases. That is called second appeal.

Appeals from orders

Section 104 of the Code .gives a right to appeal from orders as distinguished from decrees. No appeal lies from a decree passed by the Court .with the consent of parties. No second appeal lies when the pecuniary limit does not exceed 20000000 Kyats. (Amended by SPDC Law No. 6/2000)

The decisions of a Court of Law may be divided into 2 classes, namely. (1) decrees and (2) orders. Orders again may be divided into two classes, namely, appealable orders and non appealable orders.

The following are the two points of distinction between a decree and an order:

(1) Every decree is appealable, unless it is provided that no appeal shall lie from it (S.96); but every order is not appealable, only those orders are appealable which are specified in S.104andift 0.43, R.1.
(2) In the case of decrees, a second appeal lies to the High Court (now Supreme Court) if there is a question of law involved (S.1OO). No second appeal lies in case of orders at all(S.104,sub-sec.2)

The term "order" is defined in the Code as the formal expression of any '"decision of a Civil Court which is not a decree".

The term "Decree" is defined in the Code as meaning "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit".

To constitute a decision in a decree, the following conditions must be present:

(a) The decision must have been expressed in a suit.
(b) The decision must have been expressed on the rights of the parties with regard to all or any of the matters in controversy in the suit.
(c) The decision must be one which conclusively determines those rights.

If all the elements set forth above concur in a decision, the decision is a decree; if. not, it is an order, for all decisions which are not decrees or orders.

The law does not allow a second appeal from an order, whether it can be interlocutory or final. It does not allow an appeal to the Supreme Court from an order which is final in its character. An order is said to be final, if it has the effect of deciding finally the cardinal point in the suit.

Reference

Where no appeal lies to the High Court (now Supreme Court) the Code of Civil Procedure empowered the subordinate. Courts to refer questions of law for the decision to the High Court. This is called Reference. A reference may be made by a subordinate Court to the High Court -

(a) in a suit in which the decree is not subject to appeal at all, or in an appeal in which the decree .is not subject to a second appeal to the-High Court,
(b) before or on the hearing of the suit or appeal;
(c) on any question of law or usage having the force of law, on which the Court trying the suit or appeal entertains reasonable doubt.

Such reference maybe made by the Court either of its own motion or On the application of any of the parties. Where a question of the validity of any law in issue, a reference must be made. The High Court then hears the parties, and decides the points referred; a copy of its judgment is then sent to the Court by which the reference was made. It is the duty of the latter Court, on receipt of the Judgment, to dispose of the case in conformity with the decision of the High Court, (S.I 13; 0.46)

Revision

The High Court (now including the State or Divisional Court or the District Court) may call for the record of any case which, has been decided by any Court subordinate to it, and in which no appeal lies thereto, if the subordinate Court appears-

(a) to have exercised a jurisdiction not vested in by law; or
(b) to have failed to exercise a jurisdiction vested in it by law; or
(c) to have acted in the exercise of its jurisdiction illegally or with material irregularly; and the High Court may make such order in the case as it thinks fit (S.115ofthe Code of Civil Procedure read with Law No. 6/ 2000, promulgated by SPDC).

Review of Judgment (Order 47)

A party aggrieved by a decree or order may apply for a review of judgment not only where no appeal is allowed from it, but also where an appeal is allowed from it, provided that "no appeal has been preferred by him.

An application for a review of judgment may be made on any of the following grounds: .

(1) discovery by the applicant of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed;
(2) on account of some mistake or error apparent on the face of the record;
(3) for any other sufficient reason.

Every application for a review of judgment should be made to the Judge who passed the decree, and failing him, to his successor in office.

The application of review should be in the form of a memorandum of appeal. After: the application is admitted, a notice will be issued to the opposite party: The application will then be heard. It is to be heard by the very Judge who passed the decree, unless he is no longer attached to the Court, or is precluded from hearing it by absence of other cause for a period of 6 months next after the application.

An appeal from a decree lies to a Judge other than the one who passed the decree. A review of Judgment lies to the same Judge who passed the decree,. Where there is not sufficient ground for a .review, the application should be rejected. Otherwise the Court may grant the application. Where the application is granted, the Court may at once rehear the case or appoint a day for re-hearing. After re-hearing the case, the Court may pass such decree as it thinks proper.

The law does not allow a second review, that is to say, there can be no review of an order made on an application for a review and no review of a decree passed on a review.

