Burma and the common law?
An uncommon question.

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What is the role of the common law in Burma’s current and future legal system? It is often assumed that common law concepts are relevant to, and applicable in, Burma’s legal system as they are in England and other former English colonies. However, closer analysis shows that such an assumption may be wrong in many respects. Various common law concepts have been negated by statutory laws in Burma’s legal history and developments in the country’s legal system between the mid 1960’s and 1980’s. The lack of judicial independence from 1962 onward has also been a serious impediment to the common law’s use and operation. However, even if Burma obtained judicial independence tomorrow, this article suggests that earlier developments have negated many common law concepts. It is difficult to see how the common law can provide much to Burma’s legal system unless there is specific legislative revival. This article also identifies areas where the common law is inadequate and constitutional or statutory arrangements should be considered for Burma’s future legal system.

This article examines the issue in four stages:

1 introduction/overview of the common law;
2 outline of some common law concepts;
3 relevant developments in Burma; and
4 conclusions.

1 Introduction /overview of the common law

This first section provides a summary of the common law’s origins and operation. This helps in understanding how the common law worked, and can work, in Burma’s legal system. An understanding of the common law’s operation also enables us to consider some of the potential limitations.


1.1 History

The common law is a system of law derived from England’s legal system. The common law revolves around the concept of precedent and court hierarchy. Legal principles are established in the decisions of a superior court, and those principles must be followed by the lower courts unless parliament legislates otherwise. This means the common law, more than other legal systems, is shaped by previous court decisions and judicial approaches. It is useful, therefore, to have an understanding of the common law’s history and scope.

The 1200s were significant in the common law’s development. The Magna Carta gave some guarantees of legal process and other rights, and there were also the beginnings of a truly independent English parliament passing statutes to make law. Earlier ‘laws’ were just executive rulings of the monarch, able to be changed or revoked by the monarch at any time. The 1300s saw the beginning of wide-scale recording and reporting of decisions. This greatly increased the use and importance of precedent. Many of the basics of the common law were then in place, although developments continued - in the 1800s, a series of statues codified much of the criminal law except homicide. ‘Codifying’ is where all the law on an area, both statutes and court decisions, are collected together and written in one statute or ‘code’ which then becomes the source for that law. This trend of greater parliamentary regulation has continued, and over time, more and more areas are being addressed by statute rather than simply the common law. Examples of this phenomenon can be seen in the fields of employment, commerce, property, and marriage.

1.2 The common law outside England

The common law started in England, but how and to what extent it is observed in other countries? The general situation is that when England acquired a colony, all English law relevant to the conditions of the colony became the law of the colony (this included both English statutory law and common law). Laws that were particular to local English conditions didn’t become part of the colony’s law (eg. laws about local arrangements in England, English religious practices and observances etc). Developments in English law after the colony began did not automatically become part of the colony’s law, but the English parliament often retained power to legislate directly in relation to the colony. This usually continued even after the colony established its own par
The common law distinguishes between colonies that were settled (i.e. controlled by occupation) and conquered/ceded (i.e. control gained after a war or where it had been given to England by another government). In settled colonies the common law applied automatically to all citizens (subject to the above general rule – i.e. only the English law which is relevant to the conditions in the colony). In conquered/ceded colonies, the common law only applied through the decision or action of executive/parliament, and this could specify exceptions (e.g. for some colonies, the government decided the common law applied only to particular persons, or in certain geographical areas).

The above paragraphs explain ‘the law’ according to the English, or common law, system. Obviously, most colonies were populated by peoples who had their own laws and legal system, and these laws viewed the English and their common law very differently. However, in most colonies, the English enforced their rule and law to such a degree that the common law become the paramount system. Where a colony had a legal system/laws before the English arrived, parts of that legal system sometimes continued. The general situation is the common law provided the overall structure and procedural law, but there was sometimes potential for different substantive law within that overall framework.

Sometimes, of the pre-existing law, the ‘private law’ continued (i.e. law about relations between people – marriage, inheritance, religion) however the ‘public law’ was almost always regulated by the common law (public law here meaning the law about relations between citizen and state). This could result in a ‘mixed jurisdiction’ - a legal system where there is more than one type of law (e.g. common, civil, indigenous, religious).

