The new political scenario in Burma has given hope for change. The scenario relates to the current talks between the Junta and Daw Aung San Suu Kyi, the leader of the democratic opposition. The scenario is new because the past has witnessed disastrous confrontation between the two forces. The Junta stated first that they wanted the annihilation of the National League for Democracy. Now the Junta has condescended to talks. Hope for change has come because an end to the long military rule since 1962 is in sight. The end of the military rule is pregnant with the expectations of the people that there will be a beginning of the Rule of Law. The transition from authoritarianism to democracy will be ambiguous if it is not founded on interim institutional changes on issues of Rule of Law.

The Head of the Junta, in his address to the Nation on 27 March 2001, said that the Military wants to take the country to democratic change and urged all parties to reduce the conflict and work for reconciliation. He said that it is important to lay down the foundations first (whatever he meant with foundations). By accepted definition, foundation means the basic fabric of society. Society is based on social contract between the ruler and the citizens. This social contract is based on the Rule of Law. It is the pillar on which the stability of society and state rests. The Head of the Junta has to search for the meaning of Rule of Law and ways for implementing it.

In the period between 1962 and 1974, when General Ne Win ruled with his Revolutionary Council, he ingeniously created a façade of Rule of Law. The dictators are in desperate need to maintain this façade. That is the paradox: the more brutal a regime is, the more it tries to camouflage its illegality. Reform is not a destabilizing force but a revitalizing factor in civil society. To be stable, a state must be legitimate. Transition can only give legitimacy to the state. State
institutions to check abuses of power of other institutions or actors are necessary to ensure that state officials comply with law. The most important system for this is the judicial system. Ne Win maintained the judicial system and the legal system during his reign while manipulating and emasculating all institutions. In the period between 1974 and 1988, another exercise in the undermining of Rule of Law was undertaken. All the characteristics of Rule of Law were introduced by the regime which was controlled by the Burma Socialist Programme Party (BSPP). The drama of a fake referendum, a sham Constitution, a worthless Parliament, fraudulent Judiciary and everything associated with outward forms of Rule of Law was staged. Rule of Law was shorn of its core contents and a ceremonial dress was foisted on Rule of Law. Be that as it may. The generals have to understand clearly that there can be no stability unless Rule of Law is made the foundation of the governance. Reforms in law, politics and state economy generate stability. Guns failed to bring stability for half a century. The only option is reform.

Legal reform is one of the best ways and an effective instrument to restore mutual trust. It is not a pressure strategy. It is a step which the Junta took themselves as far back as July 1991, when the SLORC announced the formation of a nine-member Law Scrutiny Central Board (Notification No. 33/91, dated 17 July 1991). The Board were given the power to recommend the amendment, abrogation or replacement of any existing law which would be found non-beneficial to state and people and not in conformity with the prevailing conditions. The Board, chaired by an Attorney-General, was reported to have recommended that 151 laws be repealed. Another 35 “old laws” and 78 “subsidiary laws” were repealed and replaced by new laws.

In 1994, SLORC’s representative assured the United Nations General Assembly that 68 laws existed in Burma to protect human rights. But neither was material provided to enable appreciation of the truth, nor was any access to information given. According to the memo (dated 21 March 1996) regarding human rights, submitted by the Burmese ambassador to the UN, the Board was scrutinizing laws to be either repealed or replaced. If the reforms of laws, as suggested here, are seen in that light, the process of change becomes more likely.

The Junta, whatever their motives were, did a promising thing to bring ceasefire agreements with 14 armed groups. This was an attempt to enable the dissidents to return to the legal fold, an environment which looks like a Rule of Law. Unfortunately, the Junta stopped half-way and did not pave the way for the 14 armed groups to participate in the process of shaping their economic and political systems.

If only the Junta had gone into the exercise of liberalization or reforms, it would have found that a new civil society was born which would have been against violence and/or civil war. In other words, the Junta would have achieved stabil-
ity and lasting solutions. All problems related to Rule of Law (namely a Constitution, federal autonomy versus secession, and sustaining development) could have been sorted out. The transition from an outlawed position to a legal fold has its own problems, which cannot be solved without recourse to Rule of Law. Due to this failure of the Junta, there is a total impasse now. Neither can the Junta rule nor are the armed groups able to self-govern. The situation is tragic and the root cause of this state of affairs is the flagrant disregard of the time-tested principle of Rule of Law.

It is argued that Rule of Law seems to gain its brightest lustre when it is under threat and there is a sense of danger surrounding its prospects for survival. It is least appreciated when it appears to be most secure.\(^1\) There can also be a conflict between justice and the rule of law, like in East Germany where civil-rights activist Bärbel Bohley said, “We wanted justice but got the rule of law”,\(^2\) which has almost become a dictum.

