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WISDOM IS POWER TO TRANSFORM A SOCIETY INTO A JUST, FREE, PEACEFUL AND DEVELOPED ONE

Legal Journal on Burma

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Part (A)

Constitutional and 2010 Elections

(A . 1)
THE IMPOSSIBILITY OF FREE FAIR ELECTIONS UNDER EXISTING DRACONIAN LAWS

Free elections are characterized by the right of access to political information; freedom to organize for political purposes and the right to campaign; regular holding of elections that are decided by the freely cast vote of the majority; and equal voting power for all citizens.[1] The SPDC has restricted each of these tenets with the use of draconian laws and, with the new constitution, will be able to permanently deny free elections under various pretenses.

First, right of access to political information is currently violated due to the fact that the regime controls all media, and restricts other sources of information. The ICCPR outlines the right to information in Article 19. The Human Rights Committee specifically states that protecting the right to information includes the "freedom to seek and receive [information] regardless of frontiers and in whatever medium".[2] There is no sanctioned outlet for information except for what the SPDC warrants, and those who attempt to seek or raise awareness of political options contrary to the SPDC are imprisoned.[3]

A. 1962 PRINTERS AND PUBLISHERS REGISTRATION LAW

For example, the 1962 Printers and Publishers Registration Law effectively places a muzzle on free expression. Under this Law, all printed or written material must gain prior approval from the Central Registration Board.[4] Additionally, all printers must register with the government,[5] but registration may be revoked if the printer is found to "[harm] the ideology and views" of the government.[6] This law is commonly used to silence dissidents through imprisonment for publishing materials. It is also convenient for framing opposition leaders by simply planting a scrap of unauthorized paper in their possession, and charging them under this law.[7] This

Myo Min Tun U Ba Thin
The Activists whom were provided penalty in accordance of 1962 Printers and Publishers Registration Law.

law has been in constant use since its inception and was only amended in 1989 to increase the harshness of its penalties, which includes up to seven years imprisonment and a fine of 30,000 kyat.[8] During an election, all campaign materials from all political parties would need to be approved by the regime before being distributed. This process would, at best, unnecessarily slow down campaigning and, at worst, implicate broad political networks as targets for the regime. Using only government-censored material undeniably restricts citizens' access to information and political parties' right to campaign.

B. 1975 State Protection Law

The 1975 State Protection Law allows the military to preemptively arrest and charge people for crimes that that may "endanger the sovereignty and security of the state or public peace and tranquility"—even if they have not yet been committed.[9] The language is sufficiently vague to allow interpretation befitting the desires of the SPDC. The prescribed consequences, however, are unfortunately specific and dire. The law carries articles that allow the Cabinet to extend the duration of a person's detention for up to three years.[10] However, since there is no stipulated limit on how many times a prisoner's detention may be extended, this law may be used to detain a person indefinitely.

The State Protection Law provides for arbitrary detention, or the suspension of any other "fundamental right of any person suspected" of planning to violate this act.[11] In the International Covenant on Civil and Political Rights (ICCPR)[12]—which is considered customary international law—as well as the domestic constitutions of democratic nations around the world, suspects are presumed innocent until proven guilty. Moreover, detainees are generally guaranteed speedy access to justice, and allowed to defend themselves in a competent court. Article 9(e), however, states that a person "against whom action is taken" will only be handed over to judicial authorities if "sufficient facts for filing a lawsuit have been gathered".[13] The wording implies that people may still be held in detention *without trial* if ample evidence cannot be mounted. Again, the lack of specificity regarding the term "sufficient" provides likely scenarios of government abuse.

The 1975 Law not only omits access to justice, but goes as far to specifically bar detainees from appealing their detention to authorities.[14] Overall, the State Protection Law is an illegal tool used capriciously to strip innocent citizens of their fundamental right to liberty. Since the SPDC has historically used a broad interpretation of this law to remove opposition figures from public life, it is can be inferred that political activists will either be discouraged from openly campaigning or punished for doing so. Labeled as "subversive", political parties are routed and, therefore, denied the right to organize freely.

C. 2004 ELECTRONIC TRANSACTION LAW

Min Ko Naing and 88 students whom were provided penalty in accordance with the Electronic Transaction Law

The 2004 Electronic Transaction Law was promulgated by the SPDC to dictate all use of electronic technology. The purported aims of this law are to support modernization; increase opportunities for development in various social sectors; and enable communication with international organizations, regional organizations, foreign countries, government departments, etc.[15] However, as with the aforementioned laws, it is primarily applied as a means to charge and sentence political opponents of the military. Section 33 of this law outlines "Offences and Penalties" for the misuse of electronic transaction technology including:

> (a) doing any act detrimental to the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture;
> (b) receiving or sending and distributing any information relating to secrets of the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture.[16]

In this current era, the Internet and mobile phones are powerful tools used to disseminate information widely and cheaply. In democracies, electronic technology is used to the mutual benefit of politicians and the electorate. Politicians can convey their agendas to an extensive audience in a small amount of time; public opinion regarding various political platforms can be quickly gauged and adjusted in a way that truly responds to the needs of the people. For developing countries where infrastructure makes traveling difficult, the Internet may also be utilized to inform voters of the election issues and voting process. Unfortunately, the Electronic Transaction Law renders these progressive tools obsolete through the imposition of severe punishments for normal electronic use.

Nay Phone Lett whom was provided penalty in accordance whth the 2004 Electronic Transaction Law

A violation of this section may result in seven to fifteen years of imprisonment.[17] This punishment was recently used to sentence prominent pro-democracy leader Min Ko Naing, Chairperson of the All Burma Federation of Student Unions and 88 Generation Students group, and nearly forty other dissidents to sixty-five years in prison.[18] The members of the 88 Generation Students group were charged with violating four counts of

the Electronic Transaction Law, with each violation carrying the maximum fifteen-year sentence. This is a highly disproportionate punishment for simply using email communication[19] and, similar to the State Protection Law, presents a serious risk for political opponents of the SPDC.

D. Section 505(B) of the Penal Code

Under Section 505(b) of the archaic Burmese Penal Code, people can be charged for any statement, rumor, or report made "with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility".[20] The junta has used this law to repress and punish those taking part in free expression, peaceful demonstrations, and forming organizations.[21] Most notably, Section 505(b) was used in-part to charge U Gambira, leader of the All Burma Monks' Alliance and key activist in the 2007 Saffron Revolution, with a total of 68 years in prison.[22] The Saffron Revolution was an entirely peaceful protest of religious figures that were brutally crushed by the military junta.[23] With the harsh consequences of this law widely known, political parties are denied their right to organize and campaign. This, in turn, additionally violates citizens' rights to access the political information necessary to make an informed choice during polling.

(Endnotes)

[1] Eric Bjornland, *Beyond Free and Fair Election: Monitoring Elections and Building Democracy* (Wilson Center Press and Johns Hopkins University Press, Baltimore 2004).
[2] UNCHR 'General Comment 10' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I).
[3] Assistance Association for Political Prisoners (3 October 2009) <http://www.aappb.org/> accessed on 2 November 2009.
[4] 1962 Printers and Publishers Registration Law (1962), Part 5.
[5] 1962 Printers and Publishers Registration Law (1962), Part 4.
[6] 1962 Printers and Publishers Registration Law (1962), Part 4(10).
[7] Interview with U Nyi Nyi Hlaing, Defense Lawyer, Mae Sot (12 November 2009).
[8] Law No 16/89—the Law Amending the 1962 Printers and Publishers Registration Law (1989).
[9] State Protection Law (1975), Article 7.
[10] State Protection Law (1975), Article 14.
[11] *Id*.
[12] International Covenant on Civil and Political Rights, Article 14(2).
[13] State Protection Law (1975), Article 9(e).
[14] Notification No 11/91—the Law Amending the State Protection Law (1972).
[15] The Electronic Transactions Law (2004), Section 3.
[16] The Electronic Transactions Law (2004), Section 33.
[17] *Id*.
[18] Phanida, 'Min Ko Naing & "88 Generation Students" Given 65 Years' *Mizzima* (15 November 2008) <http://www.mizzima.com/news/inside-burma/1307-min-ko-naing-a-88-generation-students-given-65-years.html> accessed 10 November 2009.

[19] Interview with U Nyi Nyi Hlaing, Defense Lawyer, Mae Sot (12 November 2009).
[20] The Penal Code (1860), Section 505(b).
[21] Human Rights Watch '2100 by 2010: Free Burma's Political Prisoners' *Human Rights Watch* (16 August 2009) <http://www.hrw.org/en/free-burmas-prisoners/background> accessed on 2 November 2009.
[22] 'U Gambira to Serve Total of 68 Years in Prison' *Mizzima* (21 November 2008) <http://www.mizzima.com/news/inside-burma/1343-u-gambira-to-serve-total-of-68-years-in-prison.html> accessed on 10 November 2009.
[23] Andrew Buncombe, 'Burma: Inside the Saffron Revolution' *The Independent* (27 September 2007) <http://www.independent.co.uk/news/world/asia/burma-inside-the-saffron-revolution-403645.html> accessed on 12 November 2009.

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(A . 2)
THE 2010 ELECTIONS: POLITICAL PARTIES AND ETHNIC ORGANIZATIONS

A. POLITICAL PARTIES

Chapter 10 of the 2008 Constitution outlines requirements for political parties. Paramount among the goals of political parties is "non-disintegration of the Union, non-disintegration of national solidarity and perpetuation of sovereignty".[1] Additionally, the 2008 Constitution predetermines a set of unalterable party objectives. In liberal democracies, however, political parties are formed precisely to represent an array of viewpoints and offer different options to voters. The issue of set objectives is significant in the case of Burma because the majority of political parties disagree with the 2008 Constitution and will not comply with it. The regime cannot force a political party to change its agenda, but if a political party cannot adhere to the constitution, then it automatically disqualifies itself. Thus, objections to the constitution and failure to register as a political party under its guidelines may lead to cancellation of the legal status of the party. Without official legal status, the SPDC can effectively bar these groups from elections and government. This can be interpreted as a deliberate attempt to restrict the role of the opposition in political participation, which then renders the possibility of true multi-party democracy obsolete.

Article 407, discusses the justification for dissolving political parties by stating:

> If a political party infringes one of the following stipulations, it shall have no right of continued existence:
> (a) having been declared an unlawful association under the existing law;
> (b) directly or indirectly contacting or abetting the insurgent group launching armed rebellion against the Union or the associations and persons determined by the Union to have committed terrorist acts or the association declared to be an unlawful association;
> (c) directly or indirectly receiving and expending financial, material and other assistance from a foreign government, a religious association, other association or a person from a foreign country;
> (d) abusing religion for political purpose.[2]

The provisions of this article do not meet the standards of fairness or objectivity that are found in the constitutions of other democratic countries. In

South Korea, for instance, political parties may only be dissolved if the "purposes or activities of a political party are contrary to the fundamental democratic order", which is determined by the judgment of the Constitutional Court.[3] The Burmese constitution, however, does not allow for any review of activities by an impartial and legitimate body. The scope of this article is so broad that it effectively allows the SPDC to eliminate any political party it chooses. At the same time, it is targeted to encompass groups that have opposed the SPDC. Given its historic conflict with groups representing ethnic minorities, as well as its antagonism towards the NLD, the chances of fair participation are virtually nonexistent.

B. ETHNIC ORGANIZATIONS

Burma exercises a "First Past the Post" (FPTP) electoral system, which constitutes handing power to the candidate in a district with the highest percentage of votes. Burma has myriad minority groups (at least 135, according to the military regime) and a 60 percent ethnically Burman majority.[4] With the FPTP system, it will be virtually impossible for minorities to win seats in parliament. Lack of representation in government has historically been a point of serious contention for the ethnic minorities, but the electoral system does nothing to address this issue.

In democracies around the world, lawmakers have prioritized ensuring representation for traditionally marginalized populations such as ethnic minorities and women. Most often, this is accomplished by reserving a quota for members of this group. Additionally, electoral systems such as list proportional representation (list PR) can be a powerful way for the government to signify its support of smaller communities. However, reserving a quota system or list PR is nonexistent in the 2008 Constitution. Since independence, Burma has practiced a simple majority or FPTP system. As such, in a number of constituencies, representatives were elected without obtaining over 50 percent of the vote. This reality negatively impacts the representation of ethnic minorities, in terms of total population, in legislative assemblies.

The National Assembly, known as the *Amyotha Hluttaw*, would seem to be the logical place for minority representation, but nothing is specifically reserved for ethnic groups. Instead, the *Amyotha Hluttaw* is simply formed by an equal number of representatives (twelve) from each region and state.[5] While the *Amyotha Hluttaw* may seem to equalize the power in parliament with representation being based on area instead of population—and with the knowledge that states are occupied by a predominant ethnicity—the lack of specific provisions in the 2008 Constitution could still result in almost all ethnically Burman representatives.

Even if the problem of ethnic representation in parliament could be sorted out, there would still be the controversial issue of ethnic militias and the transitional period. Many of the ethnic groups have standing security forces, although the majority has signed cease-fire agreements with the SPDC. In April 2009, *Tatmadaw* officers approached leaders of various groups with the suggestion of transforming ethnic armies into a Border Guard Force (BGF). The BGFs would retain the ethnic soldiers for border security and be paid on equal footing with the regular *Tatmadaw* soldiers, but would add *Tatmadaw* officers to 'oversee' operations.[6] Almost all cease-fire groups refused this arrangement, and the SPDC retaliated by sending thousands of troops to northeast Burma. After nearly twenty years, ceasefire agreements were broken with renewed violence between SPDC forces and the Kokang army.[7]

Such a critical issue should have been discussed in the National Convention with the agreement of ethnic leaders sought before the constitution was formally drafted. From there, guidelines could have been laid out in the Chapter on Transitory Provisions. Unfortunately, no such actions were taken by the military regime. Rather, simply by using military might, ethnic cease-fire organizations were forced to transform into BGFs at the disposal of the regime, without regard to the constitution. As a result, the military regime has created another constitutional problem that will cause long-term destabilization.

Saw Tamala Baw
Chairperson of the Karen National Union

If the 2008 Constitution comes into effect, all armed forces will be technically under the command of Defense Services.[8] Given the historical reality of over sixty years of civil war, it is not feasible to place all ethnic armed organizations under the command of the SPDC Army. Despite the fact that the SPDC was able to force smaller ethnic armed organizations to accept the BGF position, stronger organizations such as the United Wa State Army (UWSA) and the Kachin Independence Organization (KIO) have not complied with the SPDC's plan. The deadline for compliance was 31 October 2009, but the USWA and KIO have stated their intention to continue negotiations and meetings with senior military officers.[9] Both organizations have demanded autonomy in their ethnic region, which would be threatened by the inundation of *Tatmadaw* officers under the BGF plan. The KIO has expressed its intent to become the Kachin Regional Guard Force under the new government instead of a subset under the *Tatmadaw*,[10] though no progress has yet been made between the opposing sides.

The last demographic of major ethnic armed organizations are those in active hostility with the regime, such as the Karen National Union, Karenni National Progressive Party, and the Shan State Army (South). They have publicly declared that the 2008 Constitution is unacceptable and must be revised. If the SPDC adheres to its own plan of holding the 2010 elections without addressing the self-determination issue of the ethnic minorities in a revised constitution, civil war and the unnecessary loss of life will persist.

If the current trend continues, there will be a clear division between the ethnic forces that have assumed the BGF role and those that have not. In that case, under the authority of the 2008 Constitution, the SPDC or the 'elected government' may order the BGF—which is under the direct command of the Defense Services—to fight against the ethnic armed organizations that have refused to transform into the BGF. The SPDC has created a situation where one ethnicity is systematically forced to fight against its own ethnic group.

(Endnotes)

[1] Constitution of the Republic of the Union of Myanmar (2008), Article 404(a).
[2] Constitution of the Republic of the Union of Myanmar (2008), Article 407.
[3] Constitution of the Republic of Korea (1988), Article 8.
[4] Nehginpao Kipgen, 'Obama Energizes Burma's Ethnic Minorities' *The Irrawaddy* (11 November 2008) <http://www.irrawaddy.org/article.php?art_id=14606> accessed 30 October 2009.
[5] Constitution of the Republic of the Union of Myanmar (2008), Article 141.
[6] Wai Moe, 'Border Guard Force Plan Leads to End of Ceasefire' *The Irrawaddy* (31 August 2009) <http://www.irrawaddy.org/article.php?art_id=16691> accessed 31 October 2009.
[7] *Id*.
[8] Constitution of the Republic of the Union of Myanmar (2008), Article 338.
[9] Saw Yan Naing, 'Border Guard Deadline Passes Without Agreement' *The Irrawaddy* (2 November 2009) < http://www.irrawaddy.org/article.php?art_id=17116> accessed 19 November 2009.
[10] *Id*.

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(A . 3)
THE NEXUS BETWEEN THE 2008 CONSTITUTION AND 2010 ELECTION

The international community has repeatedly called for the junta to hold free and fair elections in 2010, as well as allow international monitors to observe, but this alone is an inadequate response to the overall political situation. Before focusing on the future, the international community must turn to the past and address the aspects of the 2008 Constitution that intrinsically flout democracy. First, the constitution was written without the consensus of stakeholders.[1] Second, it was presented to a population where 69 percent claimed to have "no awareness of the details of the proposed constitution".[2] Third, though the UN has documented a multitude of human rights violations on the parts of SLORC and the SPDC, Article 445 promises impunity for military.[3] Thus, the very premise of the 2010 election as a step towards democracy is already compromised.

