Justice or Punishment: Forgiveness or Vengeance: Amnesty or Amnesia: Is There a Middle Path for Burma?

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Scope of the article

Our contribution to the topic, transitional justice, will address some key questions and considerations about Burma's likely model of transition from its current State form of military dictatorship to that of democratic governance. We will look at the policy options generally available, commenting on their desirability, applicability, feasibility and the realpolitik that will frame decisions. It is our intention not so much as to produce a legal academic work (although we have critically reviewed much of the literature and are actively engaged in the debate), but rather to direct our observations to ways of dealing with the past in a manner that does not entrench already deep political divisions across Burmese society.

Whilst we understand the law and its demands, we cannot and do not avoid the political dimension of the debate. Andrew Rigby's seminal work on 'Justice and Reconciliation' is a good starting point to enter, and we have drawn heavily on it to develop a comparative and historical framework to explore the idea of 'transitional justice' and how to grasp and deal with the demands of a nation in transition. Rigby's work reveals the depth of his understanding of this most vexed and confronting issue.1

It is our contention that, for transition to be successful and for reconciliation to 'take root' in society, the institutionalisation of the rule of law is a
priority requirement. This step is frequently overlooked, as people become enmeshed by notions of healing that tend towards individual needs. Without it, justice can only ever be a desire or demand, and cannot be realised. A constitutional settlement in Burma, based on federal principles, enshrining the rule of law, more than any other action will give ‘teeth’ to the goals of reconciliation.

Spain’s transition experience, called ‘public amnesia’ by various commentators, has striking similarities to Burma’s experience of inside colonisation by its military forces, and we shall contrast the dynamics of both, by looking at Spain and Burma under occupation, the nature of the transition in Spain, the transitional justice issue and how it was responded to, the success of Spain’s transition and whether it is instructive for Burma.²

Introduction

“It should be recognized that in a perfect society victims are entitled to full justice, namely trial of the perpetrator and, if found guilty, adequate punishment. That ideal is not possible in the aftermath of massive violence.”³

So it is with Burma, a country beset by long term conflict, including armed conflict, where the magnitude of suffering although apparent and quantifiable, is not readily translated into demands for justice.

Holocaust, Romanians Terror, Bosnia, Armenian Genocide, South Africa’s Apartheid, Rwanda’s ethnic slaughter, make up part of an endless list of cataclysmic human horrors well known to the world. There is as yet no description given to the horrors that the people of Burma have had to suffer at the hands of their own military, for over fifty years. All have suffered in Burma, particularly those who have stood up for political rights, and whilst there shouldn’t be a competition over whose suffering has been the worst, it cannot be denied that Burma’s large number of ethnic nationalities have suffered terribly.

There is no sign of abatement of such horrors, and the lot of those people has been one of an absolute lack of security with Tatmadaw soldiers running rampant over their villages. Displacement, forced relocation, compulsory acquisition of possessions - house, land, food-, women suffering repeated rapes, - some ending in death -, men also raped but as yet finding it too difficult to talk about – are the terrors. There is massive internal displacement inside Burma and the main casualties of this violent conflict are civilians.

In a transition from the current military dictatorship to democratic gov-
ernance, Burma’s pressing need is not only for national reconciliation with and among Burma’s ethnic nationalities, but also for reconciliation among many people, the military and the broader society. It will include the rebuilding of its shattered economic, legal, judicial, educational, and health institutions, and the strengthening of the agricultural base so that current levels of malnutrition can be overcome.

It is obvious that there are basic human needs such as food, shelter and security, but the need to be afforded human dignity, the birthright of all peoples the world over, needs to be recognised and acknowledged in the case of Burma. This will require massive political reform and an individual’s need for justice, where they have suffered a terrible wrong, as compelling as it may be, may not be able immediately to be afforded them, as broader societal needs will of necessity take precedence. That is the way human beings the world over organise themselves and further experience demonstrates that even those nations that institute a program of criminal prosecutions regarding human rights violations, cannot ensure justice for all. The maxim ‘justice delayed is justice denied’ rings true for all transition countries, but if one’s country has been besieged by conflict for decades, how can justice possibly be accorded to all, other than through working to ensure basic human needs and human rights are met.

There is, and will continue to be, debate within Burma itself, from Burmese political activists living outside Burma, and from human rights organisations around the world about identifying and punishing the perpetrators of human rights violations. These debates cannot and should not be censored, as some have said. That occurred for human rights groups in Argentina where the then newly installed Alfonsin government accused them of being a threat to the national project of reconciliation and reconstruction.4

To some degree such claims are already being cast. Some who are promoting amnesty, expect those demanding retributive justice to drop their demands to (in their words) ‘achieve transition’, with those demanding retributive justice saying those who promote amnesty are capitulating to the military. Both claims are not sustainable. Democratic principles demand that people have the right to speak out and seek redress for wrongs, and political imperatives, as compelling as they are cannot be the basis for the curtailing of freedom of expression. The advent of transition will be neither slowed nor hastened because of these demands.

Is Transition likely in Burma?

Both small, yet potentially significant recent political developments have
planted the seeds of hope for those desiring change in Burma. These include the release of Burma’s Nobel Peace Prize Laureate Daw Aung San Su Kyi and confidence-building measures that have taken place between the National League for Democracy (NLD) and the Tatmadaw’s ruling State Peace and Development Council (SPDC). The authors recognise that the confidence-building has yet to reach the next stage. That stage includes:

a) dialogue between the parties (and this must be announced publicly by parties and not only for the consumption of the regional and the international community but for the people of Burma themselves)

b) the release of all political prisoners

c) human rights violations committed with impunity by the Tatmadaw forces must cease and violators are dealt with according to the due processes of domestic law.

d) the Tatmadaw must immediately give effect to a nation wide ceasefire.

e) freedom of speech must be afforded so that the voices of the people can be heard.

f) political parties must operate freely

Some of these processes may take some time, but people must hear that dialogue has started and that the agreed number of political prisoners are to be released. These actions will help to quell growing skepticism that nothing is going to change.