Supplemental Proceedings

Supplemental Proceedings as prescribed in the Code of Civil Procedure are as follows :-

(a) Arrest of defendant or Judgment-debtor before Judgment or in execution. (SS. 94-95; 0.38, rr. 1-4)
(b) Attachment of property before Judgment. (SS.94-95; 0.38, rr.5-12)
(c) Injunction (SS.94-95; 0.39)
(d) Appointment of Receiver (S.94; 0.40)
(e) Security for Costs (0.25)
(f) Withdrawal of Suits (0.23, rr.l-2)
(g) Payment into Court (0.24)
(h) Comprise of Suit (0.23,r.3)

Criminal Powers of Courts other than the Supreme Court

According to the Notification No. 358/2000, dated 28-6-2000, issued by the Supreme Court, the following courts are empowered as follows:-

(a) State or Divisional or Additional State or Divisional Judge is empowered with Powers of the Session Judge.
(b) District or Additional District Judge is empowered with Powers of the Session Judge; "
(c) Township or Additional Township or Deputy Township Judges are empowered with Criminal Powers as prescribed in the Criminal procedure Code, by the Supreme Court, on the efficiency of individual Judge; such as Special power (that is power to imprison up to 7 years). First class power (that is power to imprison up to I year.) Second class power (that is power to imprison up to 6 months).

Supervision on the administration of Justice

The Chief Justice, the Deputy Chief Justices, the Judges of the Supreme Court, the Judges of the State or Divisional Court and the Judges of the District Court may, if necessary, inspect prisons, yebet (correction) camps and police lockups for enabling convicted persons and those detention to enjoy rights to which they are entitled to in accordance with law and relating to the proceedings and for preventing under delay in the trial of cases.(seesection25ofthe Judiciary law. 2000)

The Supreme Court may issue such rules, procedures, oders, notifications, directives and manuals as may be necessary, relating to administration of Justice and supervision. At every six months period, Supreme Court holds a seminar regularly relating to the .administration of Justice. At the seminar, Secretary 1 of the State Peace and Development Council, delivered a speech to the Judges to be honest and make effort in speed disposal of cases.

Supervision on the administration of justice.

Inspect prisoners, yebet (correction) camps and police lockups.

There has been no instance where this has been complied with because the prisoners languish behind the bars under inhuman condition and imprisonment is retribution. Seminars are to brain wash. The very fact that the secretary of SPDC, deliver a speech to the judges to be honest and make effort in speedy disposal of cases is proof enough of the domination of SPDC over judiciary. The speech is guideline to the judges to be obedient to executive.

Training Courses for Judges

The Supreme Court has in recent years implemented a number of measures to improve the administration of Judicial System.

To enable the Judiciary to achieve its objectives and perform its functions effectively, in service training programmes are being conducted for the efficiency of Judicial officers at different levels.

> *Training courses are held to brainwash the judical officers and make them more timid and loyal..*

Recruiting of Judges

The lowest grade Judges (that is grade 4 level) are recruited as required by the Supreme Court, on the basis, of entrance examination.

It is not only on entrance examination but also interviews and check-up of the background of the candidates that recruitment is made loyalty to SPDC is the first criteria.

Conclusion

To develop and promote speedy trial of cases in Myanmar, all the Judges of different levels should be honest, efficient and decide the cases in accordance with the laws and follow the instructions issued by the Supreme Court.

> *There is no mention of Fair Trial but only of speedy trial. Fair trial is the rock bottom of criminal justice. Honesty and efficiency are the two things most lacking, Therefore their need is emphasized. Cases are decided according to laws laid down by the Junta. The very fact that there is no Ministry of Law or Ministry of Justice speaks volume about the arbitrariness of the ruling junta. Conclusion makes no recommendation leaving the readers with false illusion that everything is fine in the administration of justice in present Burma.*

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Law, Morality and Justice

By U Ba Kyaing

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Law

On the definition of "Law ", the author has quoted Holland, Woodron Wilson. Regarding rules of natural future the author sayes two: *nemo Judex is Causa Sua* (nobody is to be Judge in his own cause) and *audi alteram partem* (hear the other side, the parties are be given a fair hearing.) The question is the S.P.D.C is violator of both these rules and author makes no comment on these. For e.g. under State Protection Law, activists are put under detention by Security Board under Home Ministry. The dentening authority is the Home Ministry and decision made of detention is by the same body. It is judge of its own cause. About fair hearing, almost all trials are held in secrecy and hardly there is right of defense. The article is flawed as these fundamentals have not been brought out.