An important distinction, which must be constantly borne in mind, is the distinction between ‘the common law’ and ‘the law in common law countries’. The law in common law countries can come from three sources: the constitution (if there is one), parliamentary law (e.g. statutes, regulations), and common law principles contained in previous court decisions. When a court’s decision is based on this last source, the decision forms part of ‘the common law’ and can be of considerable importance for other common law courts. However, when the decision is based on the first two sources, it is of far less relevance to courts that do not have similar constitutional or parliamentary laws.

One of the more complex aspects in understanding the common law is that there isn’t one single ‘common law’ but differ-
ent ‘common laws’ in different jurisdictions. This is because the common law is drawn from judges’ decisions, and when each colony established its own legal system and courts, these court decisions would develop the common law for local conditions. For example, Australia had different conditions to England (eg. drier climate, more land, less people) and so the case law developed differently on landowners’ liability for fire escaping their property. Different ‘common laws’ can occur even within a country. The United States of America, for example, has separate common laws in each state whereas other federal nations (eg. Australia) have one common law for the entire country.

The existence of different common laws is important to remember when considering court decisions from another country or jurisdiction. When these decisions refer to ‘the common law’ it is necessary to decide whether the ‘common law’ of your country is the same. This will depend on various things including: the sources of law for that decision, the factual situation there considered, and comparisons with your own country’s situation and the facts you now face. Also relevant is the relation between the courts of the two countries. Where a colony/country still has a right of appeal to English courts (like the Privy Council) those appeal court decisions are binding on all courts within the colony/country and other English courts’ decisions have considerable weight.

Courts in common law colonies/countries would often gain their common law jurisdiction simply by reference to the English courts. For example, many of the Australian colonial courts were created by laws which granted the courts the same jurisdiction as England’s superior courts.2 This gave the colonial court the power to apply the common law and grant common law remedies.

1.3 Parliament, the executive, the courts

Another issue to understand in the English legal system and its many offshoots is the relationship between courts and parliament. The common law recognises parliamentary supremacy. That is: where the parliament passes a law on a subject within its power, that law must be respected and enforced by the courts. In common law countries, where the law-making powers of the national parliament are listed in a constitution (eg. USA, Canada, Burma 1947-1962), the courts will not enforce a statute that falls outside the parliament’s listed powers. In common law countries without this constitutional list of powers (eg. UK, New Zealand, Israel)
the courts must simply interpret and enforce all parliamentary statutes. But all common law countries have the same approach - where parliament has power to make a law, then that law must be followed even if the law contradicts previous court decisions or long-standing concepts of the common law.

The common law has relatively few rules about relations between parliament and the executive. This is partly due to the differences in the executive in many common law countries (e.g. there are significant differences in how the executive is chosen and what powers it has in the UK and the USA). However there are common law concepts about the relationship between courts and the executive, and courts and the parliament. Under the common law, the courts will avoid considering issues (these issues are seen as ‘non-justiciable’) where:

- the law clearly gives the responsibility to another arm of government (e.g. executive, parliament); or
- there are few rules guiding the government’s action – it is a matter for policy or political process.

Examples of matters that the common law considers ‘non-justiciable’ include the executive’s decisions and actions in making treaties, declaring war, dissolving parliament, or mobilising the armed forces.

The common law has no specified court structure that it requires. Where there are no constitutional requirements, the government (parliament or executive) can determine what courts exist, their relationship and jurisdictions. Because the common law has no required structure, the government can abolish courts and create new ones in their place. The usual situation is that the judges from the old court will be appointed as judges of the new court. But if a statute creates a different situation (e.g. not reappointing judges), the common law does not prevent this.

### 1.4 Inherent rights

In can be seen, then, that common law rules and concepts create rights even where they are not contained in constitution or statute. These rights become inherent in the common law system. This offers considerable protection, but inherent rights depend on the court system to work. So where courts or judges are not independent, the common law is unlikely to be of much use. The common law is often slow in responding to changes because modification of the common law needs to come from the highest court (because of the precedent system). A further difficulty is caused by the common law’s constant potential to develop, causing un-
certainty as to the permanence of various principles. And even where a principle may be established, it has to be drawn from court decisions, so it can be difficult to find or define.

The common law’s inherent rights are also weak because they can be changed by statute. In contrast, constitutional rights can’t be ignored except by amending the constitution (which may or may not be easy). But common law rights can simply be changed by parliament – courts MUST follow a statute passed by parliament. This requires courts to recognise and enforce statutes even where they may breach human rights or other international recognised standards.

