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## A Discussion of Five Burmese Cases from the Perspective of the Rule of Law

### Introduction

Throughout its twenty-year tenure, the State Law and Order Restoration Council (SLORC)/State Peace and Development Council (SPDC) has demonstrated a consistent contempt for the rule of law. Any analysis of the junta's violation of this abstract principle cannot be considered complete without its application to concrete fact. The cases of Honey Oo, Ko Thiha, Ma Thanda, Htin Kyaw and U Ohn Than, reviewed in the context of domestic law and procedure, as well as international legal principles, will help illustrate how the Burmese regime's disrespect for the rule of law is manifest in government action.

### Case Summaries

#### **Honey Oo**

Honey Oo, a 21-year-old law student, was arrested in October 2007 for helping form a student union, her involvement in the Saffron Revolution protests and for speaking to foreign radio about those protests. After being held for over two months without charge, she was charged on December 20 with sedition and with violation of the illegal associations law. At trial, she was convicted on scant evidence that failed to address her otherwise solid alibi. Further, she was convicted on both charges despite the fact that each was framed on the same activities.

#### **Ko Thiha**

Ko Thiha was arrested for picking up "anti-government" publications from a photocopy shop on September 7, 2007. One week later, he was charged with sedition, an invalid law given the SPDC's lack of constitutional authority. Whereas the law dictates that Thiha should have been tried openly in Wundwin, the site of the arrest, the trial was held in a special court in Mandalay Prison. Facing a life sentence, Thiha was not permitted to access a lawyer, nor was he allowed either to call witnesses or defend himself. He received a 22 year sentence despite the fact that the strongest evidence against him was a confession exacted from him by torture.

#### **Ma Thanda**

Ma Thanda was arrested on April 23, 2007 at a checkpoint after having visited her husband in Thailand. Charged with sedition, involvement in an illegal



organization, and violating immigration law, she faced trial in a special Rangoon court and not the border town in which she was arrested. After court proceedings in which she was not allowed either a lawyer or to call witnesses, she received three separate but almost identical sentences, whose penalties were added together to total 28 years.

### **Ko Htin Kyaw**

Ko Htin Kyaw was arrested for his role in the August 2007 protests against fuel prices that preceded the Saffron Revolution. After appearing with a placard criticizing a forthcoming rise in the price of compressed natural gas, Htin Kyaw and another man were grabbed by men in plainclothes belonging to Swan Ah Shin, thrown into an unmarked vehicle and taken to a special interrogation army camp. Although his co-protester was released after a few weeks, Htin Kyaw was held without charge in a police battalion until February 6, 2008. He was then charged with sedition even though his protest was clearly directed at government policy and not the government itself.

### **U Ohn Than**

On August 27, 2007, U Ohn Than carried out a solo protest in front of the US embassy in Rangoon. The 60-year old was taken away in a small public vehicle by men in plainclothes belonging to Swan Ah Shin after brandishing a pro-democracy placard. He was held without charge in a military interrogation camp until the end of January. After a trial with seriously compromised due process that equated his one-person protest with sedition, he was sentenced to life imprisonment.

## **Burmese Procedure**

### **Unlawful Arrest**

These cases demonstrate a number of irregularities with respect to the proper procedure for arrest. The arrest of Honey Oo occurred without a warrant despite the fact that she was accused of a non-cognizable offence. S. 54(1) of the *Code of Criminal Procedure* (CCP) outlines the limited circumstances in which an arrest may take place without a warrant, including arrests only for cognizable offences:

54. (1) Any police-officer may, without an order from a Magistrate and without a warrant arrest –

...any person who has been concerned in any cognizable offence...

Neither Htin Kyaw nor U Ohn Than were arrested by police officers. Both were apprehended by individuals in plainclothes belonging to Swan Ah Shin and forced into unmarked cars. In neither case was the accused brought into police custody. S. 59 (1) of the CCP outlines the conditions in which an arrest by a



private citizen may occur. This is legal only when the alleged offence satisfies the conditions of s. 54 (1), above, and when the accused is immediately brought into police custody and re-arrested:

59. (1) Any private person may arrest any person who in his view commits a non-bailable and cognizable offence... and without unnecessary delay shall take over any person so arrested to a police-officer or, in the absence of a police officer, take such a person or cause him to be taken into custody to the nearest police station.