While the talks go on, the Junta must first and foremost begin with tackling the issue of Rule of Law. The core of Rule of Law is the absence of arbitrariness. To ensure that there is no arbitrariness governing the affairs of the state, the Law is to be made by representatives who are freely elected by the people. There must be accountability: those who govern must be amenable to law. There has to be independence of Judiciary to adjudicate the breaches of law and mete out punishment or compensation as the Law directs. When these tests are applied, it will be found that the laws passed by the Junta were ordained by just a few persons without any mandate from the people. It could be, that unless transition has not taken roots, it is not possible to initiate reforms to restore the Rule of Law. As a first step, laws that are Draconian and openly abusive have to be kept in abeyance forthwith. These laws are in the nature of Ordinances and not laws passed by a democratically elected Parliament.

This article will focus on some harsh laws which are clearly unreasonable. It is necessary to create a functioning, independent ministry of justice in Burma (because there is currently no such thing in Burma). Everybody has to have access to such a ministry. The ministry has to create a number of commissions to deal with core problems which afflict the issue of Justice. A genuine Rule of Law requests an overlapping, reinforcing, system of agencies of horizontal accountability.

This involves the creation or empowerment of a number of complementary institutions that are independent. First, there has to be a Law Commission (composed of judges, lawyers and journalists) to review and examine the current role and functioning of Law and Justice. Second, there has to be a Review Commission for all criminal cases to assess the miscarriage of Justice and to give recommendations. Third, there has to be a Human Rights Commission to monitor human rights violations. And fourth, a Consultative Assembly has to be put in
place to go into the questions of wide-ranging reforms for transition. If the pace of the current developments is accelerated and fast reforms are introduced, they may create problems and tensions among the participants in the reform process. Law reform is a great facilitator in this process. Immediate changes are necessary in the following laws – to begin with, these laws are to be kept in abeyance:

1. **The Towns Act of 1907 and the Village Act of 1908:** These directives are ambiguous, they allow the practice of forced labour and restrict free movement within Burma. All travel is subject to reporting requirements. Everyone must carry registration or identity cards. Every resident is obliged to register any guests who stay overnight with the local authorities. On failure one is liable to imprisonment. Such restrictions violate internationally accepted human rights standards and contravene Article 13 of the ICCPR. This issue has been debated but the situation is only worsening. These Acts have to be removed – at least they have to be kept in abeyance forthwith.

2. **The Judicial Law 5/2000:** The jurisdiction of the Supreme Court has to be widened to enable it to take cognizance of a petition of habeas corpus and enable it to decide in accordance with justice. The competence of the District Court to admit such petition and transmit it to the Supreme Court has to be enlarged. The power of the Supreme Court to conduct judicial training and training in human rights has to be vested. The Supreme Court must be empowered to create a Central Administrative Tribunal with jurisdiction to take up and decide cases related to service grievances of public servants.

3. **The Bar Council Law of 1950 (amended 1988):** The present law has to be amended and that of 1950 must be restored. Withdrawal of lawyers’ licences has to be canceled; lawyers should be allowed to practise.

4. **The Emergency Provisions Act (EPA) of 1950:** This law has been grossly abused. Its vagueness and ambiguity violate the minimum international standards laid down in respect to laws affecting the liberty of persons. Under this law, anyone who “violates or infringes upon the integrity, health, conduct and respect of State military organizations and government employees towards the government, or causes or intends to spread false news about the government, or causes or intends to disrupt the morality or behaviour of a group of people or the general public, is liable to imprisonment of up to 7 years”. Article 3 of this law prescribes the death penalty. The Emergency Provisions Act violates one of the fundamental tenets of jurisprudence: no one shall be subject to greater limitations for the purpose of meeting the requirements of morality, public order and general welfare. Article 29/2 of the Universal Declaration of Human Rights (UDHR) and article 5/10 of the International Covenant of Civil and Political Rights (ICCPR) have made provisions for protection of liberties and human rights. Other domestic laws have sufficient provisions to meet situations apprehended
in the Emergency Provisions Act. Sections 121 and 122/1 up to 130/b of the Burma Penal Code have adequately met with the provisions of clauses A and D (relating to High Treason) of the EPA. Even the colonialists did not have laws as Draconian as the EPA. The provisions for law, order and tranquility mentioned in clauses 5E and J are covered in sections 143 and 144 of the Penal Code. The Burma Penal Code has wide provisions for punishment of all sorts of crimes and offences. If they were considered as insufficient, some of its sections could be amended to meet extraordinary situations. In no case can special statutes be enacted. That goes for all statutes that are vague and arbitrary.

5. **The State Protection Act of 1975 (amended 1991):** Article 14 of this law enables imposition of wide-ranging restrictions on individuals. “Any person suspected of having committed, or is about to commit, any act which endangers the sovereignty and security of the State or public peace and tranquility, can be kept in detention without trial for a period of 5 years by executive order”. This is not subject of judicial review. This law also enables issuing restriction orders, such as keeping a person under house arrest for the same period of time. The Burma Penal Code and the Police Act have sufficient provisions to meet the situations apprehended in the State Protection Act, which is over-broad and violates all principles of jurisprudence. Article 9 of the International Covenant of Civil and Political Rights (ICCPR) has laid down the guarantees in relation to preventive detention.