Is transition in the current circumstances a probability? If yes, how, when and what form will it take? How does a society for so long closed off to outside influences, including intellectual, and each playing their own part both willing and unwilling in the State affectation of peace and unity, come out of its slumber? How do people used to being straitjacketed across all levels of society take advantage of new freedoms as they emerge?

Transitional Justice: not yet defined

The term ‘transitional justice’ is in common usage these days, and for those who are engaged in legal-political activism and concomitant debate, it is easily understood, but generally in its most narrow sense. It connotes law, prosecutions, trials, courts and the demand to bring to account those responsible for committing and/or causing human rights violations that amount to what we would know as ‘crimes against humanity’. Such crimes have now been codified in the Rome Statute that has established the International Criminal Court. The Court is able to exercise jurisdiction with respect to the following crimes: genocide, crimes against
humanity, war and aggression. (Article 5) Articles 6, 7 & 8 give some definition to the above-mentioned crimes. The Court's Statute now provides the international barometer for what constitutes gross human rights violations.

Curiously enough, the term transitional justice does not yet connote the need to hold accountable those who have been responsible for food scarcity that causes widespread childhood malnutrition, for the deprivation of land and housing, for loss of reputation, for causing criminal records when there was no criminal act, simply political acts, denial of educational opportunities to those not favoured by the military, stealing of crops and forcing farmers to sell their paddy at impossibly low prices, and much, much more. Such is the experience of many people in Burma.

Yet this is changing and we note that an organisation like the New York based International Centre for Transitional Justice (ICTJ) with whom we have worked, has a broad charter for its operations and can respond to countries' agendas and needs to suit their own particular circumstances. They demonstrably recognise the multi-faceted justice needs of countries in transition, whilst maintaining an overarching concern for victims and survivors of abuse.

‘Transition’ has been defined as ‘changing from one state or condition to another’; ‘transitional’ as ‘a transitional period; a transitional government’; and justice as ‘the fair treatment of people; the quality of being fair or reasonable’.

As in every country that has had to come to terms with its bloody past, transitional justice will come to be understood within the context of its own transition. There is no universal prescription yet to be had that can be applied to all nations undergoing transition that can satisfy the sometimes conflicting demands of justice and accountability domestically and internationally. Nations or more specifically the political actors who get to make the decisions have to do the best they can. Each nation charts its own path, and it will be the same in Burma.

**Transition Type: Transformation, Replacement, Transplacement**

One of the most compelling considerations to be factored into transitional justice discussions is the means by which the transition is to take place.

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crimes, at least short term. Rigby cites Samuel Huntington’s classification of three types of transition and says that they are, “only useful to the extent that it [his distinction] throws light on the phenomena under consideration.” Huntington’s classification does however provide us with a useful though imprecise device to speculate on the democratisation process that will ensue, based on the mode of transition. It is sui generis that transition in Burma will include the Tatmadaw-SPDC, although surprises do happen, but more so once the transition has reached the stage of irreversibility.

Huntington’s three types are that of (1) ‘transformation’, an initiative of the elite to bring about change, (2) ‘replacement’, an opposition-only initiative and (3) ‘transplacement’, a process of change through joint action of those in power and the main opposition. Following are Rigby’s examples of type matching. Spain in the 1970s was ‘transformation’, resulting from elite to elite negotiated process that in Rigby’s words “resulted in a strategy of letting bygones be bygones.” Eastern and Central Europe in 1989 was ‘replacement’, caused by pressure from below and outside, resulting in a stronger emphasis on the pursuit of justice against those who had committed human rights abuses. In Argentina, Chile and South Africa the transition type was ‘transplacement’, pressure from below that forced the regime to negotiate the transition, where the revelation of truth prevailed over that of justice.

As we came to know and understand about Spain’s transition experience from dictatorship (of a military type) to eventual democracy, although it has had a long gestation, we were taken with its familiarity to Burma, with the caveat each country has to some degree its own unique circumstances, despite each nation thinking that their experience is so unique that no one could comprehend it or that any country’s experience is in any way similar. Given this though, we would ask all involved parties to keep Spain within their purview.

There is a view put very strongly, so strongly that it has become the common sense view that for divided societies to emerge from their brutal pasts, they must do one of two things, or preferably both. They must prosecute those responsible for human rights abuses, including also those who collaborated, and to uncover the truth; have some sort of truth process, whatever it might be. Rigby concludes that, by and large, the ‘strategy’ as he calls it (‘policy’ we prefer) of Spain’s ’let bygones be bygones’ has worked with the roots of democracy deepening. Spain is anomalous to the current thinking that all need transition nations must at least uncover ‘truth’.

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Justice vs. Punishment: Forgiveness vs. Vengeance

If we discuss justice and forgiveness, we must also discuss punishment and vengeance. Some people seek vengeance. It is understandable in compelling situations and whilst it may make some individuals feel good, it does not promote nation building and, significantly, it undermines the rule of law more than any other omission or commission, amnesty or amnesia.