(2) If there is reason to believe that such person comes under the provisions of section 54 a police officer shall re-arrest him.

### **Unlawful Detention**

Both Honey Oo and Htin Kyaw were held for lengthy periods without charge. Honey Oo was held without charge in Insein Prison from the time of her arrest on October 9, 2007 until December 10 of that year. She was not brought before a court until December 20. Htin Kway was not charged until February 6, 2008 despite having been arrested on August 25, 2007. The CPP, s. 167 (2), however, allows a maximum detention of 30 days without charge:

The Magistrate to whom the accused person is forwarded... may... authorize the detention of the accused in such custody as the Magistrate think fit. But the detention of such person shall not exceed in the whole 30 days where a person is accused of an offence punishable with rigorous imprisonment for a term not less than seven years, and where a person is accused of an offence punishable with rigorous imprisonment of less than seven years, the detention of such person shall not exceed 15 days in the whole.

### **Improper Jurisdiction**

The case studies suggest a tendency for cases to be tried in either Mandalay or Rangoon, regardless of where the accused was arrested. Because Ko Thiha was arrested in Wundwin, south of Mandalay, his case should have been opened in the Wundwin District Court. He was tried, however in a special court inside Mandalay Prison. Ma Thanda was arrested at a checkpoint at Than Gan Niy Naung in Myawaddy Township, but was tried in a special court inside Rangoon's Insein Prison. These are both violations of the requirements for jurisdiction that appear in s. 177 of the CPP:

177. Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.



In addition, the trials of Ko Thiha, Ma Thanda and U Ohn Than all took place at closed special courts inside prisons at either Mandalay or Rangoon. Judiciary Law (2000), however, states:

2. The administration of justice shall be based upon the following principles;...

e) dispensing justice in open court unless otherwise prohibited by law;

### **Pre-Trial Irregularities**

The case of Honey Oo, in particular, demonstrates serious irregularities in the process by which the case against the accused was brought to trial. Specifically, the Law Officer who referred her to court had insufficient evidence by which to do so, a fact made all the more worse by the court's guilty verdict on scant evidence. The CCP specifically states that where there is inadequate evidence to make a case against an accused, he or she should be released from custody:

169. If, upon an investigation under the Chapter, it appears to the officer in charge of the police-station or to the police-officer making the investigation that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond...

The fact that Honey Oo was tried on evidence that was either false or based on hearsay indicates a failure of the prosecutor to satisfy the requirements, stated in the *Instructions to the Prosecutor (2001)* 1/2001 at Chapter 7, that the officer in charge of the case analyse and guarantee the facts of the case as correct and relevant to the law.

The sole piece of evidence passed on by police to the Law Officer was a police statement signed by Honey Oo. This is in clear disregard of the *Attorney General's Rules And Regulations*, which, at Regulation 51 of Chapter 6, requires cases referred to the Law Officer be accompanied by a) First Information Report or Direct Complaint; b) Prosecutor Side and Defence Side Witness Statements; c) Confessions; and d) Relevant Facts, Documentation, Photos and other such Evidence.

### **Access to Defence**

It stands to reason that any accused will have difficulty securing justice without access to legal counsel. Ko Thiha, Ma Thanda and U Ohn Than were all denied legal representation during their trials. This is a violation of a number of procedural safeguards established in both s. 455 (1) of the *Burma Courts Manual*



and the CPP. The CPP states:

340. (1) Any person accused of an offence before a criminal court, or against whom proceedings are instituted under this code in any such court, may of right be defended by a pleader.

The *Judiciary Law (2000)* stipulates:

2. The administration of justice shall be based upon the following principles ...  
f) guaranteeing in all cases the right of defence and the right of appeal under the law;

The *Attorney General Rules and Regulations 2001* s. 81 (b) (Dock Brief) outlines grounds where a lawyer must be provided when the accused cannot otherwise do so, and the *Attorney General Law (2001)* states, at 9. j), that this is essential where the accused faces a criminal offence punishable by death.

### **Ability to Call and Cross-Examine Witnesses**

A common thread between the cases of Ko Thiha, Ma Thanda and U Ohn Than is that none of the three was able to call or question witnesses in their defence. In the case of Ko Thiha, this was justified by the fact that the accused confessed, although the confession itself was false and its submission to the court was in violation of the *Evidence Act* (see below). The CPP clearly outlines the right of the accused to call witnesses in its description of trial procedure regarding defence:

290. The accused or his pleader may...open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. The accused shall then give evidence, if he desires to give evidence, on his own behalf, and after his examination, cross-examination and re-examination (if any) he shall examine his witnesses (if any), and after their cross examination and re-examination (if any) he may sum up his case...