During U Nu’s regime there was a Preventive Detention Act (also called the Public Order Preservation Act or POPA) but it had provisions of representation. It was also subject to writ remedy in the Supreme Court. The State Protection Act is against the tenets of human rights laws, and should be abolished. There is ample scope in the exiting Statutory Laws to cover the provisions of this law when it is abolished.

6. **The Unlawful Association Act of 1908 (amended 1957):** This is a law which was brought in by the colonial rulers. Later, the U Nu government amended it to meet the situation of civil war (then raging in rural areas). However at that time there was a Constitution with a Supreme Court and other democratic liberties. The continued application of the Unlawful Association Act has estranged the people and enabled law enforcement authorities to abuse the law. It is short of international human rights standards. It has conferred wide and unrestricted powers to the government to declare any association unlawful and impose restrictions on individuals arbitrarily. Armed opposition groups who have entered into cease-fire agreements have not been spared from the operation of the Unlawful Association Act.

7. **The Printers and Publishers Registration Law of 1962:** This law was introduced soon after the military coup of 1962 and was amended several times, lastly in 1989, widening the scope and increasing the severity of punishment. This law is the main instrument of censorship. Its sweeping provisions have
successfully stifled all dissent. It is an accepted norm in all civilized societies that there is freedom of thought. One can differ and express alternatives for progress and reforms, which is the very crux of growth and development. As a result of this law, flowering of thoughts and ideas have been stifled and society has come to stagnation. All books, magazines, periodicals, songs and films are vetted by a Press Scrutiny Board prior to publication and distribution. There is no judicial review of this board’s decisions.

This law is repugnant to the very principle that the regime has made a commitment to multi-party democracy. This law is bound to operate as a dead weight to the process of peaceful transition. This law must be removed, to enable the people to have a say in the matter of transition. A debate and discussion will result in a lasting outcome of the current talks between the military regime and Daw Aung San Suu Kyi and, eventually, with the ethnic leaders. There are provisions in the Burma Penal Code under which actions can be taken against people who indulge in derogatory writings and publications. As this law is no longer necessary, it should be kept in abeyance.

8. The Sangha Law 20/90, and SLORC Law 5/96: These laws allow interference of the Government in Sangha affairs. But if the Sangha sticks to the Code of Monastic Discipline, the Sangha will automatically be beneficial to the State. So the State need not interfere. These laws established a single Sangha to be officially approved. The Sangha however is traditionally regulated by its own regulations. The State has no right to lay down laws for it. This interference will also lead to interference in the affairs of other religions. SLORC Law 5/96 is against Article 21 of the Universal Declaration of Human Rights, as it has put a total ban on freedom of expression and the right to democratic participation.

9. Section 197/1 of the Burma Penal Code of 1861: This section provides that if a public servant is prosecuted, sanctions have to be taken by their executives. This has given virtual impunity to state officials, resulting in gross violation of laws.

10. The Burma Criminal Procedure Code of 1861: This law has to be amended in order to include some provisions of fair trial. Granting of Bail must be mandatory if the prosecution fails to frame a charge against the accused within 3 months of putting the accused in custody. In case of framing of charge, the accused has to remain in custody; the trial has to be concluded within a time frame.

11. The Jail Manual of 1894 (amended 1937): This has to be updated and all inhumane provisions removed from it. It has to be brought in line with the international standards.

12. The Ministry of Trade and Commerce Act 4/78: This act must be abolished as it made it compulsory for the farmers to sell large amounts of rice to
the government at prices far below the market value. If farmers refuse, their farms are confiscated.

13. **The Universities Act of 1924 (amended 1973):** This contains directives curtailing fundamental rights and has regimented education. Autonomy has to be restored to the academic bodies.

Steps are also needed in the international field to join relevant instruments for protecting and promoting human rights. Cooperation with UN agencies and other inter-governmental organizations needs to be normalized. Peaceful transition to democracy lies in the way it evolves. Continuity of the current governmental setup is not the sine qua non of transition. Structural reforms may appear to be destroying continuity. That is a misunderstanding, as it is bound to create confusion and alarm. Reforms will give a level playing ground to the opposition forces. If the talks fail, the reforms nevertheless will give hope. If the basics are being kept in view, there is no cause for apprehension: Rule of Law can never harm people. Wherever the law rules and human rights are assured of protection, the protection of ethnic, linguistic, and religious minorities is most likely to be assured and/ or implemented in a manner which accommodates majority and minority concerns through political and cultural reconciliation and a mutual guarantee of rights. Implementation of genuine Rule of Law strengthens human rights and sustains development.

**Endnotes**

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