Even though the common law is able to be changed by statutory or constitutional provisions, any such change need not be permanent. Certainly, where a parliamentary or other law modifies the common law, that part of the common law no longer operates. However the general rule is that where a statute modifying the common law is repealed, the common law will revive.3

2 Outline of some of the basic common law concepts

Keeping in mind the basic workings of the common law explained above, it is now possible to examine some of the central common law concepts. The source of these ‘rules’ is from previous decisions (sometimes from very old cases) that have been repetitively followed or applied by courts which use the common law. Through this process, the rules become part of the common law and are applied by common law courts unless the rule is modified by constitution or parliamentary statutes or the country’s highest appeal court.

There are a wide range of common law concepts. Some of them give the court power to grant orders or remedies, like injunctions (a court order preventing a person from doing something) or remedies against misuse of public power (eg. a mandamus order requiring a government agency to fulfil its legal duty, or a certiorari order revoking a government decision that had been made improperly. Other common law concepts address evidentiary matters - how a party must prove matters in court, and what is acceptable and unacceptable evidence. The common law provides a trial by jury for more serious criminal cases – an accused has the right for a jury to decide factual issues in relation and also whether the accused is guilty of the charges. As noted earlier, the common law has no particular structure for courts. However the
common law concept of ‘inherent jurisdiction’ dictates a superior court can decide any issue before it, unless excluded by statute.

These are just some examples of common law concepts. However there are two particular areas that merit more detailed attention in understanding the common law’s operation in Burma. These are the common law’s principles of statutory interpretation, and provisions in relation to judicial independence.

2.1 Principles of statutory interpretation

The common law dictates that fundamental rights will not be overridden by general or ambiguous words in a statute. Unless a statute clearly states to the contrary, the courts will presume that even the most general words were intended to be subject to the basic rights of the individual. As noted earlier, the courts’ respect of parliamentary supremacy means that parliament can alter these rights if it decides to do so. But it must indicate that decision clearly in the words of a statute.

Under the common law, unless a statute uses specific words to deny these rights, the courts will presume that parliamentary statutes do not:

- restrict peoples’ access to the courts;
- deny people the protection of legal professional privilege (the rule that communications between a client and lawyer cannot be used as evidence in court);
- exclude the right to silence as protection against self-incrimination (i.e. a person cannot be forced to give evidence that may show s/he committed a crime);
- excuse those exercising public authority from acting legally, reasonably, and honestly – this includes giving a person who may be adversely affected by a decision the opportunity to respond;
- give a wide application to legal immunities for government agencies;
- interfere with equality of religion; or
- require persons to do something impossible, this also leads to an assumption that legislation does not have a retrospective effect (but only applies to events occurring after the legislation is passed).
2.2 Judicial independence

Although most laws in relation to judicial independence come from a country’s constitution or statutes, the common law does provide some concepts, useful where these other sources are silent. Following a 1701 statute in England, the common law has three minimum requirements that must be observed in relation to judges:

- they have immunity from suit (they cannot be liable for things they do or say in the course of their work);
- they have tenure during good behaviour (they can only be dismissed for incapacity or misbehaviour, by a decision of parliament); and
- they must be provided with an adequate salary.

The common law also has two other principles that can assist in protecting or providing an independent judiciary: bias and contempt.

The rule against bias is designed to ensure that judges are independent and neutral. Where a judge has a financial or proprietary interest in the outcome of the case, this disqualifies the judge from hearing the case unless s/he discloses the situation to the parties and they agree to her/him hearing the case. If there is no disclosure, the judge’s decision on the case cannot stand and has to be set aside. The 1998 case concerning Chile’s General Pinochet is an example where a decision was set aside because of bias, and in this decision the UK’s highest court expanded the grounds for bias, ruling that it is not simply an assessment of financial or proprietary interest. A judge will also be precluded from hearing a case where: (1) s/he is associated with a party to the case; and (2) the party is seeking a particular outcome which is contrary to one of the other parties. Judges can also be excused where the circumstances of the case may cause a reasonable person to think the judge is not fair or neutral.

The law on contempt is designed to ensure people treat courts, and court proceedings, with appropriate respect. Parties can commit contempt in various ways including through publications that interfere with the court’s process (eg. writing or talking about a case currently in progress that could interfere with its progress) or that ‘scandalize’ the court or its officers (eg. talking/writing something that causes people to think less of them). It is also contemptuous to disobey a court order. The last area of contempt is broadly called ‘contempt in the face of the court’ and this includes things like insulting a judge, interfering with the pro-
ceedings, refusing to answer questions, recording proceedings without permission, and suppressing evidence. Where a person commits contempt the superior courts of that jurisdiction can try and punish them (even including prison sentences).