Next point discussed is " The right to equality before the laws, on equal protection as it is often phrased is fundamental to every society or state." This is correct But is it in practice in Burma? No state official can be prosecuted without prior permission from state authority. Political prisoners are not given any opportunities to engage lawyer for defence and if lawyer happens to appear, he is intimidated and his liscene is cancelled.

The article says " whether rich or poor, ethnics minority, political ally of its State or opponents all are entitled to equal protection before law." The poor have no access to seek justice as there is no law on Legal Aid. Ethnic minorities are dealt with extra judicial means, political opponents have been put in prison after sham trials, There is brutal oppression prevailing. The author makes no mention of these.

"No one is above law, which is, after all the creation of the people, not something imposed upon them." The author does not see that in reality law has been imposed on the people by SPDC. There is no Parliament to enact laws. The Executive SPDC is promulgating all laws. The people are not a maker of law. Ofcourse SPDC and military officers are above law.

The expression " The rule of law " has two meanings-first, that no man can be punished execpt for a breach of the law, established in the ordfinary legal manner before the ordinary courts; and, secondly, that every man, whatever his rank or official position, is subjefct to the ordinary law of the country and not entitled to have his case removed from the ordinary courts to some special courts.
Law operates in two different ways-

(1) It inflicts penalties and punishment upon law breaker.
(2) It enables law-respecting citizens to refuse obedience to illegal commands.

While drafting laws for British India, Macaulary, the first law Commission member, laid down the policy "uniformity where you can have it, diversity where you must have it, but in all cases certainty."

1. The main ingrediant in " The rule of law" is missed. Restricting arbitariness is the hallmark of the rule of law. All the orders, rules and laws that SPDC have passed have been to perpetuate its power and hold on the people in fear. The laws have no " certainty" They are vague and subject to all kinds of interpretation.
2. If a citizen refuses to obey illegal commands, he will land himself in jail because there is no " illegal command" under SPDC.

Justice

"All the rules in the world will not get us substantial justice if the Judges and the counsel have not the correct living moral attitude towards substantial justice.

The judicial system it self, can be a major aid or hinderance to justice. Even more crucial, however, for Justice, are the Judges: no matter how excellent a court system may be on paper, no matter how good it may be philosophically, it will never be any better than the men who administer it."

"As has been pointed out by Robson, " the administration of justice in a modern community requires ont only a real desire on the part of the Judge to promote the general welfare of the community, but also a judicial outlook in regard to social matters which is neither static nor rooted in the past".

The most difficult hurdle for a Judge in passing a sentance in a criminal case is maintaining a balance between law and order of the State and safegarding the fundamental rights of the accused.

The artical emphasises on " judical outlook" of the judges and correct living moral attitude towards substantial justice. The judges under the SPDC regime are appointees of SPDC and terribly afraid to dismiss a prosecution of political prisoner, how wrongly it might have been brought. Their outlook is not only static, it is in one mould state, that is prosecution must end in conviction otherwise it is a reflection on the Executive. The issue of "maintaining a balance between law and order of the State and safeguarding the fundamental right of the accused" is a hoax in a country ruled by military dictators. The State is a police State where no fundamental rights of citizens or the accused exist.

The artical lacks analysis or even comments to give an impression that law and justice prevail in the most brutal State of the world.

***Author is a director (Retired) of the Office of the Attorney General, Myanmar.**

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Democracy will come to China - in 25 years

Bangkok Post
Perspective (November 13,2005)
GLOBAL VIEWPOINT

China's peaceful rise necessitates a "cultural revival", democratic politics and the creation of a gently harmonious society

Zhang Bijian is a close associate and adviser to Chinese President Hu Jintao. When Hu was director of the Central Party School, where much of the Communist Party's ideas are shaped, just before becoming China's president, Zhang was vice diretor. Since Hu came to power, Zhang has headed the China Reform Forum, a government-affiliated think tank that has been working to ensure China's rise in the golbal community will be peaceful. He spoke to Jehangir S.Pocha, Global Viewpoint's Beijing correspondent, in Beijing.

Jehangir S. Pocha: You're known for saying China's rise will be completely peaceful, but how can you assure the world it will be so ?

Zhang Bijian: By 2030 or 2040, China will have more than 1.5 billion people, Given our need to develop and give these people a decent life, we need a wise strategy, in line with the values of the times. To ensure China's peaceful rise, we're pursuing three strategies aimed at overcoming three challenges.

The challenges are: getting access to resources and energy; managing and maintaining our environment and ecology; and ensuring "harmonious development," not class or social or regional conflict, as the economy grows.

