Daw Aung San Suu Kyi and her detention

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On 30 May 2006, the military Junta passed a fresh order extending the house arrest of Daw Aung San Suu Kyi for another period of one year. She has been put under house arrest four times. This makes it the fifth. The total period of detention has been 10 out of the last 16 years. This essay attempts to give a legal analysis of the detention, i.e. whether it is arbitrary, illegal and unsustainable.

First the background of the detention may be viewed.

· The first detention was from 20 July 1989 to 10 July 1995 and was at the time when the general election was held (May 1990).
· The second detention was from 1 September 2000 to 14 September 2000, at the time of her Dala journey.
· The third detention was from 22 September 2000 to 6 May 2002, at the time of her Mandalay travel.
· The fourth, from 30 May 2003 to 30 May 2006, was at the time of the Depayin incident.
· The fifth and most recent, from 30 May 2006 to 30 May 2007, came after the visit of Mr Gambari the UN’s Under-Secretary-General for Political Affairs.

First and foremost it is necessary to examine the law itself under which the detention has been made. The State Protection Law 1975 (SPL) was passed when Ne Win was in power and it was passed in the parliament constituted under the fake Constitution of 1974. This Constitution collapsed after the 8.8.88 uprising and the military junta seized power. The law therefore ceases to have legality. It has been universally accepted that a power-holder after a military coup may hold on to power for no more than three years. There are many decisions on this point by Supreme Courts of
different countries.

The “doctrine of necessity” cannot be invoked to sustain power in perpetuity. From this point of view the State Peace and Development Council (SPDC), which has been in power for much more than three years, cannot invoke the “doctrine of necessity”. Only a legislature constituted on the will of the people has law-making power. The SPDC is ruling without a constitution, without Parliament, without a separation of powers of legislature and executive, and without checks and balances. It is an illegal government. This point is particularly clear after the May 1990 election. By holding that election, the SPDC admitted that it was a temporary government, and should have transferred power to the winning party, the National League for Democracy (NLD). Contrary to that, the SPDC has kept the NLD’s leader in detention over the years.

Not only has the bad faith of the SPDC become as clear as daylight, the obvious illegality of its status becomes sharper. The gist of the argument is that SPDC, which should have gracefully retreated from the seat of power, has no right to detain the very person to whom power should have been transferred.

Having said that, it should also be recalled that when it was originally passed, the State Protection Law allowed judicial review (articles 19 to 21). Chapter 7, Article 9 of the State Protection Law says “any person against whom action is taken has the right of appeal while action is being taken”. It is difficult to imagine how to appeal “while action is being taken”. How can someone appeal while being dragged through the street by armed security troops?

Article 20 of the State Protection Law says “appeal can be made to the (military) Cabinet regarding orders regulating restriction, arrest, detention or denial of rights laid down by the Central Board under this law. The (military) Cabinet can annul, alter or approve the order as may be necessary”. This emphasizes the fact the junta is not accountable to anyone.

Article 21 of the State Protection Law says “if the Central Board considers it necessary to extend any orders passed under this Law with prior permission from the (military) Cabinet, an appeal can be sent to the Council of People’s Justices. The Council may alter, annul or approve the order as may be necessary”.

The right of appeal has been given to the Council of People’s Justices, which is of course completely under the junta’s control. After the military coup in 1962, the Supreme Court and the provisions for redress of infringements of fundamental rights were abolished. In addition, the State Law and Order Restoration Council, (SLORC) Notification No. 11/91 abolished Article 21 of the State Protection Law. Therefore, there is no effective remedy at all, contrary to Article 8 of the Universal Declaration of Human Rights, which says that everyone has the right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted by him by the constitution or by law. The State Protection Law has to be taken into account together with its context. The context is that it was passed by the ‘Pyithu Hluttaw’ parliament of the Burma Socialist Programme Party (BSPP), and the legislators provided the right of appeal to judges as an integral part of the law. When an integral part is torn out, the Law itself is vitiated. Hence, amendment of Notification No. 11/91 has rendered the State Protection Law invalid.