Additionally, the constitution contains major flaws related to each branch of government that do not represent democratic norms. In the legislative branch, 110 of the 440 seats of the *Pyithu Hluttaw* (People's House) are reserved for military personnel.[4] The *Amyotha Hluttaw* (National Assembly) contains 224 seats, with 56 reserved for military personnel.[5] Thus, a full 25% of the *Pyidaungsu Hluttaw* (Union Parliament) would be comprised of military servicemen appointed by the Commander-in-Chief of Defense Services. This proportion has special significance because the 2008 Constitution can only be amended with over 75 percent of parliamentary approval.[6] As a result, it will be impossible to change the constitution without military approval.

The SPDC Will Transform Themselves Into The National Defense And Security Council

The executive is headed by the President, which is chosen by the Presidential Electoral College (PEC).[7] The PEC is comprised of three bodies: one from each chamber of parliament, and one from the military personnel appointed by the Commander-in-Chief of Defense. Each group then nominates

a vice presidential candidate from which the president will be chosen after a vote from the entire PEC. This ensures that an incumbent army official will hold one of the three head-of-state positions (either as President or one of two Vice Presidents). The constitution provides the executive with broad powers even though he is not elected by popular vote and, thus, is not accountable to the population.

From the State Peace and Development Council (SPDC) to the National Defense and Security Council (NDSC)

The new constitution also mandates the formation of an irregular council in the Executive branch called the National Defense and Security Council (NDSC).[8] The NDSC is comprised of eleven people representing various government bodies and ministries. However, the process used to choose representatives guarantees a majority of military officials in the NDSC. The President appoints ministers by selecting from among the *Hluttaw* representatives and a list of military candidates submitted by the Commander-in-Chief of Defense.[9] The ministers of defense, home affairs, and border affairs are exclusively appointed from the military candidates.[10] Thus, at least six of the eleven seats in the NDSC will be military personnel, which constitutes a requisite quorum to pass motions.

- State President
- Vice President
- Vice President
- Speaker of the People's House
- Speaker of the House of Nationalities
- Commander-in-Chief of the Defense Services
- Deputy Commander-in-Chief of the Defense Services
- Minister for Defense
- Minster for Foreign Affairs
- Minister for Home Affairs
- Minister for Border Affairs

The NDSC essentially exercises executive power in conjunction with the President, including the power to declare a state of emergency effective throughout the entire nation.[11] Under a prescribed state of emergency, all executive, legislative, and judicial power would be transferred to the Commander-in-Chief of Defense Services for up to one year, which can then be extended for another year.[12] If the parliament term ends during a state of emergency, then there are simply no representatives in the legislature until another election—as organized by the NDSC—can take place.[13] Thus, the military would run the country under constitutionally legal pretense.

(Endnotes)

[1] Larry Jagan, 'Democracy and death in Myanmar' *AsiaTimes* (29 May 2008) <http://www.atimes.com/atimes/Southeast_Asia/JE29Ae01.html> accessed 21 October 2009.
[2] 'Burma News International: Release of nationwide voters survey on the Burmese referendum' *BurmaNet News* (7 May 2008) <http://www.burmanet.org/news/2008/05/07/burma- news-international-release-of-nationwide-voters-survey-on-the-burmese-referendum> accessed 22 October 2009.
[3] Constitution of the Republic of the Union of Myanmar (2008), Article 445.
[4] Constitution of the Republic of the Union of Myanmar (2008), Article 109.
[5] Constitution of the Republic of the Union of Myanmar (2008), Article 141.
[6] Constitution of the Republic of the Union of Myanmar (2008), Article 436.
[7] Constitution of the Republic of the Union of Myanmar (2008), Article 60.
[8] Constitution of the Republic of the Union of Myanmar (2008), Article 201.
[9] Constitution of the Republic of the Union of Myanmar (2008), Article 232(b).
[10] Constitution of the Republic of the Union of Myanmar (2008), Article 232(b)(ii).
[11] Constitution of the Republic of the Union of Myanmar (2008), Article 417.
[12] Constitution of the Republic of the Union of Myanmar (2008), Article 418.
[13] *Id*.

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(A . 4)

DISENFRANCHISED DEMOGRAPHICS: MIGRANT WORKERS, REFUGEES, INTERNALLY DISPLACED PERSONS, AND POLITICAL PRISONERS

The question of "equal voting power for all citizens" is very controversial in Burma's situation. Burma is and has been a nation in crisis for nearly fifty years. Harsh military rule has resulted in a scattered population due to either economic or security reasons. Thus, disenfranchised populations exist both outside and inside of Burma. Though a registration was compiled for the 1990 election, the worst internal fighting occurred after that, necessitating an updated registration roll.

The right to vote is guaranteed in Article 25 of the ICCPR. Furthermore, in General Comment 25, the Human Rights Committee (HRC) applied the principle of non-discrimination stating that "the right to vote must be recognized and protected for all citizens, with no distinctions, restrictions or impairments permitted on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[1] Finally, the HRC imposes a positive obligation on the State to facilitate the right to vote, mandating it to "adopt specific measures to ensure that obstacles to voting and participation, such as poverty, illiteracy, restrictions to freedom of movement and homelessness, are overcome" and that "voters should be able to form opinions independently, *free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind*." (emphasis added)[2] The following groups of people are disenfranchised under the SPDC's current policies.

A. MIGRANT WORKERS

The 1962 coup d'état and subsequent economic failure under General Ne Win impoverished Burma. The lack of economic liberalization, along with political instability, led to decreased investment in the country and a soaring unemployment rate. Citizens soon began crossing international borders (most notably into Thailand) to earn wages doing manual labor. Many workers are undocumented, and even the ones with documents cannot easily return home to vote without forfeiting their jobs.

54 Burmese Migrant Workers Who Died of Suffocation

54 Migrant Workers Who Died of Suffocation

The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families underscores the "right to participation in public affairs of their State of origin and to vote and to be elected at elections of that State".[3] Even though Burma has not ratified this specific convention, the right to vote is still an internationally recognized norm.[4] The practice of out-of-country voting (OCV) has been implemented in many countries around the world including the Philippines, Malaysia, Indonesia, Thailand, and Lao.[5] The Filipino Overseas Absentee Voting Act of 2003 allows migrant workers to register at consulates or embassies in countries of residence, and apply to vote in absentia.[6] 65 percent of the 359,297 registered overseas voters participated in the 2004 election,[7] which was comparable to the in-country turnout. Thus, it is possible for a developing country to facilitate OCV. More importantly, it is a clear violation of the right to vote if the SPDC does not implement measures to vote in absentia.[8] The lack of such a policy would deny up to three million Burmese migrant workers in Thailand[9] from their right to vote.

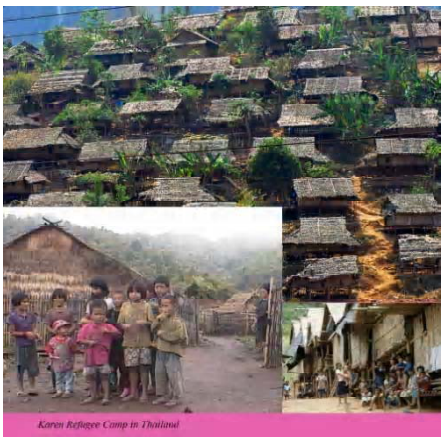
Earlier this year, the SPDC began a partnership with the Thai government to issue temporary passports without forcing migrants to return to Burma. This has helped provide national verification and documentation for migrant workers. In the same vein, the regime is obligated to create a voter registration process that will allow workers to cast votes without having to return to Burma.

B. Refugees and Internally Displaced Persons

When fighting intensified among the ethnic groups, which are situated in the North and West along Burma's border, countless villages were destroyed and people were forcibly displaced. Many asylum seekers crossed international borders and are trapped in Thai refugee camps without status as belonging to any nation. According to Refugees International, there are an estimated 3.5 million displaced Burmese.[10] Asylum seekers and refugees are in situations of persecution, which makes it unsafe for them to return to Burma. Even if their safety could be guaranteed inside the country, many are currently residing in

camps, which they are prohibited from leaving. Internally, people forced from villages, but unable to cross the border, have set up new residences in safe locations. However, internally displaced persons would not be able to return to their original homes without jeopardizing their physical security.

[* File contains invalid data | In-line.JPG *]Again, an out-of-country voting (OCV) or absentee system should be instituted to enfranchise rightful citizens. This is particularly crucial in Burma's case because internally and externally displaced communities contain a disproportionately high percentage of ethnic minorities. Participation of minority groups is internationally recognized as necessary to change existing conditions in governments that result in discriminatory practices.[11] However, political change cannot occur when ethnic minorities cannot even exercise their right to political participation. Displacement, especially in combination with ethnicity, provides particular conditions of vulnerability. As a result, special attention and provisions must be implemented to ensure safe political participation for this demographic.


Karen Refugee Camp in Thailand

C. POLITICAL PRISONERS

Article 392 of the constitution prohibits the right to vote from "persons serving prison terms".[12] The Assistance Association of Political Prisoners (AAPP) estimates over 2,100 political prisoners are currently being held in detention without trial.[13] Prisoners, as a result of breaking the social contract of the law, have historically been denied the right to vote. This practice, however, has proved increasingly illogical. Participation in civil society through democratic norms and an understanding of larger societal structures is an important way to re-engage those who may have commit crimes.[14] While states may choose to restrict the right to vote, the HRC emphasizes that such measures must be "objective, reasonable, and proportionate".[15] Few crimes have warranted sufficient reason or proportionality to deny the right to vote. In the case of Burmese political prisoners, the denial of the right to vote is especially inappropriate, as the vast majority has not been tried by a competent court.

After meeting with UN Secretary General Ban Ki-moon in July 2009, the junta has pledged to release political prisoners via amnesty in time for next

year's elections.[16] While AAPP reports the release of three political prisoners in October, an additional 41 were arrested.[17] Clearly, the SPDC still has a long way to go before fulfilling this promise. Interestingly enough, Section 401 of the Code of Criminal Procedure stipulates that only the President may grant pardons.[18] Though not the president, General Than Shwe has taken on the powers of the Presidential office, which is a concern within itself. In regards to such pardons, however, the action has been used as a tool to physically separate activists who are considered a threat to the regime.[19] For example, pardon has been granted to some members of political organizations and not to others in order to facilitate a "divide and conquer" approach to dissidents.[20] Though the SPDC may release all political prisoners before the election, timing is also a factor. It is not enough to grant them freedom immediately before the vote. Rather, the military regime should ensure ample time for political prisoners to organize and campaign for the 2010 elections as legal participants on equal footing with every other political party.

(Endnotes)

[1] UNCHR 'General Comment 25' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I).

[2] *Id*.

[3] UNGA 'International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families' UN GAOR 45th Session Supp No 49A UN Doc A/45/49 (1990).

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(A . 5)
ANALYSES OF THE SITUATION IN BURMA

A. THE SPDC: NOT PLANNING TO STEP DOWN BUT *STRENGTHENING* ITS POWER

The SPDC has proven its unwillingness to relinquish power. The regime repeatedly promises one thing, and then reneges on what it has stated to serve its own purposes. In 2005, the SPDC established Naypyidaw as the new capital of Burma. Located approximately 320 km north of Rangoon, the move attests to the SPDC's intent to maintain political control. In contrast to Rangoon, Naypyidaw is relatively undeveloped and unpopulated (except for by government officials). The area is void of mobile phone service and private landlines are prohibited for civil servants. The top military generals themselves live hidden from the public eye in mansions 11 km from the main government offices. Naypyidaw represents less of a capital city where a citizen would go to petition a government, and more of what it really is—a military base with pitiful civilian trappings.[1]

One advantage of the new capital is that it is too removed from the population to be disrupted by events like the 2007 Saffron Revolution, where monks flooded the streets of Rangoon. Business continued as usual in Naypyidaw, while the junta brutally quelled the uprising down south and arbitrarily imprisoned thousands of citizens. In the face of such blatant protest, General Than Shwe proceeded to prepare for a referendum on 10 May 2008 to ratify the constitution developed by the National Convention.

B. ARE ALL ELECTIONS STEPPING STONES FOR A GRADUAL DEMOCRATIZATION?

The tenets of liberal democracy—protection of individual rights, separation and independence of government branches, media freedom, and a robust civil society—will not appear overnight. Such institutions must be intentionally fostered and sustained in a political environment that is conducive. It is difficult to maintain democracy in the best of situations, and nearly impossible to establish democracy following a history of violence akin to the scale in Burma. The current example of Iraq highlights the difficulties of uniting a diverse population under one national, democratic government after decades of authoritarianism—despite billions of dollars in aid and technical assistance. The lack of information in Burma is another barrier to democratic transition. Even if liberal norms are clearly understood, the practice of such norms is a completely different matter. In order to prime the population for democracy, the SPDC should give civil society free reign to education others about the exercise of

liberal rights. Without this political backdrop, the elections are just another puppet show with no clear objective.

Earlier this year, the International Crisis Group (ICG) released a report describing the 2008 Constitution as the "flawed product of a flawed process".[2] At the same time, the report submitted optimistic hopes for the elections to spur political change. Though the Burma Lawyers' Council would like nothing more than for this election to ignite genuine democratization, it is crucial to remember that the 2008 Constitution, as it stands, will never lead to such a transformation. Though elections were held four times under the 1974 Constitution, none of these could be described as gradual stepping-stones towards democratization. The ICG raised three points as to why the 2010 Elections might lead to democracy:

- the hopeful promise of generational transition;
- provisions in the 2008 Constitution envisioning a multi-party state capable of representing divergent interests;
- the improvement in the domestic and international contexts, including developments in information technology (IT), media, civil society, and political awareness.[3]

Unfortunately, even given these concessions, there is no reason to believe that the present scenario will differ from the historical course of elections in Burma.

First, positive generational transition can only occur when the generation coming into power has been exposed to and believes in the merits of liberalization. Nothing in the past half century has set the groundwork for that occurrence. Moreover, the 2008 Constitution does not lead in the right direction for promotion of human rights and encouraging democratic Rule of Law. No country in the world has transformed itself from the rule of military dictatorship to democracy within the framework of a Basic Law similar to the SPDC's 2008 Constitution, which simply legitimizes the military dictatorship.

Second, despite claims of multi-polarity, no actions on the part of the SPDC have fostered such a political climate. Decades of anti-association and anti-assembly promulgations make the declarations of political heterogeneity ring hollow. Even if divergent groups were allowed to be elected and hold office, the charade of democracy would end there. Between the 75 percent majority needed to pass bills and the 25 percent of parliament claimed by the military, it would be virtually impossible for any group to pass meaningful legislation. A multi-party state is pointless if even the best of coalitions remain impotent to render change.

Third, while IT, civil society, and political awareness in Burma have undoubtedly developed from 35 years ago, instances like the Saffron Revolution

reveal that it is still unable to influence the governing powers. Media is so tightly censored that it symbolizes the junta's unquestionable control more than anything else. Regional pressure is unlikely to materialize considering the passivity of the Association of Southeast Asian Nations (ASEAN) in dealing with the military. The analysis that 'the [regional] context has changed'[4] presents a worrisome presupposition. Moreover, the lack of sustained pressure and tangible action on the part of the international community has actually seemed to result in an ever-emboldened regime. Though the international community has expressed the intent to take action, current efforts appear uncoordinated and even contradictory at times.

In Asian countries where democratization has occurred (such as South Korea, Taiwan, and Indonesia) economic liberalization and the loosening of political control have preceded such transitions. In the cases of all three countries, military dictators ruled for several decades. Generational transition, however, did not happen within the framework of the constitutions. Instead, student demonstrations with the background support of civil society organizations facilitated societal change outside of the constitutional framework. Additionally, the authoritarian regimes of all three countries were reasonably susceptible to popular opinion, which paved the way for stabilization into liberal democracy. Thus, civil society can only be effective in propelling democratic change if the ruling authorities are also willing to concede power incrementally. These factors are still not in place in Burma. Due to arbitrary restrictions made by the military regime,[5] the status of civil society inside Burma has yet to reach the level of civilian participation experienced by any of the aforementioned countries prior to liberalization.

(Endnotes)

[1] Nina Martin, 'Living in a ghost town' *Bangkok Post* (18 October 2009) <http://www.bangkokpost.com/news/investigation/25872/living-in-a-ghost-town> accessed 21 October 2009.

[2] International Crisis Group, 'Myanmar: Towards the Elections" (20 August 2009) <http://www.crisisgroup.org/home/index.cfm?id=6280> accessed 13 November 2009.

[3] *Id*.

[4] International Crisis Group, 'Myanmar: Towards the Elections" (20 August 2009) <http://www.crisisgroup.org/home/index.cfm?id=6280> accessed 13 November 2009.

[5] Community-based and non-profit organizations cannot receive funding directly from international sources.

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Part (B)

Judiciary and Rule of Law

(B. 1)
A Comparative Study: Seeking Judicial Power With a Special Focus on Burma's Judiciary

Introduction

In today's world, the rule of law has become the dominant legitimizing slogan1, despite the fact that universal agreement has not yet been reached on the nature of the doctrine. Even governments that reject or express reservations about democracy and human rights as cultural and political inventions of the West nonetheless claim that they abide by or are working towards achieving the rule of law.2 It is also evident that, with the existence of an independent, competent and impartial judiciary, the rule of law will be entrenched.