The strategies we're adopting to deal with these are, first, to transition from the old industrial ways and build new sunrise businesses. That's why scientific development is a key thing for us. Also, we want to continue opening up, connect with the global economy, develop international cooperation, realise win-win situations.

And lastly we want to surpass the unreasonable, old-fashioned model of society to construct a more cultured, harmonious society. All this will take 30 to 50 years and our population will be 1.5 billion by then. So we just don't have the time or interest to develop hegemonistic tendencies-not now, not in the future.

Pocha: If this happens, it will be the first time in history that such a big nation has risen peacefully.

Zhang: We're totally different from Japan or Germany or the Soviet Union, whose rise led to war. The reason that we can design and plan our way differently is because we live in new times and conditions. As a nation,we also have different goals characcter. I just can't see a major war happening in the future now. To develop China, we realise we have to be part of the global system, not subvert it with violence as Germany or Japan did. If we have some differences, we'll use the way of reform, negotiation and discussion. That way we can develop our socialism with Chinese characteristics independently, but without creating trouble for other countries. That'll realise double benefits, with all winning and developing together.

Pocha: Yet China, as Donald Rumsfeld likes to point out, is spending up to $70 billion on its military every year. And though it's true China has been a mature player in the world, on some issues it has pursued its own interests quite callously. For example, China resisted UN sanctions against a Sudanese government that was committing genocide in the Durfur region because of its oil interests.

Zhang: If you look at China's involvement in the international system, you'll see our attitude from 1979 onwards has generally benefited the global system.

About the defence issue .....well, we are a big country, with 1.3 billion people and a long border. Our desire to upgrade our basic defence abilities is very natural, particularly when global military technology is changing so rapidly. With other countries spending so much more than us on defence, shouldn't we improve ourselves ? Should we just give up our own defence ?

The concept for our military force is to focus it on maintaining peace with other countries, even with Taiwan across the straits. We have no goal to catch up with other big countries that are spending so much more than us military or become a threatening or hegemonistic power. We only want to make sure of our development rights.

It is true that global military technology and equipment has been undergoing a revolutionary change, but this isn't driven by China, but America. It's America

that is pushing improvements in the level of military technology and equipment. Its level of sophistication is so high that China can't compete with that. Under such a situation, as I just mentioned, our goal is only to obtain the basic defences needed to protect our population and border.

Look at the nuclear situation in North Korea. China's attitude is very clear and China is working hard alongside the US to try and realise a nuclear-free Korea. That's been recognised by all countries, including America.

Pocha: But it is now a matter of public record that China has proliferated nuclear technology to Pakistan and North Korea as recently as 1996, and the CIA says it still cannot confirm this has stopped. So perhaps your idea of China's "peaceful rise" has not been totally accepted by the Chinese government.

Zhang: I think my view is the same as the national strategy. Events that have happen in the past have happened. I won't comment on it. Now the crucial issue is to ensure North Korea does not go nuclear. On this point, our goal is very clear and our hard work has been recognised by the international community. Today if there is any country in the world that does not support spreading nuclear weapons, it's China, and I think that's good.

Pocha: Perhaps China does face some excessive criticism over military modernisation and its rising nationalism. After all, India just over look China to become the world's largest arms importer and even Japan has a rising nationalism. Why do you think this is so ?

Zhang: This is where we say there is a double standard. I think this double standard comes from Cold War thinking, and as you know this thinking was not started by China. In fact, we're the victims of this thinking. Obviously, that's not good for developing healthy international cooperation, development and understanding. We would like to communicate and be better undetstood by other countries, which is part of the idea of a peaceful rise.

Pocha: Do you think people worry more about China because it lacks transparency and is not democratic ?

Zhang: I think people don't clearly understand China. Because we're a communist party, people look at us like they looked at the Soviet Union. This view is not fair, as the communist parties are very different. in 1979, both parties made a big decision related to their destiny. The Chinese party shaped our destiny by reforming and opening up. But the Soviet Union made the decision to send their troops into Afghanistan.

On the other hand, our system is also different from the Western democratic system. So when you try to explain China, it's hard. Yet if you pay attention to the changes of these last 25 years, you will see the democratic lifestyle is progressively expanding here. We have more private newspapers today than party papers. We have hundreds of millions of people with access to Internet.
The freedom of free speech is improving. People can get involved in the making of national issues. At some levels of government, people are chosen through popular mandate.

The judiciary is improving. All these are positive changes.

Pocha: if China continues its state-controlled capitalism and limits its political changes, will it soon look like a fascist state ?

Zhang: The long-term goal of our political reform is democratic politics. Democratic politics and peaceful development are the two big concepts we will pursue in the next 25 years.

