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PANORAMA

INSIGHTS INTO ASIAN
AND EUROPEAN AFFAIRS

MYANMAR IN TRANSITION POLITY, PEOPLE & PROCESSES



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Myanmar in Transition

Polity, People and Processes



Konrad
Adenauer
Stiftung

CONTENTS

PREFACE	7
Myanmar in Political Transition	9
<i>Khin Zaw Win</i>	
 POLITY	
The Role of Parliament in Myanmar's Reforms and Transition to Democracy	19
<i>Moe Thuzar</i>	
The Appointments and Removals of Burmese Apex Court Judges since 1962 from a Comparative Asian Perspective	33
<i>Myint Zan</i>	
The Constitution, Emergency Powers and the Rule of Law in Myanmar ...	45
<i>Melissa Crouch</i>	
The Military and Political Liberalisation in Myanmar	57
<i>Maung Aung Myoe</i>	
 PEOPLE	
Governance and Legitimacy in the Myanmar Peace Process	67
<i>Ashley South</i>	
Religious Violence and the Role of the State in Myanmar	83
<i>Maung Zarni</i>	
Local Perceptions of Returning Exiles and their Roles in Shaping Myanmar's Future	97
<i>Kerstin Duell</i>	

PROCESSES

Economic Transition amid Ethnic and Resource Conflict: Myanmar's Economic Transition under the Thein Sein Government	111
<i>Anders Engvall and Soe Nandar Linn</i>	
Myanmar Civil Society's Role in Raising Social and Environmental Standards in a Country Growing on Extractives	121
<i>SiuSue Mark</i>	
Current Efforts of Environmental Decentralization in Myanmar	131
<i>Aung Soe Naing</i>	

Preface

Myanmar's political transition from military authoritarianism to an evolving parliamentary system has gained worldwide attention and praise. Local and international scepticism regarding the flawed national elections of November 2010 gave way to outright optimism once the by-elections of April 2012 brought representatives from the opposition party National League for Democracy into the bi-cameral national as well as two federal parliaments. In particular, Nobel Laureate Daw Aung San Suu Kyi's metamorphosis from long-term political prisoner into national parliamentarian was seen as key evidence of the government's sincerity in its reform agenda. Since then, the country has embarked on a journey towards fundamental change, encountering severe challenges, setbacks, and renewed criticism but also encouraging developments.

This *Panorama* edition analyses the focal areas of institution-building, principal actors and long-term processes that will hopefully lead toward a democratic, federal state. While development cooperation practitioners and experts in political transitions toil to draw up plans, programmes and budgets, Myanmar's government and parliaments face an impatient population demanding an end to underdevelopment, poverty, corruption, armed conflict and oppression of dissent, so that there can be focus on daily bread-and-butter issues.


The first part of *Myanmar in Transition: Polity, People and Processes* examines the progress being made in re-designing the polity while also identifying key obstacles to creating a balance of power and new state institutions other than the military.

The second part focuses on some of the principal non-state actors who have come increasingly to the fore: (1) ethnic minority leaders, including those from political parties and not just the armed groups, (2) a determined if weakened civil society that re-emerged from the predominantly underground networks of the past, (3) the Burmese diaspora that is returning to contribute to the transition in various capacities and, last but not least, (4) the grassroots populations, where the ethno-religious animosity between Buddhists and Muslims has burst into open violence and scorched earth. What are the roles, motives and dynamics of these diverse non-state and least-controllable actors in Myanmar's future?

The final part of this edition examines the long-term processes that will determine the success of Myanmar's political transition toward democracy and federalism. Sustained economic development and the accompanying (yet to be formulated) policy frameworks will underwrite the country's progress in all areas. True decentralisation, guaranteed in the constitution but so far insufficiently implemented, will distribute power more evenly between the central government and the sub-national governments, especially in the restive ethnic regions. The maintenance of an oversight of the extremely lucrative extractive industries by civil society organisations and watchdogs will limit environmental degradation and further public protests, provided that future

natural resource extraction will take place only after inclusive stakeholder dialogues. Myanmar's political history has come to a pivotal point where the country may win a lot if win-win solutions are sincerely sought and implemented by all state and non-state, domestic and international actors.

This selection of topics and authors seeks to stress the home-grown nature and indeed responsibility of Myanmar's changing fate that rests with the country's people and their government.

A handwritten signature in dark ink, reading 'Wilhelm Hofmeister'. The script is cursive and fluid, with the first name 'Wilhelm' and last name 'Hofmeister' clearly distinguishable.

Dr. Wilhelm Hofmeister
Regional Director

Myanmar in Political Transition

Khin Zaw Win

Myanmar's transition has been long in coming but it is now widely accepted that the swing of the political tide in Myanmar has taken a turn for the better. The 'Myanmar Spring' has elicited sighs of relief and words of welcome. The feeling among Western governments is that if the opening in Myanmar is carried to the full, the present government will be rewarded, democracy will be assured and the country will become prosperous. Indeed this is the belief-system of the past two decades reaching its climax. There is almost a sense of euphoria at the positive changes, current as well as imminent.

The whole country and lots of people abroad are very glad that the reforms and the transition are finally happening. It is like a breath of fresh air after being cooped up in the confines of dictatorship for nearly half a century. The only thing that those successive authoritarian regimes were good at was in perpetuating themselves. However, at this point in the middle of the semi-elected government's first term, one could pause and ask where the transition is leading to.

The overarching assumption is that a transition leads to something better, an overall improvement. However, this is not always the case. I can say unequivocally that I am glad the transition is happening. But am I comfortable with it? The honest answer would be: *No, I am not*. Am I worried then? Despite being a lifelong optimist, I would have to say: *Yes*.

The middle of 2013 marks the mid-term of the new government and offers a good vantage point from which to take stock. An independent, nonpartisan, and dispassionate look at what has taken place and what has yet to come.

As to the important question of who is driving the transition, none of the institutions in Myanmar have the capacity to direct, much less drive, the transition. And more challenges loom on the horizon.

There were transitions in the past—from a British colony to an independent nation, and then the descent into military dictatorship. For a country like Myanmar with its diversity, troubled history, problems and challenges, it is not an easy task to bring it all together. The Western tendency to portray Myanmar in stark whites and blacks does not help either. When I and a few others differed from this dualistic view and floated a greyish path between, there were emotional, even rabid, reactions. An inclination

towards a smooth and steady democratic succession might be a bit idealistic. I have to say that wild gyrations in political paths unnerve and concern me. Looking back, I don't think anyone was prepared for the impacts of the events of 1988. Impacts that are still to be felt today. That being the case, the present shifting in the wind warrants closer attention from both within and outside the country. It is gratifying to see signs of political activity returning to Yangon which more than any other town or city has witnessed so much in the span of half a century. This revival is happening at a measured pace, which may not satisfy some people. Rather than argue about how much or how little, this present juncture should be seen as a very good opportunity to draw lessons from the past and come up with something that is sober and considered and integrative. The buoyant mood of the present is certainly welcome, but at the same time it has to be mellowed and cautioned by the lessons of history.

The unplanned and undirected nature of the transition has to be mentioned. Everyone vaguely expected one but it is hard to ascertain how *ready* they were. The convening of the newly elected Hluttaws (parliaments) and the installation of the new government in early 2011 is part of the political transition. What followed owes much to this new state structure and particularly to the President. Accolades, openings and assistance have ensued, especially from the international community.

U Thein Sein was installed as President in March 2011 but he really came into his own in August. He was the dark horse who made good and has astounded people with his bold moves in rapid succession. However, his reforms are held back by weak implementation; it is good that he has become the torch-bearer of reform but he has to deliver as well. Having too many advisors is a distinct disadvantage. Having people who can speak the contemporary language *is* a development over the past. Thein Sein can be said to be doing a passable job. But while one set of problems is solved, another set arises.

A recent briefing from Transnational Institute/Burma Centre Netherlands states that

confidence has yet to be established that President Thein Sein—although feted in the West—has the leadership role and support to really usher progressive reform through.

For while the government, as a key element in its reform promises, has reached ceasefires with a majority of armed ethnic opposition groups, many areas remain highly militarized, the Tatmadaw still operates across the country on its own terms, and ethnic nationality peoples continue to feel excluded in both national life and the new politics of Nay Pyi Taw.

Equally critical, land loss and the increasing entry of outside and international business interests into the ethnic states are only exacerbating tensions at a sensi-

tive political time. Conflict continues, hundreds of thousands of minority citizens remain displaced, and ethnic rights are yet to be guaranteed. (*The Kachin Crisis: Peace Must Prevail*)

With the new government, there is a weak state with individuals and factions all jockeying for position and advantage. With the previous authoritarian regime, at least one knew where the power (and the corruption) lay. Now with power somewhat dispersed, there is a degree of confusion over authority, and one might add, more avenues for corruption. When you add the external players, it makes for a complicated game.

Besides that, just when the thaw began and people started reaching out to each other, the prospect of the 2015 elections has reared its head. There are indications that the election campaign has already begun.

CEASEFIRES AND PEACE

A nagging question and perhaps the most pertinent is whether Myanmar is transitioning towards peace. The ceasefire efforts to halt the fighting are important initial steps, but must be followed by genuine dialogue and negotiations to address the long standing political and economic grievances of ethnic minority populations in Myanmar including issues of cultural autonomy, natural resources, and power-sharing with the ethnic Bamar-dominated central government. In May 2013, talks were held between the government and the Kachin Independence Organization in Myitkyina to end the fighting that had erupted in June 2011.

What we have in this country is a collection of nascent nation-states with their respective own armies. This will remain so until the top Bamar leadership realizes that their country is multi-ethnic to the core, and establishing a future peace entails rethinking and reframing in depth. This has been the classic Achilles' heel of Bamar leadership of all stripes.

It is paradoxical that in a country as multi-ethnic and multi-cultural as Myanmar, most of the ethnic groups have not yet come to terms with this multi-culturalism. Observers tend to focus the blame on the Bamar Buddhist majority (not totally without reason) but if you probe deeper you see it in varying shades between the other ethnic groups too.

The state itself does not recognize this reality, however much lip service is paid to it in the constitution. Neither do political party leaders. The current ethno-religious violence in Rakhine state is but one aspect of long-simmering tensions breaking out into the open. This is a real test not only for the new government but also for Myanmar society as a whole in a democratic setting. The religious cosmopolitanism that had existed before 1962 can be said to be one of the casualties of the authoritarian era.

PARLIAMENT

Parliament is doing better than expected, despite the dominance of the Union Solidarity and Development Party (USDP) and the one-quarter presence of the military. The dynamics are interesting to observe. The Speaker of the People's Parliament or Lower House is a definite asset, although in being the central figure in a very new legislative body, he has become the target of various powerful interest groups.

One of the most pertinent points that I see about Parliament is the fact that MPs from different parties, backgrounds and persuasions are able to mingle and interact for the first time in half a century. There is a healthy interaction between government and parliament, where parliamentary committees are working like beavers with little or no resources, and everyone is taking his/her role and that of Parliament very seriously. Indeed, Parliament is seeking to out-do the government and sees itself as the leading light in democratization (which is as it should be). I would say parliamentarians are performing better than their affiliated parties. With two exceptions, Myanmar parties since independence have largely been weak. There is the possibility that Parliament shall become stronger and more active, while parties will take a long time to catch up.

The ethnic parties and MPs are not doing badly at all, given their diverse interests and newfound status. At the personal level, pivotal relationships are being forged. It seems somewhat disconcerting that ethnic political parties are not officially or directly involved in the current peace/ceasefire processes. This has started to change with the inclusion of Kachin MPs in the ceasefire talks with the KIO on 28 May 2013. The eventual link-up should be an interesting development.

ETHNIC NATIONALITIES

The ethnic nationalities question has been a running sore for 64 years, and the bogeyman and ostensible reason for the fateful military coup of March 1962. Although no one is proposing secession now, after a half-century of bitter conflict and innumerable lives lost, Myanmar appears to be facing the same ethnic dilemma that it had faced in the early 1960s. The formidable task of shaping a just and durable peace and rebuilding trust is perhaps the severest challenge confronting both the government and the country today.

Bamar predominance is a reality and all sides will have to live with it, and at the same time transform it into something more human. The preponderance of opinion both inside and outside the country favours democracy, peace, human rights and development. But let's just look at democracy and democratization. What we see now in Myanmar is actually majoritarianism, with some gestures towards the minorities. If we go on this way, it's going to be a replay of the 1950s. All the major parties are Bamar parties, and ethnic parties can be seen in a way as a reaction against this.

However, the first small steps are being taken to remedy this. Looking at the overall national picture, the Democratic Fraternal Alliance counts for far more than the NLD. The Democratic Fraternal Alliance is a small multi-ethnic bloc of MPs holding together in Parliament and making their voices heard above the march rhythm of the big parties.

Long-delayed nation-building has to be seen in a positive way—without the weaponry and the trumpets, without the fanfare and the garlands, committed to shaping a truly multi-ethnic society and nation for the good of all. Democracy can help but this is not assured, and that accounts for my concern at Bamar democracy and democratic leaders. There is a role out there for the taking, but how many Bamar leaders happen to know this, much less assume it?

THE POST-ELECTIONS NATURE OF THINGS

There is no doubt that everyone in Myanmar—including those from the military—want democratic change. The country is still encumbered by the effects and consequences of military dictatorship and the people avidly latch on to perceived sources of deliverance.

Again, as in 1990, many people including those in the government miscalculated with regard to the National League for Democracy (NLD). Confounding many pundits, the party won 43 out of 45 seats. What this proves is that the NLD led by Daw Aung San Suu Kyi is unparalleled at winning elections. But beyond that, it is an unproven, unknown quantity. What is called electoral democracy has become a widely-accepted yardstick in assessing countries' political systems. Myanmar/Burma was a democracy until 1962, albeit an inadequate one. Now with a democratic revival in the country after a hiatus of half a century, we need to move beyond the staging and winning of elections.

This is incumbent most of all upon the NLD, especially with the expectations and goodwill riding upon it. Many are willing to give that party the benefit of the doubt, considering the tribulations it has been through. The hope is that it will be able in the next two and a half years, to make the transformation from an opposition organization into a capable party sitting in Parliament and government. There will be a lot of help from friends abroad.

Myanmar has doubtless overcome a huge obstacle. Political progress had been held up for two decades because the polity could not get the first few steps right: those who are overly sanguine about prospects in the near future should dwell on this. Three developments have been hogging the limelight for the past year—the reforms of the new government, the NLD (read Daw Aung San Suu Kyi) re-entering formal politics, and the by-elections of April 2012. None of these mean much by themselves since they are starting points more than anything else. The real work—the perspiration part—begins now.

However, whether you like it or not, the present government is a USDP government. I for one do not think that this country has the luxury of waiting another two and a half years for the “deliverance government”. There is a good chance that the NLD could win big in 2015; yet that it will deliver on its promises is a huge assumption. If the USDP were a party in the sense that is usually understood, it would now be making an all-out effort to bring forth the results that the people fervently desire. Its chances for 2015 hinge on this.

In many ways, the by-elections of 1 April 2012 were a dress rehearsal for the 2015 general elections, and all eyes are on that year now. Among the parties, a good deal of rethinking, restructuring and re-strategizing should be going on. The incumbent government leadership would clearly still need the USDP if, for nothing else, as an election vehicle. The smaller, poorer parties are worrying about their very existence.

The remaining two and a half years to the conclusion of the present term of Parliament and government will be interesting times. With things shaping up the way they are, I have begun to wonder whether Myanmar is ready for a two-way contest between the USDP and NLD or for a two-party system for that matter. With Myanmar’s intrinsic diversity, one would expect and hope that a broader array of organizations would be better placed to represent the multiplicity of interests. One could even go so far as to doubt whether the two main parties truly profess pluralism. There is one country to Myanmar’s west—India—where all these issues show up in spades and where any amount of lessons can be learned.

A lot of attention has now turned to 2015, when the next general and presidential elections will be held. One needs to look beyond the prospects and preparations by the leading political parties. People seem to be neglecting the business of government in the present term—the here and now. There is too much emphasis upon winning elections and leadership figures, and not enough on democratization on the ground.

There is a burgeoning of partisan interests, not to mention self-interest. The more urgent question seems to be: how much a bigger slice of the pie can I get in 2015? Rather than: let us have a bigger pie for all to share equitably.

The five decades of military authoritarian rule engendered disastrous economic policies in addition to the political paralysis. The “socialist” economy in fact impoverished the country, and in particular the working classes and peasants. The new ambience has subjected these sectors of the labour force to even more severe pressures. The newly founded workers’ and peasants’ organizations are still very much in their infancy, but could well play a major role in the near future.

Myanmar has deep-seated problems which are beyond the capability of the “panacea” of democracy to cure. Those who are calling for more democratic freedoms should be reminded that these can exacerbate ethnic differences and tensions. Nor can a federal system be instituted (conjured?) out of thin air at once. If state-building has

lagged, nation-building has fared even worse. More democracy does not ensure that nation-building will make more progress.

Taking cognizance of the dismal lack of will in the state and much-lauded political parties, the burden settles—as with so many other things—upon civil society again. Much is said about the “deepening of democracy”. Realistically, there is little hope that it will be deepened by the present political parties.

Myanmar and her people have suffered greatly. The present political and economic openings and transition are undoubtedly welcome, but care must be taken to ensure that they do not impact negatively upon the people. Changeovers are fraught occasions and there is also the need to learn from the experiences of other countries. Myanmar does not have the institutions of higher learning that can act as intellectual “backstops”. Heeding the lessons of nearby Cambodia, the solutions and answers have to come from home. But the ferment domestically is not as strong as it should be.

The worry always is that the change might turn out for the worse. It could be asked whether the outbreaks of religious violence are already a manifestation of this trend. It would be time for Myanmar society to start looking at itself and question long-held beliefs instead of merely questioning the state. Myanmar is a weak state that has failed at authoritarianism; doubts are beginning to emerge as to how capable it can be at reform.