291. The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance...

### **Compound Sentencing**

The cases at hand indicate the willingness of courts to try and convict the accused multiple times for the same actions. Honey Oo, for instance, was convicted of both sedition and illegal association, even though both cases were framed the same. Ma Thanda experienced a similar fate in her sentencing under the *Burma Immigration Act, Penal Code* s. 124A and *Unlawful Assembly Act (1908)*, when the judge handed her three separate but almost identical



sentences with the penalties of each added together.

The *Burmese Penal Code*, at s. 71, explicitly forbids the overlapping of offences in a manner that exceeds the maximum sentence for a given offence:

71. Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

Where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

The offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

This principle is reiterated in the double jeopardy provision of the CPP, at s. 403:

403. (1) A person who was once tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him...

### **Burmese Law**

Although it should go without saying, a state's judiciary should always act consistently with its own law. This is a principle upheld by the SPDC's own *Judiciary Law (2000)*, which states:

2. The administration of justice shall be based upon the following principles;

a) administering justice independently according to the law

### ***Burma Penal Code, S. 124A***

In all of cases examined, the accused was charged and convicted of sedition. However, that charge requires that a lawyer for a constitutional government, which the SPDC is not, lodge the charge of sedition. SLORC's promulgation of the *1974 Constitution* on September 26, 1988 ended any pretence of the constitutional legitimacy of the ruling junta, something that was



confirmed by the regime's rejection of democratic election results in 1990. The definition of sedition, as described by the *Burma Penal Code* at s. 124A, does not apply to an SPDC government that is *de facto* and not *de jure*:

124A. Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards [the Government established by law for the Union and for the constituent units thereof] shall be punished with transportation for life or a shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Even if the offence of sedition did apply to the SPDC, the cases suggest that the courts are applying it in an improper manner. The prosecution is not following the law, which requires a charge of sedition to be approved by the home affairs ministry. Moreover, in the case of Htin Kyaw, the accused was protesting government policy with respect to fuel prices and was neither questioning nor challenging the authority of the state. The evidence of the case does not suggest any statements made by Htin Kyaw approached "excited disaffection" towards the state.

## Evidence Act

The cases of Honey Oo, Ko Thiha and U Ohn Than suggest that the courts have been hearing evidence in violation of the *Evidence Act*. The sole evidence presented by police against Honey Oo was an unsigned police statement allegedly made by the accused while in custody, and Ko Thiha was convicted exclusively on the basis of a confession made under suspicious circumstances. Regarding the latter, the accused claims that he was tortured into giving a confession, and the court heard evidence of that confession from a judge that Thiha insists he had never seen before. The *Evidence Act*, however, forbids the court from finding against a victim based on a confession rendered while in custody:

25. No confession made to a police officer shall be proved as against a person accused of any offence...

26. No confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a magistrate, shall be proved as against such person.

In addition, the convictions of Honey Oo, Ko Thiha and U Ohn Than were partially based on evidence heard from witnesses who were not in the presence of the accused at the time the alleged crime was committed. Numerous



witnesses, none of whom was allowed to testify at Honey Oo's trial, insisted that she was writing a law school exam at the time that the prosecutor's witnesses claimed she was leading a protest. In Ko Thiha's case, the court heard from witnesses that were not present at the time of his arrest. In the case of U Ohn Than, the court heard testimony of four witnesses who had been present at two previous protests attended by the accused and not the protests under consideration by the court. These irregularities are in violation of the *Evidence Act's* stipulations against hearsay:

60. Oral evidence must, in all case whatever, be direct; that is to say –  
 If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;  
 If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;  
 If it refers to a fact which could be perceived by any other sense of in any other manner, it must be the evidence of a witness who says he perceived by that sense or in that manner...

### ***Burma Immigration Act (1947)***

Ma Thanda was charged under s. 13(1) of the *Burma Immigration (Emergency Provisions) Act (1947)*, which states:

Whoever enters or attempts to enter the Union of Burma...in contravention of any of the provisions of this Act or the rules made thereunder...shall be liable on summary conviction to imprisonment for a term not exceeding one year or to a fine or to both.