Pocha: Do you think America will be mature enough to accept China's rise and accommodate it on the world stage ?

Zhang: This is an issue we should all be concerned about. But we also need to be prepared to face the disputes and conflicts that are likely to arise as we do that. Both China and the US need to be calm about how to deal with this.

For example. there is this talk about how Chinese textiles are causing Amercan people to lose their jobs. We need to analyse this and ask if high-paid American workers can compete low-cost Chinese textiles.

Also, American customers are benefiting from the cheap products that come from China, for that keeps inflation down, Please also notice that China has spent a lot of money(about $400 billion) buying America's national debt.

Pocha: But there's no doubt China is trying to intrude into areas of political influence that America considers its own domain.

Zhang: China is mainly interested in minding its own business. China is developing independently. We are not thinking of taking a leading role in East Asia, or Northeast Asia, or Southeast Asia, or the Asian Union. We don't have the ability to do that. In Asia, we respect the leadership of the Asian Union and we also think America plays an important role in the region. China is not challenging the existence of America and we don't even have the strength to do that. What we'd

really like is to develop constructive, cooperative relations with America. This peaceful and stable approach to development is good for China as well as the Asia-Pacific area.

If there are conflicts of interest with America or anyone else, we can always negotiate. People today talk about China always cooperating in the energy field with " bad countries", like Iran, Sudan and Venezuela. But long ago,we wanted to cooperate with America(a Chinese company, China National Offshore Oil Co., wanted to buy the US oil giant, Unocal). But the US rejected us. So where are we suppose to go ? Working through all these issues will take patience.

Pocha: You're close to President Hu. Can you tell us how to understand him as a leader ?

Zhang: He's spent many years working in the party as well as some of the toughest provinces in China, such as Tibet and Guizhou....I think he has an open-minded and practical style. He thinks that officials who don't open up their view can't confront the 21st Century.

I want to emphasise that in the next 10, 20, 30 years, there will be three big trends that will never change.

(1) We'll face the 1.5 billion population. So we'll need to continuously develop our productive forces.
(2) We need to be connected with the global economy and continue opening up to create our goal of socialism with Chinese characteristics.
(3) Our peaceful rise necessitates a "cultural revival," improvements in the quality of our peoples, democractic politics and the creation of a gently harmonious society.

We still have 45 years, until the middle of the 21st Century, to work on this. Let this time and our practice prove what I say.

The focus of the replies to questions in the interview is on the need for China to acheive economic growth. Nothing is said about ending the one-party rule or forging political reforms or rule of law. The interview leaves lot of questions in readers mind also whether economic development can be made without political reforms, without the establishment of rule of law. There have been a few countries like Chille and Singapore, who have shown the path of economic growth notwithstanding political control. But by and large States who have attempted such path

have ended in failure. Burma, China's close neighbor, is a classic case. China's economic growth has largely been fueled by the most favoured nation Status that US has accorded to it . Even at the cost of huge trade deficit, US has been feeding the appetite of China's economic dragon. The theory - that for economic growth, political reforms and rule of law are valid, is not invalidated by China's example. There is a fundamental difference between China and Burma. China is ruled by political leaders by civilian rule but Burma by military dictators without a politcal party of their own. The total political control by the junta has brought the country's economy to ruin inspite of the fact that it is following market economy. The hallmark of democracy is tolerance for political opposition. The answers to the interview should not mislead its readers to subscribe to the views expounded. Universality of rule of law is beyond dispute.

The interview when viewed in the context its context in terms of its credibility. UN special rapporteur Mr. Pinchero has said that diplomacy is the key to change in Burma. He has been so much disgusted with the military-run Government which denied his entry in Burma. He has also asked for the release of Daw Aung Sun Su Kyi and political prisoners. China remains silent on Burmese issues which agitate the UN.

The US President George Bush in APEC forum has urged seven Southeast Asian leaders to press Burma on human rights. He described Burma as an outpost of " isolation, backwardness and brutality. " How then China maintains such a close relationship with Burma ? Why not Mr. Bush talk to leaders of the most farvoured nations to try to improve the situation for the people of Burma ? If he could ask the seven nations to raise human rights issues with Burma, surely he can do the same with leaders of China. China on its own initiative can also start nudging the Junta leaders. If China is successful, where all others have failed, it will be glory to China's internationalism. Not only the region can remove its black spot, the people of Burma will forget the negative role of China and be grateful. New good neighbourly relationship can be started.