This paper will not discuss rule of law issues in-depth. However, it will discuss the underlying common concept of the rule of law as it bolsters courts, giving them their institutional status and enabling them to move toward a redesigned judiciary from diverse societal backgrounds. In addition, this paper will explore what those institutions should look like, distinguishing between two quite different judicial functions – judicial review and the ordinary administration of justice – as a comparative study of jurisdictions of some countries. Finally, with a special focus on Burma, it will suggest how to move toward good judicial institutions, what those institutions should look like, whether it is possible to achieve such institutions from the current status quo, and what judicial institutions we can reasonably hope for in Burma.

The Factors that Influence the Rule of Law

The Rule of Law in France

With reference to the Declaration of Rights of Man and of the Citizen, in which individual rights and freedoms were enshrined, Laurent Pech stated that even if no synthetic term was formulated in history of France, the concept of the rule of law was implicitly present since 1789.3 Freedom of the people is the beginning of law and is the essential feature of justice.4 People are in fact the nation and that, in consequence, the people, acting through its representatives, can adopt a constitution and rule the country on behalf of the nation. The rule of law was thus identified with rule by legislation, and the supremacy of law is understood as the supremacy of Parliament.5 However, unstable executive power under the Fourth Republic caused growing dissatisfaction among the French people with the traditional conception of parliamentary sovereignty, and it paved the way for emergence of the Constitutional Council, a unitary judicial apparatus.6

The Rule of Law in the United States

In the United States (US), which is widely considered to be a bastion of the rule of law, the doctrine is intimately connected to a liberal culture and liberal political system. Individual liberty is championed by liberalism and its goal is to curb the intrusion of governmental authority against individuals and to seize control of the power to exercise that authority.7 With the background of liberal culture and liberalism, the US Supreme Court stands as the most powerful institution which exercises the power of judicial review, protects individual rights and maintains the rule of law. According to the concept of liberalism, tolerance for other community views is forced upon the people by the fact of coexistence;8 nevertheless the values of collectivism, harmony and social cohesion cannot be found.

The Rule of Law in China

The Chinese legal system emanated from Chinese culture which is represented in the philosophy, “Heaven and Man combining into one, and all things on earth is an organic whole”.9 Accordingly, the value of collectivism was formed. However, although social stability, emperor’s rule, and hierarchy in society were maintained, individual value was neglected and individualism was strictly controlled.10

Law exists not to empower and protect individuals from the state, but as an instrument of governmental control; any rights that do exist are granted by the state and may be retracted.11 During Mao period, the purpose of law was to serve the state, not to protect individual rights.12 With these backgrounds, the Cultural Revolution (1966-1976) was sanctioned as a decade-long catastrophe;13 during that period, people were deprived of their individual rights and freedoms. The rectification of the Cultural Revolution with the desire for social justice and the needs of a market-based economy,14 initiated by Deng Xiao Peng with the underpinning of modern Chinese nationalism, dictated the application of the formal features of the rule of law in China.15 The 15th Congress of the Chinese Communist Party embraced of the rule of law in 1997 after the reconstruction of its legal system in 1978.16 The rule of law has become an official language in the constitution of China since 1999.17

A new campaign on the "socialist rule of law theory", accentuating Hu Jintao's theory of a "harmonious society" was implemented in China in 2006.18 It is found there that, except one element of "following the leadership of the party", the remaining four elements such as "ruling the country by law," "implementing law for the people," "maintaining fairness and justice," and "serving the overall situation" are not contrary to the doctrine of the rule of law adopted by the western countries. It is unlikely that the rule of law does not prevail in China as the courts follow the leadership of the Chinese Communist Party (CCP). The status of courts in China may be controversial if they are observed only from the aspect of independence of judiciary.

The Rule of Law, Independence of the Judiciary and Interactions between Political Parties and the Judiciary

The International Bar Association ranks "an independent and impartial judiciary" first out of many principles which constitute the rule of law.19 Although unhappy law professors have sharply criticized the US Supreme Court decision, Bush v. Gore, which awarded the presidency to George Bush,20 and many US citizens also worried that the Court had gone too far,21 the US Supreme Court illustrated its status, as an independent judicial institution.

Despite that the independence of the judiciary plays a major role in maintaining the stability of society and promoting the rule of law, it cannot be construed that whenever there is independence of the judiciary, the rule of law will prevail and society will be stable. Recent incidents in Thailand indicated that although independence of judiciary formally exists22, stability of society cannot be guaranteed and the rule of law has been threatened. In Thailand, the political party system has not been functioning well; courts efforts to find a reasonable space adaptable to changing democratic development of Thailand has not yet worked, and the confidence of a number of people in courts, particularly in adjudicating politically-oriented cases, has lessened.

Similarly, previous incidents in Bangladesh proved that stability of society was also threatened although independence of judiciary formally exists there. For the case of Burma, it discerns that, without reforming the incumbent political party system in effect, the rule of law will never prevail nor will stability of society be facilitated. The rule of law will essentially prevail if an independent judiciary is created with the underpinning of a stable political party system. In the US, United Kingdom (UK), India, Germany, France, Japan, Australia, Scandinavian countries and elsewhere where political party systems operate well, political parties are powerful. In such political backgrounds, when the independence of the judiciary exists and 'political parties' and 'independence of judiciary' interacts each other effectively, the rule of law prevails, stability is facilitated, and society moves forward.

Common Practices of the Rule of Law

In today's world, the rule of law has become a convergence of diverse concepts, adopted mainly by both western and eastern societies: one focuses on individual freedoms whereas another seeks the collective value of society, despite the existence of mixed practices in many countries. Either one needs not be ostracized; but coexistence and practice of both, albeit a unity of opposites, may foster the stability of society.

Western democracies apply the rule of law from the aspect of civil and political liberties whereas China does so with the concern of most people about stability

and economic growth.23 Nevertheless, common practices of the rule of law found in both jurisprudences include the following:

- the conduct of each individual in his relations with others is regulated by law, not left to the individual's caprice;24
- operation of government is governed by law; and
- no one is above the law25.

Courts and the Rule of Law

Courts were central entities within feudal societies. One of the most significant political achievements of the Persian monarchy was the creation of the satrapal system, which proved an effective means of government for over two centuries, and within this structure a key aspect of court society can be detected.26 Courts are state actors in the sense that they function in support of the exercise of state power, within the institutional framework of independence, impartiality and the rule of law, and they act to reinforce power - both public and private - by enforcing obligations and duties created by legislation, in conjunction with other state actors.27

Comparison of the Supreme Courts of Bangladesh and India

Although the Supreme Court of Bangladesh has marked an important advance for individual rights, its general outlook towards women's rights still represents the conservative and restrictive approach, while emphasizing formality rather than gravity of crimes.28 The Supreme Court's approach seems more conducive to suppressing dowry remedies than to facilitating the effective enforcement of the Dowry Act 1980.29 Dowry is an amount of money or property which a woman's parents give to the man she marries.

Crimes relevant to dowry are usually committed by husbands against their wives, who cannot afford to provide dowry. By contrast, the Supreme Court of India, with a few exceptions, took a very strong approach to remedying dowry violence and it has also adopted a far broader approach of analysing how cruelty associated with dowry provoked women to commit suicide and how society should undertake a firm commitment to get rid of that social menace.30

Both India and Bangladesh inherited a common law system from the British and the constitutions of both countries guarantee an independent judiciary. In spite of having such a common legal and historical background, the Supreme Court of India practices judicial activism whereas its counterpart practices judicial restraint, at minimum, as far as the dowry issue is concerned, in which women are treated as property. The discrepancy is found in the realm of cultural background, the strength of civil society, and disparities in economic status.

In terms of institutional independence, both Bangladesh and India's courts enjoy similar status in a general sense. However, no court in the world can stand in isolation; and, it constitutes a part of society. As such, court cannot circumvent influence of society in one way or another. In Bangladesh and Pakistan, Islamic cultural influence is mainly in place and women suffer negative aspects of culture, particularly in the rural areas.

"Numerous violations relating to violence against women have occurred as the result of misinterpretation of Islamic teachings due to incomplete readings of religious texts and explanations of such violence that are influenced by patriarchal culture."31 Cultural influence over the justices of the Supreme Court of Bangladesh, where over 90% of total number of justices are believers in Islam, will certainly take place. Judges and police are inclined to deal with domestic violence as a family problem; they are hesitant to take action in such society where women's status is like a chattel and in the whole cultural scene men are powerful. It is therefore difficult for women to get relief from the justice system in cases of domestic violence.32

Similar cultural influence over the justices of the Supreme Court of India may also be in place although it may be lesser than its counterpart in Bangladesh. However, civil society in India is much stronger than that of Bangladesh. In India, criminal justice continues to be adversarial in nature; normally it is adjudication between the State and the accused.33 Also, participation of people other than the accused or the State is exceptional and not allowed where a normal trial under the Criminal Procedure Code is available.34

Nevertheless, public participation in the criminal justice system commenced when four professors of law wrote an open letter to the Chief Justice of India against the decision of the Court in Tukaram v. Maharashtra (AIR 1979 SC 185: (1979) 2 SCC).35 The case concerned two constables who allegedly raped a tribal girl Mathura in police custody, but the Supreme Court acquitted the accused, reflecting the strong patriarchal bias.36 The letter catalysed women's organizations' movement against the decision; although the decision remained unchanged, the debate paved the way for a change in judicial attitude in India.37

The Role of Law and the Role of Courts

The Role of Law

From the beginning of the study of the state by the classical scholars, down to the modern behavioral studies, law has sprung from society. All problems such as communalism, self-determination, national integration and etc. are primarily social, rather than legal issues. They have their roots deeply entrenched in society. Ruling political ideas and cultural practices very often dominate social values and beliefs. They have tremendous impacts on their respective societies, and they undoubtedly shaped the values and beliefs of respective societies to a great extent.

Law encompasses the legal aspects of society to preserve social order and enable social progress. However, law focuses only on the conscious phenomenon of the society and views man as a natural being rather than a social animal. As such, although law constitutes an intrinsic part of society, it keeps its distance from unconscious phenomena of the society. To apply the rule of law effectively in any society or state, the limited role of law must be realized at the outset.

The Role of Courts

In order to maintain their independence and avoid being drawn into the territories that belong to the other branches of government, courts must not cross the parameters of their judicial function.38 First and foremost, the role of courts should be, at minimum, identified as centering on the effective laws in any state. Citizens can only be constrained or punished for violation of the law and in accordance with the law. Where the law ends, so constraint ends. Judges

and the lawyers are boundary riders maintaining the integrity of the fences that divide legal constraint from the sphere of freedom of action.39

Social Harmony and the Role of Courts

In response to the statement made by Wang, a spokesperson for China's judiciary who emphasizes important role of the courts in promoting social harmony, Professor Randall Peerenboom questioned what a judge is supposed to do if promoting social harmony requires redistributing wealth to the most vulnerable and least productive members of society.40 Technically, he may be right, as judges do not have any power to do so directly. Nevertheless, judges can substantially maintain social harmony if they are able to distinguish the parameters of law and its connection with society.

Legislators, executives, and judges establish society together despite the fact they may play different roles in terms of separation of power. Legislators make laws focusing mainly on the conscious phenomenon of society. The executive administers the country and resolve issues of society regardless of whether they are conscious or unconscious: if they be conscious, law may be applied; if they be unconscious, rather than law, the other ways may be used. Judges, as boundary riders, maintain the integrity of legal fences and citizens may be punished if they violate an effective law. Under any circumstance, legislators, executive, and judges, while standing on their separate positions, pay attention to unconscious phenomenon of society in order to resolve the complicated societal issues and move society from one step to another.

Whereas everything in the political system is connected to everything else,41 the judges in society cannot stand in isolation even though they enjoy both personal and institutional independence. In a society where liberalism prevails, judges might have been preoccupied with this concept before they adjudicate any case. So is the case for judges in China concerning the concept of harmonious society. The primary responsibility of judges is to know the law. Yet, even though judges may receive their legal qualifications based on their knowledge of laws, such legal qualifications alone may not be sufficient. If judges understand the concepts, ideologies and related issues surrounding the law, it will be beneficial to operate the justice system more efficiently.

In the US, the nomination of judges is made having considered their ideologies. Richard A. Posner, a conservative appeals court judge in Chicago, and William M. Landes, his colleague from the University of Chicago Law School, ranked all 43 justices from 1937 to 2006 by ideology and found that four of the five most conservative ones are on the current court.42 The recent selection of Solicitor General Elena Kagan by President Obama to be the United States' 112th justice was criticized by conservative leaders by pinpointing her background, as she was a judicial activist who adopted progressive liberalism.43

In China, by contrast, being a spoke person for judiciary, Wang's calling for judicial independence, judicial accountability and professionalism44 does not contradict his emphasis on the important roles of courts in promoting social harmony. The practice of judicial independence, judicial accountability, and professionalism does not imply that judges totally disregard the unconscious phenomenon of society, including the societal notions of liberalism and a harmonious society, among others.

The Value of Collectivism, Harmony, and Social Cohesion in Courts

The concept of a harmonious society emanates from the values of collectivism, harmony, and social cohesion which liberalism never formally adopted. Collectivism instigates the people's spirit of togetherness, harmony spurs people not to ignore vulnerable sectors of society, and social cohesion enlightens people to the importance of sharing the benefits of individualism with each other.

The harmonious society doctrine aims to diffuse any volatile trends by way of "people-centered reform," whereby the fruits of development are more equitably shared. Goals of the new platform include: providing adequate social services in rural areas, correcting regional development imbalances, addressing labor dislocation, expanding health services and education, and placing greater emphasis on environmental and sustainability concerns.45

What are the judges supposed to do with this background concept of harmonious society? Actually, the more the judges realize not only the value of individualism borne by liberalism but also other concepts including collectivism, harmony and

social cohesion, the better they will be able to adjudicate the relevant cases justly, fairly and positively. In so doing, the judges can become qualified boundary riders.

Social Harmony and the Practices of Courts in the Philippines

The concepts of collectivism, harmony, and social cohesion are reflected in the Indigenous Peoples Rights Act (IPRA) of the Philippines (1979). The act recognizes the right to land, self-determination, and cultural integrity of indigenous peoples and stipulates that indigenous peoples have the right to prior consent before development projects commence on their lands.46 IPRA recognizes and promotes the rights of indigenous peoples to ancestral domains and lands, the right to self-governance, economic and social rights, and cultural integrity, including indigenous culture, traditions, and institutions.47 This is legal protection for the marginalized indigenous people so that they continue to survive collectively, practice their culture together, and share benefits arisen from their domains, within their communities vis-a-vis their natural environment although it faces a number of challenges in enforcing this act.

The action of Mr. Reynato Puno, Chief Justice of the Supreme Court of the Philippines, may be a judicial paradigm: he initiated a writ of Kalikasan, which is equivalent to the writ of habeas corpus in terms of addressing ecological cases.48 He also led the High Court and the Supreme Court in pursuing environmental protection.49

In January 2008, the High Court approved the creation of 117 environmental courts to expedite the resolution of all pending environmental cases nationwide, and in April 2009, the Supreme Court convened leaders from the executive branch, legislature, judiciary, non-government organizations (NGOs) and various environmental stakeholders to take part in its move to push for reforms in the judiciary that would help strike a balance ecological concerns vis-a-vis economic development.50 The Chief Justice also quoted Section 16, Article II of the Constitution of the Philippines, which provides that "the State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."51

Social Issues and Practices of Courts in Latin America

Society needs to protect individual rights on one hand while maintaining collective rights of people on the other, particularly people's right to self-determination which can be implemented in accordance with the constitution. Ultimately, the goal is that diverse nationalities may preserve and practice their culture, language, traditions and other designated societal value on the basis of collectivism, harmony and social cohesion. In that sense, can courts play a role or not?

Life depends on livelihood and livelihood increasingly depends on people's access to resources required.* Many times, governments, local authorities, and foreign and local companies manage and exploit natural resources such as the country's oil and gas reserves, forest and mine resources, minerals, river system, and lands, without any restraint and self-responsibility, and without community participation and their informed consent, in the decision making. In that case, people's access to resource required is negatively challenged. As a result, for the local people, collective living, harmony and social cohesion have collapsed. Hence, courts shall have a certain role to play to protect the collective rights of people, addressing social issues, centering on unfair exploitation of natural resources, although that the courts need not necessarily redistribute wealth to the most vulnerable members of society directly.

> In social issues, Latin America's courts have played a key role in adjudicating the rights of indigenous groups, women, and homosexuals. In the economic realm, judges have ruled on policies ranging fromprivatization to state employment to the scope of emergency powers during economic crises.52

Protection of Collective Rights and the Role of Courts in India In protecting the collective rights of people, the role of courts is additionally found in India where a number of diverse nationalities, including tribal people, live. Tribal people are deeply attached to their ancestral lands; land and forest for them are essentially communal resources to be used according to their present and future needs.