All countries who have national security laws have provisions for judicial intervention. The Executive is the detaining authority and must be reviewed by an independent body as to whether the detention order is within the requirements laid down in the law. The detaining authority cannot be the reviewing body. What the SPDC has done is to amend the review clause and abolish it altogether. The power of review is vested in the cabinet.

The second detention related to Daw Aung San Suu Kyi’s visit to Della, a neighboring suburb of Rangoon. She went out to meet her party workers and give instructions. The SPDC blocked her car and ordered her to return. She refused, staying in her car for 7 days while the villagers and her supporters helped her. Daw Aung San Suu Kyi eventually returned. This attempt to meet her party workers could not be categorized as a threat to the public peace by any stretch of imagination. Her party was a legally registered and recognised political party and as long as that remains the situation, she has every right to travel. If the SPDC didn’t want her to visit certain areas, it could notify her under the law which restricts movements. But by no standard can a blanket ban on her movements culminating in her detention be justified. Article 10(b) can restrict travel but not authorise a total ban. Further, the restriction on travel is limited to the situation where travel is a threat to the
public peace. Public peace is not the same as law and order. Instead it is a situation where the tempo of public life is dislocated, from events such as a general strike or seizure of strategic position.

The third detention related to Daw Aung San Suu Kyi’s Mandalay trip. She was to go to Mandalay to give evidence in a court case which was launched against the comedian Pa Pa Lay. The train schedule in which she was to travel was cancelled and she was forced to return home. Soon after came the detention order. It is hard to determine what threat to the public peace her trip to Mandalay posed. There was absolutely no ground for detention. SPDC reacted whimsically and arbitrarily to demonstrate that the power lies with them.

On the 30th of May, 2003, in the Depayin township of Burma, members of the military regime organized and implemented nearly 5000 perpetrators to attack the motor tour of Aung San Suu Kyi, other leaders of the National League of Democracy (NLD), and civilians, leaving a number of persons dead and missing. After the massacre, 64 people from the NLD were imprisoned and Daw Aung San Suu Kyi was assigned to house arrest. The purpose of the NLD tour was to establish confidence in the democratic process. The weight of the evidence shows that the junta orchestrated the massacre to silence democracy by producing terror in the hearts and minds of those in opposition to their policies.

The regime refuses to investigate and prosecute the issue in direct opposition to the General Assembly of the United Nations, in its 58th session, which called for a full and independent inquiry into Depayin. This highlights that no judicial solution to the Depayin massacre can occur within Burma.

The decision based on subjective satisfaction can be challenged on a number of grounds such as:

- non application of mind
- presence of factual and or legal bad faith
- application of wrong tests to arrive at a subjective satisfaction
- misconstruction of a statutory provision
- reliance on irrelevant or extraneous grounds
- failure to consider any matter which the statute expressly or implicitly requires to be considered, and
- unreasonableness.
The legal detention order of Aung San Suu Kyi can be challenged on each of the grounds stated above.

The distinction between ‘law and order’ and ‘public order’ is one of degree and looks at the extent of the reach of the act in question on society. It is the potential of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved, as distinct from a wide spectrum of public, it could only raise a problem of ‘law and order’. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps to distinguish it as an act affecting ‘public order’ from that concerning ‘law and order’. The question to ask is: Does it lead to disturbance of the current life of the community, so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on its facts. Considering that background, there can be no manner of doubt that the incidents related to ‘law and order’ and not to a ‘public order’ situation.

The ground and material of a detention order cannot be the same subject matter of an earlier detention order. There must be new grounds or new circumstances. A detention order cannot be justified simply by an addition to earlier existing facts. The fact that an earlier detention order has been made and then fulfilled means those events have been legally addressed and cannot be the basis of a fresh detention order.

Further, a solitary ground of detention is ordinarily insufficient. For one action to be sufficient to sustain an order for detention there must be indication that it is an organised act or a manifestation of an organised activity. There is no proof Depayin was organised by NLD and no indication that it will be repeated if the detainee is left free.

In one case, the single ground indicated in the grounds of detention was that the detainee and others entered a bus which resulted in the shooting of two people. A subsequent criminal trial ended in acquittal when the witnesses turned hostile. The detention order was unsustainable because there were no grounds to be satisfied that the criminal prosecution failed due to tampering with the
evidence by the detainee. Further, there was no evidence that the detainee would repeat such an incident.