To extract vengeance is to do so outside the rule of law and it is our contention that if people responsible for committing crimes are to be punished it must be done according to the legal principle *nulla poena sine lege*, i.e., no punishment without law, or due legal process.11

Another significant way in which the rule of law can be abridged is by introducing retrospective (also called retroactive) legislation to effect prosecution of behaviour previously not caught by criminal laws. This happened notably among countries today known as model democratic States, such as Norway, Denmark and Holland. In the immediate aftermath of World War II each introduced retrospective legislation that introduced the death penalty for the most serious treason. Belgium and France still had the death penalty but they like the three countries cited changed their laws *ipso facto* to deal with various forms of ‘collaboration’ and the like.12 Vengeance and retrospectivity however should not be confused, and vengeance is not to be countenanced in any situation.

When so many wrongs or crimes have been committed systemically over such a sustained period of time, how do you begin to apportion blame? Is the hungry child who gets paid a few kyats from a soldier to keep a lookout or to provide some information, guilty of a crime? Are the majority of people who stay silent in the face of their neighbour’s suffering at the hands of the soldiers, guilty of crimes? Are those who don’t speak out to defend their rights guilty? Are those judges who handed down sentences to those charged with crimes, but whose only transgression had been to speak out against the military regime guilty of crimes? Do those judges remain on the bench or should they be removed? Whom do we punish: the soldiers who shot the students in 1988 or the Generals who gave the orders? It must also be remembered that within the one family it is not uncommon to have victims, perpetrators and collaborators. Conflict not only divides societies but families and local communities. Reconciliation must then take many forms.
Reconciliation

Any discourse about Burma would not be sufficient without covering reconciliation or national reconciliation (democrats term) and national reconsolidation (military term); this different terminology itself revealing of the political divide that has rendered Burma a moribund state. At least in its narrow legal sense perhaps the debate about transitional justice that must take place between Burma’s main political actors, the NLD, the Tatmadaw (Armed Forces) and the ethnic nationalities leaders, will get the parties playing the same tune. It may present itself as an opportunity for the parties to cross the divide and speak to each other with one language.

Rigby’s ideal-type model for reconciliation

Rigby describes “an ideal-typical model of a phased reconciliation process, one that might be pursued in societies emerging out of division and a history of human rights abuses where the perpetrators still control significant resources that could undermine the stability and resilience of the new regime.”13

His ideal-typical model is worthy of explanation.

It is linear and has four stages, commencing with, firstly, securing the peace. The prime requirement for this first stage is the cessation of the killings, arbitrary arrests, torturing of prisoners, disappearances, the illegal persecution of people and groups. This has yet to happen in Burma, despite the current cease-fire agreements between the Tatmadaw, and a number of ethnic nationalities armed organisations.

Stage two is uncovering the truth and this requires those who have suffered loss and pain to have that acknowledged and for their truth to be heard and validated. This can happen in a multitude of ways and does not imply prosecutions.14

Stages three and four are approaching justice and putting the past in its proper place. Rigby says that at the very least perpetrators are to be named. The names are reasonably well-known in Burma’s situation anyway and there are such degrees of complicity the naming could become endless. Importantly, though, he discusses the need to go beyond the retributive from of justice and to develop “a sustained effort at restitution and putting things right.”15 A partial example given for stage four is that of the Guatemalan President Alfonso Portillo who in August 2000 made a public statement that included the following seminal sentences. “We have recognised that
the State committed human rights abuses. We are doing this today so that the dramatic history we have lived through isn’t repeated.” This is symbolically and politically powerful.

Constitutional settlement, rule of law, good governance the path to reconciliation

We submit that three actions will do more to confront Burma’s past than can any other mechanism yet tried: They are: constitutional settlement, the reinstitution of the rule of law to legal and judicial institutions and government administration, and the adoption of the principles of good governance for whosoever is exercising power. Everyone is clamouring for national reconciliation, even the military junta, with its calls for unity and reconsolidation. However, their modus operandi by way of decree and the manufacturing of a culture of silence and evasion makes a mockery of their own words. They have failed to make an effort to encourage a culture of consent around agreed principles of governance. National Reconciliation firstly requires political reconciliation and this will be achieved in form at least when these three actions are implemented. Then the people can get on with the business of reconciling past matters or grievances and find new ways of living together that recognises and gives expression to their diversity, and their commonly agreed modes of government.

It is well the essence of reconciliation. “Reconciliation is an approach not an event. It should be understood within the context of national unity.” It is indeed an approach and not of itself an event and national unity is not to be interpreted as the winner takes all, as has been evident in Burma’s case. Reconciliation can mean agreement on a way of good governance, based on a constitutional settlement in which the rule of law to prevails. Reconciliation can mean a way of knowing the truth of the past to better shape the future. If dealt with as an approach rather than an event, it becomes less daunting and manageable. That sort of reconciliation will not utterly dominate the political landscape with the attending risks, but, by taking on very practical forms, encourage faith in the process.

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Burma’s national unity is to be found in a federal constitutional settlement and until this happens, unity will evade all. It is only this form that will give expression to unity in diversity. National unity in Burma until today has meant one thing: a unitary structure, understandable if the military is to be in charge of governance. It is, after all, a military model. If the military can adopt the civilian guise required to be able to engage in dialogue, as their counterparts are doing in Indonesia, they too will embrace unity, but unity in diversity. Military models by their very nature
are about absolute control, no separation of powers, no power sharing.

It is time to let that model go, or at least relax it and move on. With all parties to the conflict in Burma now either at or ready to come to the dialogue table, the fear of the idea of power-sharing may be diminished.