Their view is that land is a substance endowed with sacred meanings, embedded in social relations and fundamental to the definition of a people's existence and identity. Similarly, the trees, plants, animals, and fish, which inhabit the land are highly personal beings which form part of their social and spiritual universes. All lands are necessarily communally owned although there are also some lands that are owned by the clan members within a village or by individual household.53

> In September 1997, the Supreme Court of India delivered a landmark judgment upholding these rights of tribal peoples to life, livelihood, land, and forests in a case that dealt with issues of mining in tribal land. Samatha, a non-government organization (NGO) in Andhra Pradesh, filed the case on behalf of the affected tribal people. The Supreme Court held that forests and lands in scheduled areas, irrespective of whether owned by the government or by a tribal community, cannot be leased out to non-tribal people or to private companies for mining or industrial uses. It restricted mining activity in these areas to be carried out only by the State Mineral Development Corporation or a cooperative of the tribal people.54

In addition to realm of tribal people, the concept on common land and common property resources is also found in other parts of India, for instance, in Madhya Pradesh; and, it is identified by access to community's natural resources, highlighting that every member has access and usage facility with specified obligation, without anybody having exclusive property right over them.55

> In 1976-77, the MP government attempted to prohibit the entry of animals into the state for grazing; they could pass through the state, but within a maximum period of 45 days. The Supreme Court, however, struck it down, and the option of excluding the livestock from other states has been outlawed.

'Forests of MP are not grazing grounds reserved for cattle belonging to residents of MP only, even as the towns and villages of MP cannot be reserved for the residence of the original inhabitants of MP only', the court said. It added: "Accidents of birth and geography cannot furnish the credentials for such

discrimination and authorise prejudicial treatment in matters of this nature'. The limit of stay of 45 days was also declared unconstitutional.56

Court's Ignorance on Social Issues in Burma: A Case on Grazing Ground and Court's Standing

There were 452.59 acres of grazing ground, which has been used by the local farmers for their cattle, in Phaung Daw Thi village, Daik-U township in Burma. This grazing ground was confiscated by the local government authorities and distributed to a regiment and other organizations as follows:

(1) Light Infantry Regiment No (30) - (82.50) acres
(2) No. (1) Military Animal Husbandry Association - (79.98) acres
(3) Township War Veteran Association - (52) acres
(4) Union Solidarity and Development Association57 - (58.82) acres

The military and its related associations took over 273.30 acres. Furthermore, 44.93 acres of street land and 2 acres of garden land were also deducted from the grazing ground. This left only 132.36 acres of pasture land for the local farmers to use. This caused about 3,000 cattle of that area to starve. The farmers, dissatisfied with the result, asked an attorney, U Aye Myint, to help them. U Aye Myint sent this information to the International Labour Organizatoin (ILO) and the following problems resulted.

On August 27, 2005, the police arrested U Aye Myint and sued him in Daik Oo township court, accusing him of providing false information aiming to shatter the local administrative mechanism. At the hearing, the Deputy Police officer stated that U Aye Myint organized the farmers and wrote a false letter. However, this information was not corroborated by any of the prosecution's witnesses. On October 31, 2005, he was sentenced to seven years' imprisonment on a charge of violating the 1950 Emergency Provision Act Section 5(E) which prohibits"Knowing that it is a false (or) believing that it is a false, intentionally do something or let it happen a similar cause". The Bago district court summarily rejected his appeal.

The news about the scarcity of fodder resulting in the starvation of the farmers' cattle cannot be considered to be false news. The farmers gave such statements before the court as well as ILO officer Mr. Richard Hussey. The plaintiff has to provide sufficient proof that the accused clearly committed the crime58 but this was not the case.

Except the deputy police officer who arrested U Aye Myint, there were no prosecution witnesses who stated that U Aye Myint purposely fabricated a complaint knowing that it was false. Attorney U Aye Myint's case is just one of many glaring examples of how Burma's judiciary abuses its power with ignorance and lawlessness, instead of addressing social issues of people, particularly emanating from unfair exploitation of natural resources. If this case is observed thoroughly, adversities of rural people, who constitute 70 percent of total population in Burma, encompassing Burman and non-Burman ethnic nationalities, may be noticed. Those people are deprived of their livelihood due to exploitation of the country's natural resources such as land, forest and marine resources, minerals, and river systems mainly by the ruling military junta, local authorities, and other parties.

As a result, in the rural areas of Burma in which both Burman and non-Burman ethnic nationalities inhabit, a collective way of living, harmony and social cohesion are seriously damaged given that a number of people who are able to work are forced to leave their local areas and many of them, about 3 million people, end up living in Thailand as illegal migrant workers. In order to rectify these incidents and injustices, all possible ways should be sought, centering on the role of courts which is usually the last recourse for people in attempting to resolve disputes peacefully. For this purpose, as far as the judiciary in Burma is concerned, independent existence of the courts alone may not be sufficient. Other relevant factors should also be scrutinized.

Land Ownership and Forest Management System

To resolve issues emanating from exploitation of natural resources, the country's land ownership system must first be scrutinized. Since the independence of Burma in 1948, constitutions of the country 59 declare the state as the sole owner of land, contrary to China's Constitution which primarily guarantees

collective ownership of land in the rural and urban areas.60 For hundreds of years, empirically collective or communal ownership system of land has been taking place in Burma particularly in the rural areas inhabited mostly by non-Burman ethnic nationalities. Unfortunately, it has never been recognized by the government nor by the courts. The judges simply consider that the government authorities, in accordance with effective laws on behalf of the State, assume the power to manage or exploit any land in the whole country whenever it deems necessary, regardless of whether such exploitations negatively impact the lives of local people. Community land rights of local people and community based forest management have never been raised or practiced.

Motivations to Change the Perspective of Courts

The courts in Burma are usually inward looking and they rarely observe the practices of contemporary jurisdictions in different countries. Restrictions on the relationship of judiciary with the outside world have been imposed by the ruling regime. As a consequence, it is hard for judges to realize the principles being practiced by the international community, inter alia, that in the decision-making regarding natural resources, community participation with their informed consent should be required. If they do so, consideration on the merits of the case by the court may be shifted and actions of those like attorney U Aye Myint would not be criminalized. The issue of deciding a dispute relating to grazing ground is civil in nature and has nothing to do with the Emergency Provision Act, which is a criminal law.

If the court overviews the case of Attorney U Aye Myint from the perspective of individual rights vis-a-vis human rights, it is evident that the suspect exercised his right to freedom of expression, including the right to seek, receive and depart information. Acknowledging the fact that the right to freedom of expression is to be exercised with limitations61, a reasonable principle to utilize is that limitations should be minimized and the right to freedom of expression should be promoted. In light of this, U Aye Myint was innocent as he only departed information on the unfair management of grazing ground to the ILO.

Latin American legal scholarship views judges in the role of activists using the law to transform society62 but it may become a reality only when judges have

reasonable perspectives on society. In the Philippines, India, Thailand and elsewhere, people by themselves or through NGOs acting on behalf of the people, submit complaints against those who violate people's rights to access natural resources or commit other abuses. These individuals and groups may sue the responsible authorities or parties in courts. These are essential factors to motivate courts to address social issues. Conversely, in Burma, the representatives of the victims were sued by the responsible authorities in a court where perspectives of judges are inadequately circumscribed and judicial restraint is negatively exercised.

In seeking justice for society, the motivation of courts needs to be created so that the courts practice judicial activism rather than judicial restraint, enhancing its power one step after another until the independence of the judiciary comes into existence. This way, judicial review may be exercised with its limited scope and boundaries; this review lies at the heart of the separation of powers63.

Seeking Judicial Power: Judicial Review?

Judicial review gives a court the power of deciding the validity of the law enacted by a legislative body64 and that of checking abuse of executive power. Although the courts are a truly independent and co-equal branch of government, that does not necessarily mean that they have the power of government if they do not exercise judicial review. This is one view. From another view, there can be the rule of law even when court is not vested the power of judicial review. It is because the rule of law does not require that courts have the authority to invalidate legislation but it may be enhanced when courts exercise constitutional authority to review legislation and government action.65 As such, the status of a court may not be evaluated merely depending on whether it exercises power of judicial review.

Judicial Review and Independence of Judiciary: A Brief Comparative Study of Courts in the US and China

If the status of the Supreme People's Court of China is contrasted with the US Supreme Court from the aspect of judicial review, it may not be understandable

as 'Subtle Judicial Review', articulated by some scholars,66does not meet ideals of judicial review, nor does it constitute the standard being practiced by the US Supreme Court.

Although the Supreme People's Court of China is not vested with the power of judicial review67, the status of court is to some extent respected. Despite the fact that many court decisions fail to provide any discussion of how the particular acts in question will lead to instability or endanger the state or public order,68 the role of the courts is remarkable for China to achieve stability and economic development. The courts have been able to find reasonable spaces adaptable to the changing circumstances of China over the previous three decades, particularly commencing from 1980.

The status of courts may be correctly evaluated only when their connections and interactions with other institutions are observed in the specific history of a society as well as the incumbent constitutional and legal framework and the matter of state policies. Historically China and the US are different. Feudalism prevailed in China for thousands of years and, as a result, societies were primarily divided until the Chinese Communist Party (CCP) was able to unite the country in 1949. The United States lacked similar historical experiences.

In China, the majority of Chinese social elites accept the political leadership of CCP; it has evolved a national party seeking to advance the fundamental interests of the Chinese people as a whole.69 The current state of Chinese society and its judiciary might not have been better off without the modern revolution led by the CCP and its influence upon China's judiciary is positive.70 As a result, the Supreme Peoples' Court of China could not circumvent the influence of CCP.71 It is also different from the case of the US.

With reference to the abovementioned situation in China, it is worthwhile to ask whether it will be beneficial for society if complete independence of the judiciary and ideals of judicial review were to be exercised immediately. In this regard, a landmark case of the US should be attended. Many people in the US had concerns about the ruling of the Supreme Court for its split decision 5-4 in Bush v. Gore, claiming it was a political, not a judicial, decision72 although the US is well-

known for its independent court system, and political interference in the judiciary is relatively rare. It may be a case study for Supreme People's Court of China from two aspects.

One important point is that whenever a court is powerful and achieves the confidence of people, stability of society is effectively guaranteed. Another is that a court's ruling will be binding when the loser has sufficient knowledge that by complying with the decision of the highest court of the land, it will be beneficial for the whole society, including him or her, in the long run. In the case of Bush v. Gore, Al Gore complied with the decision of court, because he might have understood that if similar incidents happen again in future elections, his democratic party may take advantage from the court conversely and resolve election-related issues peacefully.73

Courts' practice of judicial review may become a threat if it does not have judges of the highest integrity, those who are sensitive to constitutional values, and who have great professional competence.74 As such, the question whether the Supreme People's Court of China is vested with the power of judicial review may not be instrumental for now since the court only has 30 years of experience. Conversely, the Supreme Court of the US has constantly invoked the Constitution of the United States and has applied judicial review for over two hundred years.75

From the aspect of constitutional development, China is also not identical to that of India, where right from the inception of the Constitution, judicial review has effectively been exercised by the court.76 These are the realities. As such, for now it should be sufficient if the courts in China find their spaces for autonomy and comply with other fundamental principles of the rule of law. None of these realities, however, justifies abandoning the principles or ideals of judicial independence and of judicial review.77

As the Cultural Revolution has already proven that the rule of a one-party system without any checks and balances infringes upon individual rights and freedoms of people, the Supreme People's Court of China may move forward to create an independent judiciary in the future. The judiciary can enhance its power while protecting individual rights and addressing societal issues, thereby

achieving the confidence of the public. The growing concern of common Chinese people over political and civil rights may create pressure on the courts to enhance their power until the independence of the judiciary is ensured.78

In regard to the protection of individual rights under the General Principle Chapter, Article 11 of the Constitution of China provides: "The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy." In addition, under the Chapter of Fundamental Rights, Article 33 stipulates: "The State respects and preserves human rights" which identifies individual rights. The latter guarantees certain judicially enforceable fundamental rights of the citizens in accordance with the constitution 79 whereas the former lays down foundation for state policy. As such, in attempting to seek more power for courts, although the limits of civil and political rights in laws and regulations are required to be clarified,80 the courts in China can invoke the constitution and enhance their roles in protecting the rights and freedoms of individuals.

By contrast, there is a factor which is identical for both China and US from the aspect of state institutions, which control the judiciary in some developing countries. This institute is the state's armed forces. Both countries own powerful armies. However, having learned lessons from experiences during the feudal era, the modern Chinese society does not provide dominant positions of government to its armed forces as its own institution81 despite the fact that there were veteran leaders who transformed themselves into civilians and assumed political power individually. A similar practice can be found in the US where the civilian supremacy principle has been adopted.

Although interference in China's courts by other institutions remains to be scrutinized, there is a lack of military intervention in the judiciary.82 It is a favorable situation for the courts in China to establish their institutions to be more independent and efficient. This has been the case over the past decade in which court rhetoric had changed from being a tool for enforcing party policy to being a neutral forum for dispute resolution.83

The Issue on the Stability of Society in Thailand: Judicial Review and the Role of Courts

Mr. Bowornsak Uwanno, the former Dean of the Chulalongkong University Faculty of Law selected to serve as Secretary of the Constitution Drafting Committee for the 1997 Constitution of Thailand ("1997 Constitution"), described the primary deficiencies of the then existing Thai political system: "Politics were dominated by the politicians rather than the people, who enjoyed only few rights and liberties. Politics were rife with dishonesty and corruption, resulting in politicians being commonly perceived as lacking legitimacy in their exercise of authority."84 To rectify these deficiencies, the 1997 Constitution explicitly granted an unprecedented number of rights and liberties to Thai citizens, opened new avenues for them to participate in politics, and supported efforts to combat vote buying.85 Despite these provisions, however, vote buying continued to take place:

> Vote buying was occurring in many rural areas, and the police were unable to prevent it. The practice of vote buying is illegal, but in Thailand, only the buying is criminalized, while vote selling is not (Appendix II, Sections 44, 45 of Thai Election Law). Observers in northeastern Thailand (i.e, Khon Kaen, Sisaket, Buriram, and Surin provinces) heard that vote buying was a major concern and problem during the election. . . . Because the northeast is the poorest region in Thailand, vote buying there is very likely an effective tool in political campaigning.86

"The intention of the Constitution has thus been foiled, as most of the independent watchdog agencies have been co-opted, emasculated, or circumvented, leaving Thaksin's government with almost absolute authority."87 Thaksin Shinawatra's regime, which came to power among allegations of election fraud and vote buying in particular, ruled Thailand from 2001 to 2006. Under the façade of democracy, Thaksin's Thai Rak Thai party was able to control parliament with an overwhelming electoral majority, establishing the strongest government in the history of modern Thailand since 1932.

Although Thaksin was ousted from his position as prime minister in the aftermath of the military coup in 2006, the army was not able to resolve Thailand's underlying

political issues. Subsequently, not only the middle class, NGOs, educated and royalists, but also majority leaders of the army relied on the judiciary, as an independent institution, to be the final arbiter in resolving challenging societal disputes. General Anupong Paochinda, the Army Commander-in-Chief, stated that the judiciary was one of the three pillars of government that everyone must respect to ensure that society continues to function properly.88 Former Prime Minister Chavalit Yongchaiyudh also portrayed the judiciary as the chair umpire that has been keeping the balance in society.89 Thai media constantly showed its support for the judiciary, particularly in the aftermath of the military coup of 2006. Since then, the judiciary has consolidated its power step by step.

Adjudication of Political Disputes

In May 2007, the Thai Rak Thai party was dissolved by the Constitutional Court, and its executives, including ousted Prime Minister Thaksin Shinawatra, were banned from politics after being found guilty of electoral fraud.90 Surprisingly, Thai Rak Thai leader Chaturon Chaisang urged party loyalists not to fight the Court's decision or protest the ruling.91 Similarly, in response to the ruling Thaksin himself mentioned that if the rule of law is observed, the ruling is to be respected.92 As a consequence of the above decision, the Court solidified its authority as an independent arbiter capable of imposing checks on the other branches of the government. Then, the Thai Rak Thai transformed itself into the People's Power Party, led by Samak Sundaravej and former allies of Thaksin.