The term “imperial over-reach” has been used to describe part of the situation the US is facing now. Similarly, the term “reform over-reach” would be an apt description of the present Myanmar’s government’s predicament. It is not so much a matter of how broad or how fast the reforms are: it is about managing the change—and its consequences. But if it comes to a toss-up between change and no change, the choice is obvious for many. The current state of Myanmar is the result of decades of preserving the status quo and of extreme reluctance to change. The lack of capacity became apparent only when the reforms were actually launched. Bringing in droves of advisers, consultants and technocrats from overseas—even from the diaspora—is not the answer and might even do more harm than good. Most of those people would tend to prioritize their own interests before that of the country’s.

Will a mechanism to establish broad consultations and agreements amongst the different stakeholders in Myanmar be instituted before there is more conflict? It is time to do away with the depressing combination of power and greed that has held sway for decades. But old patterns and habits die hard. There are no easy answers, only messy ones. People are learning by doing. One of the first things to learn is that there is such a thing as contestation without violence.

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POLITY

The Role of Parliament in Myanmar's Reforms and Transition to Democracy

Moe Thuzar

INTRODUCTION

There is no denying that a country's legislative decision-making body, the parliament, has an important role in shaping the country's political development and progress. However, it is not uncommon for references on "government" to conflate political influence and power with that of the executive branch alone. In democracies, political power is shared between the executive and legislative branches of government on the basis of the country's constitution, which determines how the power is shared and the extent of influence over formulation of policies or laws¹. For new legislatures that have just emerged on the scene of government, the legislators themselves have the responsibility to build strong legislative institutions. This is done by the legislators asserting themselves in the law-making or oversight functions, or by effecting specific structural changes through constitutional amendment, legislation or rules of procedure².

This paper attempts to document some of the current efforts and circumstances by which the parliament in Myanmar is trying to assume a more influential role in the country's transition towards a "modern, developed, genuine democracy". Myanmar is making the transition faced with a daunting array of challenges inherited from past decades of mismanagement. Yet, the commitment of the executive branch—personified by President Thein Sein—to implement wide-ranging reforms also presents unprecedented opportunities for the transition to democracy. This commitment is, however, accompanied by executive "dominance" in implementing the reforms. This in turn has led to what can be characterised as a "gutsy" flexing of muscles by the parliament in asserting its role of oversight and legislation. This paper also attempts to assess the extent of parliament's "check-and-balance" role and the implications for further reform moves in Myanmar.

¹ Strengthening Legislative Capacity in Legislative-Executive Relations, Legislative Research Series – Paper #6, National Democratic Institute for International Affairs, 2000.

² Ibid.

MYANMAR REFORMS: A BRIEF BACKGROUND³

2011 saw unexpected new beginnings in Myanmar under the new Thein Sein administration which came into power after elections in 2010 that many around the world decried as a sham. The 2010 general election was not open to international observers or election monitors. The Union Solidarity and Development Association (USDA), which was established by the military junta in 1993⁴, transformed itself into the Union Solidarity and Development Party (USDP) in July 2010 and registered to participate in the November 2010 election. The National League for Democracy (NLD) boycotted the elections, and was subsequently deregistered as a political party⁵. The USDP won the majority of the parliamentary seats, and was sworn in on 30 March 2011. The State Peace and Development Council (SPDC) was dissolved on the same day.

With this as a backdrop, Thein Sein's reform-oriented inaugural speech met with scepticism. This soon turned to surprise as the new government took steps to introduce "genuine democracy" through an ambitious agenda of political and democratic reform. Announcements of changes in the political and economic environment of the country occurred almost every month.

Starting "peace" negotiations to resolve the decades-long ethnic conflict; reforming the economy with steps toward good governance; relaxation of restrictions on freedom of expression; the right for peaceful protests; the right for workers to strike; and re-introducing substantive dialogue between the government and Daw Aung San Suu Kyi, induced countries such as the United States (US), Britain, Australia and those in the European Union (EU) to seek closer engagement with Myanmar. Myanmar's decision, in September 2011, to suspend a US\$3.6 billion hydroelectric dam project with China, directed the world's attention to the reforms in Myanmar, especially the new administration's willingness to listen to the people.

The Association of Southeast Asian Nations (ASEAN) gave its support for Myanmar to take the ASEAN Chair in 2014. ASEAN also called for the immediate lifting of sanctions following the watershed by-elections on 1 April 2012. The by-elections saw the National League for Democracy (NLD) sweep a majority of the parliamentary seats (43 out of 44), and Aung San Suu Kyi became a member of parliament. Myanmar invited ASEAN and international observers—with media teams—to witness the polls in different constituencies. The by-elections were acknowledged to be freer and fairer

³ This section builds on the assessment of developments since March 2011 to date, first reflected in Moe Thuzar, "Myanmar: No Turning Back", *Southeast Asian Affairs 2012*. eds. Daljit Singh and Pushpa Thambipillai (Singapore: ISEAS, 2012), 203-219.

⁴ The State Law and Order Restoration Council (SLORC) formed the USDA on 15 September 1993, as its popular base.

⁵ Some senior members of the NLD formed a political party called the National Democratic Force to contest the elections, claiming that a boycott would play into the junta's hands.

than the 2010 elections. Thein Sein expressed his satisfaction at the transparency of the polls⁶.

The continued freedom of movement and speech of Aung San Suu Kyi; greater press freedom; the right to assemble and organise; the right for peaceful protests; successive amnesties since May 2011⁷ (including political prisoners), and the commitment made by the President during a speech given at Chatham House on 15 July 2013 that “by the end of this year, there will be no prisoners of conscience”⁸; a general amnesty offered to self-exiled Myanmar citizens “who had not committed serious crimes”; stabilisation of the (multiple) exchange rate and several other measures towards opening up the economy; and the NLD’s rejoining of the political process had the combined effect of aiding the reconsideration of various sanctions policies imposed on the country. Australia and Canada have eased visa bans. The US matched “action for action” in April 2012 by announcing:

- a fully accredited ambassador;
- an in-country USAID mission and supporting a normal country programme for the UNDP;
- private organisations in the US to pursue a range of non-profit activities from democracy building to health and education;
- lifting of visa bans on selected government officials and parliamentarians; and
- start of targeted easing of bans on exports of US financial services and investment⁹.

In April 2012, the EU suspended economic sanctions on Myanmar, then lifted all sanctions except the arms embargo the following year, in April 2013. On 11 July 2012, the US Treasury Department’s Office of Foreign Assets Control (OFAC) authorised “certain” US financial services and new US investments in Myanmar¹⁰. This was fol-

⁶ President Thein Sein said the polls were “conducted in a very successful manner” when asked by the Associated Press whether he thought the by-elections were free and fair. The president’s remark was the first by a top Myanmar official following the polls; he spoke on the sidelines of the 20th ASEAN Summit in Cambodia. (*Burma leader endorses byelection results* by the Associated Press, <http://www.cbc.ca/news/world/story/2012/04/03/burma-reaction-tues.html>).

⁷ There have been eight amnesties as of July 2013.

⁸ Mark Inkey, guest contributor for the *New Mandala* online, “Thein Sein Talks at Chatham House”, 17 July 2013. <http://asiapacific.anu.edu.au/newmandala/2013/07/17/thein-sein-talks-at-chatham-house/>

⁹ Statement by US Secretary of State Hillary Clinton, *Recognising and Supporting Burma’s Reforms*, 4 April 2012 (<http://www.state.gov/secretary/rm/2012/04/187439.htm>)

¹⁰ Fried Frank Harris Shriver and Jacobson LLP, Mario Mancuso, J.R. Kraemer and Robert P. Mollen. “US eases economic sanctions against Burma, opens door to US financial services and investment”, 13 July 2012. <http://www.lexology.com/library/detail.aspx?g=22c2d87d-9b55-49e3-8417-413aca0c86ac> (accessed 2 August 2012)

lowed in September 2012 by the easing of sanctions banning the import of goods from Myanmar, and a landmark visit by a sitting President of the United States in November 2012 when Barack Obama stopped over in Yangon on his way to the East Asian Summit in Cambodia, visiting both Thein Sein and Aung San Suu Kyi, and delivering a historic speech at Yangon University where he used “Myanmar” in greeting the country and her peoples.

It is significant that the countries that led the imposition of the sanctions regime on Myanmar for the past decades are now at the forefront of easing the sanctions and readily admitting that sanctions alone did not work in moving for change in Myanmar. As Myanmar continues to open up, the world’s attention is focused on her every move. World leaders, who have stated their support for the reform measures, have caveats on monitoring the further implementation of reforms so that Myanmar does not backslide.

The parliament in Myanmar also has an interest to ensure that the reforms do not lose headway, especially in the measures targeted towards economic development. When parliamentary sessions reconvened in 2013, the focus of legislators was on a set of laws aimed at opening up Myanmar’s once-insular economy. At the same time, presidential ambitions expressed by leading parliamentarians such as the present Speaker (for both houses) Thura Shwe Mann and Aung San Suu Kyi have given pause to Myanmar watchers, on the degree of cooperation, consultation and compromise between the branches of policy-making in government.

PARLIAMENT’S “CHECK-AND-BALANCE” ROLE

According to the 2008 Constitution, the highest legislative organ in Myanmar is the Pyidaungsu Hluttaw, or National Parliament, which, for the purposes of this paper, will be referred to as “Parliament”. Myanmar’s parliament is bi-cameral, comprising the People’s Assembly (Pyithu Hluttaw) or the lower house, with 440 seats; and the National Assembly¹¹ (Amyotha Hlyuttaw) or the upper house, with 224 seats. Both houses have 25 per cent of their representatives nominated by the military¹². There are also seven minority and seven local (Burman) legislatures under the national legislature.

From the start, the Parliament seems to be serving the check and balance role that is expected of it, particularly in view of the government’s commitment for “good governance”. Several myths about the role of the Parliament have been debunked. For example, the national legislature remains more active than the provincial legislatures and has shown that it is not a rubber-stamping authority. The role of the military-appointed members of parliament is another interesting factor. Contrary to expectations

¹¹ Also referred to as House of Nationalities as it is formed with representatives from the different regions and states.

¹² The 2008 Constitution states that the Commander-in-Chief of the Defence Services nominates these military representatives.

that they would vote in a bloc against opposition motions, military legislators supported a motion in the lower house calling on the president to grant a general amnesty for political prisoners. Interviews with members of parliament (MPs) revealed that after some initial mistrust, relations are improving between elected and military representatives, and the two groups engage in discussions on issues of shared interest in the corridors of Parliament. At local government levels, the regional commanders have not intervened in local legislation and administration, despite their past positions of power and authority in the various regions.

Writing on Myanmar's nascent parliamentary system for the *New Mandala* in April 2011, guest contributor Kyaw Kyaw (2011) observed that since Parliament began hearing questions and proposals from the MPs on 9 March 2011, the first sessions of Myanmar's new Parliament saw an unprecedented level¹³ of disclosure, if not yet complete accountability, from the then military-appointed government ministers. Ministers were probed on possible amnesty for prisoners; the introduction of compulsory military service; prevalence of tax evasion; lack of availability of loans for small and medium enterprises; manipulation of commodity prices; excessive cost of mobile phones; low internet connectivity; sale of fuel on the black market; prevalence of gambling; conducting a national census; costs of middle and high school education, and the raising of pensions and government salaries¹⁴. Many of these questions have found their way into new legislation or reform measures, including the government's Framework for Social and Economic Reforms launched in January 2013. An interesting instance of accountability exercised by Parliament is the question posed to the then Minister of Electric Power 2 U Khin Aung Myint, who was also an MP and the speaker of the upper house at the time. In his capacity as cabinet minister, his response to Parliament on the status of electricity sufficiency in Chin State was tantamount to a public admission that Chin State's total electricity generation was woefully below the needs of the people residing in the state¹⁵. Most of the ministers' answers to MPs' (mainly from the opposition parties) questions were mainly a "litany of facts". But it is noteworthy that these factual responses were nonetheless confirmations from the military junta of the deteriorating conditions in the country. A heady development in the early days of Myanmar's new Parliament, in other words. This was not picked up enough, in Kyaw Kyaw's view, by the mainstream and exile media abroad.

A feature of democratic transition is the atmosphere of debate and discussion that accompany decision-making processes, including in the legislature. Such debate continues in the parliamentary committees. However, the parliamentary committees are

¹³ Unprecedented in view of the past several decades.

¹⁴ Kyaw Kyaw, guest contributor for the *New Mandala* online, "Burma's parliamentary system explained", 1 April 2011, <http://asiapacific.anu.edu.au/newmandala/2011/04/01/burmas-parliamentary-system-explained/>

¹⁵ Khin Aung Myint's answer highlighted that less than one in ten people in Chin State have simultaneous access to electricity.

largely chaired by USDP MPs. There are a few exceptions. The committee on the Rule of Law and Peace and Stability under the People's Assembly is chaired by Aung San Suu Kyi who leads the National League for Democracy. For the committees under the National Assembly, the committee on Citizens' Fundamental Rights, Democratic Rights and Human Rights Committee is chaired by U Aye Maung of the Rakhine Nationalities Development Party; the chair of the United Nations, ASEAN, AIPA and International Relations Committee is military-appointed; and the Pa-O National Organisation (PNO)'s U Nay Win Tun chairs the Mines and Natural Resources Committee. USDP MPs chair all three committees under the National Parliament.

Table 1. Committees under the People's Assembly¹⁶

#	Committee	Chairman	Party
1.	Bill Committee	T Khun Myat	USDP
2.	Public Accounts Committee	Thurein Zaw	USDP
3.	Rights Committee	Nanda Kyaw Sar	USDP
4.	Government's Guarantees, Pledges and Undertakings Vetting Committee	Win Sein	USDP
5.	Representatives Vetting Committee (dissolved 11 January 2013)	Maung Oo	USDP
6.	Citizens' Fundamental Rights, Democracy and Human Rights Committee	Htay Oo	USDP
7.	National Race Affairs and Internal Peace-Making Committee	Thein Zaw	USDP
8.	Banks and Monetary Development Committee	Aung Thauang	USDP
9.	Planning and Financial Development Committee	Soe Tha	USDP
10.	Farmers, Workers and Youth Affairs Committee	Tin Htut	USDP
11.	International Relations Committee	Hla Myint Oo	USDP
12.	Economic and Trade Development Committee	Maung Maung Thein	USDP
13.	Transport, Communication and Construction Committee	Thein Swe	USDP
14.	Sports, Culture and Public Relations Development Committee	Aye Myint	USDP
15.	Agriculture, Livestock Breeding and Fishery Committee	Soe Naing	USDP
16.	Investment and Industrial Development Committee	Htay Myint	USDP
17.	Resources and Environmental Conservation Committee	Lun Thi	USDP
18.	Health Promotion Committee	Kyaw Myint	USDP
19.	Education Promotion Committee	Chan Nyein	USDP
20.	Judicial and Legal Affairs Committee	Aung Ko	USDP
21.	Public Affairs Management Committee	Maung Oo	USDP
22.	Social Development Committee	Maung Maung Swe	USDP
23.	Reform and Modernization Assessment Committee	Aung Thein Lin	USDP
24.	Water Transportation Development Committee	Kyi Min	USDP
25.	Legal Affairs and Special Affairs Assessment Commission	Nanda Kyaw Sar	USDP
26.	Rule of Law and Peace and Stability Committee	Aung San Suu Kyi	NLD

Source: Altsean Parliament Watch

¹⁶ <http://www.altsean.org/Research/Parliament%20Watch/Legislative/Peoples%20Assembly/Committees.php>

Table 2. Committees under the National Assembly¹⁷

#	Committee	Chairman	Party
1.	Bill Committee	Mya Nyein	USDP
2.	Public Accounts Committee	Thein Win	USDP
3.	Rights Committee	Mya Nyein	USDP
4.	Government's Guarantees, Pledges and Undertakings Vetting Committee	Aung Tun	USDP
5.	Representatives Vetting Committee	Than Swe	USDP
6.	National Races Affairs Committee	Paung Nap	WDP
7.	Citizens' Fundamental Rights, Democratic Rights and Human Rights Committee	Aye Maung	RNDP
8.	Education, Health and Culture Committee	Khin Shwe	USDP
9.	Women and Children Affairs Committee	Mya Oo	USDP
10.	Public Complaints and Appeal Committee	Aung Nyein	USDP
11.	United Nations, ASEAN, AIPA and International Relations Committee	Col Maung Maung Htoo	Military-appointed
12.	Farmers and Local and Overseas Workers Affairs Committee	Myint Kyi	USDP
13.	National Planning Committee	Zaw Myint Pe	USDP
14.	Monetary and Customs Committee	San Tun	USDP
15.	Commerce Committee	Nan Ni Ni Aye	USDP
16.	Financial and Legal Affairs Commission	Aung Tun	USDP
17.	Non-governmental Organizations Committee	Win Naung	USDP
18.	Mines and Natural Resources Committee	Nay Win Tun	PNO

Source: Altsean Parliament Watch

Table 3. Committees under the National Parliament¹⁸

#	Committee	Chairman	Party
1.	Joint Bill Committee	Mya Nyein	USDP
2.	Joint Public Accounts Committee	Mya Nyein	USDP
3.	Representatives Vetting Committee	Maung Oo	USDP

Source: Altsean Parliament Watch

Private and foreign media coverage of parliamentary sessions was allowed since October 2011. State media coverage of proceedings has now been elevated into a dedicated television channel, starting September 2013¹⁹. All the bills presented, discussed and enacted are also shared extensively in the mainstream media. With the emerging media freedom, private dailies and journals also provide commentaries to these documents.

¹⁷ <http://www.altsean.org/Research/Parliament%20Watch/Legislative/National%20Assembly/Committees.php>

¹⁸ <http://www.altsean.org/Research/Parliament%20Watch/Legislative/National%20Parliament/Committees.php>

¹⁹ Ministry of Information's status report to the Mid-Term Review of the ASEAN Socio-Cultural Community (ASCC) Blueprint.