Policy Options for Transitional Justice or Coping with the Past

In their work 'Democracy and Deep-Rooted Conflict Options for Negotiators', International IDEA characterise the policy options into five areas.18

1) **Amnesty**. Absolute amnesty can be granted through self-amnesty that the outgoing elite unilaterally award themselves, through negotiations between old and new leaders, or through agreement by the new democratic forces.

2) **Truth Commissions**. The main goal is to investigate the fate of individuals and of the nation as a whole, not to prosecute and punish.

3) **Lustration**. Disqualification of the agents of the secret police and their informers, of judges and teachers, of civil servants and military personnel.

4) **Criminal Prosecution**. This can be done by an international body (e.g., International Criminal Tribunal for the Former Yugoslavia), or by national courts.

5) **Compensation**. Compensation by the State (monetary reparation, free medical and psychological treatment, reduced interest on loans for education and home building) and the establishment of permanent reminders of the legacy of the past (monuments, museums, public holidays, etc.)

These five policy choices identify the main ways in which nations have chosen to come to terms with or confront their past.19 The sixth policy option is that of ‘do nothing’, or, as in Spain’s case manifested as a policy of ‘let bygones by bygones’. The ‘do nothing’ option is of itself an active choice. In Spain’s case some actions, albeit small, have been taken. It may have taken a long time, 60 years in fact, for the Spanish people through their parliament to finally condemn the 1935 military uprising spearheaded by General Franco, but they did. The resolution of condemnation was supported by all political parties except the conservatives, with their general secretary protesting that such action was divisive, and that the focus should be on the future not on the past. So even a nation that made the transition from military dictatorship to democracy, adopting a policy of ‘public amnesia’ or ‘forgetting’ or ‘let bygones by bygones’ and with no truth mechanism, still felt the need to put the past in its con-
text sixty years after the event.

The influence of Buddhist Culture in choosing a policy option or not choosing

The multi-religious nature of Burmese society was acknowledged in its 1947 constitution (by amendment) and Buddhism was recognised as a major force. However, religious freedom was accorded to practitioners of other systems of belief. Buddhism remains one of Burma’s major institutions, larger in fact than the Tatmadaw, and its essence remains untouched by the military, even though the Sangha suffers the same fate, controls, and repressions as do others who enter political debate. Its influence on Burmese society is quite profound. It is an intellectual tradition that has been acculturated over many centuries. To deny or fail to take into account its influence in the reconciliation debate would be foolish.

Although in a paper such as this one there is a danger of failing to do justice to the profound intellectual tradition of Buddhism, we can say that Buddhism recognises that each person will and does pay for their deeds in life at some stage or incarnation and so it will be for those perpetrators and collaborators of human rights abuses. They may not suffer criminal prosecution or have to forfeit their ill-gotten gains, or pay compensation for appropriating State property or for damage to life, crops and land, but suffer they will. The demand for prosecution and trials sits well with modern principles of justice and the rule of law, and a secular modern State, but Burmese know that even the most fervent and inspired merit making cannot put right the cruelty and criminality of those who inflicted it, predominantly the Tatmadaw.

In a modern State, the rule of law remains the best guarantee of justice and freedoms for all, and religious tradition should not be used as an excuse to either gain merit or escape responsibility or punishment for wrong actions that constitute crimes. If an amnesty were to happen, even if shaped and instructed by Buddhist values, that amnesty must be a political act, so that the rule of law is paid heed to and the State retains its secular nature.

Whilst it may not satisfy the real and pressing demands for immediate action such as criminal prosecutions, the Burmese approach, informed by Buddhism, may alleviate or obviate the need for therapeutic models of healing, so popularly subscribed to, especially in the West.
Amnesty

We have confined our comments largely to the amnesty policy option, making only brief comment on the other options with particular reference to compensation as it relates to land issues, a rather complicated matter in Burma, as is the case in all failed and dysfunctional States.

The National League for Democracy (NLD) leaders and ethnic nationalities leaders, the political elite, understand very well the policy choices that they are confronted with, and know that for justice to come to Burma, that is justice in all its forms and justice for all, it may be necessary to transform the country by agreeing to and perhaps even encouraging Amnesty, as unpalatable as this may be especially for those whose loved ones have been murdered. If this does eventuate those who have suffered such tragic personal loss must somehow be given the opportunity to have their grief and anguish acknowledged and validated, if such is their wish.

Amnesty is neither new nor novel in Burma. Since monarchical times amnesties have been granted. The difference today though would be that we know that the State cannot forgive anyone on behalf of the victims. This right belongs only to the victim and it is the one thing that cannot be taken from them.

In sharing his experience and thoughts with South African colleagues before their Truth and Reconciliation Commission was established, Jose Zalaquett, a member of the Chilean National Commission for Truth and Reconciliation had this to say about amnesties:

One should begin by reconciling oneself to the idea that amnesties are possible. However several things should first take place:

* amnesty should possibly serve the ultimate purposes of reparation and prevention;
* it should be based on the truth, or one cannot really know what the pardon or amnesty is for;
* there should ideally be an acknowledgement of that truth; and
* the amnesty must be approved democratically in the sense that it must be the will of the nation to forgive.20
He was describing what he saw as an ideal type. However, amnesties can be granted free from any conditions. Though it may be a desirable goal, reparation may not ensue.

There is much pressure to have the truth come out at all costs, on the tenuous assumption that all victims need to have the truth to be able to heal. The extrapolation of such an assumption is that then the nation can heal. It is a therapeutic approach to suffering and perhaps it will prove to be effective, but it is hard to apply therapeutic models to State apparatus. It would seem though that for those families who had loved ones ‘disappear’ in times of armed conflict, for them to discover what happened would remain of prime importance.