2.3 Common law shortcomings

It should not be thought, however, that the common law is always beneficial to an individual’s legal rights and standing. Various common law rules conflict with human rights standards or contemporary understandings of the rule of law. For example under the common law there is no right of appeal – when a court makes a decision, if there is no appeal available under the country’s constitution or statutory laws, then that decision is final.

The common law also provides various immunities or legal protections for a government. Most of these derive from the concept of sovereign immunity which originated when the government was the monarch. Historically, the monarch was above the law and so the government’s actions cannot questioned in any court - ‘crown immunity from suit’ prevented most legal proceedings being commenced against the government regardless of the cause of action. Many of the immunities originally recognised by the common law have been amended/removed through parliamentary statutes. For example in the UK through the Crown Proceedings Act 1947, and in many countries the national constitution provides that legal proceedings can be taken against the government. However, if there is no statute or constitution addressing this, you need to be aware of common law limitations. There are other crown immunities, which may result in legal proceedings against the government being struck out, including:

- immunity from the ‘unwritten’ law – such as common law claims in tort and contract;
- immunity from the written law, that is from the application of statutes that apply to the community generally.

Even when immunities don’t prevent the claim being initiated, there are other immunities that can protect the government during the proceedings. Immunities can also enable the government to withhold evidence if it considers the public interest requires the court and the parties not to have the evidence. Another crown immunity is that the government is immune from execution against its assets, which limits a successful plaintiff’s enforcement options.
3 Relevant developments in Burma

Burma’s legal history affects what use can be made of the common law in Burma today. In order to properly understand and assess the role for common law principles in contemporary Burma, it is necessary to consider some of Burma’s legal history.

3.1 Pre-independence

Following the first contact between various Kingdoms in Burma and the English in the 1600s, a series of wars ended with Burma becoming part of the colony of India in 1886. It remained part if India until 1934 when it became a separate English colony. So it is also necessary to consider the common law in India because this impacts on Burma’s legal system.

India was not a ‘settled’ colony of England, and so the common law only applied through actions/decisions of the government. The presence and power of the East India Company, which exercised governmental powers, saw the common law apply first only in certain areas in India, and then later throughout the colony but only to certain persons. However, by the time of Burma’s absorption into the English colonial empire, the authorities had decided that English law (and those common law aspects of it) applied to all of the territory but not to matters governed by the personal law of Hindus and Muslims (eg. marriage, inheritance, religion). Over time, much of the law in India was codified – collected into the Anglo-Indian Codes dealing with various subjects (eg. procedure, criminal law etc). This occurred to an even greater extent than it had in England. For these codified areas of law, all the previous statutory and case law became redundant – the source and extent of the law was now simply what was written in the code. Many areas were ‘codified’: criminal law, civil procedure, evidence, contract, and some equitable laws. Many common law concepts were transferred into these codes (eg. hearsay, habeas corpus, best evidence rule) and so these concepts exist in India’s legal system. However the source for these laws then became the code, NOT the common law.

In Burma, as in other colonies, the colonial powers used the local legal system to assist their rule. They were happy for it to continue and develop in areas that didn’t interfere with English interests. This resulted in two sets of laws in same jurisdiction,
with differing application depending on subject. In Burma, Burmese Buddhist law governs, for practising Buddhists, laws of marriage, divorce, inheritance, succession (ie. division of property where there is no will), in effect becoming a type of mixed jurisdiction.

Burma, like other English colonies, used the Privy Council (part of the UK’s House of Lords) as the highest court of appeal in Burma’s legal system. So Privy Council decisions directed and influenced the common law in Burma. The common law in Burma was also circumscribed through statute. All the Indian acts relating to Burma were codified into the 13 volumes of the *Burma Code*, originally issued by the government authorities in India and then subsequently the responsibility of the independent parliament in Burma.

In 1934, Burma became a separate colony of England. Burma’s Parliament supplemented and amended the Burma Code. According to a Burma legal expert, this gave the following three main sources of law in Burma.

1 – The Burma Code and other statutes
The most important source, containing ‘the law’ on most areas including procedure, evidence, contract, local government, and criminal law.