This interview is published as China is our great neighbor and a regional power supporting the present military dictatorship in Burma. Also because from one party rule the transition of China to multiparty democracy is of great interest to people of Burma who are struggling for transition from military

dictatorship to multi-party democracy. "Democracy will come to China - in 25 years", the caption says; How long it will take in the case of Burma 50/60 years? The issues are different but China is in a position to tilt the balance of forces towards peaceful change in Burma. Does China's peaceful rise necessitate existence of the military dictatorship in Burma? Is it not a fact that democratic Burma will be more conducive to China's growth as a global power. Will not China's change in policy towards the junta be more consistent with its policy of supporting people suffering globally and struggling for development, democracy and peaceful change? It is not argued that China should follow policy a more procactive role in the democrate change in Burma. What is contended is that China should come in the open and support UN stand on Burma. Rule of law is the unniversal practice which helps development of society. In the context of globalization it has become more a necessity. China's voice on Burma will be a litmus test of its commitment to democracy and peace. It will be a model for cutivating people to people friendship. Where U.S, E.U, UN and Asean have failed to nudge Burma's dictators, China will succeed and what a glorious page it will add to its history of struggle for freedom and good governance.

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U.N. Hears Case against Burma

Former Czech President Vaclav Havel and Nobel Laureate Desmond Tu Tu international notables have in their Report appealed to the UN Security Council (UNSC) for taking immediate action against Burma's Junta. The report captioned "Threat to Peace. A Call for the UN Security Council to Act in Burma." The report says the ongoing military dictatorship in Burma constitutes a potential threat to Southeast Asian Solidarity.

The Junta has reacted and dismissed it as an attempt to discredit the government. The opposition and the international community have welcomed it. The question whether the move to put Burma on the UNSC agenda will succeed or not is not relevant .What is of importance is the legal issue raised by such move. UN General Secretary himself said that democracy should be restored in Burma by 2006. Overtime continued detention of Daw Aung San Su Kyi and other NLD & SLD leaders, imprisonment of hundreds of political prisoners and massive repression against people and ethnics nationalities are indeed signs of democracy coming!

The issues raised in the Report basically are whether a member State of UN can go on flouting the founding charter without any restraint reprimand from its highest organ, the Security Council. If UN is toothless, it is time that reforms are initiated to meet the demands of time. A State which has no constitution, no Parliament, no rule of law should be disqualified to be member of UN or having entered into UN as a Constitution Governed State, subsequently overthrows the Constitution, it will be regarded a pariah isolated state and international Community will know how to deal with it.

The Report called on UNSC for the release of Daw Aung San Suu Kyi reminding the UN of its past record against outrageous regimes in 7 Countries. Burma they say is worst than the 7 Countries, "far worse". The response a from UNSC came early and become primarly a question of rule of law and human rights.

The United Nations Security Council (UNSC) has come to a decision to attend a formal briefing on Burma. This is by far the biggest step the world body ever has

taken against military junta ruling Burma for over 4 decades. The decision puts Burma on notice that a new chapter to deal with dictators is opening for regime change.

The case against the regime is long and clear. Military rule has eroded rule of law impoverished the innocent people and enriched the generals. Their own Prime Minister Khin Nyunt is a recent case. The generals have set up an alternative economy with drug and human traffickers. All fundamental freedoms have been suppressed. Daw Aung San Suu Kyi: house arrest has been arbitarily extended and the NLD which had a landslide victory in 1990 Election has been denied elementary rules of politics. The shifting of the Capital to Pyinmana, a remote Central area almost, coincides with the coming of the briefing of UNSC. This shifting has been done without consultation with people who are most of affected. Nuclear research reactor is also on the agenda of the Junta. The outragerous regime shamelessly rebuffed the UN saying it will not be bullied into making a faster transition to democracy. Its attempt to push on with the National Convention is to pre-empt any UN Action. The generals have not only defied people's will but are challenging the wishes of the world Community.

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Burma and its road map

Uncertainty

Burma's Constitution- drafting National Convention resumed after a break of 8 months. The exercise is going on since 1993. Now it is the fourth session scheduled to last two months. This is the first step of the seven steps envisaged in the "road map". Even within 2 years, the first step could not be completed. The draft document includes 15 chapters, with 9 left to be finished. Australian Foreign Minister stated "The progress has been as fast as glue flowing up the hill" How long the seven steps will take to be reached, is anybody's guess. No time frame has been laid down because basically it lacks sincerity and confidence in their own capacity to reach the goal. It is therefore consolidation of power that is the main determinant. The seven steps will take years to be reached. In the first step with many more sessions, only the outline of the future constitution will be settled. Thereafter it will have to go to the expert Committee to refine it. The refined Constitution will come back to yet another session for approval. Then there will have to be a referendum which is a time consuming process: the appointment of Election Commission, updating of the voters' list and other logistics of referendum process are a few examples . After that, if referendum accepts the constitution, a General Election will have to held. Participation of different political parties and groups and all the requirements for free and fair election will have to be arranged. Whether the verdict in the election will be honored or not, there is no guarantee. Nobody can assure that it will not be repeatition of May 1990 election.

