(2) The Status of the Rule of Law in Burma

Radio Free Asia Roundtable Discussion (May 13, 2007)
Participants: U Nyan Win, U Myo Swe, and U Thein Nyunt
(Lawyers Practicing Inside Burma)

Moderator: U Win Naing Oo

U Win Naing Oo (moderator): Today we will discuss how authorities are interfering with the legal process for political reasons and aims. We will also discuss how the public must be aware of the law and its effect. I understand that the law aims to protect the people. The people must be protected against this dangerous government. The present government said that no one should be above the law. For the lawyers, which facts should be looked at to decide whether the country follows the rule of law or not?

U Nyan Win: When implementing the law, the authority should respect the law. If they ask the people to respect the law and they don’t respect it, there is no rule of law. There must be a fair judiciary. Without respect for the law and a fair judiciary, there is no rule of law. Only when there is rule of law, can we implement the essence of the law. Only when we apply the essence of law, will the people in the country be protected. Without these the people will not have the protection of law.

U Myo Swe: From the time of the Roman age, the people have said that no power should be above the law. In Burma, they are using the same concept, that no person should be above the law. If this concept is true, both the authorities and the people should follow this concept. In the country, if one part of the country follows the concept and in another part they don’t, this is not a good situation. The role of the rule of law will disappear.

U Thein Nyunt: With respect to the rule of law, I would like to give one example. In Burma there is a famous journalist, U Win Tin. He was charged under Criminal Law Section 216. According to this section, he could be released on bail. But the court didn’t allow him to be released on bail. U Win Tin appealed to the highest court, the Supreme Court. The Supreme Court agreed with the lower court and decided that violators of Section 216 can, but do not have to be, released on bail. From this example you can see what the Burma judicial system is like. Those who are in power, those who are poor, and those who are rich must have equal rights. Only then is there rule of law.

U Win Naing Oo (moderator): In the U.S., Mr. Gonzales dismissed eight U.S. attorneys. This is a great problem. The Senate and the House of Representatives are investigating. The White House is also interfering in this matter. If democratic countries like the U.S. have these kinds of problems, what will happen in those countries without democracy?

U Nyan Win: In democratic countries the political systems are based on a balance of power among the executive, legislative and judiciary. However, in Burma all power is centralized. There is no balance between the three branches. Thus, there is no rule of law.
U Thein Nyunt: I would like to give an example about the house arrest of Daw Aung San Suu Kyi. The arrest was made under the State Protection Law, which was drafted based on the 1974 Constitution. The law purports to protect the country from those who wish to destroy it. However, the nature of this law has become deformed. Those protections stated in section 9 are meaningless. There are problems in challenging facts when considering whether the arrest is in accordance with the law. The arrest and continuing detention prescribed by the central committee can only be submitted to the board of ministers. When there was a constitution, if the defendant was unsatisfied with the order of the board of ministers, the order could be appealed to the Council of People’s Justice. The Council of People’s Justice could repair, dissolve or confirm the decision of the board of ministers. Now there is no section providing for an appeal. In the latest news, the NLD headquarters was unable to obtain a true copy of the arrest order of Daw Aung San Suu Kyi in order to submit an appeal to the board of ministers. The NLD has issued a statement asking for a true copy of the arrest order. The Criminal Procedure Act (371/1) provides that, when a copy of any order is requested, it should be given to the person concerned without delay and free of charge. The Criminal Procedure Act still provides this.

U Win Naing Oo (moderator): Let us continue discussing the previous topic about legal action on crimes connected with politics. What we have seen and heard is that a student of age 20 was sentenced to 60 or 70 years in jail for a political crime and the sentencing of a 60-year-old man to 100 years in prison for the same crime. Additionally, in a town where everyone rides un-licensed motorcycles, a politician riding an un-licensed motorcycle will be sent to jail. U Myo Swe, what is your opinion on the legal aspect of these crimes and their punishment?

U Myo Swe: The judges have jurisdiction to sentence a defendant to life imprisonment, a death sentence, two to three years in prison or be acquitted. The judge can make a decision based on his own reasoning. However, in dictatorship countries there is centralization. The dictators do the following: (1) arrest all those in the area of the crime and send them to court, (2) charge them under the most severe criminal section possible, (3) order the highest punishment, and (4) acquit no one. These actions should not happen to the people.

Another example is the Printing Act. A person was jailed for 3 years under the Printing Act and sentenced again for the same offense to 7 years under section 5/J. He was jailed twice. The law prescribes that nobody should be sentenced twice for the same offense. Here he was sentenced twice. So many cases of this type have happened. In the case of Dr. Win Aung, he was sentenced to 2 years in prison under the Printing Act and later to 2 years in prison under the Video Act and additionally to 7 years under section 5/J. The law prescribes that in making decisions on crimes, punishments should not be separate but should be given as a whole. Here, he was sentenced to a total of 9 years. This judgment was unknown by our nation’s leaders but was happening in the lower strata. We want to reveal this judgment. These unjust decisions and deviations of the legal mechanisms must be straightened out. In our law we frequently say that things must be done truthfully, and decisions must be based on truth and should not be hearsay but be seen by all the people. Only then the power of the pillar of law becomes strong, respectable, and prestigious and everybody will follow the rules. We hope and believe that we will have a true judiciary that considers things
systematically. Whether the government will accept this concept or not can be seen by all people in our country.