A decision about any amnesty will be taken by the parties involved in the transition and initially those involved in the negotiations for establishing the mechanisms for the transition. Jose Zalaquett’s last point that “[the] ...amnesty must be the will of the nation.” is sound. The NLD are clearly in the best position to gauge the will of the nation on many matters, given that the will of the nation is that the NLD lead the country. This was confirmed in the 1990 general multi party elections in which the NLD won 392 of the 485 constituencies contested. Through such groups as UNLD (although it is still banned by the military) and the SNLD the ethnic political leaders won significant numbers of constituencies in the 1990 election, and these groups can and also should be a barometer of the people’s will. Ultimately it is a decision to be taken inside Burma with reasonable and fair representation.

Due to the lack of a robust civil society in Burma and an absence of political debate and commentary, there is no other measure of the people’s will, despite the signs that the military has erected country wide extolling the ‘people’s desire. Organisations like Burma’s United Solidarity Development Association (USDA) are creatures of the military and only say what is required of them, so their occasional forays into the public arena cannot be said to be representative of the people’s will.

People should be at liberty to demand justice, in all its forms. However, given prevailing political conditions with a military that has remained in power in different incarnations for well over fifty years and given the daunting state of Burma’s economy; those demands will be difficult to meet.

This is a current debate in East Timor and their President, Xanana Gusmão, has pointed out that he is not calling for international criminal tribunals and wide scale criminal prosecutions but is busy getting on with
the job of seeing his country develop to provide food, shelter, transport, education, health care and to build a sound economy and an independent and credible legal and judicial system. Social justice is what President Gusmao is referring to in all but name.

Burma, we submit, will be no different. Social justice is its most pressing need.

**Pros & Cons of a policy of Amnesty**

Amnesty is the granting by the State immunity from prosecution. It can be absolute or partial and granted to known persons, classes or groups of people, or to all at large. It is done by an outgoing, or incoming government generally through a parliament. It neither forgives nor condones human rights abuses, but stops the clock and says that human rights abuse will not be prosecuted. It is pragmatic as politics demands. Even though it is neither a pardon nor an act of forgiveness, some victims may view it in this way, almost as an act of political forgiveness. It would be best seen as an act of political reconciliation, without which the country cannot begin to rebuild and heal, i.e. actualise reconciliation. It is frequently the policy outcome of negotiations between the old and the new leaders-governance structure and often the only key to a deadlock in transitional negotiations.

An important note of reminder is that with any amnesty care has to be given that human rights abuses committed against children and the crime of rape as a weapon of war would not ordinarily be covered in a grant of amnesty, even if left unstated. It is inconceivable that any military man or soldier with even a little vestige of honour, would seek to claim amnesty for committing such abuses against women and children.

The granting of an amnesty does not prevent the government or the people for that matter from instituting a means or mechanism that is aimed at coming to terms with one’s past, for this is clearly the big question. How does one go forward is probably best answered by firstly looking backwards, but we would recommend not getting stuck on looking forever backwards. To determine what a society wants for its future it is imperative to know the past and if it is an ugly past such as it is in Burma, then coming to terms with the past can facilitate shaping the present. Burma’s past and indeed its present are wracked by an absence of a constitutional settlement, the rule of law and not only good governance, but governance in any real form.

To ensure that constitutional certainty, the rule of law and good govern-
ance become the way of the present, hence the future, it is necessary to start to deal with their absence, and this requires looking at the past. Does a State potentially on the brink of a transition possibly risk the transition itself by debating such questions, including the pros and cons of amnesties? Any leader faced with such a possibility will on balance decide on a policy that best secures a transition that is aimed at consolidating the future peace and prosperity of the nation. In politics such a risk is always present and even more so for those not directly involved in the confidence building or dialogue. Nevertheless, although formal dialogue is yet to begin, it is a debate that has begun and it cannot be avoided. However it is highly unlikely at this stage to derail any proposals for a transitional arrangement that may result in a gradual move towards liberalisation, perhaps some type of consociation model.

It is sometimes said that amnesties work to undermine the rule of law, and perhaps at a formal level they do, but political will in the first instance will more than anything consolidate the rule of law.

**Truth Commissions**

If the people so desired they could establish a ‘truth’ process, not necessarily a ‘Truth Commission’ or a ‘Truth and Reconciliation Commission’, a topic not very far removed from any discussion regarding transitional justice. The most comprehensive and powerful work on the world’s Truth Commissions has been undertaken by Priscilla B. Hayner 21 UN-TAET in East Timor formed a Truth Commission (see its website on www.easttimor-reconciliation.org for information) that has been endorsed by the newly independent government headed by Chief Minister Mari Alkatiri. It is currently confronting its past. Due to its immediacy it is not covered in Ms Hayner’s book; however she has worked in East Timor to provide advice to them. We recommend that all actors involved in the ‘Burma’ debate read her brilliant work on the world’s truth commissions. 22

**Lustration**

Lustration, the disqualification of people from public office, or the removal of those already in public positions has been used mainly in Eastern Europe and is immediately attractive. Yet it is also problematic. How far does one go down the bureaucratic chain to purge the State institutions of people and should it be used against all who collaborated by commission or omission? When does one begin this sort of purging and how does one know when to stop? Czechoslovakia’s Vaclav Havel spoke against this even though in his country legislation was passed supporting
it. Poland’s Solidarity Adam Michinik also spoke out against it. The greatest danger of lustration lies in the fact that beyond the purging of some top line leaders, it can become as oppressive as the system that the new government is trying to leave behind.