Since 2011, Parliament has approved close to 30 laws²⁰. Among the most significant approved in 2011 were the labour-related laws paving the way for workers' rights to organise, the law on peaceful assembly, and the law amending the previous Political Party Registration Law. This latter piece of legislation was an illustration of the executive and the legislature working towards a common goal: to facilitate the re-entry of the National League for Democracy (NLD) into the country's political process, and effect a political reconciliation of sorts.

In 2012, 14 laws and their attendant Rules were debated and approved. The most attention-grabbing was the Foreign Investment Law (FIL), approved in November 2012, after much back and forth passing of drafts between the President and the Parliament. The crux of the matter seemed to centre around MPs' concern over the provisions in the FIL that signalled a "radical departure" from the former insular and protectionist policies. In addition to providing investment incentives to foreign investors, the new FIL also grants the Myanmar Investment Commission a large amount of flexibility in granting investment contracts. A Philippine commentator has observed that constitutional provisions in the Philippines would restrict such provisions²¹. Myanmar MPs' concern over the FIL was largely protectionist. Though MPs are prohibited by law from speaking of parliamentary proceedings, businessmen voiced their concern over the incentives, which they felt would affect their competitiveness as they were "not ready to play on a level playing field"²². Some businessmen even raised their worries over the FIL to the influential lower house Speaker Thura Shwe Mann. This prompted much discussion in urban circles on conflict of interest issues²³, and Myanmar's overall state of readiness for meeting regional economic integration goals specified under the ASEAN Economic Community.

The FIL was approved at a time when tensions were still simmering a mere two months after an overwhelming majority (i.e., more than two-thirds) of MPs from all parties voted to impeach all nine judges of the Constitutional Tribunal. The judges, all appointed by the President, were felt by the MPs to be curtailing the parliamentary committees' reach on the issues raised by Parliament. This feeling was exacerbated

²⁰ For a comprehensive listing of all approved and pending laws and bills, please see update as of 2 July 2013 at Altsean Parliament Watch, <http://www.altsean.org/Research/Parliament%20Watch/Laws.php>. For full text of the documents, please visit the Burma/Myanmar Online Library, www.burmalibrary.org

²¹ Gerardo Sicat for the *Philippine Star* online edition, "Myanmar's new Foreign Investment Law", updated 12 June 2013. <http://www.philstar.com/business/2013/06/12/952886/myanmars-new-foreign-investment-law>

²² Aung Hla Tun for Reuters, "Myanmar parliament's agenda: reshaping the economy", 3 July 2012 http://articles.chicagotribune.com/2012-07-03/news/sns-rt-us-myanmar-parliamentbre862068-20120702_1_anti-corruption-law-foreign-investment-investment-law

²³ The military MPs who had business interests were seen as trying to protect their own interests against the more investor-friendly instincts of the president. See *The Economist* article of 3 November 2012 "Myanmar's Parliament: Power Grab" from the print edition. <http://www.economist.com/news/asia/21565636-derided-not-long-ago-gutsy-parliament-now-challenging-president-power-grab?fsrc=rss>

after the Tribunal ruled (in March) that the status of the parliamentary committees were not of Union, or state, level²⁴, thus effectively diluting the impact of the committees' recommendations and requests on the conduct of the executive branch. Aung San Suu Kyi had joined other lower house MPs in signing the petition for impeachment. Speaker Thura Shwe Mann expressed his view that the Tribunal's decision "affected the ability of the lawmakers to carry out their duties"²⁵. Analysts observe that the impeachment move—which involved MPs from the ruling Union Solidarity Development Party (USDP)—illustrates more the presidential ambitions of Thura Shwe Mann rather than a genuine desire to liberalise Myanmar (which is attributed to the NLD). Their Sein's call for MPs to resolve the dispute by amending the Constitution rather than impeachment went unheard.

Nevertheless, Parliament has now made a move for constitutional review, albeit in the context of reviewing the provisions of the 2008 Constitution on allowing ethnic minorities increased self-rule, which could lead to greater autonomy and, possibly, a federal system. The USDP's proposal in March 2013 to set up a committee to review the constitution was approved unanimously. Aung San Suu Kyi's statement made at the World Economic Forum on East Asia hosted by Nay Pyi Taw in June 2013, on her interest to run for president in the 2015 election has prompted speculation whether the constitutional review commission would take up this issue. Currently, the eligibility criteria for presidential and vice-presidential candidates require that they are citizens of Myanmar as well as have no family members who are subjects or citizens of a foreign country. This provision currently bars Aung San Suu Kyi from being considered for the presidential electoral college²⁶ even if the NLD were to win a landslide victory in 2015.

However, the committee's work will progress slowly, despite the deadline it has set itself: to submit a report of its findings to Parliament by end-2013²⁷. After the announcement in March 2013 for the formation of the commission, the actual composition was agreed only in late July. The 109-member committee comprises 50 USDP members, 25 representatives from the military, seven members of the NLD, and five representatives from ethnic-based parties²⁸. It is not clear at the moment of writing whether the committee will take on additional areas or provisions to review, including the presidential eligibility criteria and the question of introducing proportional representation.

²⁴ "Nine Judges Quit in Constitutional Tribunal Row", *Irrawaddy* online, 7 September 2012. <http://www.irrawaddy.org/archives/13479>

²⁵ *Ibid.*

²⁶ Article 60 of the 2008 Constitution states that the "President shall be elected by Presidential Electoral College".

²⁷ "Constitutional Review Report to Go To Parliament Before Year-End", *Eleven Myanmar News* online, 24 August 2013. <http://elevenmyanmar.com/politics/3167-constitutional-review-report-to-go-to-parliament-before-the-year-end>

²⁸ <http://www.rfa.org/english/news/myanmar/charter-07262013192623.html>

Observers view the latter as a move to ensure the USDP and some smaller parties seats in the 2015 elections, which might otherwise be swept by the NLD.

Even when the findings and recommendations of the committee are accepted by 75 per cent of the Parliament, constitutional amendments require putting the recommendations to a national referendum for agreement.

In the meanwhile, Parliament continues discussion and debate of several bills for enactment into law. It has just passed the telecommunications bill (on 28 August 2013)²⁹, which was still under debate when the executive granted telecommunications licences in late June to two foreign companies: Norway's Telnor and Qatar's Ooredoo. Also recently passed is a bill drafted by the Ministry of Agriculture, Livestock and Fisheries on protecting farmers' rights.

A controversial bill that is proving more of a political football than the FIL is the draft media bill. The current draft restricts the rights of journalists to gain access to information on matters of "public and national security"³⁰, and occasioned an outcry from local and international media. However, in an illustration of the media's newfound influence, the government (Ministry of Information) has "backed off" from pushing the bill further and is now engaged in consultations with journalists³¹. The upper house's bill committee has also called for amendments to the press bill³².

Another document that occasioned international outcry, and with a potentially explosive outcome should it reach Parliament, is the draft marriage law written by senior Buddhist monks, proposing restrictions on marriage between Buddhist women and men of other faiths. While Buddhist leaders assert that they have collected three million signatures in support of the bill, female MPs have expressed their concern on the document reaching Parliament. Only MPs and government ministries can introduce draft legislation for further discussion in Parliament. At present, no one has committed to submitting the document to Parliament³³.

All these developments signal that deliberative democracy is at least alive and well under the representative system exercised in Myanmar today. Assessing the Myanmar Parliament's role of representation, lawmaking and oversight, the emphasis seems to

²⁹ "Burma approves long-awaited telecoms bill", AFP news carried on Democratic Voice of Burma online, 29 August 2013, <http://www.dvb.no/news/business-news/burma-approves-long-awaited-telecoms-bill/32005>

³⁰ Kavi Chongkittavorn, "Myanmar's draft media law casts shadow on press freedom", *The Nation*, 4 March 2013, <http://www.nationmultimedia.com/opinion/Myanmars-draft-media-law-casts-shadow-on-press-fre-30201146.html>,

³¹ Aye Aye Win, "Myanmar backs off proposed press law following criticism", Associated Press, 18 March 2013. <http://www.ctvnews.ca/politics/myanmar-backs-off-proposed-press-law-following-criticism-1.1200021>

³² <http://elevenmyanmar.com/politics/3174-parliamentary-bill-committee-calls-for-press-bill-amendment>, *Eleven Myanmar News* online, 24 August 2013

³³ Cherry Thein, "Female MPs call for review of draft marriage law", *Myanmar Times*, 28 August 2013 www.mmtimes.com/index.php/national-news/7988-women-mps-call-for-review-of-draft-marriage-law.html

be more on oversight in today's Myanmar where corruption and governance issues are increasingly becoming a focus. The administration has appointed a high-level anti-corruption board headed by Vice President Dr Sai Mau Kham, "as part of the efforts for good governance and clean government"³⁴.

In the exercise of its formal powers, the above examples show that in the thirty odd months since it first convened, Myanmar's Parliament has considerable technical capacity (considering the relative inexperience of the MPs) in exercising their powers effectively in the following areas:

- introducing legislation, including those with fiscal cost;
- over-riding executive vetoes (example, the FIL);
- approving cabinet officials;
- compelling the executive to provide information;
- censuring government ministries and other officials;
- approving/disapproving the budget, and spending; and
- power to remove executive-appointed bodies (the impeachment of the Constitutional Tribunal).

Ongoing parliamentary strengthening efforts focus on building parliamentary capacity in staffing and infrastructure (e.g., setting up library resources). The parliamentary committees also serve as good strengthening mechanisms for MPs to improve their managerial and information needs. However, for Myanmar's Parliament to continue its assertive role, building new capacities becomes equally important as building internal capacity. In the remaining months to the general elections in 2015, MPs will also need to reach beyond the walls of parliament and improve the ways they engage and communicate with, and listen to, civil society. Myanmar's parliamentarians are learning to tap the expertise of existing civil society—including the nascent think tanks—for policy inputs and advice.

In summary, the political influence of Myanmar's Parliament on the country's reform process is undeniable. Greater press freedom and an increasingly active civil society provide useful feedback mechanisms that serve as a check to Parliament's check and balance role in Myanmar's democratisation.

³⁴ "Naypyitaw unveils anti-corruption board" written by *Mizzima News*, 9 January 2013. <http://www.mizzima.com/business/corruption-in-burma/8701-naypyitaw-unveils-anti-corruption-board.html>

WHITHER THE PARLIAMENT?

Going by the forms of democracy that were maintained and acclaimed by the leaders of the former Burma's Anti Fascist People's Freedom League (AFPFL) in the post-1948 "golden era" of the country's democratic past, Myanmar today can see at least three out of four slowly re-emerging. These are: freedom of speech; a strong, free press; and a democratic opposition. The importance of the fourth requirement, the rule of law and "impeccable courts", cannot be denied, especially in view of the events leading to the resignation of the constitutional tribunal. This points to the necessity of the rule of law, and, more importantly, an understanding by the people of the role law plays in their daily lives. The constitutional tribunal impeachment in 2012 highlights an important point, however. Myanmar has experienced—and managed—constitutional issues that even mature democracies struggle with.

Myanmar's Parliament today is in the midst of reviewing, amending and drafting new laws that are meant to address the country's imperatives for reform and integration into the global community. It is important that the debate and discussions around these legal changes are also accompanied by a deeper awareness of the role of law (in addition to the oft-repeated importance of the rule of law) in Myanmar society today.

The situation of communities in conflict areas, the Rohingya issue, and the related religious animosities cannot be ignored in the emerging discourse on human rights in Myanmar. Transitional justice processes are only beginning to develop in the country, to address the concerns of multiple groups that were uprooted at different times and for different reasons. These groups include those in the Thai-Myanmar border area, and those displaced by armed conflict and by large-scale infrastructure projects. The recently established Myanmar Peace Centre and the independent investigation commission³⁵ formed expressly to probe into the communal violence in Rakhine State, have had their work cut out in assessing the situation on the ground and in balancing and managing expectations all round.

As a member state of ASEAN, Myanmar also has the responsibility to comply with the provisions of the ASEAN Charter (which it has ratified). Several ASEAN commitments—especially those with regard to economic integration—require domestic legislations in order to be complied with or implemented fully. While Myanmar is not the only ASEAN member state that has not translated all her regional commitments into domestic legislation, the present atmosphere of change and renewal in Myanmar provide an opportune window to intensify the pace of such considerations. This would also assist Myanmar in meeting her international commitments in social and human development under the United Nations framework. This is another area where the Parliament can take a proactive role in lawmaking.

³⁵ <http://asiancorrespondent.com/87841/burma-president-sends-off-an-investigation-commission-to-the-rakhine-hot-water/>

Key assumptions underlying the above observations are that the relations between the executive and the legislative will not escalate further in tension, and that the military will not interfere with the reform process. The military has authority over internal security and can step in to address perceived “threats” to national security. The military MPs can also oppose constitutional changes. Another key assumption is that the peace negotiations with ethnic armed groups continue to make headway. Both the executive and legislature will have to counter and allay suspicions from the ethnic groups (and ethnic political parties) that the reforms are primarily Burman- and elite-centric. Finally, implementation of the reform measures will need to be more participatory and consultative, especially if they are to benefit the people as intended³⁶. At the core of all this is the assumption that the polity in Myanmar have sufficient awareness and understanding of the role—and rule—of law and that the organs of state have the capacity—and will—to apply its letter and spirit.

The fragile state of democratic transition in Myanmar is already facing issues that confront mature democracies. Frictions are emerging, much of it stemming from the mismatch in expectations of the role and responsibilities of each branch of government.

Proponents and critics of Myanmar's reforms continue the debate on whether Myanmar will move forward on the path to democracy, and emerge (as Indonesia has in recent years) as a nascent democracy with necessary institutions in place within the next ten years.

CONCLUDING THOUGHTS

Writing in 1958 for “Perspective of Burma”, the Honourable U Thant (who later became United Nations Secretary General) mused on the nation-building process that the then ten-year-old democracy was going through. His observations find an eerie parallel in the pronouncements being made on reforms in Myanmar today. U Thant in 1958 stated: “Today a whole new nation is being built in Burma—politically, socially, and economically. Part of the task is physical: to repair war damage and create enough industrial capacity to improve living standards and make our country self-sustaining; an even greater part is social and psychological: to educate a people long held down by colonialism in the ways of democracy and self-development. [...] Progress in some fields has been delayed by shortage of funds and unsettled conditions. But Government and people alike are determined that a new and better nation will arise in Burma in the shortest possible time.”

Substitute “military rule” for “colonialism” and the narrative might be about Myanmar and her reforms today. The understanding of “Government” should also encompass both executive and legislative.

³⁶ Moe Thuzar, “The 2012 By-Elections and the Future for Political Parties in Myanmar”. Unpublished paper written for a planned ISEAS publication on political parties in Southeast Asia.

Bright though Burma's dawn of democracy was at the beginning of her independence from the British in 1948, Ne Win's military coup of 1962 soon dimmed hope of its further flourishing in the 20th century. Now, at the beginning of the 21st century, Myanmar is experiencing a new dawn. There are still teething problems as Myanmar's executive and legislature, government and civil society, and ruling and opposition parties, all strive to determine the boundaries of dialogue and debate. However, democracy encourages people to be themselves. It gives wider space for discussion, of which there is much in Myanmar today. Parliament's contribution to, and participation in this space, will contribute to its transformation in tandem with the country's transition to greater positions of influence and effectiveness.

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The Appointments and Removals of Burmese Apex Court Judges since 1962 from a Comparative Asian Perspective

Myint Zan

INTRODUCTION

Developments in Burma (officially renamed first as “Union of Myanma” on 27 May 1989, then to “Union of Myanmar” on 18 June 1989 and with the coming into operation of the *2008 Constitution* on 30 March 2011, “Republic of the Union of Myanmar”)¹ since about mid-2011, has attracted, at least generally, the praise of foreign observers and many Burmese. Some even enthused about President U Thein Sein’s government’s “stunning reforms”.

This Chapter would argue that what has been called “stunning reforms”² has not actually taken place in, or at least not spilled over into, the judicial field—especially with regard to the judiciary’s independence. This Chapter focuses mainly on the removal and appointment of judges in the Burmese apex courts since 1962, with comparison and comments on the removal of apex courts judges (including a Lord President and three Chief Justices respectively) from four of Burma’s neighbouring countries of Malaysia, Pakistan, Philippines and Sri Lanka.

¹ This Chapter, in making a political point, will generally use the words *Burma* and *Burmese*, albeit in a mixed manner in that reference to the (post-1988) Myanmar judiciary is mentioned as such mainly in order to distinguish from the previous judiciary and apex courts, especially the judiciary of the pre-1962 era.

² For example, one among many praises, Patrick Boehler, “Behind the Story: Time’s Hannah Beech on Burma’s President Thein Sein”, *Time*, January 10, 2013. See also, Adam Dean, “A Most Unlikely Liberator in Myanmar”, *New York Times*, March 15, 2012.

A. THE ABOLITION OF THE BURMESE SUPREME COURT AND ARREST AND DETENTION OF THE THIRD CHIEF JUSTICE OF INDEPENDENT BURMA IN COMPARISON WITH OTHER LESSER AND LESS IMPACTFUL ATTACKS ON THE JUDICIARY IN BURMA'S NEIGHBOURING COUNTRIES

On 2 March 1962, the Burmese military, led by the late General Ne Win, took over power from the democratically elected government of former Prime Minister the late U Nu. President Mahn Win Maung, Chief Justice U Myint Thein (1900-1994) and most of the Cabinet Ministers were arrested and held in detention. After six years in detention, Chief Justice U Myint Thein was released on 27 February 1968.