Unfortunately, not much has changed in Thai politics in terms of election fraud since the previous elections. The new elections, held at the end of 2007, were again fraught with instances of vote buying. The People's Power Party, including Thaksin's brother-in-law and eventual prime minister Somchai Wongsawat, assumed power by proxy on behalf of former members of the Thai Rak Thai and Thaksin.93 Courts came under increased pressure of the government after Samak Sundaravej assumed the post of prime minister. In June 2008, Prime Minister Samak Sundaravej criticized the judiciary, alleging that courts wielded excessive power and meddled in politics.94 Similar criticism was also made by deposed Prime Minister Thaksin, who contended that Thailand's judicial system suffered from political interference.95 The Supreme Court later rejected these

criticisms,96 and the courts continued to exercise their power without fear or favor.97

On June 25, 2008, the Supreme Court sentenced three of former Prime Minister Thaksin's lawyers found guilty on charges of attempting to bribe court officials with 2 million baht stashed in a snack bag.98 On July 8, 2008, the Supreme Court ruled unconstitutional the government's signing of the Preah Vihear Joint Communiqué with Cambodia on June 18, citing Article 190 of the 2007 Constitution, because the communiqué was a kind of international treaty.99 It was one of the landmark judgments of the Supreme Court which checked the power of the government by exercising judicial review. Furthermore, on July 10, 2008, the Constitutional Court disqualified Public Health Minister Chaiya Sasomsap from holding office for failing to declare some of his wife's assets within a specified deadline.100 Finally, on July 31, 2008, the Criminal Court delivered another landmark verdict that marked a crucial step towards the restoration of the rule of law and sentenced Khunying Pojaman, Thaksin's wife, to three years of imprisonment on charges of tax avoidance in the alleged amount of 546 million baht arising out of a stock transfer in 1997.101 According to The Nation, "the court cited moral shortcomings in its ruling, saying Khunying Pojaman, while being Thailand's first lady, failed to act as a good example for society."102

The courts continued to solidify their reputation as an institution capable of independently adjudicating politically motivated cases, notwithstanding the constant pressure created by politicians who garnered the support of a majority of the Thai people by means of election fraud. In another such case adjudicated on September 9, 2008, as described in The Nation, "the Constitutional Court made a historic ruling by ordering Prime Minister Samak Sundaravej to stand down immediately over the scandal surrounding his TV cooking show."103

On December 2, 2008, the Constitutional Court ruled that Prime Minister Somchai Wongsawat, Samak's successor, must step down over election fraud, that his governing People Power Party and two of its coalition partners must be dissolved, and that the parties' leaders must be barred from politics for five years.104

The foregoing rulings of the courts have had a far-reaching impact and effect on Thai society and Thai politics, despite the fact that some of those rulings have been met with harsh popular criticism.105 The Constitutional Court reached the apex of its power by courageously pronouncing controversial, historical decisions while facing pressure from often unruly supporters of three political parties, which are no longer legal:

> Although the mob prevented Constitutional Court justices and officials from entering the courthouse and forced the change of venue of the hearing and decision, the ruling of the Constitutional Court is in accordance with the provisions of the Constitution, thus upholding the rule of law without yielding to the pressure from any group.106

Anti-government protesters terminating their crippling, week-long occupation of Thailand's airports after the courts' foregoing rulings is further evidence of the judicial power.107

A Comparison of the Constitutional Courts of Korea and Thailand From the Aspect of Judicial Review

Widespread dissatisfaction with political manipulation of legal processes, which had aggravated the legitimacy crises in Korea108 and in Thailand,109 paved the way for the emergence and strengthening of constitutional courts in both countries. In Korea, given that judicial review of the constitutionality of legislation had previously been inoperative, the Constitutional Court was created to embody a new dedication to constitutionalism.110

Both constitutional courts in Korea and Thailand have become major institutions in the governance of their respective countries. Whereas the Court in Korea has been heavily involved in transforming Korea's military-bureaucratic regime into a constitutional democracy,111 its counterpart in Thailand has played a significant role in checking the political majority by applying judicial review.

However, the positions of the courts present an interesting contrast. The Constitutional Court of Korea avoids direct challenges to the dominant political interests112 and circumvents decisions that might provoke hostile reactions from

prominent political parties.113 In May 2004, the petition for impeachment adjudication of Korean President Roh Moo-Hyun was rejected by the Court on the grounds that the number of the justices required to remove the president from office under Article 23(2) of the Constitutional Court Act had not been met.114 "During the deliberation of the case, the mid-term election was held and Roh's party received overwhelming support, winning an absolute majority in the Assembly."115

Conversely, the Constitutional Court of Thailand in 2007 encountered a direct challenge and adjudicated the issue against the interests of dominant political forces. This may be why majority rule in the Thai parliament is no longer solid, in contrast to the period between 2001 and 2006 when the Thai Rak Thai party held an overwhelming electoral majority.

Judicial Review and Dissolution of Political Parties in Thailand

The constitutional courts in both Korea and Thailand are entrusted with the power to dissolve political parties.116 In Korea the relevant provision allows dissolution "if the objectives or activities of a political party are contrary to the democratic basic order."117 The scope of the law is wide and ambiguous. A similar provision is enshrined in the Constitution of the Kingdom of Thailand.118

Notwithstanding the foregoing provisions, the Constitutional Court of Korea has not yet exercised that power, and no political party has been dissolved.119 It may remain unexercised for the foreseeable future "due to circumstances that raise other important constitutional considerations."120 The Constitutional Court of Thailand, on the other hand, has already dissolved several political parties and there are indications that the Court may continue exercising its power. There are positive as well as negative aspects to the Court's actions. It is positive because the Court is able to check majority rule and deter abuses of power by politicians who gained power by means of election fraud. It is negative because with the repeated dissolutions of political parties it will be hard to establish a stable political party system in Thailand. More importantly, dissolution of an entire party on grounds of unethical action by a party leader or party elites by election fraud may damage the political spirits of all other innocent members of the dissolved party.

Alternatives for Rectification

The demonstrations in Thailand, led by the 'red shirts' allegedly supporting former PM Thaksin, temporarily ended in tragedy with at least 88 people killed and almost 2,000 injured in clashes during the two months since March 2010.121 As a result, in addition to damage to public and private property worth over 1.9 billion US$, the very stability of society is under serious threat. Uncertainties are currently prevailing in Thailand. Facilitating the establishment of a stable society while protecting individual rights and freedoms and exploring reasonable ways to avoid similar political violence in Thailand, as an emerging democracy, not only benefits Thai citizens but also all people who love justice, peace and development across the world.

During the abovementioned demonstrations, red shirt demonstrators demanded that parliament be dissolved immediately and a new election held. They may expect to win again if this is to happen. Elections have been the centerpiece of Thai politics. Recognizing this and citing deepening social divides, incumbent Prime Minister Abhisit Vejjajiva, rejected the call to hold elections within the year, saying on May 29, 2010:

> If we succeed in inviting and embracing all the stakeholders, including 'red shirts', the opposition, to our reconciliation program and over the next few months we see government and parliament function smoothly, that would be the right kind of environment."122

Thai PM's statement may be correct. It is the path that the government in power should take, despite the fact that many governments ignored the need to heal the wounds of social divisions. It also reflects the prime minister's good will for a negotiated settlement. However, it should be scrutinized as to whether it is a step in the right direction. Key red shirt leaders who led the recent political violence are currently facing criminal charges and might not be able to reach the negotiation table for reconciliation. Granting them amnesties would undermine the rule of law, and similar violence in the future might not be deterred. Even though red shirt leaders and the opposition in parliament participated in the negotiation processes in one way or another, the deeply rooted problem will not be addressed if negotiations are not in the right direction. The prime minister's

initiative is a must. However, it looks like 'an elite oriented approach', and it does not address the issue of the rule of law nor the underlying political issue of the country, that is, 'politics rife with dishonesty and corruption', in addition to the following perception of the international community:

> Thai parties actively pay bribes to candidates of rival parties at election time. In order to win a majority in national or local elections, or to increase their number of seats in parliament, Thai parties make it a practice to offer bribes of up to 720.000 US$ to candidates who are willing to switch parties *(Bangkok Post, 3 February 2000; New York Times 19 November 1996).123*

Moving the next election to an earlier or later date is not a real solution. A reconciliation program is required given that, at minimum, negative emotions of the family members of deceased and injured demonstrators must be addressed. Nevertheless, superficial political reconciliation without regard to the rule of law will seriously damage the society in the long run. Achieving reconciliation may become a reality only if economic disparities between the rural poor and urban rich can be adjusted.

The Thai government's depiction of former Prime Minister Thaksin as a key behind-the-scenes force124 encouraging red shirts to commit political violence and terrorist acts may be reasonable. On the other hand, it should be noted that several hundred rural poor participated in red shirt-led demonstrations expecting, should they achieve the goal of forcing a new election, some economic benefit akin to or greater than the 30 baht health care system125 implemented by Thaksin. In any case, under these circumstances the rule of law is seriously threatened and the stability of society challenged. Only after these realities have been taken into account can another important step, addressing the issue of corruption in politics, be taken.

Gaining political power by buying votes and committing election fraud; bribing candidates of rival parties in order to gain a majority of seats; using money to assume, maintain and expand political power; and seeking illegal financial benefit by taking advantage of political positions all constitute systemic problems

negatively affecting the entire country of Thailand. These problems should be publicly highlighted now. Instead of taking an elite-oriented approach which focuses on only a few hundred political leaders, wider participation of the public, in conjunction with civil society and the legal community, should be encouraged to resolve these problems effectively. Unless the ethical values of society, which are an unconscious phenomenon, are revitalized to encompass political power, the establishment of the rule of law, which is a conscious phenomenon, cannot be expected nor can the power of the court be effective.

Interactions between the Judiciary and Political Party System Within a Rule of Law Framework

Notwithstanding the political violence occasionally arising out of deeply rooted social divisions, Thailand is still on its way to peace and development. This is because the foundation of the rule of law, centered on judicial independence, has been laid down by the Thai society in the form of a respectable constitution. However, the role of the judiciary needs to be promoted effectively again. Almost all political leaders respect the judiciary. They comply with the ruling of the courts, regardless of whether or not they agree with the ruling. They may also criticize the judiciary, but they dare not, at least in public, stand against the courts' decisions even when their political parties occupy a majority of the parliament. The Thai judiciary has solidified its power. In attempting to resolve underlying political problems, facilitate the stability of society and restore the rule of law, the role of courts in Thailand may not be underestimated.

However, the judiciary alone, be it independent, impartial and efficient, will not be able to resolve deeply rooted societal issues, whether conscious or unconscious; thus the judiciary needs to continue positioning itself as a 'boundary rider' while emphasizing the separation of power. As such, in order to further the judiciary as a final arbiter of underlying societal issues, interactions with and based on an efficient political party system are of paramount importance. The rulings of courts may not be effectively binding nor facilitate the stability of society so long as the operating political party system is weak and the way in which politicians achieve power – at minimum into the legislative body – cannot be managed properly.

In order to reform a political party system in Thailand or elsewhere, particularly in developing countries, the following may be crucial factors: voters' monitoring of a politician's conduct within and outside of parliament to benefit the public good126, relocating political decision-making from parliament into party committee meetings in which business and interest group representatives are frequently present,127 governing internal party structures by transparency and accountability, improving parties' interactions with state institutions and civil society,128 producing campaign finance legislation to control campaign spending, creating rules for transparent and competitive party leadership elections and candidate nomination procedures, introducing codes of conduct for party members and related internal party financial checks and balances,129 and improving intra-party democracy.130

Exploring effective interactions between an independent judiciary and a functioning political party system will be the best way in the long run to address the underlying issues being faced by Thai society. The judiciary and political systems may continue to interact, but the interaction should be reformed in order to support this.

Dissolution of political parties should no longer be promoted by the Constitutional Court as a major method of dealing with unlawful political platforms and means, even though, as the Court noted, a patient may be cured by a doctor getting rid of a disease. Instead, the Court may consider the principle that prevention is better than a cure. Only when the latter is unworkable should the former be done.

Judicial Supervision of Elections

In order to take advantage of the respected position currently enjoyed by the courts, Thai society may also advocate an expanded role for judges through judicial supervision of elections, as has occurred not only in the US but also in many countries in Europe. There, when the public has lost its confidence in other branches of government, judicial intervention in the political arena has proven acceptable to the public.131 When elections are convened, judges can play a role by securing an equal platform for the candidates132 and promoting

the values of basic fairness and ethics133 while exercising stricter supervision of electoral regularity, 134campaign finance laws and regulations,135 and the good standing of candidates. Robert Badinter, former President of the Constitutional Council of France, stated as follows:

> ---the more you open up the possibility of criminal prosecutions and the more powerful is the threat. In France as in Italy, indeed as in all Western nations, the opening of a criminal prosecution against a very important politician is itself sufficient to ruin his career. In the eyes of the public, no presumption of innocence prevails. The fact that a judge has decided to investigate what has happened, the fact that the judge has found that corruption is possible, that is enough to lead the public to conclude that corruption exists. The fellow is politically wounded, if not dead.136

How to Improve Judicial Institutions (With a Special Focus on Burma)

Burma and the Issue of Independence of the Judiciary

The independent judiciary is not a new concept for Burma. Following its independence, Burma established an independent judiciary in accordance with the 1947 Constitution, which lasted under the democratic regime from 1948 to 1962. The return to an independent judiciary is essential for Burma today.

U Ba Oo was the first Chief Justice of the Union appointed by the President with parliamentary approval post independence. U Ba Oo's appointment was a controversial issue among political leaders because when Burma was under British rule, the British government awarded U Ba Oo the title "Sir" due to his good service in judiciary. The superficial giving of this title was an attempt by the British to restrain rebellious farmers, led by Saya San, struggling against British rule during 1930-1931.137

For this reason, some political leaders objected to the proposed appointment of U Ba Oo as Chief Justice of the newly established democratic state. Nevertheless, U Nu, U Ba Swe and U Kyaw Nyein, the then most influential political leaders, strongly supported U Ba Oo, making his appointment a reality. The Burman political leaders' major consideration in U Ba Oo's appointment

was not to use him as an instrument for their political support, but to endeavor to seek justice by applying his legal and academic skills to an independent judiciary.138

U Ba Oo became President of the Union in 1952, and retired in 1956. Thereafter, the country was forced to find another leader to replace U Ba Oo. Dr. Thein Maung, then the Chief Justice of the Union, was qualified to take Presidential responsibility. Big debates spread through Parliament as to whether Dr. Thein Maung should replace U Ba Oo as President. Parliaments' justification for rejecting the proposal to elect Dr. Thein Maung as President lied in fear of creating misconstrued tradition. The explanation provided was that if the retired Chief Justice were appointed and assumed the Presidential position, then others would presuppose that this tradition was law. Then the new Chief Justice, who would replace Dr. Thein Maung, might attempt to get support from political leaders aiming to become President of the Union; and as a result, he might ignore his major responsibility to administer the justice without fear of being threatened from the executive.139

The refusal to elect Dr. Thein Maung as President proved that the new democratic Burma placed great emphasis on an independent judiciary. As a result, in spite of having some weaknesses in the judiciary of independent Burma, the roles of the Supreme and High Court were highly regarded by both the people and scholars from the international community. Unfortunately, immediately after the independence, Burma was plagued by insurrections. In early 1949, the democratic regime could defend only Rangoon, the capital of Burma, while other remaining areas in the country were under the control of insurgent forces.

Judiciary continued to function independently and the executives were not permitted to communicate with the judiciary under any circumstances. The executives, often to their dismay, had to observe the judgments of the Courts without redress. U Nu, the then Prime Minister of Burma, commented on this situation as follows:

"The government was angry at times in being thwarted, and Ministers often complained that the judiciary was not helping in the drive for law, order, and

progress. The Government was often angry, and it often winced with pain, but generally it took the decisions gracefully. Beyond the normal conflicts that occur between the Executive and the judiciary in any country in times of peace and more sharply in times of war and emergency, there has not been any mortal struggle for supremacy".140 "Our Courts have always acted freely,' said U Nu said as President of the AFPFL at the League's third congress, on January 29, 1958. 'Often times, we have wrung our hands in despair because a person whom the government wanted to imprison is set free by the Courts, and often times the Government has appealed against the decision of the Lower Courts only to have it confirmed by the Higher Court. When we have followed the case right up to the highest court of law, and find that the decision still goes against the desire of the Government, we can fold our hands, and watch the person go free."141

The Issue of Independence of the Judiciary:
Ethnic Nationalities and the Foreseeable Political Scenario

Unfortunately, for several decades there has been a lack of awareness of and training in the concepts and practice of judicial independence in Burma. The military junta has exercised total control over the judiciary, and institutional judicial independence has never been a subject of discourse within the regime's legal system. Fortunately, some major ethnic armed organizations such as the New Mon State Party, the Karen National Union, the Karenni National Progressive Party, Chin National Front and several Kachin and Palaung youths have to some extent been exposed to the concepts with the facilitation of the Burma Lawyers' Council, although exposure has not yet been sufficiently widespread.

The ruling military regime's strategy of pressuring the ethnic armed ceasefire organizations into becoming Border Guard Forces has appeared unsuccessful up to this point. Despite the fact that the April 22, 2010 deadline has already passed, the regime has been unable to enforce its ultimatum. Instead, the leaders of both ceasefire and nonceasefire ethnic armed organizations held a conference in Chiang Mai, Thailand on May 21-23, 2010, following preparatory meetings convened along the Chinese-Burmese border.142 Asserting a common position, they emphasized their desire to adhere to the spirit of the Ping Long pact, to

maintain and protect the character of ethnic nationalities, and to continue struggling for the rights of ethnic groups to equality and selfdetermination, including the ownership of natural resources within their local areas, subject of course to the need to share for the common interest.143 This agreement marks the first time in more than two decades that the armed ethnic organizations, ceasefire and non-ceasefire alike, have been unified against State policy. The organizations stand in further opposition to the 2008 Constitution, which has been forcefully approved by the regime.

Since 1989, many ethnic armed organizations have entered into ceasefire agreements with the military regime for various reasons. Citing these agreements, the regime was able to convince the international community, particularly ASEAN, of Burma's stability. In reality, this is not the case. Even under the ceasefire, ethnic groups have been deprived of not only individual rights and freedoms but also collective rights, including their common property rights. As such, despite what looks like superficial stability, society has become divided. In essence it has never been stable. This is because an independent judiciary has not been established throughout the country, particularly in ethnic areas, as a mechanism to protect individual and collective rights.

The regime's offensive last year against Ko Kant armed group, a ceasefire organization, resulted in several thousand refugees fleeing into China. Such attacks prove that so-called ceasefire agreements can be broken and fighting can resume at any time. However, the regime may not start fighting now for the following reasons:

1. The remaining major ceasefire organizations are much stronger than Ko Kant;
2. China may not be happy to receive more refugees from Burma should fighting break out;
3. The regime may wish to hold the 2010 elections first, and to deal with the costly issue of ethnic armed ceasefire organizations only after that.