**Criminal prosecution**

The benefits of criminal prosecution are *prima facie* eminently desirable. You commit a crime: you should be dealt with according to law. The rule of law of course requires this, but transition periods are not normal circumstances in the life of the State and its citizens, and it may not always be practicable to comply with all that one should. If an amnesty prevails as a policy option then criminal prosecutions will be few. The amnesty may be complete or partial so that those crimes that can never go unchecked such as crimes against children and the rape of women can and should be prosecuted. Again these are crimes that even the most draconian state has criminalised and it would beggar belief if any party to transition tried to seek amnesty for such crimes.

**Compensation**

Compensation can take many forms. For example, it can be used to provide educational opportunities for political prisoners who were denied education; it can be for medical assistance for physical and/or psychological ill health due to State action or inaction; it can be used to pay pensions; and it can be for land compensation.

Many people either individually or as a community have had their land compulsorily acquired and on unjust terms, frequently by forced removal and forced relocation, and the State have appropriated the land for its benefit and again not on just terms. Most countries that have undergone transition have had to grapple with difficult land law regimes and unfortunately it is not always possible to give back land to some people, even though they have a legitimate claim to the title.

With the advent of transition but not before it would be wise to seek from, say, the World Bank a land compensation fund by way of grant (*not loan*) so that this matter at least can be addressed in the most equitable way possible. Otherwise it will remain a major political problem for whichever parties are in power. There should also be a statutory body established to deal with such matters. It should exercise administrative power but with appeals to be had to the court. There are various models in existence. Some would also argue that those who got rich through their privileged position as State leaders should be made to pay.
Does Burma have domestic and-or international obligations to prosecute human rights perpetrators?

This is a vexed question. Those who want to see perpetrators prosecuted will argue the case that as nations have obligations not to cause human rights abuses; the corollary is that the obligation then exists to prosecute. Others will equally argue that obligations of themselves do not incur corresponding duties to prosecute.

It is quite clear that Burmese domestic law already provides for crimes that are akin to human rights abuses, but do not carry with them the gravity that attaches to crimes against humanity, even though the acts may be the same. The difference would be the extent to which some of the abuses are covered by domestic law, but assault, rape, abduction, stealing, larceny, murder, and the like are crimes that perpetrators could now be charged with and prosecuted according to Burma’s penal code and criminal procedures code.

To attempt to address this issue it is necessary to look to the international treaties that Burma has acceded to and also to sources of international law, including customary international law. Renowned international law expert, Brownlie, correctly in our view tells us that these sources “provide the basic particles of the legal regime.”

- Burma has not acceded to many treaties but has done so to some important ones such as: the Universal Declaration of Human Rights (UDHR); 
- the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; the Geneva Convention Relative to the Treatment of Prisoners of War;
- the Geneva Convention Relative to the Protection of Civilian Persons in Time of War; commonly called the Geneva Conventions;
- the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention);
- and in more recent times the Convention on the Rights of the Child (CROC) and The Convention on All Forms of Discrimination Against Women (CEDAW).

Burma did sign the Convention on The Political Rights of Women in 1951 but never ratified it.
Treaty obligations are of course, *prima facie*, compelling. For example, the Genocide Convention says that States have an obligation to “prevent and punish”. Article 1 says *inter alia* that “Genocide...is a crime under international law which Contracting Parties undertake to prevent and punish.” However, if we are searching for authoritative law we must as is the case with international law go beyond the treaty obligations. They signify, albeit importantly, that States have an obligation and as Brownlie tells us, “treaties are as such a source of obligation and not a source of rules of general application.”

Genocide is singularly important given that a large number of the human rights abuses committed in Burma have been upon the ethnic nationalities, referred to internationally as minorities (but not so in Burma). The military junta has been accused by Burma’s ethnic nationalities of having committed acts of genocide against them. We cannot in this article speculate on how a court would deal with this matter but the Genocide Convention assists to clarify the discussion regarding the obligations that a State has.

To some degree it is for now a moot point, as the politics of the situation will determine whether prosecutions are effected or not in the first instance; however as lawyers we would be remiss not to give cognizance to any legal obligations that may be present, even if they are not to be accorded. Such obligations can be recognised in a grant of amnesty, to give effect to the principles of the rule of law and honour the suffering of all whose human rights have been violated, so in effect a small but maybe significant step towards rebuilding the culture of the rule of law.

“When analysts agree that governments confronting a legacy of State violence should comply with established rules of international law, they have generally demurred on the question of what, precisely, the law requires.”

The debate then is one to be had more over whether such obligations arise under international law, with an arguable case that States have the dual obligations not to inflict human rights abuses and to prosecute when such occur. However what and when these crimes should be prosecuted and which perpetrators should be brought to account is not so clear.

**Spain’s Transition Experience: General Franco’s Fading Influence**

The experience of Spain is one of occupation by its own military under the rule of General Franco. It involved everyone to some degree, as it is not possible for dictators to maintain power and control without varying...
degrees of collaboration and complicity of the populace. It is a fact that if the populace did not “live within the lie” as Vaclav Havel so eloquently and correctly phrased it, dictatorships would be denied the sustenance that prolongs their life.\textsuperscript{32}

The Spanish transition experience as told by Rigby describes the occupation period, the complicity, the transition period and beyond. It so clearly speaks to the general and in some cases the particular experience of Burma.