2 – The common law applies in two areas: torts and damages
**Torts** – a ‘tort’ is a civil action taken by one person against another who has wronged them. Examples include negligence (when a person doesn’t take care and this injures another person), defamation (when someone says or writes something that injures another person’s reputation), and misrepresentation (when someone says something wrong, and another person relies on this and suffers loss because it is wrong).

**Damages** – the law on how to determine the amount a plaintiff should receive as compensation if the court decides the defendant has broken the law.

3 – Religious law on some matters
By legislation in 1898, some of Burma’s religious laws and customs were recognised and enforced in cases dealing with ‘succession, inheritance, marriage or caste, or any religious usage or institution’. In these cases, the courts should use ‘(a) the Buddhist law in cases where the parties are Buddhists, (b) the Muhammadan law in cases where the parties are Mohammedans, and (c) the Hindu law in cases where the parties are Hindus’.

There is also a fourth source, after 1947, being the constitution.

**3.2 1947-1962**

When Burma became an independent nation in 1947, it ended all legal ties with England. The final court of appeal was now a domestic court in Burma. However, the continued use of the com-
mon law was supported by court practice and also various provisions in Burma’s first constitution. The constitution established a High and Supreme Court and specified their jurisdictions, including that the High Court had ‘original...jurisdiction and power to determine all matters and questions whether of law or of fact’. This gave the High Court the power to use common law concepts and grant common law remedies. The High and Supreme Courts were designated to be ‘courts of record’ meaning they had to keep a permanent record of proceedings before them and publish their decisions – critical for the common law’s operation. The decisions of the Supreme Court were constitutionally stated to be binding on all other courts.

As apparent from earlier discussion, for the common law to operate effectively requires an independent judiciary. The 1947 constitution promoted a strong and independent judiciary in several respects:

- The constitution supported a competent judiciary through a detailed procedure for their appointment, necessary qualifications, and also a requirement that judges had to give an oath to uphold the constitution & law.
- Each judge’s position was protected through constitutional provisions that their employment conditions had to be specified in law and couldn’t be reduced during their time as a judge, and that they couldn’t be dismissed except through a decision and detailed procedure involving both houses of parliament.
- Each judge was constitutionally bound to decide matters independently.

During the first 15 years of the country’s independence, the courts in Burma referred to common law concepts and decisions of the Privy Council and other courts. Burma’s courts granted various remedies like certiorari, mandamus, and habeas corpus (against preventative detention). These were common law concepts, certainly, but the actual source of much of this law was from the Burma Code rather than directly from the common law.

### 3.3 1962-1974

In 1962 the military staged its first coup, aiming to control the whole country. The military didn’t formally revoke the 1947 constitution but they abolished the parliament and the two main courts (High Court and Supreme Court). The 1947 constitution thereby became ineffective because there was no way to use or enforce its terms. The loss of these institutions also had signifi-
The military created a new court called The Chief Court. In 1965, the Chief Court gave a decision in *Maung Ko Gyi v. Daw On Kin* addressing the sources of Burmese law. Justice Maung Maung (who later became Burma’s Judicial Minister and then President) directed judges to seek the Burmese law not in the common law, but from dhammasattha (Buddhist law texts) based on ‘lawkabala taya’ or the ‘principles upholding the universe’. Remedies such as certiorari, mandamus, habeas corpus were not used after 1962. They were not officially removed, but have never since been granted by courts in Burma.

In 1972 the legal system was significantly restructured, and there were two significant developments impacting on the potential for the common law. The first of these was that the judiciary became part of the executive and legislature, as part of the one party state. The second significant development was that a “system of people’s justice” removed an independent judiciary and replaced this with panels of three party members (usually without legal training) who made decisions. The panel was advised by legal advisers (ex-judges) but their advice could be ignored.

In 1973, a government manual for the courts directed judges on where to (and where not to) find the law. The manual stated that judges should not refer to any decisions from other countries. It also directed that judges should not even refer to earlier decisions of Burma’s courts because “the circumstances vary from case to case depending on different social and historical factors”. This created a significant restriction on the operation of the common law: a judicial system that discourages reference to previous judicial decisions is almost the contrary of how a common law court arrives at its decision.