In reality, both sides – the SPDC military regime and all ethnic ceasefire organizations – have their own reasons not to resume fighting. On one hand, the regime is quite aware that ethnic armed resistance organizations cannot be

completely annihilated by military means, as this has been proven through more than six decades of civil war.

On the other hand, so long as the military regime has power in one form or another, it will never exert effort to resolve the underlying issues between ethnic nationalities by peaceful political and legal means. To do so would leave no other alternative except the establishment of a decentralized federal union of Burma, which would destroy the power the military currently holds through rigid centralization.

In conclusion, the military regime will not implement a policy of annihilating ethnic armed organizations, nor will it resolve the underlying issues between ethnic nationalities by establishing a federal union. More importantly, by not applying an annihilation policy, the regime can justify military expansion by referring to the existence of ethnic armed organizations as subversive elements destabilizing society. As such, it will assuredly continue a policy of deception even after the 2010 elections, restructuring its strategy only in appearance while essentially maintaining the former ceasefire policy.

Seeking Judicial Power and The Possibility for Improvement I

Expected Strategy Shift within the Ethnic Communities

Despite numerous negotiations between the ruling regime and the leaders of the ceasefire organizations, the ceasefire experience over the past two decades has proven that the formal political dialogue expected by the ceasefire organizations never existed.

This will continue for the foreseeable future. For this reason, ethnic ceasefire organizations can no longer remain trapped in the political artifice framed by the military regime. Nor can they unknowingly get involved in ineffective arms races with the regime, which is currently working to produce long-range missiles and nuclear weapons.144 Such action by the ethnic ceasefire organizations would undoubtedly result in the continuation of a vicious cycle, not only for the ethnic organizations themselves but also for all citizens of Burma.

This is the time for all ethnic armed organizations – ceasefire and non-ceasefire alike – to consider whether they will move forward by themselves to establish a federal union in practice in which self-determination is to be exercised in accordance with a federal constitution. It is also time for them to consider how to resolve serious disputes between the ethnic organizations over territory and natural resource management through peaceful legal means. In the past, serious fighting has broken out over territorial disputes, including between the Karen National Union and the New Mon State Party in 1988 and between the Shan State Army (South) and the United Wa State Army (UWSA) since 2000. The development of an efficient and independent judiciary in areas under their control will pave the way for a peaceful resolution of the abovementioned underlying issues over the long term.

Most importantly, if the ethnic resistance organizations are committed to establishing a federal union, they must prepare for the emergence of efficient judiciaries in their local areas, because the judiciary usually plays an instrumental role in resolving all major issues in every federal state, both political issues and those arising out of the ordinary administration of justice. Preparing ethnic resistance organizations for military defense on the one hand and participation in negotiations with the military regime on the other can be realized. By not doing so, the ethnic resistance organizations may struggle to survive. It should also be noted that although the common people have been living in a Hobbesian state of nature even under ceasefire for two decades, there is currently no indication that their status will improve.

It is now time for all ethnic armed organizations to shift their strategy and focus more on legal avenues, particularly the operation of the judiciary. They must submit themselves to adjudication by a competent and independent judiciary, which they must create themselves. This will be quite difficult but not impossible. Rome was not built in a day. Preparations to move in the right direction with a focus on a bottom-up approach should begin immediately. The ethnic armed organizations have to prove that people living in areas under their control enjoy the protection of an independent judiciary and that the serious disputes over territory and natural resource management arising between the organizations can be peacefully resolved by recourse to an independent judiciary supported by the rule of law.

Student Leader Salai Tin Maung Oo case

Throughout the history of Burma, particularly after independence from the British, the ethnic nationalities have not fully enjoyed the protection of an independent judiciary. Instead, they have suffered even more since the military regime used the judiciary as a major tool for oppression in the aftermath of the military coup of 1962. The courts, while controlled by the military regime, applied the death penalty to Salai Tin Maung Oo, of Chin nationality and one of the most prominent student leaders of the peaceful demonstrations of 1974-1976. He was hanged by the neck in June 1976. Such an official execution of a student leader was unprecedented in Burma, even during the era of the British colonialists who ruled for more than one hundred years.

Shan Ethnic Leaders' Case

On February 9, 2005, nine Shan national leaders, including U Khun Htun Oo, Chairman of the Shan Nationalities' League for Democracy (SNLD), were unjustly arrested and charged by the SPDC military regime with allegations that they had formed a "Shan State Academics Consultative Council". They were convicted of serious crimes and given severe punishments on November 2, 2005. U Khun Htun Oo was sentenced to 93 years in prison and the other Shan leaders to prison terms of 79 to 106 years.

> U Khun Htun Oo and the other arrested Shan leaders were simply attempting to implement their political aspirations by exercising their fundamental human rights and freedoms, such as of the freedom of expression, assembly and association. None of them committed a crime that should be punished under any section of Criminal Law in Burma. The SPDC was assuredly concerned that this peaceful movement would spread throughout the country and inspire the other ethnic peoples. In response, the SPDC criminalized the peaceful political actions of the Shan ethnic leaders.

The simple truth is that U Khun Htun Oo and the other Shan leaders were condemned to outrageously inappropriate prison sentences for attempting to facilitate the struggle of those people who would like to establish a genuine federal union.145

Requirement of Sufficient Attention by the International Community To Promote Operation of Judiciaries in the Ethnic Areas

Having noted the foregoing examples, it can be seen why the protection of the judiciary has been disregarded by the ethnic nationalities and organizations. For these reasons, they are more inclined to take up weapons to defend themselves. However, it is time now to change and to focus more on legal means. The initiative taken by the NLD to avail itself of the judiciary and promote the rule of law is quite positive, but it has not yet been taken up at the grassroots level by the people and in ethnic areas.

In order to facilitate the efforts of ethnic armed organizations to reform and promote the judicial systems in the areas controlled by them, sufficient attention by the international community is also of paramount importance, although it has not yet been seen. To encourage the emergence of civil society, the international community has spent several million US dollars within Burma. Unfortunately, many of the human rights activists, social workers and reporters who should constitute a part of any civil society are languishing in prisons. It should be noted that without the protection of an independent judiciary, civil society can rarely develop and will never be entrenched. The international community, which is committed to promoting human rights, peace and justice in Burma, must consider providing to the ethnic resistance organizations the technical and financial assistance necessary for operating an independent judiciary based in the rule of law.

Seeking Judicial Power and The Possibility for Improvement II

Possible Strategic Defection of Judges: A Comparative Study of the Judiciaries in Argentina, Korea and Burma

Both South Korea and Argentina have been ruled by military regimes, beginning in 1961 and 1976 respectively. Despite that past, both countries have been transformed into democracies. Burma, however, is still under the rule of military dictatorship and has been since 1962. In regard to the role of the judiciary in

those three countries, a brief comparative study will be made, emphasizing the situations in which judges strategically defected even though they were under the rule of the military.

'Strategic defection' is the term used by Gretchen Helmke146 to describe when judges under the bayonet rule against the rulers, despite lacking institutional security, caring about retaining their posts147 and facing personal insecurity. With reference to the status of judges under military rule in Argentina, Gretchen concluded that strategic defection may take place when judges are motivated by lofty goals,148 when judges' beliefs and expectations about the threat they face changes,149 when the court has to deal with serious human rights issues once the military regime begins to unravel,150 when judges' perceptions shift in accordance with the political environment,151 when judges want to minimize the sanctions they may face from future governments,152 when judges begin to sense that the current government is losing power153 and when judges perceive that a transition is likely to occur.154

> Under the military regime in the year 1980, judges ruled against the government on average in 36 percent of cases. But in the final two years of the dictatorship, once it became likely that a transition would occur, judges increased their percentage of anti-government rulings considerably, to almost half of all decisions going against the government.155

Strategic defection took place in Korea to a notable extent during the period of the Third Republic (1961-72), which was established under General Park Chung-hee. Unlike in Argentina, the defection of Korean judges owed more to legal reasons, particularly constitutionalism, than to the political environment.

A lower court in Korea struck down Article 2(1) of the Government Compensation Law, a provision that excluded military personnel from certain forms of compensation normally available to those who suffered injury from government action.156

The Supreme Court upheld the lower court decision, reasoning that the Government Compensation Law violated military personnel's constitutional right to equal treatment.157 President Park was furious at this decision and used his power to re-nominate the Supreme Court judges and exclude every judge who had voted to strike down Article 2(1).158 Tom Ginsburg argues that the Korean Supreme Court challenged political authority and subsequently provoked a backlash that contributed to the downfall of the entire constitution, leading to the 1972 establishment of the Korean Fourth Republic.159 Such was the power of judicial review practiced by a Korean court even under the rule of a military regime.

Similar to Argentina and Korea, strategic defection of judges has also occurred in several cases in Burma even though defecting has a different meaning in Burma. Unlike in Korea, defection in Burma takes place during the ordinary administration of justice rather than in judicial review. A case study follows.

A Death Penalty Case

On November 28, 2003, the North Rangoon District Court imposed the deathpenalty on nine victims, including Nai Yetkha, who had been charged with high treason under Section 122 of the Penal Code. It was alleged that they had contacted opposition groups in exile, had detonated mines and bombs and were planning to assassinate the leaders of the military regime.

The judgement made no reference whatsoever to any verbal or written testimony or other documentary evidence in support of these contentions. The evidence suggests that the case was concocted behind closed doors by the military authorities, who then sought to give the matter an air of legality.

Questioning of the accused was for the most part conducted in the secret interrogation centres of the Military Intelligence Service. Military Intelligence personnel are not legally accredited criminal investigation officers. The trial was held in camera.

The prosecution produced a list of articles allegedly seized, but produced neither witnesses from any search party supposed to have seized them nor the articles themselves. The court examined no independent witnesses. There were six witnesses – all of them for the prosecution – of whom five were police officers while the sixth, a supposed accomplice by the name of Ko Than Htun, was produced by the Military Intelligence Service.

The prosecution failed to produce for the court any admissible evidence, whether oral statements or documents, that might support the very grave charge of high treason laid against the accused. The case appears to have been fabricated by the Military Intelligence Service, and the convictions were based entirely on statements taken by Military Intelligence personnel. All nine suspects were given the death penalty.

During the process of appeals, the Burma Lawyers' Council received the original judgment of the court, translated it into English and distributed it widely along with legal analysis. The International Labor Organization was shocked at seeing the following paragraph in the judgment, finding that four of the nine suspects were given the death penalty simply for their communications with ILO:

> Evidence (K), such as three sheets of paper contain with "Structure of unit 1,2,3,4,5" written in English, the original address card of Richard Horsey, deputy coordinator, ILO, four copies of address card, some books and sheets of paper were seized. It was found that those materials were placed behind the painting of Buddha at Nai Min Kyi's house. Therefore, it's clear that he sent false information on the government to ILO and he is also going to be punished.

The media satirized the situation, joking that for the simple receipt of the address card of an ILO official, a suspect deserves to be hanged by the neck. The ILO also effectively applied pressure against the court's judgment. As a result, upon appeal the sentences for all nine suspects were reduced and the four accused of involvement with the ILO were eventually acquitted entirely. Up to now, there have been several cases in which judges have had to shift their positions and strategically defect, willingly or unwillingly, whenever the following conditions exist together:

(1) the original judgment of the court becomes widely publicized and is revealed to be obviously contrary to principles of justice;
(2) in addition to human rights violations, evident legal errors are found;
(3) a public campaign focusing on a particular case increases pressure;
(4) the international community, particularly international organizations such as the ILO, applies pressure;
(5) the case does not have a very high profile status politically.

A Forced Labor Case

Another interesting case related to forced labor. The case was brought before the Kaw-hmu township court in 2004. A female activist, Su Su Nwe, from the National League for Democracy (NLD) brought suit against local village authorities for forcing villagers to work illegally on the construction of a road connecting two villages. Even though a small case, the international community took note because of its class action nature. The court sentenced four local officials to eight months imprisonment. Prior to this decision, the courts had never sentenced any government official in response to complaints filed by ordinary citizens. Similar to the local courts in Korea, strategic defection by judges in a local Burmese court had taken place. The case was remarkable because it constituted a judicial review of the actions of government officials and indicated that judges in a local court are not happy with the unjust treatment of their own fellow citizens by local government authorities. Furthermore, it showed that a local court responded positively to the pressure created by local people and the media.

In order to deter an increase in similar efforts by the people, cross complaints were filed against Su Su Nwe by the governmental authorities. To some extent, the court was at the center of the rights movement during that period. Unfortunately, similar peaceful struggles for justice based on the court's power did not increase for the following reasons, among others:

1. a non-independent judiciary;
2. a lack of campaign strategy, coordination and financial assistance to spread similar actions across the country;

3. a lack of adequate knowledge of human rights and the law at the grassroots level;
4. insufficient efforts from lawyers' communities;
5. thinly-veiled support from political parties and no assistance from so-called civil society.

What Judicial Institutions Burma Can Reasonably Hope For

In today's Burma, the judiciary, under the military regime, is as corrupt as the administration. A number of judges as well as court officials regularly take bribes and rule in favor of those who can bribe them. The concept and practice of independence of the judiciary alone may not benefit individual citizens or society as a whole if the judiciary is independently corrupt in terms of both power and money. When the judiciary is itself corrupt, taking legal action against public officials on charges of corruption or abuse of power is pointless. As a result, the people's confidence in the judiciary will continue to wane. To avoid this, a system of checks and balances within the judiciary should be implemented. To this end, the court's power should first be delineated.

The Court's Powers

In light of previous human rights abuses committed not only by governmental authorities but also by local non-state actors, the district courts throughout the country should be vested with a power analogous to habeas corpus. In addition to Burma's three apex courts – the Supreme Court, Constitutional Court and Supreme Administrative Court – each state, as a constituent unit of the union, shall have to establish the power of judicial review in its highest court. Judicial power must also be divided between the three apex courts of the union and the high courts of the states.

Additionally, the role of military tribunals must be redefined. If their role is expanded more than necessary, it will circumscribe the power of civilian courts. Military tribunals should not exist on the same level as the civilian courts. They shall have power to adjudicate only disputes in which both parties are in the military. Military courts must be restricted to crimes of a military nature.160

However, final decisions must be subject to appeal in the civilian Supreme Court. A civilian justice system must be applied in the future Burma, and the military regime's 2008 Constitution will have to be revised.

Society will be stable only when the past is confronted. The courts shall have the power, in line with international law, international human rights law, and humanitarian law, to deal with heinous crimes committed under the rule of successive military regimes, as has been the case for courts in Argentina and elsewhere. The amnesty provision included in the SPDC's 2008 Constitution, which encompasses all international crimes, must be nullified. Under transitional justice arrangements, amnesties may be considered only for crimes that do not constitute crimes against humanity, war crimes or genocide.

A Jury System

A jury system must be reintroduced in Burma for criminal cases. It should be composed of temporary jurors in order to (1) promote the participation and awareness of the people and (2) make the judiciary less technical and more in dialogue with people at the grassroots level.

Judicial Tenure

Obviously, complete judicial independence from the other two arms of government is not theoretically possible given that most judicial appointments are made by the government. Independence should be further ensured by limiting removal and guaranteeing judicial tenure except in limited cases of proven misconduct or incapacity. The removal process should be institutionalized and controlled by a permanent and independent judicial service commission comprised of the chief justices of the three apex courts, three law school deans, three practicing senior advocates elected by bar associations, and the attorney general.

The Judicial Conference

A Judicial Conference may be created as a national policy-making organ for the judiciary, with authority over such policies as judicial misconduct. It should

be facilitated by the Department of Justice. Membership in the conference may be comprised of the justices of all three apex courts, justices of the high courts of each state and a district judge from each judicial region. The judicial affairs committee of the legislative body may request the opinion of the judicial conference if a bill relevant to the judiciary is to be submitted for debate at the parliament.

The Judicial Council of the Constituent Units of the Federal Union

The Judicial Council's main purposes would include: to monitor the conduct of autonomous judges, to certify the permanent mental or physical disability of district and township judges who though eligible for retirement refuse to step down, and to provide recommendations to the Judicial Service Commission regarding removal of a judge. It would also take responsibility as arbiter of disagreements over administrative policies in the lower courts.

Judicial Facilitation Offices

This office would serve as a liaison between the Judicial Conference and legislative body. It would also take responsibility, as the secretariat for the Judicial Conference, for all fiscal and business services, and prepare statistical data and reports on the business transactions of the courts.

Federal and State Judicial Centers

These centers may be established not only at the federal level but also in each and every constituent unit of the federal union of Burma. Their main responsibility would be to support the operation of their respective judiciaries through analysis, research, training and planning in order to deal with the following: corruption; interference from outside influences; interactions with other institutions, including bar associations; congestion and delay; inadequate facilities and finances; uneven distribution of case loads; the general absence of administrative expertise; the observation of contemporary judiciary systems of other countries; and raising awareness within the respective local judiciaries.

Financial Independence and Transparency in Financial Management

The judiciary will rarely be independent if it must fully rely on financial support provided by the government. The judiciary's budget should be separated from the Department of Justice's appropriation. In order to maintain independence in the future Burma, the budget for the judiciary should be allocated separately and determined with the aim of preventing corruption of the judges and judicial staff in mind.

Conclusion

While applying the foregoing norms and practices, Burma's political party system must be reformed. In Thailand, a political party system is fragile whereas, in Burma, it has totally collapsed. As indicated above, in order to further the judiciary as a final arbiter of underlying societal issues, interactions with and based on an efficient political party system are of paramount importance. It is desperately required for the case of Burma.