\textit{Spain:} After Franco’s death the need to secure a transition to parliamentary democracy was subordinated to all other considerations. There was, Rigby, contends an unwritten pact that the Franco past should stay in the past and not be in the public domain.\textsuperscript{33}  
\textit{Burma:} General Ne Win’s power is on the wane He has achieved political death and approaching physical death. There appears to be a growing climate of ‘let bygones be bygones’ developing, let the past go and move on, and focus on securing a transition.

\textit{Spain:} During the civil war Franco’s Nationalists executed thousands, some for simply being found carrying a membership card of a socialist trade union \textit{Burma:} Many have met the same fate, for regular political matters or activity. The 1988 military massacre of civilians stained the military and is still fresh in people’s memory. The fate of many in both situations is still unknown.

\textit{Spain:} Official history was rewritten and imposed in very deliberate ways on the people, and in the words of Paul Preston, “History under the Francoist dictatorship was a direct instrument of the State, written by policemen, soldiers and priests, invigilated by the powerful censorship machinery. It was the continuation of war by other means, an effort to justify the military uprising, the war, and the subsequent repression.”\textsuperscript{34} The war that was to ‘free’ the citizens brought with it a regime hell-bent on revenge and repression that was to last with varying degrees up until General Franco’s death in 1975.  
\textit{Burma:} The military coup in 1962 was according to the military view, somewhat one-sided, to prevent the country from disintegrating, due to federalist and insurgent activity and to install a pure socialist regime. The arguments used today by Burma’s same military still at the helm of the State, are unchanged, with the same debates being had and yet to be settled. The repression of the years immediately following the military’s ascension to power has not abated, in fact since the 1988 military \textit{coup d'état} it has intensified under the rule of the Tatmadaw’s State Law and Order.
Restoration Council (SLORC), now called the State Peace and Development Council (SPDC).

Spain: Those who had joined hands in supporting General Franco's rebellion and had benefited from his patronage feared what would happen to them. This group remained opposed to the opening up of the political system to the end.35
Burma: There are military diehards who equally have benefited most and have the most to fear and they remain implacably opposed to the transition.

Spain: How to get enough to eat, rather than how to resist the regime, was the enduring preoccupation of much of the population.36
Burma: With malnutrition widespread in Burma, particularly among the children, paddy shortages due in essence to military led policy, with a bankrupt economy and failed State, getting food is a major preoccupation for the people of Burma, as much as they do not like the military regime.

Spain: People retreated into a culture of fiction and fantasy to escape the horror of daily life under General Franco's regime, with bullfighting, football, and other entertainment media, becoming an almost cultural movement.37
Burma: The same could be now said of Burma where people have developed their own ways of dealing with the horror by pursuing similar pastimes, such as sport and cultural activities. Thus the political is muted and personal is paramount.

Spain: Political rights and freedoms were seriously eroded; military courts dealt with serious 'political' crimes, and the State apparatus intimidated the people through administrative means.
Burma: It is ranked as one of the world's most repressive regimes with a Freedom House score of seven, the lowest possible rating, for both political and civil liberties. Its partners in severe repression equally ranked at seven in Freedom House's 2002 scorecard are Afghanistan, Cuba, Iraq, Libya, North Korea, Saudi Arabia, Sudan, Syria, Turkmenistan, Chechnya and Tibet.38

Spain: A division existed between those who saw the need to reform to ensure the survival of the regime (aperturistas) and the members of the bunker (immobilistas) who saw the beginning of the end of the regime if reform was to happen.39
Burma: It is well known that the Tatmadaw has its own aperturistas and immobilistas, hence the slow pace of change, as the aperturistas work to either bring the immobilistas with them or at least neutralise them. This di-
vide is not limited to repressive regimes and has to be responded to within so-called oppositional forces as well.

This descriptor brings us up to Spain’s transition years, where not long before General Franco’s death the opposition parties working in a broad-based coalition, called for a clean break with the past (ruptura democrática). That included complete political amnesty, legalisation of political parties, a neutral army, independent judiciary, etc. These were to come to pass but only after a, “slow and careful expansion of political liberties, alongside an equally cautious program of political amnesty,” culminating in a negotiated means of transition called reforma pactada, which is as its name implies, a pact or compact for reform. The Spanish experience speaks more to Burma, than do other’s experience, in as much as anyone’s can.

There is much more to be said about Spain’s transition (the subject of a future paper) and the ensuing years which brought a consolidation of democracy, the re-establishment of parliament, the reinstatement of the rule of law through the legal and judicial systems and the adoption of the principles of good governance. The conclusion to be drawn from their experience is that they managed a peaceful transition from dictatorship to democracy, without adopting a policy of criminal prosecutions or creating a mechanism, such as a truth commission, and have done so successfully. They have taken their place in the international community with a great degree of activism and pride and have been quite successful in developing an educated and prosperous nation. They do not seem to have suffered too much trauma that is visible. They did not go down the therapeutic path of truth finding. We illustrated Spain’s experience to put on the table a case study of one nation that belies current conventional wisdom of the transitional justice language that one must always come to terms with one’s past by adopting at least a process of truth finding and healing.

Conclusion

The most likely transition for Burma is that of transplacement with the possible adoption of a consociation model of government, that is able to both recognise the 1990 election in a creative way, gives its imprimatur to a policy of amnesty (not necessarily by de jure means), or it may be a policy of ‘let bygones be bygones’, but in either case not for crimes against children and women...
also be necessary to secure a transition that is aimed at long term peace that does not see endless years of trials, purges and commissions that could further drive a wedge into a long and already deeply divided society.