Objectives

It made an announcement that it will endeavour "to build a genuine disciplined, and flourishing democratic state" which is best suited to its people. One of the six objectives of the convention calls for the military to play a "Leadership role in

the future State". This session will focus on issues, sharing of administrative and judicial power in future government.

As a matter of fact, the critical objective is to entrench the military grip on power with a façade of a Constitution.

Composition

There are 1086 delegates, military picked representing "all walks of life". The appearance of representative ness and inclusiveness has been sought. But representatives cannot be delegates unless they come with the mandate of people exercised through free and fair ballot system. Composition has been made so that they all become yes voice. The previous sessions bear testionary to the fact of rottness of the composition. Constitution is the Supreme Law of a country bestowed with respect and regard. The process that the junta is following is fraud and a crime. In order to make the convention more democratic, junta could have put the issue of participation of NLD/SNLD members for debate and discussion by the delegates. Although they may reject the debate would have lent some understanding of the issues at stake.

Legitimacy

The convenors of the Convention are lacking in legitimacy. The junta had held a General Election in May 1990. Daw Aung San Suu Kyi and her party NLD got 88% of people's vote. Non-participation of representatives of this vast majority group rendered the entire Constitution making process invalid. The illegal detention of NLD leader makes the case far worse.

From international dimension, the matter is also seriously flawed. The United Nation Security Council has taken the issue to hold a closed door "briefing regarding the prevailing situation in Burma. The US has called Burma under junta as "out post of tyranny". The Asean lawmakers have also asked for the release of Daw Aung San Suu Kyi. Their pressure enabled a situation to develop where by the junta was forced to give up its chairmanship of the Asean Summit soon to be convened.

Credibility

The gingerly manner that the process is being conducted and prolonged has already cast doubts in the minds of the people as to its real destination. Convention is shaky, credibility has further eroded, with ethnic groups manginalised at the talks. The New Mon State Party which signed a peace deal with the junta and

represents the ethnic Mon are not attending because their earlier proposals were ignored. The leaders of Shan groups have been arrested and convicted a few months before the convention was due to start. Daw Aung San Suu Kyi is still under house arrest and her opposition party of Daw Aung San Suu Kyi has refused to participate. The house arrest was extended for 6 months on the eve of the commencement of the session. By non-extension junta could have given a gesture to initiate confidence building step. The junta could have also amended some office rules and regulation governing the National Convention to enable Daw Aung San Suu Kyi's NLD to rethink and rejoin "and involve them in the military's reform process. This would have been a positive step to add credibility to the Convention.

The delegates are barred from speaking to reporters or even leaving the compound. The UN human rights envoy to Burma likened the event to "mass house arrest". This restriction in the context of secrecy shrouding the Convention is a factor which weighs heavily against credibility of the exercise. Phillippine Foreign Secretary said "When your credibility is at stake there is a limit to one's tolerance and patience"

Conclusion

The demand of different political parties inside and outside Burma, the demand of the ethnic nationalities for a peaceful settlement of the political crisis are being ignored by the junta. In tandem, the call by the international community to speed up progress of the constitution making process has been rebuffed. The junta is acting like a full blown dictatorship. All such dictators have fallen. The more it becomes adamant for a peaceful regime change, the more will the ground under its feet be removed. Nobody is asking it to do a favour to the democratic society. All that it expected is that it takes lessons from history, end the misery and suffering of the people, open the door for creation of a new society in the family of nations. Let the process be inclusive, participating and representative. The Convention is the only chance for junta to take initiative to break deadlock with Daw Aung San Suu Kyi's NLD and for the people to wrestle any political reform from the junta.

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NEWS AND NOTES

Daw Aung San Suu Kyi

Previous one-year detention order of Daw Aung San Suu Kyi under State Protection Law expired on November 27, 2005. Suu Kyi has spent 10 of the past 16 years in detention in house arrest. She was last taken into custody on May 30, 2003 after her motor cade was attacked by a pro-junta group with a gathered mob as she was making a political tour of northern Burma. She was held first by the military and later transferred to house arrest after undergoing an operation at a hospital in Rangoon.