On 30 March 1962, the Chairman of the Revolutionary Council, General Ne Win, issued a decree abolishing the two apex courts—the Supreme Courts and High Courts of Burma.³ He also announced that the termination of the services of five of the Supreme and High Court Justices, including Chief Justice U Myint Thein, was “effective from noon on 31 March 1962”.⁴ A new apex court by the name of “Chief Court” was formed with the “remaindered” (i.e., those who were not detained or whose services were not terminated) Justices of the former Supreme and High Courts together with some new appointments.

In contrast to, for instance, the initial dismissal or (eventually unsuccessful attempt to dismiss) the Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry, by the former President of Pakistan, General Pervez Musharraf⁵, there were no protests⁶ from either the then Burmese Bar Council or the remaindered apex and other Burmese courts personnel of that time.

The 1988 judicial crisis in Malaysia which led to the removal of six apex court judges, including the then Lord President Tun Salleh Abbas, provoked domestic and

³ Under the *1947 Constitution of the Union of Burma* (in force from January 1948 to March 1962) the two apex courts were the “Supreme Court of the Union” and the High Court.

⁴ The announcement, including the English translation, of the decree of General Ne Win can be found in all the newspapers including *The [Rangoon] Guardian* and *The [Rangoon] Nation* on 31 March 1962. The author has seen the decree in the Burmese language newspaper *Ludu* published in Mandalay of 31 March 1962. The Chief Justice and a few Supreme Court Justices were detained without any charge or trial or even under “any law in force” at those times.

⁵ See for example, Aljazeera, “Pakistan’s Musharraf placed on home arrest Former military ruler is remanded in judicial custody over claims he illegally detained judges in 2007”. (April 20, 2013) <http://www.aljazeera.com/news/asia/2013/04/2013419425176901.html> (accessed 8 June 2013).

⁶ See also another contemporaneous report of judges and lawyers protesting against the emergency rule by Musharraf in *Daily Times*, “Pakistan defies US with new crack down” (November 09, 2007) <http://www.dailytimes.com.pk/default.asp?page=2007/11> (accessed 8 June 2013).

international protests as well as academic, professional and journalistic comments.⁷ In contrast, the arrests and removal of not one but three former Supreme Court justices, including the Chief Justice of Burma, elicited much fewer expressions of international or domestic concern, even from contemporaneous reports. The removal of apex court judges occurring a few decades apart included the then-head of the apex judiciaries in Burma in 1962, in Malaysia in 1988 and in Pakistan between 2007-2009⁸. The basis for comparison here is that these removals occurred in what can be described in part as common law-based legal systems

In both judicial crises in Malaysia in 1988 and in Pakistan from 2007-2009, procedures for impeachment and removal were followed in that at least some allegations of judicial misconduct against the heads of the apex courts were made. In the Malaysian case, a tribunal was formed. The Pakistani Chief Justice was mainly reinstated due to his large-scale support from Pakistani lawyers as well as from many Supreme Court Judges of Pakistan.

In the case of Burma, the issuance of a decree in 1962 “terminating the services” of five Supreme and High Court Justices by the coup leader General Ne Win was all that was necessary to give effect to their removals. In contrast, in Malaysia in 1988, then Prime Minister Dr. Mahathir Mohamad, and in Pakistan in 2007, then President Pervez Musharraf, had to go through certain processes to effect the removals. Subsequently in both Malaysia and Pakistan, at least a partial restoration of the independence of the judiciary took place.⁹

Likewise, even though Pakistan has had a succession of military governments, Pakistani military governments neither abolished the nation’s apex courts in the

⁷ See for example, Tun Salleh Abbas and K.Das, *May Day for Justice* (New York Magnus Book, 1989), Raja Addis Addruse, *Conduct Unbecoming In Defence of Tun Mohd. Salleh Abbas* (Kuala Lumpur Walrus, 1990).

⁸ The initial removal of Chief Justice Chaudhry took place on March 9, 2007 and he was reinstated as Chief Justice on 22 March 2009, *GEO Pakistan*, “Justice Iftikhar to be restored as Chief Justice of Pakistan” www.geo.tv/3-16-2009/37454.htm (accessed 8 June 2013).

⁹ In 2008, former Prime Minister of Malaysia Ahamad Abdullah Badawi’s administration “awarded” Ringitt Malaysia 10.5 million *ex gratia* payments to six former Supreme Court judges sacked or suspended in 1988. Though falling short of an apology, Prime Minister Badawi also stated in a dinner in April 2008, with 600 members of the Malaysian Bar Council, that “for many, the events of 1988 were an upheaval of the nation’s judicial system. Rightly or wrongly, many disputed both the legality and morality of the related proceedings. For me, personally, I feel it was a time of crisis from which the nation never fully recovered”. Full text of PM Speech. Speech by Datuk Seri Abdullah Ahmad Badawi, Prime Minister of Malaysia, at the Malaysian Bar Council Dinner on April 17, 2008: Delivering : Renewing Trust’, http://web.archive.org/web/20080421183014/http://www.nst.com.my/Current_News/NST/Friday/Frontpage/20080418 (accessed 9 June 2013). Hence, in both Malaysia and Pakistan, restoration of certain aspects of judicial independence has taken place. At the least, in Malaysia, a retrospective acknowledgment that the judicial independence has been affected as a result of the 1988 judicial crisis was made by the highest executive official, albeit 20 years later. No such official acknowledgment has taken place or is likely to take place in Burma for the much worse situation of the Burmese judiciary over the past few decades. See text and notes accompanying notes 26 to 29.

immediate aftermath of their respective takeovers nor did they transform or “fuse” the apex courts with the executive arm of the government. In contrast, under a succession of Burmese one-party and military regimes, the apex Burmese judiciary was transformed into just such an institution.

From independence in 1948 to the early 1960s, the Burmese apex judiciary (similar to the Malaysian judiciary before the 1988 crisis) was independent and also seen as a model for some other Asian countries. Regretfully and indeed outrageously, after the 1962 military coup, Burma’s judiciary was transmogrified into a supporter and defender of successive one-party and military regimes and as a supine, pliant enforcer of many unjust laws and practices.

Pakistan’s military takeover of 1999—and the military regimes that preceded it—was less authoritarian and totalitarian than that of the Burmese military. In Burma in contrast, open or even covert peaceful dissent was impossible on pain of jail or at least disqualification of the lawyers on contrived and entirely politically motivated grounds. Burmese lawyers since the mid-1960s were either more compliant with regard to the transmogrification of the Burmese judiciary or circumstances were such that overt or covert opposition was not feasible.

1. A brief update of Apex Court judges Appointment and removal from 1988 to 2013

It may be argued that the events in Burma and Malaysia occurred long ago (in the case of Burma, more than fifty years ago) and that analyses and comparisons of these events might be outdated. Yet, in the case of Pakistan though, the independence of the judiciary and the removal of the Chief Justice were remedied, since the Chief Justice was reinstated and as of June 2013 still serves as the Chief Justice of Pakistan.

However, the cases of Malaysia and Pakistan show that attempts to undermine the independence of the judiciaries were not fully successful. Whereas the judiciary’s independence in both Malaysia and Pakistan was reduced but not eliminated, in Burma, it was completely extinguished in the early 1970s.

Thus, from a comparative perspective, the decline towards total subordination of the Burmese judiciary to the various military regimes remains unparalleled in Malayan, Malaysian and Pakistani legal history. During virtually all of Malaysia’s and Pakistan’s post-independence history, the judiciaries were at least semi-independent. In Burma, except for the 1948–1961 period, there was not even a pretence of judicial independence

after the military coup of 1962. The status of the Burmese judiciary in the intervening years since 1962 has been widely analysed by this author and others.¹⁰

After military suppression of the 1988 uprising and the takeover by the State Law and Order Restoration Council (SLORC) from the previous one-party regime on 18 September 1988, all “organs of State power” formed under the *1974 One-Party Constitution* were abolished by decree. The “Central Court of Justice” was also automatically abolished since it fell under the aegis of the “Council of People’s Justices”—an organ of State power specifically named and abolished by decree of the new regime.

From 18 September 1988, for ten days, there was no apex court in Burma. On 28 September 1988, the new military regime—referring to the powers under the *1948 Union Judiciary Act*—formed a new apex court and renamed the socialist-sounding “Central Court of Justice” to “Supreme Court”. SLORC directly appointed all Supreme Court judges.

After the abolition of the Central Court of Justice, a retired registrar of the Central Court of Justice, U Aung Toe, became the new Chief Justice of the SLORC Supreme Court: a position which he held for more than 22 years until 30 March 2011, with the coming into force of the *2008 Constitution*. In 1974, none of the then judges of the “Supreme Court”, which ceased to exist by “operation of the *1974 Constitution*”, was reappointed to the new “Central Court of Justice.” In 1988, no members of the Central Court of Justice abolished by SLORC decree on 18 September 1988, were reappointed to the SLORC-appointed Supreme Court.

The dismissal, “retirement”, termination by operation of Constitution (in the case of the 1962-1974 Burmese Chief/Supreme Court in March 1974) and termination by abolition by military decree (of the Central Court of Justice in September 1988), are of no particular interest, or even of note, to most, if not all, in the international or even domestic legal community of jurists and lawyers. In contrast, jurists and lawyers both in and outside of the countries have either commented on or made protests regarding the

¹⁰ See for example, Myint Zan, “Law and Legal Culture, Constitutions and Constitutionalism in Burma”, in Alice E. S. Tay (ed.) *East Asia-Human Rights, Nation-Building, Trade* (Nomos Publications, Baden-Baden, 1999), pp. 180-281; Myint Zan, “Judicial Independence in Burma Since Independence: Constitutional History, Actual Practice, Future Prospects”, Volume 4 (December 2000) Special Burma Edition of *Southern Cross University Law Review*, pp 17-59; Myint Zan, “A Comparison of the First and Fiftieth Year of Independent Burma’s Law Reports” (2004) 35 (2) *Victoria University of Wellington Law Review*, pp. 385- 426; Myint Zan, “Myanmar (Burma): From Parliamentary System to Constitutionless and Constituionalized One-Party and Military Rule” in Clauspeter Hill and Jorg Menzel (edited) *Constitutionalism in Southeast Asia* (Konrad Adenauer Stiftung, Singapore, 2008, pp. 191-210); Myint Zan, “‘New’ Supreme Court and Constitutional Tribunal: Marginal Improvement or More of the Same’ in Nicholas Cheesman, Monique Skidmore and Trevor Wilson (editors) *Myanmar Transition: Openings, Obstacles, Opportunities* (Institute of Southeast Asian Studies, Singapore 2012). See also, Nick Cheesman, “Thin Rule of Law, or Unrule of Law in Myanmar” (2009) 82 (4) *Pacific Affairs*, pp. 597-613, Nick Cheesman, “How An Authoritarian Regime in Burma Used Special Courts to Defeat Judicial Independence” (2011) 45 (4) *Law and Society Review*, pp. 801-830.

impeachment and removal from office of the Chief Justice of the Philippines, Renato C. Corona, in 2012¹¹ and the Chief Justice of Sri Lanka, Shirani Bandaranayake, in 2013.¹²

These events indicate that in the Philippines, Sri Lanka, Malaysia and Pakistan there have been vicissitudes concerning judicial independence in the last decades. Conversely, the judicial independence in Burma, at the latest since the early 1970s, did not have any more vicissitudes: it is already fully in its nadir.

On 13 November 1988, the State Peace and Development Council (SPDC) issued an announcement in which five out of the then six Supreme Court judges of the then apex court were “permitted to retire”.¹³ Even if there were reports of the five out of six Myanmar Supreme Court judges being removed on the same day in November 1998, there were no protests or expressions of concern from lawyers, jurists and international organizations comparable to what had happened when six Supreme Court judges, 10 years earlier, were removed in 1988, in Malaysia, and a Chief Justice was impeached and removed 14 years later, in 2012, in Sri Lanka.¹⁴

Not that the removed or retired judges of 1998 would have in any way maintained or even make rudimentary efforts to restore even the vestige of the independence of the judiciary. In 1998 (unlike in 1962) the removals did not make much difference and the lack of interest, far less protest by both international and domestic legal community demonstrated the little importance accorded to the actions of a regime that had so comprehensively subjected the judiciary to its total control.

¹¹ Floyd Whaley, “Philippine Chief Justice Removed Over Omission in Reports on Assets”, *New York Times*, May 12, 2012 . p. A 9. http://www.nytimes.com/2012/05/30/world/asia/philippines-chief-justice-removed-over-finances.html?_r=0 (accessed 22 June 2013).

¹² Shihar Aneez & Ranga Sirilal, “Sri Lanka’s Rajapaksa removes chief justice after impeachment” (Reuter news item, January 13, 2013) <http://in.reuters.com/article/2013/01/13/srilanka-impeachment-idINDEE90C05R20130113> (accessed 22 June 2013). See also. International Commission of Jurists Press Release, “Sri Lanka: Appointment of new Chief Justice undermines Rule of Law”, <http://www.icj.org/sri-lanka-newly-appointed-chief-justices-long-record-of-blocking-justice/> (accessed 22 June 2013).

¹³ See for example, Cheesman, “Thin Rule of Law” above n. 10 at p. 612 foot note 49 where he stated that “In 1998, 64 ju[dges] including five of the Supreme Court, were ‘permitted to retire’ at the same time. The senior ones were removed via an order that simultaneously dealt with the foreign affairs minister, two deputy ministers and five members of the Civil Service Selection and Training Board.”

¹⁴ For Sri Lanka, see above notes 12 and 13. The International Commission of Jurists expressed its concern also for the appointment of former Attorney-General Mohan Peiris as the new Chief Justice. Mohan Peiris was a former top legal advisor to President Mahinda Rajapakse and the Cabinet. “During his tenure as Attorney-General and the government’s top legal advisor Mohan Peiris consistently blocked efforts to hold the government responsible for serious human rights violations and disregarded international law and standards,” said Sam Zarifi, ICJ’s Asia director. http://www.colombopage.com/archive_12B/Jan16_1358312922CH.php (accessed 30 June 2013) as reported in “ICJ condemns appointment of Sri Lanka’s new Chief Justice,” *Colombo Page*, January 16, 2013.

B. BACK TO THE PRESENT: THE PAST IS NOT (QUITE) PAST IN THE CURRENT MYANMAR JUDICIARY

The Central Court formed on 4 March 1974 (under the *1974 Constitution*) and the Supreme Court appointed by SLORC on 28 September 1988 did not include any members of the previous second (the Chief Court 1962-1974) and third apex courts (the Central Court of Justice 1974-1988) respectively of independent Burma.¹⁵

On 30 March 2011, the *2008 Constitution* came into force and a new Supreme Court was formed. This new (fifth) Supreme Court did see the retirement of U Aung Toe who served for 22 ½ years as Chief Justice in the fourth Supreme Court. U Tun Tun Oo, a Deputy Chief Justice in the fourth apex court, was appointed and sworn in as the “Union Chief Justice” on 30 March 2011.

In the current Myanmar Supreme Court, Chief Justice U Tun Tun Oo and at least three of the seven judges of the current Myanmar Supreme Court are former military officials.¹⁶

The Alternative Asean Network for Burma (ALTSEAN) published the background of the current 11th head of the apex court of Burma as follows:

In November 2010, he was a j[udge] on the three-member Supreme Court bench that rejected Daw Aung San Suu Kyi’s special appeal on her conviction to 18

¹⁵ For the author’s own categorization of the five apex courts in Burma since independence, see, “‘New’ Supreme Court and Constitutional Tribunal” in *Myanmar Transition*, above note 10 at p. 250 Table 14.1, where the author “categorized” the first (January 1948-March 1962) post-independence Supreme Court as the “first Supreme Court”, and the “Union Supreme Court” established since 30 March 2011 as the “fifth” apex Court. On pages 256 to 257 at Table 14.2, the author provides the names, the academic and law qualifications, the period of service of all the heads of the apex judiciaries or the apex judicial body in Burma since independence in January 1948. There is one error as regards the name of the Chief Justices in Table 14.2. Around August 2012, on what the author thought was the Myanmar government’s website, the name “U Soe Thein” as the new Chief Justice appeared. The author mistakenly put this in the draft and was unable to rectify it in time before the publication of the book. The author would like to “rectify” that mistake and states that as of June 2013, U Tun Tun Oo is the current “Union Chief Justice”.

¹⁶ None of the current and former heads of the apex judiciaries of Malaysia (known as Lord President and later Chief Justice of Malaysia) were former military officials. See the profile of the current Chief Justice of Malaysia and twelve other former Chief Justices of Malaysia at the website of the Federal Court of Malaysia <http://www.kehakiman.gov.my/?q=en/node/446> (accessed 26 June 2013). In Burma, the 6th apex head of the Burmese judiciary, known as “Chairman of the Council of People’s Justices” (from March 1974 to November 1981) *Thura* (a military title) U Aung Pe was a former Colonel, the 7th apex head of the Burmese judiciary, the late U Mounng Mounng Kyaw Win (Chairman of the Council of People’s Justices from November 1981 to July 1982), was a former Brigadier and also a Barrister at law. The current (since 30 March 2011) Chief Justice U Tun Tun Oo is a former Lt. Colonel. Among the eleven head of the apex judiciaries in Burma since independence, three are former military officials at their time of appointments as the head of the judiciaries.

months under house arrest. He is on the EU black list¹⁷. Previous positions: Deputy Chief Justice (2007-2011), Major in the office of the Military Advocate General (1990-1994), Captain in the *Tatmadaw* [Army] Southwestern Regional Command (1981-1989).¹⁸

In comparison, in early 2013, the newly and controversially appointed Chief Justice of Sri Lanka, Mohan Peiris, was not a military official but a former Attorney-General. The description used by the Asia Director of International Commission of Jurists Sam Zarfi vis-à-vis this appointment could also apply to the role the current Myanmar Chief Justice played in denying the appeal of Aung San Suu Kyi's "eighteen month house arrest" in the partly previous military regime. The ICJ Asia director stated that the current Chief Justice of Sri Lanka had "consistently blocked efforts to hold the [Sri Lankan] government responsible for serious human rights violations and disregarded international law and standards".¹⁹

Yet, when President U Thein Sein nominated the then Deputy Chief Justice U Tun Tun Oo, the Myanmar Legislature approved without objection.²⁰ Neither domestic dissent was heard, nor did international lawyers and human rights organization such as the International Commission of Jurists formally express any concern regarding U Tun Tun Oo's appointment.