Only then, Burma may achieve a judiciary that is not only independent from legislative and executive controls but also neutral, objective, competent and free from all external influences. To this end, the common law tradition which essentially protects individuals from arbitrary intervention by the government must be re-established in the future Burma, based on the rule of law and underpinned not only by liberalism but also by the value of collectivism. This will facilitate the stability of society in Burma.

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The Burma Lawyers' Council Applauds the United States for Its Support for a United Nations Commission of Inquiry

The Burma Lawyers' Council welcomes the public support of the United States for a United Nations Commission of Inquiry (COI) to investigate crimes against humanity and war crimes in Burma. The Obama administration announced its support for a COI on August 17, 2010, which marked the government's departure from its previous policy of engagement with the regime.

The United States has become the fifth country to affirm the need for a United Nations investigation of international crimes in Burma, joining the United Kingdom, Australia, the Czech Republic, and Slovakia. The demand builds upon the momentum created by the groundbreaking March 2010 report of the Special Rapporteur on the Situation of Human Rights in Burma which called for a United Nations COI to investigate war crimes and crimes against humanity in Burma. In his report the Special Rapporteur, Tomas Ojea Quintana, indicated that human rights violations are a part of systematic state policy that involves all levels of the regime. He noted that the crimes in Burma are not only human rights violations but also crimes against humanity or war crimes as defined under the Rome Statute of the International Criminal Court, and he urged the United Nations to establish a COI to address these crimes.

By supporting a United Nations COI, the United States takes a stand against the long-running impunity that currently reigns in Burma. After the elections scheduled for November 7, 2010, this systematic impunity will be codified in law. Burma's 2008 constitution, which will be enacted following the elections, offers no hope for justice through Burma's domestic legal system. The constitution ensures that the judiciary will be unable to hear any charges against government officials for any crimes, even crimes against humanity and war crimes. Victims of international crimes in Burma must look elsewhere for some measure of justice. The international community's support for a COI is the first step to uncovering the truth about the regime's rampant criminality and forging a path to justice.

The United States has taken a strong stance against the criminality of Burma's ruling regime. Since the United States announced its support for an investigation, the Burma Lawyers' Council is now looking to other countries to echo this necessary demand. Other nations dedicated to international justice and peace building must join the call for justice in Burma and push for a United Nations COI to investigate war crimes and crimes against humanity in the country. One

key opportunity for the international community to rally around the call for justice is to include the need for a COI in the United Nations 20th General Assembly Resolution on Burma, which will be released later this year. The General Assembly Resolution should acknowledge the need for an international investigation into the criminality of Burma's ruling regime and should include strong language calling for the establishment of a United Nations COI. The international community must respond to the calls for justice from within Burma and establish a COI to begin the process of bringing the rule of law and accountability to the country.

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Part (C)

Federalism

Federalism in Multiethnic Societies: A Look at Accommodative Institutions

by C.Rubi

Multiethnic societies contain groups of people with varied traditions, languages, and cultural backgrounds. Frequently, the sociological development of the ethnic identities predates the political development of the state unit that governs that society. Whether the state was created as a result of a series of historical battles, a consensual coming together, or as part of an ill-designed decolonization process, many multiethnic states struggle with ethnic differences and face the choice of fragmentation or redesigning the government to better hold it together. Federalism is a form of governance increasingly recommended for multiethnic societies.

Federalism, according to William Riker's classic definition, has three fundamental elements: two levels of government rule the same territory and people; each level is autonomous in at least one area; and the respective autonomy is protected from encroachment, generally by a constitution.[1] In practice, federalism requires democratic rule and a developed rule of law. Without those two prerequisites, one level of government can encroach with impunity on the powers of the other. While some scholars believe that federalism can exist under an authoritarian regime, the unchecked power of such a regime defies the autonomy and protection components. Non-democracies such as Ethiopia and Serbia and Montenegro give decision-making powers to regional legislatures in principle but interfere in regional affairs by flouting regional law and installing politicians at the regional level who will not challenge the center.[2] Both of these actions undercut the foundations of federalism.

In multiethnic states, federalism can benefit both the center and the sub-national regional units. Regions acquire local autonomy while retaining advantages accessible only to larger states. They benefit from a larger common market,

centrality of trade, and an increased military capacity to protect against cross-border aggression and strengthen international political posturing. In conflict-prone diverse societies, the regions benefit from constraints on predatory politics and the "ethnic security dilemma" in which one group fears another will seize power and wield it against it; decentralization insulates regions from the center so as to limit absolute control by any one group.[3] The center, in turn, can better manage inter-ethnic conflict through the federal framework and thereby avoid dissolution or secession. Federalism cannot prevent conflict but may be able to contain it if adapted properly and implemented in a supportive context. Distributing authority at lower levels of society may serve as a pressure valve to release ethnic tension within the state.[4] Key is determining the best level of devolution of power, internal self determination, and shared rule.

On the other hand, an inappropriately designed form of federalism may threaten to further destabilize a society. Some fear that federalism encourages secessionism or that it risks entrenching differences instead of "unifying through diversity".[5] Other fears doubt the long-term stability of federalism, questioning whether it can accommodate the changing demands of groups. The delicate balance of state-region and inter-regional relations may further be vulnerable to societal suspicion of "the other" or to opportunism by either level of government. A properly tailored system of institutions and incentives can assuage many fears even though it is not an infallible arrangement.

What this paper aims to do is to discuss typical federalist institutions from the perspective of multiethnic accommodation. It will then highlight some ideas that could be particularly relevant for the situation in Burma. Being unable to offer an expert opinion on the political situation in Burma, the paper does not presume to provide a means of transition from the current military regime to a democratic federal state; the scope is limited to considering varied options for what may one day allow Burma to achieve a peaceful and stable state.

Multiethnic States Face Special Challenges to Political Unity

Some multiethnic states require special accommodations in order to have a successful federal government. Inter-ethnic conflict or friction and the pervasion of ethnicity in all political decisions and debates add more tension to already complex decision-making processes. Political decisions are sub-optimal for the entire society as a result. Frequently the majority ethnic group fears losing the political influence it already enjoys while oppressed minority groups struggle to gain enough influence to provide for their own political goals. Exclusion

from the political system, after all, costs more than simple pride (although pride is in itself not an insignificant factor). Additionally, suspicions of those who oppose the majority can be exacerbated by historical enmity or a lack of affinity towards the national identity of the state. All of these conditions may pose a threat to the unity of the state.

I. Division of Powers: Shared and Self Rule

The Combination of Shared and Self Rule Supports Autonomy through Decentralization

Through self rule, federal states devolve a degree of political duties to sub-national units while retaining specific governing powers for the center. Many also have a system of shared rule in which particular powers are controlled by both the center and regions. While shared rule implicates a power balance between the center and regions, self rule invokes the principles of autonomy and self-determination, both of which are frequently cherished aspirations for marginalized ethnic groups.

Decentralization brings government closer to the people, giving the population greater control over their political, social, and economic affairs. Citizens can oversee the work of public officials and more easily hold politicians accountable.[6] It also increases opportunity to participate in government by creating more positions while shrinking the pool of candidates against which one must compete to fill them.[7] Thus, being able to govern themselves, regions achieve a degree of autonomy.

Autonomy insulates regions from the central government and improves the regional government's capacity to respond to the local people's needs. Particularly significant in areas of ethnic friction, autonomy increases political accountability and reduces the likelihood of the electorate misplacing blame. Where politically salient ethnic tensions are high and blaming a group of others is an easy scapegoat, misplaced blame can produce disastrous consequences. Localized governance increases accountability. Autonomy can further protect both individuals and minority groups from the center because it decreases opportunity for domination.[8] The regional instead of the central government controls the dispensation of services. Since the local ethnic groups likely

constitute a greater percentage of the regional population than they do of the state population, the regional government will have less freedom and incentive to deprive those minority groups.

Granting internal self-determination to regions gives them the autonomy to control their own affairs. In the ethno-federal context, it increases the ability of ethnic groups to protect their culture, language, and traditions, which is frequently a serious fundamental concern to people. If an official state language or even an unofficial functional language is not their own, parents and community leaders may fret that their children will lose their mother tongue and the cultural traditions attached to it. Language is particularly tricky since a state cannot function with a dozen different languages treated equally in all official business. The state must choose one or two languages in which to conduct its business, so decentralization grants regions an opportunity to conduct regional business in their predominant language should it differ from that of the state. It may be wise, however, for the regions to consider using the functional state language on an equal basis with their chosen language in order to enable close state-region relations and to allow regional politicians to more easily enter the central level of government.

States can only realize the benefits of decentralization if the regional governments are granted significant responsibilities. In order to avoid dispute, it is also important to clearly delineate which powers and responsibilities are granted to the regional governments and which to the central government. By clearly defining these responsibilities, the society reduces the likelihood of conflict between the levels of government due to misunderstanding or opportunistic attempts at encroachment on the other level's power.[9]

Residual powers which are not explicitly granted to either level of government need also be specified as presumptively going to one or the other level. Typically societies fearing fragmentation have vested residual powers in the center. Those societies who either fear domination by the center or need to offer a satisfying compromise to separatist regions seeking greater autonomy often reserve residual powers for the regions. Highly centralized India reserves residual powers to the center in a country that must consistently deal with separatist threats. Its ethnic and religious conflict led to the initial partition of the territory into India and Pakistan, and it notably still threatens to give way to the separatist movement in Kashmir. The United States, although multiethnic in a unique way, exemplifies a highly decentralized union of sub-national units which has become increasingly centralized over a couple centuries. Its founding fathers

valued small-scale local governance and feared a powerful sovereign; however, as societal attitudes changed and people developed an American identity, constitutional interpretation began to grant more lawmaking powers to the federal legislature and more policy-making freedom to the president. While many powers are still adamantly protected as states' rights,* the United States strongly identifies and operates as a single state.

In a state with a well-functioning rule of law, the judicial system will have interpretive powers to determine which duties and responsibilities fall within each level's scope. The division of powers between the center and the units must be supported by the rule of law in order to exist at all. Even where each government's powers are clearly enumerated, courts provide an invaluable service through their case-by-case interpretation. The influence of courts on the de facto division of powers is clear in the Canadian situation, where the constitution grants residual powers to the center but the courts have interpreted the constitution in such a way as to grant them to the provinces. Additionally, both American and Canadian courts have interpreted the enumerated powers broadly.[10]

II. Institutions and Federal Design

The Number, Size, and Composition of Regions Dramatically Affects Outcome

Federal constitution-makers must consider the most accommodative number and size of sub-national units as well as the most optimal geographic boundaries for those regions. The boundaries determine both the demographic composition of the units and the distribution among the units of natural resources and pre-existing industrial and cultural centers. Both are prime factors for future satisfaction in inter-regional and intra-state relations. In multiethnic states, boundaries may be drawn either to match or to contravene the extant ethnic boundaries.

The Number of Units Impacts Center-Region and Inter-Regional Relations

Many constitutional scholars warn of the destabilizing tendencies of states with only two or three regions.[11] The historical examples of Czechoslovakia and Yugoslavia prominently demonstrate the potential for dissolution or secession. Having too many sub-national units on the other hand may subordinate their

power and role in relation to the central government, making them less able to withstand central government attempts to encroach on their power.[12] Nigeria has experimented with the number of units during its different constitutional periods, having increased from 3 to 36. Due to the size and composition of the units, the Nigerian state struggled to maintain regional parity with only three units when one dominated central politics, and this resulted in civil conflict and constitutional change.[13] Dramatic inequality invites dissatisfaction. The breakup of Nigeria's interim 12 regions into 36 was partially an attempt to keep ethnic groups from aligning with regional boundaries.[14]

Regional Composition May Exacerbate or Alleviate Existing Tensions

Where boundaries are drawn in relation to the existing ethnic lines can have an even more immediately obvious effect on the success of a federal state. Not only can disagreement about where boundaries should be set destroy negotiations, but suboptimal determinations may doom a country to renewed conflict. Of course, the geographical distribution of ethnic groups within a state will greatly affect how internal borders can and should be drawn. If groups are physically interspersed, borders cannot be matched with preexisting ethnic-based community boundaries. If groups are geographically concentrated, borders can match historical divisions; however, whether this is a good or a bad idea depends on the context.

On one side of the argument, matching subunit boundaries to preexisting ethnic boundaries may increase secessionism by providing the ethnic group with the organizational structure and resources to mobilize for secession. Viewing the situation from another perspective, though, separatist sentiment among the ethnic group may have been founded on dissatisfaction with systematic denial of internal self-determination. Granting the ethnic group sufficient autonomy to govern its own affairs may inherently remove the desire to secede. Separatist mobilization of Tamil nationalism in India in the 1950s, for example, subsided after Tamils were given their own state. If full independence is not the ultimate goal of the group, remaining part of the state could provide enticing benefits.

Ethnofederalism typically draws boundaries so that a minority group has a majority status in at least one province.[15] This type of federalism has been criticized for historical outcomes of civil conflict and separatist movements, but numerous other factors could contribute to the breakup of a state, including

establishing a federal government too late or halfheartedly. The existence of a core ethnic region (defined as having a regional population composed of at least 20 percent of the total population within the region dominated by the core ethnic group) among numerous smaller ones, however, may be particularly unstable, and one scholar suggests that such a region should be divided into multiple smaller ones; this would frustrate collective action by the core ethnic group by dividing their political energy among multiple regions each with their own institutions.[16] Because subdividing a large region may actually increase the representation of the core ethnic group where a bicameral legislature exists, though, subdivision may not always be appropriate for establishing an accepted balance of power.

Studies have shown that greater geographical concentration of minorities is positively associated with secessionism, protest, and rebellion.[17] Prominent examples such as Kosovo's struggle for independence (approximately 95% of the region's population is Kosovar) may increase fears of secessionism. Logically, territorial boundaries that match ethnic divisions can strengthen ethnic identity and stifle an incipient identification with the state. However, where geographical concentration of a minority group exists, it is something with which the state must cope, and it does not have to lead to violent separatism. Accommodating institutions can ideally grant the minority group self rule within its geographically concentrated area, provide a way for the group's political concerns to be addressed at the central level of government, and create or maintain benefits for remaining a part of the state.

Drawing boundaries instead to create cross-cutting cleavages in a multiethnic society may mitigate ethnic conflict in some states. Such a division can encourage alternative forms of competition unrelated to ethnicity and may thereby reduce the effects of an ethno-centric identity. Competition for political influence among mixed ethnicity groups, such as resource-rich regions versus resource-poor regions, can create some of these cross-cutting cleavages.[18]

India has successfully used territorial delineation to create intra-ethnic group cleavages that counteract inter-ethnic group tensions. By reorganizing states along linguistic/ethnic lines, the conflict between Tamil and Telugu speakers became instead a political struggle within the new states between subgroups of those speakers.[19] The reorganization did not protect sub-regional minorities from discrimination within the Indian states, though, since regional governments denied their linguistic minorities educational services, government publications, and civil service exams in the minority languages.[20]

To protect sub-regional minority ethnic groups from marginalization or rights violations, one solution is to give the federal government special responsibility for guarding those minorities against repression. Such a situation is often used in the case of aboriginal and indigenous people. It does require that the central government has the capacity and motivation to enforce protections for the individual and group rights of the smaller minorities. Further, a constitutionally granted comprehensive set of fundamental rights can assuage small minority groups' fears of regional oppression.

When establishing internal territorial boundaries, the following conditions should be considered: ethnic group geographical distribution, identity, and demands; the extant security situation; availability of protection for sub-regional minorities by either a cooperative regional political system or a strong and willing federal government; and ensuring that the formerly dominant groups do not maintain overwhelming de facto federal political power at the expense of the oppressed groups.

The Electoral System Must Be Specially Designed for Minority Representation

Common goals for a democratic electoral system include proportionality of seats to votes, accountability of representatives, and the durability of government. In divided societies, however, these may need to be subordinated to the goal of state survival through interethnic moderation.[21] If political affiliations are not fluid and a certain group never receives a turn of political power, representation of that minority is de facto suppressed.[22] When ethnicity has political salience, such minority suppression can easily seem or be equivalent to ethnic oppression.

Persistent denial of political influence exacerbates ethnic tensions and may spark violent separatism. True democratic rule of the majority, then, may be unachievable and may actually do more harm than good. Compromise through broader ethnic inclusion in the political system is essential, and this is what the electoral system's design must accomplish. How best to do that in a given context requires exploration of the contrasting consociational and centripetal democracy models of federalism.

Consociational and Centripetal Democracy Are the Two Primary Models of Federalism

Consociational democracy enforces proportional representation as a means of decreasing minority disaffection by guaranteeing political influence to all significant groups. As envisioned by Arend Lijphart, it has four key components: (1) rule by grand coalition within the cabinet; (2) a veto power granted to minorities for significant decisions; (3) proportional representation; (4) and regional autonomy. The proportional representation extends to all main branches of government, including the executive department, legislature, and civil service. All substantial minorities are guaranteed representation in the governing coalition according to a predetermined proportionality, and each minority may veto major decisions. The veto power forces groups to compromise on important matters in order to achieve the required consensus. It thus encourages participation and compromise but threatens stalemate.[23] Ideally, the political struggle for compromise will accommodate special interests and fears. The lawmaking process is more frustrated under a consociational model than under a traditional government model since the government is formed based on ethnic composition instead of a common ideological basis.