Important legal issues arise out of the detention. The initial arrest was by the military which was absolutely illegal. To legalize the process of arrest, she was transferred to police custody and served the detention order- The Depayin event which was the cause of her arrest provides no ground of arrest even under the State Protection Law under which she is presently kept under detention. The Depayin event was State sponsored terrorism against peaceful tour movement of a respected and well honored citizen. She was the victim of terrorism and she was fortunate not to be killed although that was the motive behind the attacks. Instead of a probe/ judicial inquiry as to what happened, who was the aggressor, the SPDC passed an order that she was a danger to the peace and stability of State and hence deserves to be detained.

Secondly question arises? Why the extension? During her confinement, nothing untoward had happened to justify the extension. No extension can be given merely on suspicion unless fresh evidence emerges to justify extension.

Thirdly, she is under virtual solitary confinement at her residence, being allowed no outside visitors and no telephone contact. Even in prison, periodical visitors are permitted to see and talk to their relatives. Although in appearance, it is less severe than imprisonment, in reality it is revolting. It is degrading human dignity and inhuman. Even solitary confinement in prison under the jail manual has led

down restrictions.The present confinement of Daw Aung San Kyi is a mental cruelty and is torture under law. It cannot be for indefinite period which may result in life long confinement. Generals may rethink the matter in the light of Buddhism which they practise and in the context of human rights which has world wide support.

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Conviction and sentence of the Shan leaders

The SPDC in a sudden and surprise move arrested U Khun Tun Nu and others. These leaders were in Rangoon for the past ten years trying to facilitate the ongoing dialogue process. U Khun Tun is the leader of the SNLD (Shan National League for Democracy) elected Member of Parliament in 1990 election. He is also the leader of ethnic nationalities and has a good rapport with the N.L.D.

The arrest is illegal and unconscionable. To give justification to the illegality, the SPDC held mock trials beyond the reach of his relatives and friends in the far-away places. The trials were secret and nobody knows under what charges the trial was framed. No independent lawyer was allowed. The accused were not allowed to put up their defenses. Even the State media made no mention of the trial. The principle of transparency and trial in open court was violated. The punishment given abused the rule that it should be proportionate to the crime committed. It is said that the sentences amounted to 40 years. The Burma Penal Code has no provision for such inhuman punishment.

The significance of the surprise arrest is that they have been kept in far away prisons like the trials were secret. To comply with the procedure, paper appeals were filed and summarily dismissed.

Shans are the second largest ethnic people next to Burman. 17 ethnic groups have entered into cease fire with the SPDC. Among the Shan group only one is in arms. The leaders imprisoned and setenced were the leading light steering the course of dialogue and negotiation. Their arrest and harsh conviction have been made to send a message to all the ethnic groups to be camp followers of military rulers or else they will face the same fate. The suicidal course that the Generals are following is indeed a matter of concern for state security and peaceful transition. A message to all democratic activists that they will not be tolerated in any manner what so ever, that the peace process is a closed chapter. Any thing talked about dialogue/ negotiation amounts to treason because it implies change in the balance of power. It means a regime change, that is stepping down from the seat

of power either in the form of power sharing or in the form of transfer of power from military to civilian change. So long as it is through peaceful process change is universally accepted. If the Generals consider such change as a threat to their holding power and hence treasonable, it is unfortunate. Under the Rule of Law such change is admissible and any confrontation raised against it is violative. People cannot be gagged of their fundamental rights by fake trials or otherwise .The Generals are only digging their graves and marking time till the storm breaks out.

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Burma Lawyers' Council

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Wisdom is power to transform the society into a just, free, peaceful and developed one.

Mission Statement

"By vigorously opposing all unjust and oppressive laws, and by helping restore the principle of the Rule of Law, the Burma Lawyers Council aims to contribute to the transformation of Burma where all the citizens enjoy the equal protection of law under the democratic federal constitution which will guarantee fundamentals of human rights."

The Status of Organization

The Burma Lawyers' Council is an independent organization which was formed in a liberated area of Burma in 1994. It is neither aligned nor is it under the authority of any political organization. Individual lawyers and legal academics have joined together of their own free will to form this organization.

Objectives of the BLC

- Promote and assist in the educating, implementing, restoring and improving basic human rights, democratic rights, and the rule of law in Burma;

- Assist in drafting and implementing a constitution for Burma, and in associated matters of legal education; and

- Participate and cooperate in the emergence of a Civil Society in Burma.