¹⁷ The information could well be outdated. Many officials of the partly previous regimes, including President Thein Sein, were as recently as 2011 on the "black list". Since 22 April 2013, the EU has lifted sanctions. Shibani Mahtani, "Sanctions Lifted Against Myanmar. Europe Rewards the Country for Sweeping Reforms, but continues Arms Embargo", *Wall Street Journal*, April 22, 2013. <http://online.wsj.com/article/SB10001424127887323735604578438632149787290.html> (accessed 28 June 2013). It is virtually certain that U Tun Tun Oo's name has been removed from the EU black list.

¹⁸ <http://www.altsean.org/Research/Regime%20Watch/Judicial/SupremeCourt.php> (accessed 24 June 2013). The current Myanmar Supreme Court has a website. <http://www.unionsupremecourt.gov.mm/?q=content/2011-myanmar-law-report> (accessed 26 June 2013). A search of the website in both English and Burmese languages does not show a profile of the current Chief Justice of the Myanmar Supreme Court and other Supreme Court judges as well as past Chief Justices. The website of the Supreme Court of Pakistan, <http://www.supremecourt.gov.pk/web/page.asp?id=204> (accessed 26 June 2013), has a profile of the Chief Justice of Pakistan Mr. Justice Iftikhar Muhammad Chaudhry. Also, the website of the Supreme Court of Sri Lanka has a biography and profile of Chief Justice Mohan Peiris (apparently controversially appointed, see above note 15) <http://www.supremecourt.lk/index.php/component/content/article/174.html> (accessed 26 June 2013). The website of the Supreme Court of the Philippines, <http://sc.judiciary.gov.ph/#> (accessed 26 June 2013), also includes a biography of the Chief Justice of the Philippines, Maria Lourdes P. A. Sereno, and other Supreme Court justices. <http://sc.judiciary.gov.ph/aboutsc/justices/cj-sereno.php> (accessed 26 June 2013).

¹⁹ See above note 13. "ICJ condemns appointment of Sri Lanka's new Chief Justice".

²⁰ Shwe Yin Mar Oo, "Chief Justice named, attorney general nominated", *Myanmar Times*, February 21-27, 2011, <http://mmtimes.com/2011/news/563/news56308.html> (accessed 30 June 2013), where it is stated that "Earlier in the week [President] U Thein Sein nominated U Tun Tun O to head up [sic] the Supreme Court, which is the highest court in the country, and no objections were received."

However, the opposition Democratic Voice of Burma warned that “the influence that [President] Thein Sein’s personal endorsement of [nominee to the Supreme Court] Tun Tun Oo likely played on the decision will not be lost on Burma observers who have long criticised the lack of independence of the country’s legal system”.²¹

Why was the President of Sri Lanka formally criticised for appointing a former Attorney-General and a “confidante” as its Chief Justice while there were no comments on the appointment of U Tun Tun Oo who had a comparable record of “defending” the previous military regime’s actions?

Not only is this of interest but also what is perhaps of significance is that the International Commission of Jurists became involved, since early 2013, in the training of the personnel from the Attorney-General Department’s as well as judges on matters concerning constitutional rights under the *2008 Constitution*.²²

Certainly, the appointment of Mohan Peiris as Sri Lanka’s Chief Justice attracted more condemnation because it immediately followed the controversial, strongly criticised impeachment and removal of Sri Lanka’s first female Chief Justice Shirani Bandaranaye. But in Burma, unlike in the Philippines and in Sri Lanka, one did not even require the rigmarole of an impeachment to remove the apex court judges. The 1998 removals by decree of five out of six Supreme Court judges were almost *non-sequitur*.

Under the *2008 Constitution*, arbitrary removals of Supreme Court judges by the executive authorities are no longer possible unless preceded by an impeachment. However, this constitutional provision means at best a marginal improvement.²³

The fact is that for about fifty years, there has not even been a semblance of independence in the Burmese judiciary. In the first decade of the 21st century, there is very few, if any, Burmese judicial personnel with the stature, qualifications as well as the understanding and practice of independence of, for instance, Pakistan’s Chief Justice of Iftikhar, Muhammad Chaudhry, or, indeed, the late U Myint Thein imprisoned for six years by General Ne Win’s Revolutionary Council.

Burmese lawyer Kyaw Min San writes:

in the present Supreme Court, three judges are understood to have come from the Defence Services. Aside from these three, one of the two remaining judges is understood to have come from the Ministry of National Planning and Economic Development while the other is from the Ministry of Mines. Therefore, the question arises as to whether or not these five judges have sufficient experience in legal mat-

²¹ Ahunt Phone Myat, “Burma names new Chief Justice”, *Democratic Voice of Burma*, 17 February 2011, <http://www.dvb.no/news/burma-names-new-chief-justice/14312> (accessed 30 June 2013).

²² “ICJ holds seminar on prerogative writs under the 2008 Constitution of Myanmar”, <http://www.icj.org/icj-holds-seminar-on-prerogative-writs-under-the-2008-constitution-of-myanmar/> (accessed 30 June 2013).

²³ Myint Zan, “‘New’ Supreme Court and Constitutional Tribunal”, above note 10, pp. 257-258, 263.

ters. At the time of writing, no information has so far been published in the newspapers, nor have detailed biographies of these judges been made public.²⁴ Even among legal professionals, the qualities and experience of these judges are not known, so people cannot decide if the qualifications of the judges conform to constitutional requirements and the needs of the courts.²⁵

As for the rhetoric of having an independent judiciary, Chief Justice U Htun Htun Oo, (name spelt differently in the cited source but same person) said in a speech given at Keiko University in Japan:

[A] [I]ong time ago [sic, how long ago?], disputes have been settled by traditional judicial system in Myanmar, but during the late 19th century, common law legal system was introduced by British colonialist [sic for “colonialists”].²⁶ The essence of Myanmar traditional judiciary was settlement of disputes through negotiation between the two parties. In contrary [sic for “contrast”], the judicial function of English common law system rested on the decision of win and loss rather than fairness and harmony in the society.²⁷ After independence in 1948, different political

²⁴ The author would claim that his search and listing (with the assistance of Dr Nicholas Cheesman of the Australian National University) and provided in *Myanmar's Transition*, above note 10, at pp.256-257 at Table 14.2, of the names, qualifications of the Chief Justices and Head of judiciaries, together with their days of appointments and retirements or removals, to be the “first” listing of the heads of the apex judiciaries in Burma since independence.

²⁵ Kyaw Min San, “Critical Issues for the Rule of Law in Myanmar” in *Myanmar's Transition*, above note 10 at 220. (Internal citations omitted.)

²⁶ The colonial “blame game” persists under the new (citing directly from the Myanmar Chief Justice’s statement above) “democratic movement”. In a message for Union Day 2013, President U Thein Sein spoke about the bad effects of the “colonial education system”. *The New Light of Myanmar*, 12 February 2013, Volume XX, No. 298, p.1. Even though the English translation of the President’s speech used the words “colonial education system”, the original Burmese version actually used the harsher phrase “slave education system”.

²⁷ The denigration of the colonial judicial system continues and the rhetoric of the current Myanmar Chief Justice in 2012 is not that different from that of the rhetoric of the 5th Chief Justice of independent Burma, the late Dr. Maung Maung, in his post 1970s writings. See Dr. Maung Maung, “General Law Knowledge” (in Burmese language *Win Maw Oo Srapay*, 1975) *par tim*, where, in a few parts of the book, Dr. Maung Maung castigates the “colonial British judicial system”. About fifteen years earlier, Dr. Maung Maung had, in some published copies of his doctoral thesis, *Burma in the Family of Nations* (Djambatan, Amsterdam, 1956), at “Stellingen” dated 27 June 1956, stated that the “British brought the rule of law to Burma and it is good”—a theme he continued to make in parts of another of his book *Burma's Constitution* (1958, revised edition 1959)—only in his later writings to negate them and (to translate from a Burmese phrase) “rubbing with one’s foot what has being written with one’s hand”. For a more contemporaneous report and less derogatory and more complimentary “take” on the “English common law system” by the current Myanmar Attorney-General, Dr. Tun Shin, see the title of the report of his speech at the “Rule of Law in Myanmar: Perspectives and Prospects” seminar that was held in Nay Pyi Taw on 9 February 2013. The long heading in full reads: “As Myanmar belongs to the Common Law Legal System family, Myanmar Judicial System is deeply rooted with legal maxims, judicial customs and precedents which are enshrined with International Legal Principles that are utilized by successive [sic] judges all over the world”. *The New Light of Myanmar*, Volume XX, Number 296, 10 February 2013, p. 1.

systems have been dramatically changed [sic for “dramatically changed”], but in the judicial branch the traditional strict appliance of “law and order” approach has been preferred.²⁸ Judicial functions were conducted by Courts of law under the influence of the executive authority [sic].

A theme that is popular with some of the media in Myanmar is that the judiciary does not change together [sic] with the democratic movement [sic]. The judiciary should exercise the “rule of law” centered approach preferentially [sic, “preferably”?] in doing its functions to be in line with the democratic values.

We accept that it is the most important duty of the judiciary to protect people’s rights through a fair and equitable trial within the limits of domestic legal framework. There must be clear laws under which people can ask [for] protection of their rights and remedies for their grievances before the Court. If the Court carries out a quick, effective and fair response to protect their rights and to redress their grievance proportionally [sic for “fairly” or “expeditiously”], the judiciary could maintain the public confidence.²⁹

It is false to claim or at least to infer that since 1948, the apex Burmese judiciaries have always followed a “strict law and order approach”. This actually implies that the Burmese judiciary has been subservient to the executive since 1948.

There are significant cases before the 1962 military takeover where the late Burmese Supreme Court released prisoners as a result of successful *habeas corpus* applications.³⁰ It also struck down the actions of the President as *ultra vires*³¹, and ruled that merely calling the ruling Prime Minister and the executive government as “Fascist murderer Thakin Nu’s government” in pamphlets was not sufficient ground for preventive detention.³²

²⁸ The “law and order” approach directly reflects the name of the State Law and Order Restoration Council (SLORC) from its formation on 18 September 1988, to its name change on 15 November 1997, to “State Peace and Development Council” (SPDC). Notwithstanding the name change, the “law and order” “approach” was and still is taken by not only the executive (ruling military regimes) but also the judiciary.

²⁹ Speech by H.E. U Htun Htun Oo[,], Chief Justice of the Union[,], “Current Developments of Judicial System in Myanmar” [sic, the title is better written as “Current Developments **in the** Judicial System **of** Myanmar” (2012) 3 (2) *Judicial Journal* (English Section), p. 2 at 6. The journal can be downloaded from http://www.unionsupremecourt.gov.mm/sites/default/files/supreme/judicial_journal_v3_n2.pdf (accessed 30 June 2013).

³⁰ *G N Banerjee v. Superintendent Insein Jail Annex* 1948 *Burma Law Reports* [BLR] Supreme Court [SC], p.199. The *Banerjee* case was decided on 10 May 1948, barely four months after Burma’s independence. See also *Tinsa Maw Naing (Applicant) v Commissioner of Police, Rangoon and another (Respondent)*, 1950 BLR (SC), 17 where the Supreme Court released a detainee, Bo Yan Naing, on another *habeas corpus* application. The *Tinsar Maw Naing* case was decided in February 1950, barely two years after Burma’s independence.

³¹ *Ah Kham v U Shwe Phone*, 1952 BLR (SC) 222.

³² *Ma Ahmar v Commissioner of Police and One*, 1949 BLR, SC 39.

These landmark rulings stand in stark contrast to the subservient and supine roles the apex Burmese judicial branches have played in the implementation of oppressive laws, policies and practices by the various regimes since the early 1970s.

The current Myanmar Supreme Court has made no significant ruling for the protection of rights of what some government officials even now refer to as the “so-called prisoners of conscience”. The Thein Sein administration has released several hundred prisoners of conscience in various batches since 2011. These releases were not made by the current Myanmar Supreme Court through the writs provided in the *2008 Constitution*.

The current Myanmar Chief Justice has also incorrectly and unfairly inferred that “judicial functions” were conducted by the courts of law “under the influence of the executive authority” in Burma’s post-independence history.

None of the rulings made by the current Myanmar Supreme Court since March 2011 shows the boldness and the dedication to protect the fundamental rights of the people displayed by the late Burmese Supreme Court under the *1947 Constitution*.

Quite a few international organisations, including the International Commission of Jurists, are now cooperating with the Myanmar judiciary and the Attorney-General’s office. Certainly, international assistance is based on the fact that (judicial) politics is the “art of the possible” and of compromises. Still, all assistance should benefit the population, not only the government.

CONCLUSION

This chapter describes in considerable detail and in comparison with four other Asian countries the state and status of the apex Burmese judiciaries especially as they relate to the appointment and termination of judges. Since most of the events occurred in the past, in fact quite a “long time ago”, it might be stated that this Chapter is substantially “past-oriented”. And it is. Yet, as George Santayana has said, “those who do not remember the past are condemned to repeat it”.

The above narration, analysis and commentary have been made with a view to contribute towards a historical, comparative and contemporaneous understanding of events and factors that have impacted on the Burmese judiciary. It is hoped that they could contribute to enhance the modes and quality of (mainly international) assistance now being provided to reform it.

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The Constitution, Emergency Powers and the Rule of Law in Myanmar

Melissa Crouch

INTRODUCTION

In 2011, Myanmar officially began its transition to a more democratic form of government, and this shift has been followed by significant legislative reforms on a wide range of areas. On 30 March 2011, the State Peace and Development Council (SPDC) formally transferred power to a new Union Government headed by President Thein Sein, former general and prime minister of the SPDC. The process has taken place within the framework of the 2008 Constitution, which came into effect in January 2011. The 2008 Constitution has a long history, dating back to the early 1990s. The National Convention for the drafting of the 2008 Constitution began in 1993 and was a controlled process, with participants selected by the SPDC. Public discussion and criticism of the drafting process was criminalised.¹ The “drafting” process was not completed until 2007, partly because the National Convention was suspended from 1996 to 2004. The 2008 Constitution is therefore not a new initiative, and neither is it a constitution of the people.

The current reform process has taken place within a constitutional law framework that grants significant powers to the executive and to the military. According to the 2008 Constitution, the country is a presidential republic with the President as the head of state and head of government. The president is elected by members of parliament, not by the general population. Not all members of parliament are democratically elected, however, as the Constitution provides for 25 per cent of the seats in both houses of parliament to be reserved for the military. Further, members of the Union Solidarity and Development Party, the successor to the military’s Union Solidarity and Development Association, occupy about 80 per cent of the seats in parliament.

Within this political structure, one of the key challenges as a transitional and democratising state is how the government of Myanmar deals with social tensions and

¹ Law Protecting the Peaceful and Systematic Transfer of State Responsibility and Successful Performance of the Functions of the National Convention against Disturbances and Oppositions No 5/1996.

conflict that arise between religious and ethnic communities. The use of emergency powers is one response, although these powers raise serious questions about the capacity and role of a government to address complex political and economic crises, natural disasters, wars and internal conflict. Under the 2008 Constitution, the power to declare a state of emergency is dealt with at some length in Chapter XI (art 410 – 435).² The President has exercised his wide powers to declare a state of emergency twice since the Constitution came into effect in 2011.

In this article, I critically examine the use of the constitutional power of emergency. I begin by analysing the response of the executive to the conflict in Rakhine state from June to October 2012, and in Meikhtila District in March 2013. I outline the key elements of emergency powers and identify the challenges to the rule of law inherent in the existing constitutional provisions, including how an emergency is defined, the conditions under which it can be declared, who has the power to make such a declaration, how long it lasts, and what effect it has on human rights.

I argue that the existence of such extensive emergency provisions in the Constitution contradicts the claims of the government to be in a democratic transition, and that the selective use of these powers raises questions about the motives involved, and has the potential to further exacerbate religious and social tensions. By design, the 2008 Constitution ensures that the executive and the military retain ultimate power in a state of emergency widely defined, without any checks or restrictions, which effectively permits them to act beyond the limits of the law. These powers may be reviewed, however, and I conclude with reference to the ongoing process of constitutional amendment, which is due to be completed by 31 December 2013.

USE OF EMERGENCY POWERS

Between May and October 2012, a serious outbreak of violence occurred in Rakhine State between (Rakhine) Buddhists and Muslims who identify themselves as Rohingya. It is estimated that hundreds of people were killed and tens of thousands of people were displaced; most of these were the Rohingya, Muslims who are referred to by many Burmese as “Bengalis”. In response, on 8 June 2012, it was reported that an order was made under section 144 of the Criminal Procedure Code to impose a curfew in Maungdaw and Buthidaung townships.³ This was quickly followed, on 10 June 2012, by Ordinance 1/2012 of the President who declared a state of emergency in Rakhine

² These provisions are mirrored in Law on the Union Level Government No 15/2010, Chapter VII, art 83-98.

³ Section 144 only gives a Magistrate the power to issue such an order in an emergency, although it is unclear who issued the order in this case. After 60 days, the President has the power to issue a notification to extend the order. In a separate incident, section 144 has been used to prevent farms from accessing their land in relation to the Letpadaung copper mine: see AHRC 2012.

State. This was the first time that the President had exercised his powers to declare a state of emergency under the 2008 Constitution.