### 3.4 1974 onwards

The legal system’s restructuring of 1972 was formalised in the 1974 constitution. This constitution had one aspect that could support the continuation/use of common law. This was an article directing that the “Administration of justice shall be based on...principles [including: (a)] to administer justice independently according to law...[b] to dispense justice in open court unless otherwise prohibited by law...[and (c)] to guarantee in all cases the right of defence and the right of appeal under law”. Arguably, these provisions could give some support to an independent judi-
ciary. However, much of the operation of the 1974 constitution was contrary to the common law. This can be seen in various matters like:

- the constitution provided direction on how cases are to be decided; 30
- the validity of government acts were only determined by parliament, not the courts; 31
- parliament, not the courts, was now the body responsible for interpreting the constitution; 32 and
- the ‘judiciary’ and courts were formed from members of the parliament. 33

One of the main obstacles to the common law under the 1974 constitution was the removal of judicial independence. This was undertaken because “now the working people of Burma are in charge, the checks and balances offered by an autonomous bureaucracy and judiciary are no longer necessary”. 34 These changes were particularly evident in the lack of judicial tenure, 35 the imposition of non-judicial responsibilities (for example that the “Administration of justice shall be based on the...principles...to protect and safeguard the Socialist system” 36), and that the courts were now responsible to the parliament. 37

Did the common law continue after these developments? It’s a question on which commentators disagree although the weight of opinion is that the common law effectively ended. A UK academic considers Burma has been “dislodge[d]...from the common law family into the socialist law family”. 38 He sees this having happened through three particular developments: (1) the 1965 Maung Ko Gyi -v- Daw On Kin decision, (2) the legal system’s restructuring in 1972, and (3) the 1974 constitution. A recent decision of a superior court in the United States of America agreed, stating “…the socialist regime of the 1960s and 1970s...ended the common law system in Burma”. 39 In that case, however, an opposing voice considered that “Burmese law has remained a common law system right through the anti-socialist military coup of 1988 up to the present century”. 40 This was the view of a legal expert called by parties associated with Burma’s military rulers.

And what of contemporary Burma? The 1998 coup removed all previous legal institutions, 41 and so it is a valid question to ask what is the current relevance of common law concepts. There is certainly a lack of judicial independence:

- There is officially no separation of powers. The military announced it exercises executive, legislative and judicial power. 42
The military established a new Supreme Court in 1988 and has since appointed and dismissed many judges, demonstrating a complete absence of tenure. In late 1998 the military stated that five (of the six) Supreme Court Judges were ‘permitted’ to retire.

This lack of judicial independence makes it very difficult for the common law to operate. However, some commentators say the courts have some degree of independence in cases that do not have political interests for the military.

There are other signs that may suggest a greater resilience in the common law. A study of Burma’s Supreme Court decisions in 1998 shows that the Court does make some reference to earlier decisions (including to cases from pre 1947, 1947-1962 and after 1962). This appears a move closer to one aspect of the common law system, than was the case under the 1973 court manual.

The military’s Judiciary Law regulates the courts’ operation and therefore the potential for the common law. There are various aspects in this law that support or contribute to the continuation/use of common law.

- The Judiciary Law establishes a Supreme Court, vests it with jurisdiction in many areas, and empowers it to function through employing staff and issuing rules.

- The Judiciary Law enables a court hierarchy and precedent system to operate and for the lower courts to follow the decisions of the Supreme Court. It does this by specifying the structure of Burma’s court system with the Supreme Court above the State, District and Township Courts, and through providing a right of appeal.

- The Judiciary Law gives the courts the power to make orders similar to common law remedies of habeas corpus and certiorari. These words are not specifically used in the Judiciary Law, and should the courts chose to exercise these powers, any orders made would be pursuant to the Judiciary Law and not the common law. However, given the lack of direction in the Judiciary Law as to when and how these powers should be exercised, it is quite conceivable the courts could refer to previous decisions and common law principles in exercising these powers.

The Judiciary Law also has other aspects that, while they do not mandate its use, are consistent with the common law being used by Burma’s courts. For example the military appoints Supreme Court judges, and there is a ‘guarantee...in all cases [of]
the right of defence'. However caution should be exercised in relying too heavily on these words because there is sometimes a difference between what the law provides and the degree to which judicial independence exists in practice. In Burma, as in some other common law countries (e.g. New Zealand, Australia), the executive has almost complete freedom in who they appoint as judges. This system has permitted the appointment of some very good judges, however in Burma this freedom, together with the lack of judicial tenure, has been used by the military to ensure a compliant judiciary.

Regardless of the actual degree of independence where the law is neutral, there are some provisions in the *Judiciary Law 2000* that clearly act as obstacles to the common law’s use in Burma. The main areas in this regard are noted below.