The best outcome for the people is to have a transition to a federal constitutional system with democratic governance, to re-establish Parliament, legal and judicial systems, economic systems, health and education, road building and rural and regional development and to have a strong civil society that can act as a buffer to and against if needed to those elected to govern. In all of this matters such as the reclamation of and compensation for land, reclamation of reputations and good standing, expungement of political prisoner’s criminal records, recognition of suffering through a variety of means including national days, State days, monuments freely erected and honoured will occur. It is important to honour those who suffered, particularly those who paid with their lives.

Our view is that as Burma, its diversity of people, and the nation itself has suffered so much for so long, and is seen as one of the world’s pariah’s, with transition, there has to be a focus on rebuilding relationships and institutions, so that all members of society can again become participants in public life instead of bystanders. In other words learn to be interdependent. Rigby cites John Hooper’s most telling observation about Spaniards during Franco’s rule, where he could equally have been speaking about Burma, when he said, “Franco’s rule made Spaniards more reliant on themselves and on the state. But not on each other.” How true.

We are both lawyers and politicians and our contribution cannot help but consider this issue within those traditions. If at times we strayed carelessly from one into the other, we offer no apology. We understand both law and politics in all their glory and limitations. The decisions at the outset regarding the transitional justice policy options will be political decisions. This is as it should be and as for the future and legal developments, we could only begin to speculate.

Acknowledgements

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Endnotes

* The authors are Executive Committee Members of Burma Lawyers’ Council.

1. ‘Justice and Reconciliation’ After The Violence Andrew Rigby PL Lynne Rienner Boulder & London 2001

2. The authors have long been concerned with the justice needs of Burma and some years ago secured a legal student researcher, Mathew Deighton, to research and prepare a case study of Burma that we called “Confronting the Past”. We wish to acknowledge him for his timely and rigorous work and also his Lecturer and Supervisor Associate Professor Sam Garkawe of Southern Cross University Lismore NSW Australia for the support for this work and their subsequent joint publication in the SCU’s special edition vis-à-vis Burma referred to below.


4. Rigby p 70

5. Article 5 Crimes within the jurisdiction of the Court

   1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
      (a) The crime of genocide;
      (b) Crimes against humanity;
      (c) War crimes;
      (d) The crime of aggression

6. The International Students Edition, Oxford Advanced Learner’s Dictionary. (the term was not to be found in the dictionaries including law and political science versions)

7. Rigby pp 7-8

8. Ibid


10. Rigby p 2

11. Rigby p 34

12. Ibid

13. Rigby pp 185-186

14. Rigby p 186

15. Rigby p 188


19. Rigby p 60


22. A note of interest is the correlation between the popularity of truth commission over the past few decades and the rise in civilian casualties in war. In the First World War civilian casualties comprised ten per cent, in the Second World War it had risen to fifty per cent and now stands at ninety per cent. Given that women and children are predominantly the main victims of violence in both war and peace; the women then should be given every opportunity to have their say about ‘peace’. Source is The New Internationalist, The final stretch, Creating peace & reconciliation No. 311/ April 1999 pp 18-19


24. see GA Res 217 A, 3 UN GAOR, UN Doc A/Res/217/A (1948

25. see 75 UNTS 85 (I) as adopted 12 August 1949

26. see 75 UNTS 85 (II) as adopted 12 August 1949

27. see 75 UNTS 135 (III) as adopted 12 August 1949

28. see UNTS 75 287 (IV) as adopted 12 August 1949

29. see 78 UNTS 227 as adopted 12 January 1951

30. Brownlie p 2


32. Rigby pp 90 & 97

33. Rigby p 39

34. Rigby p 42

35. Rigby p 44

36. Ibid

37. Rigby p 45


39. Rigby p 48

40. Rigby p 49

41. Rigby p 59

List of References


Brandon Hamber, *Dealing With The Past Reconciliation Processes and Peace-Building Belfast, Northern Ireland*, 9 June 1998 (Brandon Hamber Co-ordinator of the Transition and Reconciliation Unit (Project on Truth Commissions) at the Centre for the Study of Violence and Reconciliation (CSVR). http://www.wits.ac.za/csvr


LAWASIA Research Institute, Children’s Rights Trust Latest Developments on the Centre for the protection of Children’s Rights Foundation, Thailand LAWASIA Update July-September Quarter 1998 Australia

Martha Minow, Between Vengeance and Forgiveness, PL Beacon Press (Published under the auspices of the Unitarian Universalist Association of Congregations) Boston 1998


Janelle Saffin, Confronting the Past-Embracing the Future, Members of Parliament Union seminar notes January 2001 Bangkok

The New Internationalist (NI), The final stretch Creating peace & reconciliation, No. 311/ April 1999 PL London New Internationalist Publications Ltd. 1999

Andrew Rigby, Justice and Reconciliation after the violence, PL Lynne Rienner Publishers U.S.A. 2001

Southern Cross University Law Review Special Issue: Restoring the Rule of Law in Burma, Vol. 4 Special Issue Editors Myint Zan & Sam Garkawe, Student Editor Adrian Lipscomb Editorial Committee Peter Dehlsen, Rebecca Kenny, Glen Mylne, Jef Sewel PL School of Law and Justice Southern Cross University Lismore December 2000

Paul van Zyl, International Transitional Justice Centre (ICTJ) (workshop overhead presentation), 3rd meeting of the Constitution Drafting Committee of the National Council of the Union of Burma (NCUB) 24-25 2001 Bangkok

Newspapers
Don Greenlees, The Weekend Australian, East Timor puts justice to one side, p 12 Sydney 4-5 MAY 2002;

Christopher Lockwood, The Sydney Morning Herald, Justice stalks the tyrants, p 19 Sydney 27 November 1998