In addition, in June 2012, the government formed a local investigation commission by Notification 43/2012. Due to the ongoing nature of the violence, in August 2012, the President established a National Investigation Commission by way of Notification 58/2012. The Commission consisted of 27 members, four of whom were Muslim religious leaders, although none of the members were Rohingya. The Commission was given the responsibility to investigate the contributing factors to the conflict and suggest proposals to resolve the situation. The report of the Investigation Commission was originally due within three months, but the deadline was extended by eight months and the report was finally released on 29 April 2013. The report was controversial because it recommended a range of policies targeting the Rohingya, including verifying the citizenship status of the displaced Rohingya communities; targeting the Rohingya for a family planning program; reviewing the curriculum of all private Islamic schools; and increasing the personnel and capacity of law enforcement agencies in the area, among other things.⁴

In the meantime, however, violence between Muslims and Buddhists erupted in the township of Meikhtila, near Mandalay, in March 2013. This led to further deaths, property damage, and the displacement of several thousand people, and spread to nearby townships. Again, section 144 of the Criminal Procedure Code was reportedly used to prohibit public gatherings and impose a curfew in Meikhtila.⁵ Then, on 22 March 2013, the President exercised his powers to declare a state of emergency in Meikhtila District, although no time limit was specified.⁶

On 20 May 2013, a special session of the Union Assembly was held to debate the extension of the declaration of the state of emergency in Meikhtila. The key debate that emerged was how long the extension should last. The issue was whether it should remain open-ended as the President had proposed, or whether it should be subject to a 60-day time limit. The majority voted in favour of a 60-day time limit, which indicates that some USDP members voted against the proposal of the President.

In May 2013, the President made a public statement in response to the conflicts in which he reiterated the right to freedom of religion, and the responsibility of the government to protect the rights of citizens (Office of the President, 7 May 2013). The problem, however, is that he appeared to confine this protection to citizens, while the reality is that many Rohingya do not have citizenship. The most important point he made in this speech was that “the Government will take all necessary actions to ensure the basic human rights of Muslims in the Rakhine State”. The subsequent extension of

⁴ A summary of the report in English, and a list of the key recommendations, was also issued.

⁵ As the unrest continued to spread, section 144 was also used in several townships in Pegu Division: DVB 2013.

⁶ Ordinance No 1/2013 on a Declaration of a State of Emergency, 22 March 2013.

the state of emergency was approved without any evidence from the military, police or local government as to what measures had been taken, or progress made, to restore order.⁷ While the presence and power of the military in Meiktila was therefore consolidated, the lack of information on the situation potentially means that this was at the expense of transparency and protection of human rights.

POWERS OF EMERGENCY

The exercise of emergency powers in Myanmar can be contextualised within broader debates about the role and scope of constitutional powers to declare a state of emergency. Not all modern constitutions contain explicit emergency powers, but the majority of new constitutions do include emergency powers and often in some detail (Ramraj, forthcoming 2014). There are important reasons in favour of the inclusion of emergency powers in the Constitution. For example, such provisions help to preserve a sense of legality and due process. It can uphold the rule of law by subordinating emergency powers to law. Constitutional provisions can also act as a counter to the potential dangers of such powers, and prevent a perpetual state of emergency. The exercise of emergency powers can also prevent unwarranted detention or harsh treatment of suspects of terrorism.

The central concern in the literature on emergency powers in Western liberal democracies is the extent to which a state's response to an emergency remains subject to legal limits and the rule of law.⁸ On one side of the debate, Gross (2006) has characterised emergency powers as existing *beyond* the confines of the legal system and has proposed an “extra-legal” model of emergency powers. In contrast, Dyzenhaus (2006) argues that emergency powers must be subject to the rule of law and remain within the boundaries of the law. I proceed on the assumption, similar to Dyzenhaus, that the power to declare a state of emergency and actions taken as a result of that power within a democratic, or democratising, state must still be conceptualised as existing within a legal framework. It is therefore important to consider the constitutional framework of these powers in Myanmar and whether any boundaries exist on the exercise of emergency powers.

⁷ On 20 July 2013, the state of emergency in Meiktila was official brought to an end by Presidential Order No 2/2013 on Revocation of the Proclamation of the State of Emergency.

⁸ See for example Gross and Aoláin (2006); Dyzenhaus (2006); Ramraj and Thiruvengadam (2009); and Ramraj (2008).

Defining “Emergency”

A Constitution usually defines the terms, procedures and conditions under which a state of emergency may be declared. A state of emergency can broadly be defined as a decision made in response to an exceptional circumstance that may suspend some individual rights and may affect the functions of one or more of the branches of government—the executive, legislature and judiciary. It may allow the military and the police to impose restrictions on the rights of citizens in order to contain the emergency and restore order as quickly as possible.

The central concerns that need to be considered are the extent to which a state’s response to an emergency remains subject to legal limits or boundaries, and how these boundaries are defined. The way in which a Constitution defines the term “state of emergency” is important because the broader the definition that is used, the greater powers this gives to the executive. While some Constitutions spell out in detail the requirements and conditions for a state of emergency, others leave these details to legislation.

Under the previous 1947 Constitution of Burma,⁹ an emergency was narrowly defined as a threat to the security of the country, such as war, internal disturbance or “grave economic emergency” (art 94). The 1974 socialist Constitution was much more open-ended, and allowed for a declaration if “an emergency affecting the defence and security of the State should arise” (art 76). No mention was included of any limitations on this power.

The 2008 Constitution of Myanmar takes a more detailed approach and provides for three definitions or types of situations in which an emergency can arise.¹⁰ In case one, an emergency is a situation where “a local administrative body cannot carry out its administrative functions”. This type of emergency appears to allow the central government wide discretion to take control in any situation where a local government is not seen to be fulfilling its duties.¹¹ In case two, an emergency is defined as a situation that “endangers lives, shelter or property of the public”. This was the type of emergency that was declared in both Rakhine State and Meikhtila District, as discussed above. Case two appears to have two stages, with the more serious situation allowing the President to declare a “military administrative order”.¹²

⁹ For a discussion of emergencies prior to independence, see Aung-Thwin (2008).

¹⁰ Some of the provisions appear to reflect the general emergency provisions contained in the State Protection Act 1975. In addition, the Criminal Procedure Code article 144 and the Emergency Provisions Act 1950 have been cited in relation to the conflict, although in this article I focus my discussion on the constitutional provisions on states of emergency.

¹¹ Constitution 2008, art 40(a), 410.

¹² Constitution 2008, art 40(b), 412; and Art 413(a).

In case three, the Constitution allows for a state of emergency to be declared on the grounds that a situation “may disintegrate the Union,... national solidarity or that may cause the loss of sovereignty, due to acts or attempts to take over the sovereignty of the Union by insurgency, violence and wrongful force”.¹³ Rather than specifying particular situations, such as “war”, “aggression” or “serious internal disturbance”, as is common in some other Constitutions, this third case again provides for a very broad definition that could potentially be used to justify a response to any conflict that is perceived to threaten the interests of the quasi-civilian government.

Conditions and Power to Declare an Emergency

In order to uphold the rule of law, there must be a clear understanding of how and when a state of emergency can be declared. The conditions under which emergency powers can be exercised should be provided for under the Constitution, or a national law, and usually requires enactment through some form of a legislative instrument or decree. The Constitution, or enabling legislation, must clearly specify the conditions under which a state of emergency can be declared. It must usually be a real time of crisis, for example, a state of emergency may be declared if civil conflict occurs, if a war breaks out, or in the event of a major natural disaster. For example, in 2004, states of emergency were declared in several countries in Asia affected by the tsunami, such as in Indonesia and Sri Lanka.

The authority to invoke emergency powers is usually exercisable by the head of state, or by the parliament, or by a combination of the two. In all three cases of emergency described above, it is the President of Myanmar who is vested with the power to declare a state of emergency, although only after he or she confers with the National Defence and Security Council (“the Council”). The Council consists of eleven members, including members of parliament, although a majority of the Council are military officers. The power therefore rests in the hands of the President (who is not directly elected) and the military. There is no role for the parliament in the initial decision to declare an emergency.

Implications of an Emergency

There are two broad implications an emergency declaration may have. The first set of consequences relates to the impact on the three branches of government and what they can or cannot do in an emergency situation. The second set of consequences relates to how an emergency affects the rights and freedoms of individual citizens.

In the 2008 Constitution, the impact of a state of emergency depends on which type of emergency is declared.¹⁴ In case one, it allows the President to exercise the executive and legislative power of the Region or State, essentially overriding the powers of

¹³ Constitution 2008, art 40(c), 417.

¹⁴ Constitution 2008, art 411, 413, and 417.

regional governments. In case two, the Defence Services can assist local administrative bodies, and, if a military administrative order is declared, then executive and judicial power is conferred on the Commander-in-Chief of the Defence Services. In the third case, the powers of all three branches of government are conferred directly on the Commander-in-Chief. This includes the suspension of the parliament, and the dismissal of all members of parliament from office. The effect on the branches of government in this situation is therefore total, and potentially allows the Defence Services to act as a substitute without restraint.

The second key issue during a state of emergency that may be addressed by a constitution is the effect that it has on the rights of citizens. A state of emergency may result in the limited suspension of the rights and freedoms of individuals. But it is recognised under international law that an emergency can only affect those rights that are derogable, such as freedom of movement, for example, by imposing a night curfew. It cannot affect non-derogable rights such as the right to life, the right to be free from slavery and the right to be free from torture. Some Constitutions specify which rights cannot be interfered with by a state of emergency.¹⁵ Other Constitutions heavily qualify the effect of an emergency by emphasising that rights can only be suspended where absolutely vital to restore social order.¹⁶

The 2008 Constitution of Myanmar, however, provides no guarantees at all for basic human rights in a state of emergency. In case one and two, it allows the President ultimate power to “restrict or suspend” any right, while the Commander in Chief has the same power in relation to case three.¹⁷ Further, the constitutional writs of *certiorari* (quashing order), *habeas corpus* (order for release from illegal detention), and so forth are deemed to be suspended if an emergency is declared, and the right of a citizen to obtain “redress by due process of law for grievances entitled under the law”, does not apply in an emergency.¹⁸ This is particularly concerning because not even *habeas corpus*, the right to challenge an illegal detention, is available. This is important because some cases of illegal detention have been brought to the Supreme Court by relatives of individuals who have been accused of being involved with the Kachin Independence Army, in relation to the conflict in Kachin State. In contrast, individuals (that is, Rohingya) who have been detained due to their alleged involvement in the violence that occurred in Rakhine State and Meikhtila District have no such right, because a state of emergency has been declared in these areas.

¹⁵ One example of this is the Constitution of East Timor, art 25.

¹⁶ One example of this is the Constitution of South Africa, art 34(4).

¹⁷ Constitution 2008, art 414(b) and 420 respectively.

¹⁸ Constitution 2008, art 296(b), and 381(c). These provisions are similar to art 25 and 27 of the 1947 Constitution.

Limits on Emergencies

There are several ways that a constitution may impose limits on the scope of a declaration of a state of emergency, though few of these common limitations appear in the 2008 Constitution of Myanmar. The first is a time limitation on the duration of the power, and these are often very short, such as two, three or four weeks. There is general recognition that a state of emergency should not remain ongoing and must be subject to specific time limitations. It may also specify the conditions under which a state of emergency can be extended, and the time period it can be extended for. The purpose of a time limitation is to ensure that a state of emergency is not enduring and is only a temporary measure. If the Constitution or legislation requires a time limit to be specified, it is important that the enabling instrument that declares the state of emergency does specify a time limit.

In the 1947 Constitution of Burma, no time limit was specified, although a declaration of emergency was deemed to have expired after six months if it was not approved by both Chambers of Parliament. The 1974 Constitution failed to specify any time limitation at all.

In the 2008 Constitution, case one and two simply requires the President to specify the time period. There is a default time limit, however, because any declaration requires the approval of the Hluttaw within 60 days; otherwise it is deemed to have expired. This is perhaps the only basis on which the declaration in relation to both Rakhine State and Meikhtila may be unconstitutional. The former states it applies “until further notice”, while the later states it “shall take effect until another order is issued”. It is arguable, therefore, that this may not fulfil the requirement that a time limit must be specified. If a declaration is made under case three, the state of emergency automatically lasts for an entire one year.

Aside from the time limitations, another way to set boundaries on this power is by legislative checks on the process by which an emergency is formally declared, such as ratification of a declaration of a state of emergency by the legislature. This is not the case in Myanmar in relation to the initial act of declaring an emergency, although the Hluttaw is required to approve an extension of a state of emergency within 60 days. No grounds are specified as to the conditions that must be fulfilled to extend an emergency, and the recent Hluttaw session suggests that the President can propose an extension without any clear evidence of the need for it.

A third limit found in some constitutional provisions on emergencies is the right to seek judicial review of the legality of the declaration. This goes to the heart of the role of the courts in a state of emergency and whether the government’s actions and decisions made during the period of emergency can or should be subject to review by the judiciary. In some countries, the Constitution provides that any superior court has authority to enquire into both the validity of a declaration of a state of emergency, and

any action taken in relation to that declaration.¹⁹ This ensures that the power to exercise a state of emergency remains accountable and subject to review.

Under the 2008 Constitution of Myanmar, however, it is very clear that there is no room for legal action to be taken against any “legitimate” decisions or actions made during an emergency.²⁰ Presumably, if action is not “legitimate”, it may be possible to bring a challenge if judicial power had not been transferred to the Commander-in-Chief. There is silence on whether a declaration itself could be open to challenge. This is a reflection of the broader essence of the 2008 Constitution, in which the judiciary is subordinate to the executive.

CONCLUSION

Emergency powers highlight the extent and scope of executive power and the role of the military. This controversial area of law is also an indication of whether accountability mechanisms remain in place to uphold the rule of law and act as a check on the misuse of this power in exceptional circumstances. The existence and use of emergency powers in Myanmar is a broader reflection of the transition process that remains under the control of a highly centralised executive, with few, if any, checks and balances. It also demonstrates the closely intertwined powers of the President, the Commander-in-Chief and the military-dominated National Defence and Security Council.

The declarations of emergency issued in 2012 and 2013 raise serious questions about how this power is being used by the executive and who it is being used against. For example, it is striking that a state of emergency has been declared in areas where there has been Buddhist-Muslim conflict, but not in Kachin State, where an intense conflict between the government and the KIO has led to displacement of thousands of people. Given the loose definition of a state of emergency, the conflict in Kachin State could have easily satisfied the conditions for an emergency. One explanation may be that the government is concerned to be seen to be making progress in terms of ceasefires and peace plans with ethnic nationalities, and issuing a state of emergency in Kachin State would contradict this claim. Further, the exercise of emergency powers in relation to Rakhine State and Meikhtila District legitimises a sense of crisis about the Rohingya and the government’s claim that this situation requires urgent action. It also opens up a wide role for the military, and the failure of the President and the military to clarify at the May 2013 special session of the Hluttaw what steps have been taken to restore order and stability in Meikhtila raises further concerns about the transparency of the situation.

In terms of the 2008 Constitution itself, the concerns arising from the emergency powers provisions are just a small reflection of the broader issues surrounding the

¹⁹ For example, the Constitution of South Africa, art 34(3).

²⁰ Constitution 2008, art 432.

powers of the President, the Commander-in-Chief and the military. A long list of items for discussion may potentially feature on the agenda as part of the constitutional amendment process, with the Constitutional Review Committee due to submit its report to the Union Parliament at the end of December 2013. At the top, however, is the need to scale back the excessive powers of the executive, subordinate the military to executive control, and provide for a full separation of powers in which each of the three branches acts as a check on the others.

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The Military and Political Liberalisation in Myanmar

Maung Aung Myoe

Since its inception in March 2011, the Union Solidarity and Development Party (USDP) government led by President U Thein Sein has publicly committed to building Myanmar into a “modern developed democratic nation” and initiated a number of measures aiming at political and economic liberalization in Myanmar. As the USDP is commonly known as a military-backed party and its leadership is almost entirely made up of former military officers, many observers and the general public are cautiously optimistic about the president’s commitment. This is due to the fact that the Tatmadaw (Myanmar Armed Forces) has been involved, directly or indirectly, in running the successive (authoritarian) governments in Myanmar at least since 1962. While there are various stakeholders in Myanmar politics, this article examines the Tatmadaw’s perception and position on the ongoing process of political liberalization, if not outright democratization.

With a declared objective that states “Our vision for Myanmar is to become a modern developed nation that meets the aspirations of its people for a better life and to achieve greater integration with the international community by 2020”, the Myanmar government under President Thein Sein initiated a series of liberalizations that could be conveniently grouped into three categories, namely, political liberalization, socio-economic liberalization, and administrative liberalization. Under political liberalization, the government appears to focus on three major themes. First, it is about “all-inclusiveness in Myanmar’s political process”. In order to make this commitment a reality, the government has entered peace settlement with armed nationality groups and has remained engaged in negotiation with the remaining ones. It also opened up a venue for the National League for Democracy (NLD) and Daw Aung San Suu Kyi to participate in by-elections in 2012. It also releases political prisoners and recognizes the existence of “political prisoners” in Myanmar. Moreover, the government welcomes the “return of Myanmar expatriates with dignity”; therefore, quite a number of Myanmar activists returned and visited the country. In addition, the president personally met people from civil society and recognized the important role of Civil Society Organisations (CSO) in Myanmar’s political process. Second, the government “promotes political openness

and democratic practices". The most obvious case is the freedom of press and association. The government abolished the censorship system and the half-a-century-old Press Scrutiny Board. Demonstrations or protests are allowed in accordance with the law. Moreover, the president respected public opinion and suspended the construction of the "Dam at Myitsone on Ayerwaddy River" and a coal-powered generator in Dawei Industrial zone. In addition, parliamentary oversight on public projects is now allowed in Myanmar. For instance, the Hluttaw cut the funding for mega projects under the "Ministry of Myanmar Industrial Development", which was finally dissolved in September 2012. It also appears that the government has begun to introduce a system of consultation with stakeholders when projects are initiated. The government now requires open consultation with experts on the social impact and environmental impact of projects. This is an example of democratic practice and bottom-up approach; in the past the government applied a top-down approach. The government also encourages people-centred legislation in the Hluttaw. This point is reflected in the president's comments on bills submitted in the Hluttaw—the land reform bill. Third is the "[re]engagement with international community". The government openly invites international assistance in resolving Myanmar political issues. For example, Scandinavian assistance for a peace centre is a case in point. In the past, such an activity would be considered as interference in domestic affairs. International NGOs are allowed to operate more freely in Myanmar. In order to attract more international assistance—especially loans and grants—the government introduced a mechanism for aid effectiveness assessment. Moreover, the government diversifies its external relations and expands the scope for cooperation. For instance, Myanmar is now an observer in the annual Cobra Gold exercise jointly carried out by Thai and United States armies. However, the most challenging aspect of political liberalization is yet to come; it is the review of the 2008 constitution and its amendments.