- Courts are charged with non-judicial responsibilities. For example, “The administration of justice shall be based upon...principles [including] aiding in the restoration of law and order and regional peace and tranquility...[and] aiming at reforming moral character”.58
- The Supreme Court is given wide-ranging powers to interfere in the independence of other courts in conducting their business. The Supreme Court has the power to order cases be transferred to it, or that they be transferred from “any Court to any other Court”.59
- The Supreme Court also has extensive powers in relation to the creation and supervision of the lower courts and appointment of their judges.60 These provisions can seriously impair the independent exercise of the judicial functions in the lower courts.

Another significant obstacle to the common law’s use in contemporary Burma is the lack of access to previous court decisions. The common law is based on previous decisions and for this to work, those decisions must be easily available. The most important decisions will be those of Burma’s superior courts, and various commentators and judges have indicated the difficulty in obtaining the decisions of Burma’s courts.62
4 Conclusions

And what of the future? In assessing the potential relevance of common law for future Burma, it must be appreciated that Burma’s recent legal history demonstrates significant departure from the common law system.

- In contrast to other former colonies and countries using common law (e.g. India, Malaysia, Sri Lanka, Australia) where many of the concepts used at independence are still similar to practices now, this is not the case in Burma.
- Burma’s court system has changed significantly (at various times).
- The sources of law have changed over time, with judges directed to and using, various sources to find ‘the law’.
- The legal structure changed - currently there is no official recognition of a separation of powers, and therefore no independent judiciary.

Thinking about the common law’s role is relevant to Burma because, if there is a return to the rule of law, there may be an opportunity or necessity to decide what the law and legal system will be. There are different views as to the relevance of the common law to the future of Burma's law. A UK academic considers that “future Burmese law will be no closer to the English common law than is the law of Thailand and Cambodia”. That may be true - without significant change, the common law will have little relevance to Burma’s courts and legal system. Certainly the lack of knowledge of, or access to, court decisions makes it difficult for the common law’s principles of precedent to function.

It is difficult to see how common law concepts can be used directly in Burma’s current legal system. In tracing these concepts’ development or modification, we can see many of them have been taken into the Burma Code or other statutory provisions. The court, as the body through which the common law operates, needs to have the jurisdiction to be able to use common law concepts. The current Supreme Court cannot trace an unbroken history back to earlier times which would support its use of the common law. The Court’s jurisdiction is as set out in the military’s establishing law – a law that, when viewed in total, provides little room for the common law to operate.
But perhaps parts of the common law can be re-introduced through statutory or constitutional provisions. Particular areas for attention could include

- improving judicial independence and the rule of law (e.g., through use of a constitution, observing the separation of powers, stronger judiciary, reduced interference of court cases etc);
- re-introducing certain common law rules through statute; and
- better availability of court decisions.

Through developments such as these, there may be potential for renewed use of common law principles.

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2. For example, section 16 of the Supreme Court Act 1935 (Western Australia) provides that the state's Supreme Court 'is invested with and shall exercise such and the like jurisdiction, powers, and authority within Western Australia and its dependencies as the Courts of Queen's Bench, Common Pleas, and Exchequer, or either of them, and the Judges thereof, had and exercised in England' in 1861.


10. ‘Since Burma as it was then known was administered with India, when much of the common law was codified in India the codification was similarly adapted in Burma and eventually compiled into the 13 volumes of the Burma Code’, J Finch and D Schmahman ‘An Updated Look at Whether Investors in Southeast Asia should enter Myanmar’, Today Magazine, 1997, as reported at <www.ibiblio.org/obl/reg.burma/archives/199707/msg00054.html>, accessed 11 December 2006.

14 Section 13(1) of The Burma Laws Act 1898 (India) see note 13 above.
15 The Constitution of The Union of Burma (1947), section 134
16 Section 148, 1947 Constitution
17 Section 152, 1947 Constitution
18 Section 140, 1947 Constitution
19 Section 142, 1947 Constitution
20 Section 139, 1947 Constitution.
21 Sections 144 & 149, 1947 Constitution
22 Section 143, 1947 Constitution
23 Section 141, 1947 Constitution.
29 Article 101, 1974 Constitution.
30 Articles 101 & 202, 1974 Constitution.
31 The validity of the acts of the Council of State, or of the Central or Local Organs of State Power under this Constitution shall only be determined by the Pyithu Hluttaw’, article 200(c), 1974 Constitution.
32 Articles 200(a)&(b) & 201, 1974 Constitution.
33 Articles 95 & 103, 1974 Constitution.
35 Article 97, 1974 Constitution.
36 Article 101, 1974 Constitution.
37 Article 104 1974 Constitution.
40 As reported in A Huxley, ‘Case Note: Comparative Law Aspects of the Doe


By its Declaration No.5/88 of 27 September 1988, the State Law and Order Restoration Council appointed a Supreme Court with five members as the highest judicial court in the country. The Supreme Court is headed by Chief Justice U Aung Toe, Myanmar military’s website <http://mission.itu.ch/MISSIONS/Myanmar/basicfacts/organs.htm>, accessed 27 Sept 2006.