Although the *Immigration Act* as written applies equally to citizens of Burma and to foreigners, subsequent case law dictates that only foreigners can be charged under s. 13(1) of the *Act* (*Sakinabebe v. Union of Burma (1966 Supreme Court No. 320)*). In other words, Ma Thanda, a Burmese citizen, was charged with a provision of the *Immigration Act* that is applicable only to foreigners.

### **International Legal Principles**

While many of the judicial irregularities occurring in Burma do not explicitly contravene either domestic law or procedure, there are several practices that fall within the purview of international legal principles.

### **Right to a Fair Trial and the Presumption of Innocence**

The right to a fair trial is an umbrella principle, and it is easy to see how much of what occurred in the cases under consideration is in violation of this



principle. Honey Oo was tried and convicted based on hearsay evidence that contradicted her otherwise solid alibi. The court did not follow proper procedure and her sentence was clearly unfair. Ko Thiha was tried in a closed court and was permitted neither to defend himself, to call witnesses, nor to counter the prosecution's witnesses, who were not present at the time of his arrest. He had no opportunity to challenge the torture-induced confession presented to the court. To make matters worse, his trial was far too short to have followed proper practice, with hearings completed in a single day following a mere ten days of investigation. Likewise, Ma Thanda was convicted after only one day of closed court hearings in which she was not permitted either to defend herself or to call and question witnesses. Htin Kyaw was convicted in a closed court on evidence that did not confirm the offence with which he was charged. Like Ko Thiha and Ma Thanda, U Ohn Than was unable to defend himself or to call or challenge witnesses in a special court; in addition, the presiding judge rendered inadmissible a question of his that clearly pertained to his case.

Given these and other occurrences, it is clear that none of the accused considered here was given access to a fair trial that respected and facilitated the presumption of innocence. These are principles codified in the Universal Declaration of Human Rights (UDHR), which is binding upon Burma by virtue of its membership in the United Nations:

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

### **Freedom from Arbitrary Arrest and Detention**

Honey Oo, Htin Kyaw, and U Ohn Than were all held for months without charge in clear violation of the 30 day maximum provided for under Burmese



law. Honey Oo's arrest took place in absence of a warrant, and private citizens arrested Htin Kyaw and U Ohn Than. These actions are in clear contradiction of the UDHR, which states:

Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

This is a principle that is further elaborated upon in the International Convention for Civil and Political Rights (ICCPR). While Burma is not a signatory to this convention, it is indicative of international legal practice, and a case can be made that it constitutes customary international law:

- Article 9.
1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
  2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
  3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...

### **Freedom from Torture and Security of the Person**

Ko Thiha insists that he was tortured while in custody, and that it was only under these conditions that he confessed to the offence of which he was accused. Clearly this is a violation of the *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, although, like the ICCPR, Burma is not a signatory of that treaty. Torture is also in contravention of Article 9(1) of the ICCPR (above) and of the UDHR:

Article 3. Everyone has the right to life, liberty and security of the person.

Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

### **Freedom of Assembly**

Both Honey Oo and Ma Thanda were charged under the *Unlawful Assembly Act (1908)*; the former for her involvement in a student union and the



latter for having crossed the border with individuals associated with a banned organization. These draconian charges are in transgression of Freedom of Assembly, which is codified in the ICCPR:

Article 21. The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

The case of Honey Oo, as it pertains to her student union, is also in violation of Freedom of Assembly as described by the *ILO Convention Concerning Freedom of Association*, which is binding on Burma, and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which is not:

Article 8. 1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;...

## **Freedom of Expression**

With the exception of the Ma Thanda, each of the cases considered involved an arrest for some kind of expression. Honey Oo was accused of corresponding for foreign journalists and partaking in protests; Ko Thiha was in possession of publications said to be anti-government; and both Htin Kyaw and U Ohn Than were protesting in public. Clearly these individuals had their freedom revoked for non-violent expression that, if anything, challenged the tenuous authority of the SPDC. This is a lucid and egregious violation of freedom of expression as described in the UDHR:

Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without



interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Freedom of expression is also articulated in the ICCPR:

- Article 19
1. Everyone shall have the right to hold opinions without interference.
  2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
  3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
    - (a) For respect of the rights or reputations of others;
    - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

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