In a recent study on civil-military relations, Zoltan Barany claimed that "democracy cannot be consolidated without military elites committed to democratic rule and obedient to democratically elected political elite".¹ This fact is also thoroughly understood by key political figures in Myanmar like Daw Aung San Suu Kyi, who has repeatedly stated that "a democratic system [in Myanmar] could not be established or sustained without the willingness of and cooperation from the Tatmadaw". It is in this context that this paper would like to examine: To what extent is the Tatmadaw prepared to cooperate with the government on political reforms and to withdraw from politics? What are the conditions or factors, both endogenous and exogenous, which could determine the Tatmadaw's political role in Myanmar? This article would like to look at (1) the political tradition and professionalism of the Myanmar military, (2) the institutional

¹ Zoltan Barany (2012), *The Soldier and the Changing State: Building Democratic Armies in Africa, Asia, Europe, and the Americas*, Princeton University Press, Princeton and Oxford, p. 3.

culture of the Tatmadaw, and (3) the political and security environment as factors that influence the Tatmadaw's support for political liberalization in Myanmar.

POLITICAL TRADITION AND PROFESSIONALISM OF THE MYANMAR MILITARY

From its inception, the Myanmar military has its political tradition. Here, I would like to discuss the “*Tat* tradition in Myanmar politics and political tradition of the Tatmadaw”. During the anti-colonial struggle, Myanmar nationalists, political activists and politicians formed various *Tats* (private pocket armies without bearing arms) to back up their political activities. Hence, the *Tat* tradition in politics has almost become a norm in post-colonial Myanmar. This *Tat* tradition in Myanmar was certainly alive and, in the 1950s, there were several *Tats*; this time they were more destructive and deadly as they carried guns, including *Pyusawhti* and *Karkweye*, and were controlled by individuals or parties. Besides, there were various paramilitary *Tats* formed by the government, such as *Sitye-Tat* and *Sitwundan-Tat*. Until the 1960s, the Tatmadaw had hard time handling these *Tats*. The legacy of the *Tat* tradition in Myanmar politics, the unpleasant historical experience of dealing with various *Tats* that undermined the state's institutions, and challenges posed by the *Sitye-Tat* under the Ministry of Home Affairs at one stage in 1958, led the Tatmadaw commanders to constitutionally place all “armed forces” under the control of the Commander-in-Chief of the Defence Services.

It is true that the Tatmadaw was born out of historical necessity of the nation and for the independence struggle and, from its inception, it was a political force. The “Thirty Comrade”, the embryo of the present-day Tatmadaw, was formed by politicians from *Dobama Asiayone*. Therefore, the genealogy of the Tatmadaw could be traced back to the national struggle for independence and the employment of Tatmadaw as a political force, which was beyond the scope of classic professional armies (in the Western sense), has become a conventional wisdom and an established historiography. This political tradition of the Tatmadaw is an established discourse in the socialization process of the Tatmadaw.

Another important factor closely related to the political tradition of the Tatmadaw is the concept of military professionalism in Myanmar. The word “professionalism” in Myanmar means mercenary (*Kyesar*), with a derogatory connotation.² This is particularly true for the Tatmadaw since it claimed itself to have a nationalist or patriotic origin. Bogyoke Aung San, father of the present-day Tatmadaw, claimed that “our

² Khin Myo Chit (1999), *Let me Say Something*, Nyein Nyein Chan Chan Bookhouse, Yangon, pp. 156-160. (Khin Myo Chit explained how Myanmar people translate professional athletes as mercenary athletes.)

Tatmadaw is not a mercenary army and it is unlike the one formed by the British”.³ In the words of General Ne Win too, the Tatmadaw was formed with hardcore politicians and it was not a mercenary army.⁴ Similarly, at the 67th Anniversary of Armed Forces Day parade on 27 March 2012, C-in-C Vice Senior General Min Aung Hlaing claimed that the Tatmadaw is a patriotic army. This conceptual differentiation between a patriotic soldier (*Myochit Sitthar*) and a mercenary soldier (*Kyesar Sitthar*) is a hallmark of the Tatmadaw in Myanmar. In addition to the social image of being patriotic soldiers and the lack of proper indoctrination of the Western notion of professionalism and the concept of civilian control, the political situation at the time of independence reinforced the Tatmadaw’s political orientation.

The political indoctrination in the Tatmadaw is nothing new and it has a long history since the days of the Burma Defence Army in 1943. Political indoctrination was particularly important for the Tatmadaw as it has to conduct counterinsurgency operations against the Communists. Hence, since the 1950s, as a consequence and by-product of counterinsurgency, the Tatmadaw progressively redefined its political role in terms of broad national security concerns. This came with the formulation of a national security doctrine known as *National Ideology and the Role of Defence Services* (NIRDS), the ideological basis of Tatmadaw’s political involvement and activism. In essence, the NIRDS has assigned the Tatmadaw a guardian’s role in nation-building and state-building; therefore, it has a right and obligation to involve itself in the socio-political field in addition to its primary duty of national defence.

Since 1962, soon after the Tatmadaw took over the state in the name of the Revolutionary Council and founded the Burma Socialist Programme Party (BSPP), the Tatmadaw has begun to digest leftist political ideas and Marxist economic theory. This institutionalized political indoctrination reinforced the existing belief in the political role of the Tatmadaw. Even after the collapse of the BSPP government in 1988, the Tatmadaw continued its political indoctrination, this time, of “Our Three National Causes”: non-disintegration of Union, non-disintegration of national unity, and perpetuation of national sovereignty. Until and unless the military officers are socialized with a new discourse of military professionalism, which focuses on external defence and on the concept of objective civilian control, what Alfred Stepan called “new professionalism” will remain with the Tatmadaw and it is assumed to be natural by the Tatmadaw that it is involved in the “national” politics.

³ Aung San’s Speech on 31 January 1944 (*Bamarkhit Newspaper*, 3 February 1944); Aung San’s Speech on 13 March 1944 (*Bamarkhit Newspaper*, 15 March 1944) in Sagaing Han Tin (1985), *Rare Speeches of Bogyoke Aung San*, Parabike and Arts, Yangon, pp. 95-107.

⁴ General Ne Win’s speech on 30 July 1982 at the 3rd Central Committee Meeting of the War Veteran Organization.

INSTITUTIONAL CHARACTERS OF THE TATMADAW

In term of structure, the Tatmadaw instils corporate solidarity by identifying its goals with that of the unitary state. Learning from its experience in the early years of its existence, the Tatmadaw introduced institutional measures and mechanisms to keep the military away from communal and factional struggles. It takes serious actions against any attempt to undermine its organizational unity and cohesiveness. Especially since the early 1960s, by keeping civilian meddling in military affairs out, the Tatmadaw was able to keep open conflicts and factional struggles under control. Besides, inter-service rivalry within the Tatmadaw has been more or less resolved since both the navy and air force accept the dominance of the army in the Tatmadaw. So far, for the past 50 years, although there were occasional purges of some cliques and individuals (particularly from the intelligence corps), the Tatmadaw has overcome any open split within the institution. The present Tatmadaw leadership is likely to maintain institutional cohesion and to prevent any open split within the Tatmadaw. In other words, the Tatmadaw leadership wants to maintain institutional autonomy so that it can prevent the outside interference in its internal affairs, such as promotion. The Tatmadaw is concerned with institutional unity, operational capability, and troop discipline. At present there are problems of low morale and a high rate of desertion. Hence, it appears that the Tatmadaw leadership wants to devote more time and resources for military efficiency and operational capability while staying aloof from the political process if possible. Meanwhile, the Tatmadaw has introduced measures to improve its institutional cohesion and unity.

One also needs to understand the present Tatmadaw leadership's attitude towards its former commanders and predecessors. When the present writer visited the Defence Services Museum in Naypyitaw on 23 October 2012, there were three oversized photographs hanging on the wall on the right side of the main passage in the main hall: Bogyoke Aung San in the middle (a few inches higher than the other two), General Ne Win on his left and Senior General Than Shwe on his right.⁵ The photo display at the Defence Services Museum clearly indicates that the present Tatmadaw leadership accords a high regard to Senior General Than Shwe. This point was further proven in the C-in-C's speech on the 67th Anniversary of the Armed Forces Day on 27 March 2012. In his speech, Vice Senior General Min Aung Hlaing said: "From its initial establishment to the present, respective military leaders through various ages have built up the Tatmadaw to enhance not only its strength but also its capability in order to promote

⁵ On the left side of the main passage, there were photographs of Commanders-in-Chief of the Armed Forces, Deputy Commanders-in-Chief and Command-in-Chief (Army), and Joint Chiefs-of-Staff, Commanders-in-Chief (Navy) and Commanders-in-Chief (Air Force). What is interesting is that while Brigadier General Thura Tin Oo appears among the photos as the deputy Commander-in-Chief, he was not listed as the Commander-in-Chief though he served in the position for two years.

the defence security of the nation. In this noble tradition, General Ne Win and Senior General Than Shwe kept on building up the well-disciplined, systematic and modern Tatmadaw that was initially established by General Aung San, the forefather of the Tatmadaw, to abreast of the current age. Their [General Ne Win and Senior General Than Shwe] worthy gratitude can also be seen.” The point is that, at least among some senior commanders, there is a tradition in the Tatmadaw to regard some former commanders as parents.⁶ Even at the battalion or regiment level, the commanding officer and his wife are usually regarded as the parents of the unit. This institutional culture, if I may say so, should be acknowledged, at least for the time being, during the democratic transition in Myanmar.⁷ One has to remember that this institutional culture was a sensitive issue when Daw Aung San Suu Kyi heavily criticized the then Tatmadaw leadership for being close to General Ne Win in June 1989.

POLITICAL AND SECURITY ENVIRONMENT

There are about a dozen ceasefire agreements between the government and armed nationality groups; yet they have massive firepower. Since late 2009, in line with the 2008 constitution, the then SPDC government urged all “peace settlement groups”—the official term for insurgent groups that reached ceasefire agreements with the government—to transform their troops into Border Guard Force (BGF) under the command of the Tatmadaw. In this way, a total of 23 BGF battalions were formed; each comprised of 356 officers and ranks, including 30 officers and ranks from the Tatmadaw. However, there are unconfirmed reports that some of these BGF battalions have resisted the Tatmadaw’s command. In particular, those BGF battalions, thirteen in total, formed with the Democratic Karen Buddhist Army (DKBA) are more or less outside of the control of the Tatmadaw. The Tatmadaw leadership is also fully aware of the instability and unreliability of the BGFs. In addition, there are about a dozen “People’s Militia Force (PMF)” units, each with about 100 armed personnel drawn entirely from

⁶ Senior General Saw Maung once mentioned that General Ne Win was like his parent. Lt. Gen. Chit Swe in his memoir said that General Thura Kyaw Htin was like his father. [*WPD* (5 February 1989); *Asiaweek* (3 February 1989); Naung Sitthi, *Thae Tanae Mawae Tanae*, Vol. 2, p. 783.]

⁷ Although Senior General Than Shwe, former Chairman of the SPDC and the C-in-C of the Armed Forces for nearly 18 years (1992-2010), is reportedly retired from public life, he still appears to exercise his influence, in some selected cases, among key members of the Tatmadaw (and the ruling party). It is no secret that senior government officials, senior military officials and UDSP leaders occasionally visit the Senior General’s residence. While he is apparently not involved in the day-to-day running of the government, it appears that the senior general plays an important role in some key decisions. An example is the appointment of Major General Mya Tun Oo, who is unofficially known as chief of palace guard for the senior general and his family, to the position of Chief-of-Staff (Army)—the position left vacant for 10 years since the death of Lieutenant General Tin Oo in 2002—which ranks 4th in the command hierarchy. This appointment ensures that the Tatmadaw will be in the hands of commanders loyal to the senior general for another 10 years.

former armed national groups, under the control of the Tatmadaw. However, many powerful ceasefire groups remain outside of this arrangement and these groups pose far more serious challenges to the state. The United Wa State Army (UWSA), the Kachin Independent Army (KIA), and the Shan State Army (SSA) are some examples. One conventional estimate registers that there are about 100,000 armed troops under nearly 40 non-state groups and organization. To the Tatmadaw leadership, the existence of such a large number of insurgents is beyond the capacity of the police force and, therefore, for all practical purpose, it is the Tatmadaw which has to deal with these internal security challenges, that is clearly in line with what is known as “new professionalism”. The persistence of insurgency is an important factor that could explain why the Tatmadaw considers internal security operations as part of its responsibilities.

CONCLUSION

As far as the Tatmadaw (leadership) is concerned, the political liberalization in Myanmar should take place within the framework of the 2008 constitution. While there is some room for constitutional amendment, it is not likely to tolerate any change in the constitution that could undermine the self-projected national political role of the Tatmadaw, its institutional autonomy and unity, and what is known as “Our Three Main National Causes”, namely, (1) non-disintegration of the Union, (2) non-disintegration of national solidarity, and (3) perpetuation of sovereignty.

At present, the relations between the USDP leadership and senior government officials (especially the president and his cabinet members) on the one hand and the Tatmadaw leadership on the other are rather smooth as they share the same institutional background. The president himself is a retired general from the Tatmadaw and one of his two vice presidents is also a retired admiral. Moreover, the incumbent UDSP government is made up mostly of retired military officers and the USDP leadership itself is also heavily dominated by ex-military personnel. At the individual level, the so-called USDP political leaders are former senior commanders or comrades of the present-day active service officers. At the institutional level, again, since a substantial number of top civilian bureaucrats are former military personnel, they share a similar political outlook and close working relationships with the military officers. On the basis of smooth relations between the government and the Tatmadaw at both individual and institutional level, it is safe to conclude that the Tatmadaw will continue to support the political liberalization measures initiated by the president and supported by the national assembly, where the Tatmadaw plays a dominant role. As far as the Tatmadaw is concerned, constitutional amendment is possible as long as the changes do not undermine the national political role of the Tatmadaw, the three main national causes, and the institutional autonomy of the Tatmadaw.

Since the Tatmadaw's officer corps has been thoroughly socialized with the concept of “new professionalism”, for both practical and ideological reasons, for a long

time, it is rather unrealistic to expect that the Tatmadaw will give up its national political role. At present, military professionalism in the Tatmadaw is closely related to its self-reflected role as the guardian of the state. While one can expect that the Tatmadaw will not get involved in running the day-to-day administration, it will continue to exercise its influence over certain policy areas, especially in defence and security matters. The Tatmadaw leadership's concern for combat efficiency will also create room for its withdrawal from day-to-day management of the state. As it views itself as the embodiment of the Myanmar state, the Tatmadaw generally believes that any challenge to the Tatmadaw constitutes a threat to the state. Despite the fact that the government has successfully negotiated ceasefire agreements with insurgent groups, internal security challenges remain a top priority on the Tatmadaw's security agenda. Hence, objective civilian control is perhaps neither possible nor practical for the time being in Myanmar. However, in the long term, with the exposure to Western notions of democratic civil-military relations and military professionalism through various training programs in Western countries, as well as the changing discourse of military professionalism in socialization as the security environment continues to improve, there is a possibility that the Tatmadaw will be more and more attuned to the principles of democratic governance.

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PEOPLE

Governance and Legitimacy in the Myanmar Peace Process¹

Ashley South

OPPORTUNITIES AND RISKS

The peace process which emerged in Myanmar in late 2011 represents the best opportunity in many decades to address political, social, economic and cultural issues which have driven conflict between the government and ethnic groups since independence.² The 7-point agreement of late May 2013 to halt fighting between government forces and the Kachin Independence Organisation (KIO), remains problematic, but means that for the first time in the country's history, all major non-state armed groups (NSAGs) have agreed to ceasefires. This is a significant and historic achievement in peace-making. However, a number of serious issues remain unresolved. The peace process is unlikely to succeed, and result in a substantial and sustainable process of peace-building, unless these are addressed. This will be difficult, given the long history of mistrust among key stakeholders, and the failures of understanding and action evident among key external actors, including international supporters of the peace process.

In order for the peace process to be successful, initial ceasefires between the government and NSAGs need to be consolidated; a substantial and credible political dialogue needs to commence between the government, Myanmar Army and other mainstream political actors, and representatives of the country's diverse ethnic communities; and solutions need to be found to a number of urgent issues which threaten to undermine trust and confidence in the peace process. It is also necessary that international aid donors, and others (including private sector interests) seeking to support or otherwise engage with the peace process, inform themselves about the complex dynamics of conflict in Myanmar, and take care that their interventions "do no harm".

¹ This article is based on a presentation made to the "Myanmar in Reform 2013" academic symposium, held at the University of Hong Kong, 17-19 June 2013.

² For an historical overview of ethnic armed conflict in Myanmar, see Martin Smith, *Burma: Insurgency and the Politics of Ethnicity* (London: Zed Books 1999).