A study of the 1998 reported cases in Burma suggests that, outside of political cases or cases in which the military has an interest, the legal system is operating acceptably (assessment by Burmese lawyer Mr BK Sen). The military’s unexplained replacement of 80% of the Supreme Court judiciary in November 1998 perhaps indicates there was a degree of independence operating until that time’, J Southalan, ‘Impunity and Judicial Independence’, 2004, Legal Issues on Burma Journal, no 17, p40 at 70, available at <http://www.blc-burma.org/pdf/liob/liob17.pdf> accessed 11 December 2006. Burmese opposition groups in exile have stated that they have received reports that the MIS is interfering with judicial discretion, especially in politically motivated cases. The Supreme Court judges were among those who suffered from pressure from the MIS.’, Burma Lawyers Council, ‘JUDICIAL REFORMS: An Urgent Need for Judicial Reform in Burma’, Legal Issues on Burma Journal, No 3, as reported at <www.hrsolidarity.net/mainfile.php/1999vol09no08/1242/>, accessed 11 December 2006.

See Myint Zan, ‘A Comparison of the First and Fiftieth Year of Independent Burma’s Law Reports’ (note 27 above). Myint Zan notes, however, that the 1998 Supreme Court makes far less reference to earlier cases in its decisions than did the Supreme Court fifty years earlier.


Sections 3, Judiciary Law.

Sections 5, Judiciary Law.

Sections 27 and 26 (respectively), Judiciary Law.

Sections 5(d), 6, 7 and 14-22, Judiciary Law.

Sections 2(f), 5(d), 15 & 22, Judiciary Law.

The Judiciary Law states the courts have the power to ‘inspect prisons [and]...police lock-ups for enabling convicted persons and those under detention to enjoy rights to which they are entitled to in accordance with law’ (section 25 - equivalent of habeas corpus), and ‘examin[e]...any
order and decision which is not in conformity with the Law relating to the legal rights of a citizen and altering or setting [it] aside as may be necessary' (section 5(h) - equivalent of certiorari).
54 Section 3, Judiciary Law.
55 Section 2(f), Judiciary Law.
56 A study of judicial independence in Latin America emphasises the sometimes significant difference between independence ‘de facto’ and ‘de jure’. That is, constitutional or statutory laws may indicate the judiciary has independence but the political realities are such that any legal independence is not exercised in reality. A Pozas-Loyo & J Rios-Figuera ‘When and Why Do “Law” and “Reality” Coincide? De Jure and De Facto Judicial Independence in Chile and Mexico’ (2006) at <http://homepages.nyu.edu/~jrf246/Papers/APL_JRF_Final3.pdf>, accessed 13 December 2006.
57 ‘Some judges want to perform their tasks as legal professionals while others bow to pressure from the MIS so as to retain their appointments. ... The removal of five out of six judges in the Supreme Court led observers to understand that the military junta has no tolerance for independent judges. In fact the situation is even worse than international observers realize, as the removal of judges at lower levels is unknown to the international community. ... [Burma’s] judicial system has been totally converted into a tool serving the military junta’, Burma Lawyers Council, ‘JUDICIAL REFORMS: An Urgent Need for Judicial Reform in Burma’, (see note 45 above).
58 Section 2, Judiciary Law.
59 Section 5(b)&(c), Judiciary Law.
60 Section 12, Judiciary Law.
61 Section 13, Judiciary Law.
62 eg. decision Chaney J, Superior Court of California John Doe and o’rs -v- Unocal Corporation (see note 39 above); Myint Zan, ‘A Comparison of the First and Fiftieth Year of Independent Burma’s Law Reports’ (see note 27 above); and A Huxley, ‘Case Note: Comparative Law Aspects of the Doe v Unocal Choice of Law Hearing’ (see note 12 above).