_U Thein Nyunt_: Punishment to opposing politicians, democratic supporters, and the cases we are handling personally reveal that defendants are given severe sentencing. The severe sentencing should be given only when it is necessary. Now they are given the harshest punishment. As can be seen from judicial rulings, sentencing to several years in prison is an act of resentment. I plainly believe that this act is the settling of a grievance against sentenced persons, the country and the civil society. Another point is that the upper court does not know the decision of the lower court. The lower court has to submit its decision to the higher court and if the higher court rules that the decision is unfair, then the higher court can revise the punishment and can correct it in line with the objectives I mentioned above. However, in practice this is not how it works. Because of this failure to exercise these concepts in practice, the observer groups who come and study the laws in Burma have said that “Burma is included in the list of countries where the severest punishments by lower courts are not corrected by the higher court.”

_U Win Naing Oo_ (moderator): The courts do not accept that people accused of crimes give the excuse that they did not know something was a crime. Do the people need to know the law and is it important for the public to personally and actively participate? _U Thein Nyunt_, please express your opinion.

_U Thein Nyunt_: We should promote and encourage the people to learn as much as possible about the law because justice is not solely the work of the judges but also concerns the people. Judges are not the owners of the law. It is not a must for the people to have skilled legal knowledge but consciousness of law is very important. Though there may be a good constitution and good laws, to have a good judicial system the participation of people is very important. If the people do not participate, the good constitution and the good laws are only pieces of paper. To show the sign of life in law, the people with the legal consciousness in mind must report the unfair cases and convey the details of the unlawful cases. If the authorities subsequently take no action then any possible way to take action must be used. People must be courageous to complain about these unlawful acts so that the public can obtain a just decision. Now it is the time for people to have the courage to express their desires and this is the duty of the people.

_U Myo Swe_: Responsible government personnel must prevent the unjust cases, cases of violating law and cases involving force. They must report them to the responsible authorities and the authorities must take action. Every citizen has the duty to inform the authorities of cases of violence when they see or hear of them. If a crime is committed in plain sight, the citizen must inform the responsible authority. The duty of a citizen is to report criminal cases that they see or hear about. For example, if a citizen knows the whereabouts of a murderer, he must reveal it and report it to the responsible person. He will be blamed if he knows it but does not reveal it. If he finds stolen property he must inform the responsible person. If he does not, he will be blamed for accepting stolen property or for conspiracy. These are the laws. The duty of a police officer is to find the truth, the duty of a citizen is to inform and the duty of a judge is to determine guilt or innocence.
U Win Naing Oo (moderator): The last thing to discuss is about judges. In the judiciary, the decisions of the judges must be made independently. The most important matter here is the judge’s reasoning. In deciding whether to impose a harsher or lighter sentence, the judge must use his own reasoning. The law says that, in sentencing, a judge cannot be held liable. What is your opinion U Thein Nyunt?

U Thein Nyunt: In the policy of the law, it is clearly provided that sentencing must be independent in accordance with the law. The answer to your question can be seen in the sentencing in political cases. With respect to the judiciary, our national leader Bogyoke Aung San said in the First Preliminary Conference of AFPFL held on 19 May 1947 that the “court of the nation must look to benefit the people”. He said these words 60 years ago. All of our citizens know whether the present court of our country benefits the people or someone else.

U Myo Swe: It is stated in Criminal Procedure Code Section 77 that in the judiciary the judge can use the power given by the law and, when plainly believing that the power is given by the law, he is not committing a crime. In revealing the truth, conducting a fair trial and arriving at a fair decision, the main people from the legal side are the judges, prosecutors and police. If the process is unfair then the judge must have the courage to decide the case using his own reasoning. It is the duty of the entire citizenry and also the tax service personnel and everyone should fulfill this duty. We believe that the minister on the other hand should revise these unfair cases and uphold the law and also reform the judiciary so that everybody will cherish and respect the pillar of the law and practice it. We pray to God that they can control the pillar of the law so that it is upright and also maintain their dignity. We wish to those practicing the law that they be respectable and reliable and bring about true, accurate and just decisions in the judiciary.

U Thein Nyunt: Power is unstable in anybody’s hand. When it is the turn for the powerful to suffer, only then are they grieving and remorseful. I will give the example of my detention at Moulmein Jail in 1964 while I was a student. At that time a Tavoy parliamentary member was detained in the same jail and stayed together with me. He said to me that the cell in which we were staying had no electric lights and we would have to depend on the corridor lights only. I asked him that since he had been the chairperson of the judicial affair committee of AFPFL and also the uncle of Prime Minister U Ba Swe at that time, why he had not repaired the jail, which is related to the judiciary. He answered to me that he thought the jail was not concerned with them and the power would be everlasting. Only when we suffer do we personally know the importance of maintaining the law and that the judicial system is important to all the people. I remember this distinctly even today.

* * * * * * *