In contrast, the centripetal model (so named because of its aim to support moderates) encourages pre-election cross-ethnic power sharing. Political candidates must vie for the votes of those outside of their own ethnic group, so those who are elected are held accountable for addressing broader interests than those of a single ethnic group. Successful political candidates will be those moderates who can appeal to members of other ethnic groups, and ethnic-based parties may appeal to voters from different ethnic groups through coalition partners. Both require willingness to compromise on ethnic issues.[24] Such a system aims to naturally and gradually reduce the political saliency of ethnicity. Instead of abandoning majoritarian democracy it seeks to achieve majority rule by producing cross-ethnic majorities as opposed to ethnically-based majorities.

Key in a centripetal democracy is implementing an electoral system that will naturally support the election of pan-ethnic moderates.[25] List system proportional representation is disfavored because it tends to emphasize or exacerbate ethnic cleavages. Where groups are geographically dispersed within the state, single-member constituencies may favor the alternative vote, while multiple-member constituencies may prefer reserving certain seats based on

ethnicity in an otherwise common role election. The alternative vote encourages interethnic exchange of voters' second preferences. If the ethnic groups are instead in geographically concentrated units aligned with regional borders, then the electoral system may require that candidates achieve a minimal percentage of votes within a significant proportion of the regions in addition to a plurality of the total votes cast across the state.[26] Nigeria's 1978 constitution, for example, required that the president win a plurality of total votes plus 25 percent of the votes in at least two-thirds of the states. Indonesia's 2002 constitution similarly created a vote distribution formula. The first past the post electoral system will only perpetuate majoritarian democracy and cannot alone encourage ethnic integration.

The consociational and centripetal systems are not interchangeable. Whether one is preferred over the other in a given context depends largely on where regional boundaries may feasibly be established. Consociational democracy only functions in parliamentary as opposed to presidential systems. Critics of consociationalism argue that it unrealistically expects groups to shift instantaneously from irreconcilable conflict to a sustained ability to compromise. In the case of Cyprus, the Greek majority ended the consociation within three years after the Turkish Cypriots' frequent use of the group veto; this led to further civil strife and a Turkish invasion of the island.[27] Furthermore, some believe that reinforcing both ethnic-based parties and proportional representation perpetuates ethnic politics.[28] Another argument suggests that while proportional systems are associated with dampened ethnic protest they do not change attitudes or cultivate a state-wide identity.[29] In the case of Northern Ireland, extremist parties have actually flourished under consociational federalism.[30] As a result, proportional representation may not offer a long term solution to ethnic conflict.

Political Party Organization Can Substantially Affect the Success of Federalism

Large, well-organized parties can dominate politics in their own constituencies and can often impose party discipline to influence the developing government structure in surprising ways. For example, party discipline of the national party in post-independence Burma caused the two chambers of the bicameral legislature to develop uniformly even though one was created to represent the states and the other the people. The result was a barely recognizable skeleton of federalism.[31] Centralized party systems operating both regionally and

nationally can also keep in check opportunistic attempts by one level of government to alter the center-region power balance.[32]

Strong regional parties can undermine the maturation of federalism in a state. One argument goes so far as to say that federalism can only succeed when representatives derive their electoral power from a broader national constituency instead of a purely regional electorate.[33] National parties are still capable of meeting regional needs, especially when they have the ability to secure electoral rewards in the politicians' home states.[34]

Some research faults regional parties and not decentralization for increasing ethnic-based conflict in federalist states. According to that argument, regional parties may increase conflict by reinforcing ethnic-based identities, producing legislation that favors certain groups over others (such as by preventing educational instruction in a group's mother tongue), and mobilizing groups to engage in ethnic-based conflict, secessionism, or terrorist violence. Regional parties are most likely to gain influence in decentralized states if the state has large regions, if the upper house of the government is elected or appointed by regional legislatures, and if national and regional elections are not held concurrently.[35] Additionally, regional parties may enable destabilizing minority control at the central level of government. Nigeria's First Republic failed for just such a reason. Through its substantial regional majority, the Hausa-Fulani politically dominated its region to the extent that regional minorities could not build political influence. Using its strong regional power base, the Hausa Fulani then gained a large number of seats in parliament through the predominating size of its region.[36] The combination of one excessively large region and a small number of regions is likely to subvert a federal arrangement.

Federalism Requires True Fiscal Decentralization

Whether a state exhibits true federal characteristics is substantially determined by the fiscal resources at the regions' disposal. The number of powers constitutionally granted to a subunit is of no consequence if its government does not have the resources to carry out its duties. Ethiopia is notably unitary despite the federal administrative structure within its constitution, for example, partially because the regional governments rely heavily on the central government for redistributed fiscal resources. Regions have constraints on their powers of taxation and may only borrow money with federal approval; some regions can generate enough revenue to cover only ten percent of their expenditures.[37] Fiscal dependence constrains policy making powers. It enables

central government interference in the regions, and can easily frustrate electorate satisfaction with the regional governments who are unable to provide the services they need. Regions need to have sufficient expenditure freedom and administrative capacity and should be able to tax or receive unconditional transfers from the central government.[38] In states with bicameral legislatures, added fiscal security can be given to the regions by requiring all budget bills to be passed by the region-based chamber.

Fiscal decentralization must be considered in reference to other elements of the federal structure and the state context. One study found that the likelihood of ethnic rebellion increases with fiscal decentralization when there exists a high degree of inter-regional inequality, especially when territorial divisions match ethnic divisions. Unalleviated inter-regional inequality also increases the chance of ethnic rebellion when territorial and ethnic divisions coincide. Increased fiscal transfers to subunits, however, reduce the chance of ethnic protest when the groups are regionally concentrated.[39] In many contexts, the central government can improve the sense of unity by taking on the responsibility for protecting macroeconomic stability, using transfers to ensure regional equality, and using targeted and matching grants both to promote the core national objectives and encourage regions to provide public goods that have a natural and positive spillover effect in other regions.[40]

Resource Allocation Can Strain State-Region and Inter-Regional Relations
States rich in natural resources may suffer destabilizing effects if the resources are naturally unevenly distributed. Such states may also experience increased tension between the central and regional governments as each competes to control the financial benefits from the resources. Prevalent corruption can easily eat away at the profits at either the regional or central level and doubly so if the money passes through both sets of hands. Allowing the center to control resource revenues may consolidate its control and even encourage development of a national identity. If conducted improperly or controversially, however, it can do precisely the opposite. It may exacerbate tension between resource-rich and resource-poor regions, threatening to reignite overlapping ethnic divisions or to perpetuate regional dissatisfaction with the center.

Iraq presents a unique system of resource allocation. The 2005 Constitution uses the supremacy of regional law to provide relative regional control over the lucrative natural resources within the country. Regional law prevails where

competences are shared between the state and the regions (such as with natural resources), so if there is a resource revenue allocation dispute between a region and the center, the regional law reigns. Some criticize these provisions as decentralizing and causing Baghdad and the non-oil producing regions to be at the mercy of the oil-producing regions. If other factors fall into place, such provisions may also allow the Shiites to construct a nine-province region and control all of the country's oil.[41]

III. The Situation in Burma

Burma's history as a single state has been checkered with disunity and mismanaged accommodation of varied groups of people. The current military regime has pressed for a centralized, unitary state, and many view their resulting policies as a form of "Burmanization".[42] The military and those possessing political power are overwhelmingly from the Burman ethnic group, which can easily compound problems related to the existence of severe ethnic conflict and the objective dearth of ethnic representation or consideration of cultural protection and respect. Granting ethnic groups greater representation and self determination through decentralized federal government could alleviate some of these societal problems.

Distributing power between the ethnic groups in a manner that satisfies everyone would be one of the trickiest tasks for designing a federal state. While outdated and imprecise census figures fail to provide an accurate representation of Burma's ethnic composition, an estimated 68 percent of the population is Burman. Substantially-sized ethnic minority groups are geographically concentrated in the border areas of the country. Some of these groups exist within their own state, which loosely aligns with the approximate ethnic boundaries. Others have never had their own state, and some either have only a small population or are not geographically concentrated. Within the states are sub-regional minorities. Furthermore, categorizing people by ethnicity is not a simple task, as intermarriage is common and there is dispute about the anthropological development of various groups; some groups could be claimed by different ethnic categorizations.

Achieving the ideal politically stable version of Burma's future may be constrained by the current political situation, the inevitable transition period, and the tensions and fears that pervade society. A promising and not impossible theory suggests that Burma's minority tensions are not due to entrenched

incompatibility but are instead in response to military atrocities since the time of independence.[43] This may or may not be so, but the Karen in particular have hoped for their own independent state since they were promised as much by the British in return for military support during World War II. Overcoming the devastation and distrust developed during the world's longest running civil war would require numerous compromises and guarantees. Sensitivity to the needs, fears, and aspirations of the Karen and other marginalized minority ethnic groups would likely demand a particularly unique set of federal institutions, but a foundational combination of internal self-determination and substantial autonomy offers a lot of promise.

Ethnofederalism May Be a Viable Option for Burma

One option for decentralizing Burma would be to partition the state into regions divided along the existing geographic lines of the larger ethnic groups. Devolving power to the regions would then allow ethnic leaders to govern their people in their chosen language and according to their cultural traditions, granting regions cultural autonomy. Many federal states choose to grant their regions policy making powers in such areas as family law, education, and local economic development. Such a system allows regions to educate their children in their native language and manage the natural resources and traditional trades and professions according to the needs of the local population.

Ethnically-aligned regional division in Burma threatens two primary forms of dissatisfaction. The Burman majority could feel slighted at the federal level if they are represented as a region on equal footing with other regions; due to their large population size, they may feel their region should have greater power. On the other hand, if the size of the Burman region earns it greater weight than other regions at the federal level, the other regions may feel unfairly marginalized. Either the larger or smaller ethnic groups would rationally be dissatisfied with either representation scheme, so institutional compromise would be necessary to compensate the slighted group.

Establishing one political region per sizeable ethnic group can give the groups equal representation in institutions based on regional status. Alternatively, it could enable a more flexible representation scheme based partially on population and partially on regional status. Using a 100-member legislative chamber as an example, the Burman region could have 27 representatives while the largest

minority regions could have 18 representatives each and the smaller regions somewhat fewer respectively. This prevents dominance by a single ethnic group but does not entirely deny the largest group its majority status.

With regional identity based on ethnicity, ethnic minorities within each region would require special protections at the sub-regional level in order to maintain respect for their cultural and political needs. Either the federal government can guarantee these protections (as occurs in the United States with the specially protected Native American population), or a combination of an individual and group rights-oriented constitution with a strong, independent, and non-corrupt judiciary at the regional level can do so. Both require a well-developed rule of law to fairly assess and remedy ethnic marginalization.

In the case of a consociational democracy, the compromising required for a grand coalition to succeed could prove difficult in Burma's situation. Additionally, because long-term satisfaction with the political situation depends in part on satisfaction with the predetermined allocation of proportional representation, the ability to compromise within the grand coalition could easily become captive to this. In other words, it is unlikely that all groups will be content with the number of representatives they are apportioned, and those who are dissatisfied with the strength of their representation in the grand coalition may in response adopt a strategy of frustrating compromise and increasing veto use.

Proportional ethnic representation in the civil service and military is an important additional factor for achieving widespread satisfaction with consociational democracy in Burma. Because the military has played such a central and tense role in Burma's recent history, it will likely be instrumental to any successful outcome to provide a way for the military to become ethnically integrative. It is, after all, extremely important to avoid the perception of military occupation by another ethnic group, particularly one with substantial political power. Building a multiethnic leadership could both reduce the likelihood of a premature military coup in response to separatist sentiment and help prevent the perception of occupation of one ethnic group's homeland by another group. Initiatives such as proportional admission into the military academies could certainly help in the longer term. While immediate proportionate ethnic representation within

one of the strongest institutions in Burma is not feasible, concrete efforts to remedy the situation may be enough to satisfy those concerned. Lawmakers may consider an affirmative action system to increase diverse representation and then leave open the idea of a corresponding phase out period to be evaluated in light of the level of success of societal integration and development.

Heterogeneous Divisions Are Unlikely to Succeed in Burma

A second option for dividing Burma into an effective regional system would be to strive for a cross-cutting alliance incentive structure by breaking states down along non-ethnic lines. Considering Burma's pre-colonial history and the entrenched ethnic identification over the past several decades, however, this option is unlikely to suit Burma well. The geographical concentration of several substantially-sized ethnic groups and the prevalence of mutually unintelligible languages create logistical complications for satisfying the cultural needs of the people. Since many primary languages in Burma are mutually intelligible, this would threaten to frustrate the timely provision of services as well as to pave the way for feelings of domination by the group whose language is chosen to be the lingua franca. If such a division could be achieved, however, it would be more likely to provide a long-term strategy to make the electoral system less ethnic based and would pave the way for a more majoritarian system that is "color blind" but not oppressive of smaller minority groups. If this is not feasible or desirable, the alternatives create a risk of long term resentment by the Burmans, who would be denied rule by majority, unless their interests are noticeably protected and satisfied in other ways. This may be achieved by altering the degree of decentralization within the federal state.

Federalism Is Not Perfect but It May Succeed in Burma

It is important to keep in mind that federalism is not a fix all and may simply not be appropriate for certain societies. The failures of federalism in Yugoslavia and Czechoslovakia prominently demonstrate that decentralization cannot hold all states together. Combining federalism with pre-established regional parties may threaten greater conflict, which could be particularly dangerous in Burma because of how much time regional parties – often with their own armies – have had to become an entrenched part of the society. Half-hearted federalism

and transitional period vulnerability to ethnic separatist mobilization might also threaten failure.

While loyalty to a state cannot be created by force, a federal structure that respects minority rights and grants internal self-determination to autonomous regions can create ways for such loyalty to develop naturally. In Burma, ethnicity-based regions can offer much coveted ethnic self-determination. If an electoral system and distribution of shared and self rule can strike a balance between increased minority representation and a sustainable majority level of influence, then federalism may provide Burma with a cohesive state.

(Endnotes)

[1] Kristin M. Bakke and Erik Wibbels, " Diversity, Disparity, and Civil Conflict in Fe deral States", *World Politics* 59:1 (Oct. 2006), *citing* William Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown and Company, 1964) p.11.

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[4] Jenna Bednar, "Federalism as a Public Good", *Constitutional Political Economy* 16 (2005) p.193.

[5] Bakke, *supra* note 1, at 15.

[6] *See* Charles R. Hankla, "When is Fiscal Decentralization Good for Governance?", *Publius: The Journal of Federalism* 39:4 (6 Nov. 2008) p.635.

[7] *See* Donald L. Horowitz, "Patterns of Ethnic Separatism", *Comparative Studies in Society and History* 23:2, (Apr. 1981) p.165. *See also* Brancati, *supra* note 2.

[8] *See* Nicholas Charron, "Government Quality and Vertical Power-Sharing in Fractionalized States", *Publius: The Journal of Federalism* 39:4 (8 June 2009).

[9] *See* Hankla, *supra* note 5.* Note in this specific case that the term "state" is not given the same meaning as elsewhere in this paper. Here it refers to the sub-national units of the United States of America as opposed to a meaning similar to the term "country". "States' rights" is a phrase with a particular meaning in American constitutional law.

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[13] *See generally* Martin Dent, "Federalism and Ethnic Rivalry", *Parliamentary Affairs* 53:1 (Jan. 2000); Donald L. Horowitz, "The Many Uses of Federalism", *Drake Law Review* 55 (Summer 2007).

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[15] *See* Charron, *supra* note 7, at 1.
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[17] *See* Zachary Elkins and John Sides, "Can Institutions Build Unity in Multiethnic States?", *The American Political Science Review* 101:4 (Nov. 2007).
[18] *See* Horowitz, "The Many Uses of Federalism", *supra* note 13, at 960.
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[20] *See* Steven Ian Wilkinson, "India, Consociational Theory, and Ethnic Violence", *Asian Survey* 40:5 (Sep. – Oct. 2000) p.778.
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[23] *See* Charles E. Ehrlich, "Democratic Alternatives to Ethnic Conflict: Consociationalism and Neo-Separatism", *Brooklyn Journal of International Law* 26 (2000– 2001).
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[25] *See generally id*. at 1217-18.
[26] *See id*.
[27] *See* Horowitz, "Conciliatory Institutions", *supra* note 24 at 1221.
[28] *See* Adeno Addis, "Deliberative Democracy in Severely Fractured Societies", *Indiana Journal of Global Legal Studies* 16:1 (Winter 2009) p.67.
[29] *See* Elkins, *supra* note 14.
[30] *See* Horowitz, "Conciliatory Institutions", *supra* note 24 at 1222.
[31] *See* Josef Silverstein, *The Struggle For National Unity in the Union of Burma*, Doctoral Thesis for Doctor of Philosophy at Cornell University (Sept. 1960) p.293.
[32] *See* Bednar, *supra* note 3.
[33] *See* Kevin Roust and Olga Shvetsova, "Representative Democracy as a Necessary Condition for the Survival of a Federal Constitution", *Publius: The Journal of Federalism*, 37:2 (27 Mar. 2007).
[34] *See id*.
[35] *See* Brancati, *supra* note 2.
[36] *See* Horowitz, "Democracy in Divided Society", *supra* note 14, at 30.
[37] *See* Kidane Mengisteab, "Ethiopia's Ethnic-Based Federalism: 10 Years After", *African Issues* 29:1/2 (2001) p.23.
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[39] *See* Bakke, *supra* note 1.
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