The police commissioner had said that Daw Aung San Suu Kyi did not pose any threat. Yet, as stated by the Police Commissioner, an extension of the detention could only be made on ground of threat. This case clearly shows no threat existed and that the order was perverse. It has also been said that there had been talks between Daw Aung San Suu Kyi and the junta before her detention was extended. There was discussion on conditions for her release. They became abortive when talks failed. This means, that detention has been made not because of a “threat” but because of failure in the talks. The ground for detention became even weaker as the SPL has no such ground within its parameters. Hence the detention is not sustainable under junta’s own law.

The issue of previous talks gives a new dimension to the larger question related to release of Daw Aung San Suu Kyi - the situation for democratic activists is not hopeless as it seems. It is an admission by the junta that Daw Aung San Suu Kyi is a force to reckon with. Daw Aung San Suu Kyi, who is holding the banner of the rule of law, has survived and will eventually triumph.

**State Protection Law**

The main power base for the military regime is the State Protection Law.

Laws already on the books provide the government with enough power to handle whatever threats that do exist. But in each of these laws, there is provision for trial. The State Protection Law has no such provision. In normal criminal cases, sufficient evidence has to be put to the court for there to be a conviction. The State Protection Law is crafted exactly for cases where there is insufficient evidence to stand for trial. The basic principle in criminal law is that an accused is presumed to be innocent until it is proved to the jury the accused is guilty. Furthermore under normal criminal law, even if there is some evidence, that is not sufficient to convict an accused because the principle of a person only being convicted ‘where proved beyond reasonable doubt’.

When a regime has these criminal laws, the existence of State Protection Law is in violation of these laws. It cannot operate in
the manner it has been doing. It also violates the fundamental principles of jurisprudence. No one shall be subject to a limitation greater than that necessary for the purpose of meeting the requirements of morality, public order and general welfare. Daw Aung San Suu Kyi has repeatedly reiterated her faith in non violence and peaceful change. She can never be a potential threat to public peace. She has called for calm and discipline amongst people whenever sparks of unruly behaviour arise and people lose control.

The Security Council

The military government’s actions have strengthened the resolve of the US and some European countries to involve the Council in Burma. The US has stated that by extending Suu Kyi’s detention, Burma has shown that it is unwilling to engage in a credible and inclusive political process.

At the same time it seems that members like China, Russia and Japan have made it clear that their positions have not changed and that it would be hard for them to accept a resolution. Taking action in Burma under the formal agenda of the Council is still not an option for these countries. China views the situation in Burma as an internal issue that needs to be solved nationally. Japan has also indicated it would find it difficult to accept a resolution on Burma as it sees the situation as a humanitarian and human rights issue that should not be discussed by the Council.

The European countries are likely to see some merit in the US resolution but they are aware that this issue could polarise the Council without effectively increasing pressure on the authorities in Rangoon. On the other hand, there is also a sense that Gambari’s visit has opened up a window of opportunity that should be used productively.

The following questions remain: Is the political situation created by junta a threat to international peace? Does the detention constitute a crime against humanity and how can the law truly defend human rights? If a few veto-wielding countries in the UN’s Security Council can obstruct and derail the mandate and will of the overwhelming majority of the rest of the world, the UN body will cease to have the respect of a large number of oppressed peoples. The Burma issue is debated in the Council but it is high time that it is prioritised in its agenda.
The UN can unseat the SPDC regime from representing Burma as happened in the case of Cambodia when the power-struggle went on between two factions of Prince Si Har Nu and Hun Sein. The 1990 Burmese election has clearly determined the will of the people. The military regime no longer has the right to represent the country. The seat should be vacant until this question is resolved further. Those countries which support human rights should withdraw their diplomatic missions in view of the gross violations of human rights and the regime’s refusal to respond to the august body of the UN. When diplomatic pressure has mounted on the junta, the countries sitting on the fence will have to rally around the UN. Isolation and diplomatic pressure will trigger a new energy in the people to call for Daw Aung San Suu Kyi’s release. This will place Burma in the limelight and the Generals will be forced to come to the negotiating table to salvage the broken ship.