There is a risk that, should the peace process fail, the broader reform process underway in Myanmar could be threatened. This is evident in moves by Myanmar politicians in mid-2012 to position themselves vis-à-vis the 2015 elections, by criticizing the government's handling of negotiations with NSAGs. Such frictions tend towards a view that the window of opportunity to make progress on peace in Myanmar is closing. As the country takes on chairmanship of the ASEAN regional grouping in 2014, in the run-up to elections the following year, political leaders are likely to be increasingly distracted, and/or caught up in games of zero-sum electoral politics. The success of the peace process will rest on a number of factors, including the degree to which Myanmar's political leaders feel a sense of ownership—not least in the expectation that, whatever government may take power after 2015, this regime will inherit the legacy of many decades of often bitter conflict, and also the hopes for a better relationship between the state and the country's diverse ethnic groupings.

BACKGROUND

Non-Burman communities make up at least 30% of Myanmar's population. During the pre-colonial period, ethnic identity was diffuse, with ethno-linguistic characteristics being one among several markers of socio-political position. The political salience of ethnicity became reinforced during the colonial period, so that by the time of independence in 1948, ethnicity had become a defining category of political orientation. In the lead-up to independence, ethnic nationality elites sought to mobilise communities, in order to gain access to political and economic resources, demanding justice and fair treatment for the groups they sought to represent. Burman and minority elites having failed to successfully negotiate a pacted transition to independence; the late 1940s saw widespread outbreaks of violence. By the time the Karen National Union (KNU) went underground in January 1949, the country was on the course of a civil war which lasted more than six decades. Armed conflict in Myanmar has been marked by serious and wide-spread human rights abuses on the part of both the *Tatmadaw* and—less systematically—NSAGs.

For more than half a century, ethnic nationality-populated, rural areas of Myanmar have been affected by conflicts between ethnic insurgents and a militarised state, widely perceived to have been captured by elements of the ethnic Burman majority. For decades, communist and dozens of ethnic insurgents controlled large parts of the country. Since the 1970s however, armed opposition groups have lost control of their once extensive “liberated zones”, precipitating further humanitarian and political crises in the borderlands. For generations, communities have been disrupted, traumatised and displaced. In 2011, there were an estimated 500,000 Internally Displaced People (IDPs) in the southeast alone, plus some 150,000 predominantly Karen refugees living in a

series of camps along the Thailand-Burma border.³ In the nearly two years since the start of ceasefire negotiations in late 2011, the number of displaced people in southeast Myanmar has considerably reduced, while it has increased dramatically in Kachin and Rakhine States as a result of war and communal violence.

A previous round of ceasefires in the 1990s brought considerable respite to conflict-affected civilian populations. These truces (some 25 agreements in total) provided the space for civil society networks to (re-)emerge within and between ethnic nationality communities. However, the then-military government proved unwilling to accept ethnic nationality representatives' political demands. Therefore, despite some positive developments, the ceasefires of the 1990s did little to dispel distrust between ethnic nationalists and the government.⁴

The election of a military-backed, semi-civilian government in November 2010 represented a clear break with the past. Although opposition groups (including most NSAGs) continue to object strongly to elements of the 2008 constitution, this has nevertheless seen the introduction of limited decentralisation to seven predominantly ethnic nationality-populated States. In late 2011 and through 2012, the new government under President (and ex-General) U Thein Sein agreed, or re-confirmed, preliminary ceasefires with 10 of the 11 most significant NSAGs, representing the Wa and Mongla, Chin, Shan, PaO, Karen, Karenni, Arakan/Rakhine and Mon. Despite such positive developments, in June 2011, the Myanmar Army launched a major offensive against the KIO, the main Kachin armed ethnic group in northern Myanmar, breaking a 17-year ceasefire. As a result of this resumption of armed conflict, at least 80,000 people were displaced along the border with China, with tens of thousands of more IDPs in the conflict zones and government-controlled areas. This resurgence of armed conflict included some of the most significant battles of Myanmar's 50-plus-year civil war. The reasons behind the resumption of armed conflict in Kachin areas are complex and contested, and largely beyond the scope of this chapter, including sometimes opaque political-economic and geo-strategic factors.

CEASEFIRES

The agreement of ceasefires between the Myanmar government (and Army?), and all of the main armed ethnic groups in the country, is a necessary and important milestone in peacemaking—but not sufficient to achieve significant peacebuilding. Since

³ Thailand Burma Border Consortium, "Program Report 2012: January to June" (Bangkok 2012).

⁴ Trust was further eroded in April 2009, when the government proposed that the ceasefire groups transform themselves into Border Guard Forces, under the direct control of *Tatmadaw* commanders. Several of the less militarily powerful ceasefire groups accepted transformation into BGF formations. However, most of the larger groups resisted: Transnational Institute, "Burma at the Crossroads: Maintaining the Momentum for Reform", *Burma Policy Briefing No.9* (Burma Centrum Nederland. Amsterdam 2012).

late 2011, the military-backed government has agreed preliminary ceasefires with 14 NSAGs.⁵ In addition, at the time of writing, an initial May 2013 truce with the KIO seemed to be holding, after several false starts—although clashes continued to be reported between government-backed BGF militias and the KIO. Furthermore, since the agreement in 2012 of ceasefires with the two main Shan groups (the Shan State Army-South/Restoration Council of Shan State, and the Shan state Army-North/Shan States Progressive Party), scores of clashes have occurred with the Myanmar Army. The fact that ceasefires agreed with groups based in northern Myanmar (Kachin and Shan States) have been the most unstable is particularly worrying. Presumably, the Myanmar Army prefers to continue fighting with NSAGs which are relatively isolated from the aid and media networks which proliferate along the Thailand border, in southeast Myanmar (where Karen, Mon, Karenni and other armed groups operate). Displaced populations fleeing conflict in the north are less likely to seek refuge across international borders, causing embarrassment for the Myanmar government—unlike in Thailand, where the presence of aid agencies and activist groups would rapidly draw attention to the humanitarian impacts of fighting. It should also be noted that, in some cases at least, clashes have resulted from NSAG commanders on the ground patrolling aggressively, seeking taxation from villages and provoking Myanmar Army interventions.

The continuation of fighting in several areas is clearly of great concern. However, the middle and later part of 2013 seems have been characterised by less frequent clashes between NSAGs and government forces.⁶ Furthermore, in many areas, the ceasefire situation is relatively more stable. Civilians living in conflict-affected areas where ceasefires are holding benefit in a number of ways: through reduced fear, improved livelihood options, and better opportunities for travel and access to services and assistance—allowing some displaced populations to begin the task of rebuilding their lives.

Civilian populations in conflict-affected areas are often extremely vulnerable, with extensive needs in many sectors (e.g., health, education, livelihoods and food security). Among the dimensions of human security, the primary concern of most conflict-affected communities is physical safety. Many ethnic nationality communities continue to experience high levels of militarization. If the Myanmar Army and NSAGs could withdraw from some non-strategic positions, perceived as threatening by communities,

⁵ Main ceasefire groups in Myanmar: United Wa State Army, National Democratic Alliance Army (Mongla), Kloh Htoo Baw (formerly, Democratic Karen Buddhist Army Brigade 5), Restoration Council of Shan State (Shan State Army-South), Chin National Front, Karen National Union, Shan State Progressive Party (Shan State Army-North), New Mon State Party, KNU/Karen National Liberation Army Peace Council, Karenni National Progressive Party, Arakan Liberation Party, PaO National Liberation Organization, National Socialist Council of Nagaland (Khaplang faction), and KIO: Burma Centre Netherlands/Transnational Institute, *The Kachin Crisis: Peace must Prevail* (Policy Briefing No.10, Amsterdam March 2013).

⁶ <http://www.mmpeacemonitor.org/> - “Peace Monitoring Dashboard”.

this would provide a boost in confidence to local stakeholders, helping people to believe that the peace process can result in sustainable improvements to their situation.

Preliminary ceasefires agreed between the government and NSAGs therefore need to be consolidated, with concrete agreements regarding troop positions and the behaviour of armed forces (i.e., negotiation of a ceasefire “Code of Conduct”, details of which have been discussed between the KNU and government). There is also a need for ceasefire monitoring, by local actors (community peace monitoring), and/or by international agencies—as specified in a number of ceasefire agreements (e.g., negotiations in 2012 and 2013 between government and the KNU).

As noted, the continuation of military clashes between the Myanmar Army and ceasefire groups in Kachin and Shan States is deeply worrying. These ceasefire violations raise questions regarding whether the Myanmar Army is under government control, or if military commanders are following their own agendas. Some observers and actors suggest that the government and Myanmar Army have adopted a strategy to “divide and rule” NSAGs, using the peace process to achieve international rehabilitation (removal of sanctions etc.), while outmanoeuvring ethnic armed groups militarily, picking off recent battlefield enemies one-by-one (“good cop, bad cop” roles of government and army).

Even if this conspiracy theory has some truth to it, political change and peace in Myanmar are dynamic “processes”, made and re-made by doing. Regardless of what dark plans may be playing out, there is a momentum behind the reform and peace processes, which needs to be intelligently supported. It is difficult to imagine Myanmar returning to a one-party military dictatorship. However, it is equally difficult to imagine a Western-style bourgeois liberal democracy in Myanmar. Most likely is a unique Myanmar hybrid regime, reflecting elements from other countries in the region.

POLITICAL NEGOTIATIONS

There is a need to move from the agreement of preliminary ceasefires to discussing long-standing political issues which have structured armed and state-society conflicts in Myanmar since independence (or even before). In February 2013, an historically important—if largely symbolic—agreement to begin a process of political dialogue was reached in Chiangmai (Thailand), between the President’s chief peace envoy, U Aung Min, and the United Nationalities Federal Council (UNFC—the main NSAG alliance⁷).

⁷ During the period of the peace process, two main alliances have been predominant among ethnic armed and other opposition actors: the UNFC, and the Working Group for Ethnic Coordination. At this key moment in Myanmar’s history, long-standing tensions between the UNFC and other ethnic political actors are unhelpful. Such tensions became increasingly evident during 2013, between the UNFC, seeking to position itself as the primary interlocutor with the government on behalf of ethnic communities in the peace process, and the Working Group for Ethnic Coordination, a network of NSAGs with broader participation, including some civil society actors.

At the time of writing however, substantial political talks between the government and ethnic political leaders had not yet started, leading to scepticism regarding the government's sincerity in pursuing the necessary political talks, with the clock ticking towards elections scheduled for late 2015.

Key stakeholders question whether the government (U Aung Min, and ultimately the President) have enough political capital to credibly deliver political negotiations. Sceptics also question whether the government has enough leverage with the Myanmar Army to deliver ceasefires—leaving U Aung Min and colleagues with only two strategies: “peace through development” and buying peace through the provision of business opportunities. As the 2015 elections approach, it may become increasingly difficult to move forward with the peace process, as Myanmar politicians position themselves in relation to the elections (zero-sum politics), with a growing reluctance to give the present government credit for achievements in the peace process, and increasing scepticism that anything agreed with this government will hold post-2015. In the meantime, the long delay to starting political dialogue has undermined an always limited confidence in the peace process. Therefore, any new moves from the government regarding political dialogue must be very credible—needing a concrete timetable and real agenda. In this context, individual armed ethnic groups (e.g., the KNU and RCSS) have asserted their right to engage directly with the government—and Myanmar Army—to discuss urgent issues of importance to local communities.

Notwithstanding such caveats, developments in August and September 2013 increased the possibility of concrete progress in the peace process, with the imminent likelihood of a substantial multilateral agreement between the government and NSAGs, followed by discussion of a framework for political negotiations, ceasefire monitoring and other issues, including how best to assist and provide “peace dividends” to conflict-affected communities. Participants in such talks would include initially key NSAGs, senior government officials (including parliamentary representation through the Union Peacemaking committees), and the Myanmar Army. Subsequently, it would be necessary to include ethnic political parties and civil society actors in comprehensive discussions.⁸

During 2013, civil society groups and political parties have become increasingly worried about their lack of participation in the peace process. Unless these stakeholders feel a sense of ownership and participation, they may become alienated, and even start to mobilise against the peace process. The exclusion of women from most aspects of the peace process is a particular problem, given the centrality of gender issues in armed and state-society conflicts, and the important contributions women can make towards reconciliation efforts. When political talks begin, there is a need to ensure participation of key stakeholders, including conflict-affected communities, civil society groups and

⁸ For a first-hand account, see Shan Herald Agency for News, “Naypyitaw: Nationwide ceasefire in October” (September 3, 2013).

political parties, and women. This will be a logistical challenge, reflected in the complexity of the “Framework Agreement” (ethnic peace plan) presented to the government by the UNFC and other ethnic political actors in mid-2013.

A number of questions remain unresolved, regarding the role of civil society actors in the peace process. While many civil society actors will demand a seat at the peace negotiations table, others may be more effective in a “watchdog” role, monitoring proceedings, and where necessary attempting to pressure key actors to reach agreement. An intermediary role would be for society groups to have observer status at peace talks, and/or to be looked upon as expert resource people on specific issues. Whatever the eventual structure of society participation in peace talks, it will be necessary to ensure systematic and sustained consultation with representatives of Myanmar’s diverse social groupings.

A number of ceasefire talks (e.g., those negotiated by the Chin National Front, Karenni National Progressive Party and KNU) have agreed in principle to establish ceasefire monitoring mechanisms. However, at the time of writing (prior to any proposed National Peace Accord), ceasefire monitoring has yet to become a reality on the ground. Leaving aside the tricky distinction between monitoring a ceasefire (agreement between NSAG and government) and the broader peace process (including more general elements of commitments to human and other internationally designated rights), there remain questions regarding whether monitoring is best undertaken by international and/or local actors. In principle, there is an important role here for ethnic civil society actors who have access to (and the trust of) conflict-affected communities.

OUTSTANDING ISSUES

Business interests could be spoilers in the peace process, or could be engaged to play a more positive role. Most new business activities in conflict-affected areas are extractive (logging, mining etc.), and often connected to local or national powerholders (e.g., Myanmar Army, NSAGs). Business activities in newly accessible conflict-affected areas are often associated with land-grabbing (e.g., for plantation agriculture). As well as the negative social and environmental impacts, such activities can undermine communities and other stakeholders’ trust and confidence in the peace process. Unless the government, NSAGs and their international partners address these issues, there is a risk that local communities may be alienated from the peace process; for NSAGs, there is a particular risk that their legitimacy and leadership of ethnic communities may be challenged if armed groups are perceived as having strong economic agendas in the peace process. It is therefore in NSAGs’ interests to demonstrate awareness of action on this issue.

Problems of land-grabbing are compounded by the negative impacts of the 2012 Farmland Act, and 2012 Vacant, Fallow and Wasteland Act, which do not recognise customary upland land tenure practices—but rather seem designed to facilitate the

transfer of land from communities to powerful business interests. It may be appropriate to suspend implementation of the 2012 land laws, in conflict-affected areas—although the mechanism for doing so will need to be carefully considered.

Ethnic communities are also concerned about major infrastructure projects. Myanmar undoubtedly needs economic and infrastructure development, especially in remote and conflict-affected areas. However, ethnic communities are deeply concerned that the peace process will see the construction of major infrastructure projects (e.g., hydroelectric dams)—depriving them of ancestral lands, and undermining human security and livelihoods. Large-scale projects should only be implemented after free, prior and informed consultation with all stakeholders, and following proper impact assessments. For some ethnic stakeholders, there should be no significant outside investment in conflict-affected areas, until political dialogue is well-established.

LOCAL AUTONOMY AND THE POLITICS OF GOVERNANCE

A particularly significant, but largely unremarked upon, challenge in the peace process lies in conceptualising and working constructively on the relationship between government structures and those of NSAGs. Many armed opposition groups have long-established, if chronically under-resourced, para-government structures, for example, in the fields of education, health and local administration. Peace talks have yet to address, let alone resolve, how these non-state local governance structures will relate to formal state structures. This is a particularly pressing question in areas of recent armed conflict, where communities are subject to multiple authorities (government, Myanmar Army and one or more NSAGs, plus local militias and other informal powerholders). For many displaced and other communities in the conflict zones, NSAGs' structures and personnel are perceived as more legitimate and effective than those of the state. Civil society actors in conflict-affected areas often enjoy very close relations with (and personnel overlap with those of) NSAGs' service provision actors. It is essential that such individuals and networks enjoy a sense of ownership in the peace process, if momentum is to be maintained. Deepening of the peace process therefore should include participation of affected communities and other stakeholders, such as civil society and political actors, with special attention to the roles of women and young people.

The government has committed in principle to negotiations regarding decentralisation in ethnic nationality-populated areas. On the ground meanwhile, the ceasefire process has seen the state, and Myanmar Army, pushing to expand its authority into previously contested, conflict-affected areas. This is not necessarily (or entirely) a conspiracy: it is what governments do—apply governance to subjects.

The extension of government services into previously inaccessible, conflict-affected communities can have positive impacts for vulnerable populations (e.g., improved access to health and education services, provision of ID cards etc)—but can also be seen as threatening by local communities, who often continue to regard the state

as threatening, and the Myanmar Army as violent and predatory. Efforts to expand Myanmar government authority and service-delivery systems should therefore be undertaken in close consultations with relevant NSAGs and affected communities, and appropriate civil society groups.

In many conflict-affected areas, local organisations (working cross-border, and from “inside” Myanmar) have for years been the only agencies providing assistance to conflict-affected communities. Many NSAGs, and CBO networks working in partnership with them, have developed long-established, if chronically under-resourced, structures in the fields of education, health and local administration. For many displaced and other communities in the conflict zones, NSAG and related civil society structures and personnel are perceived as more legitimate and effective than those of the state. It is essential that such individuals and networks enjoy a sense of ownership in the peace process.

There is a risk that international and state agencies entering these areas could undermine and/or overwhelm existing local capacities, damaging confidence in the peace process. Therefore, international actors should only support the expansion of government authority into previously contested areas in consultation with local stakeholders—i.e., donors and international agencies should seek to “do no harm”.

POLITICAL CULTURES

The government’s ability to deliver reforms is hampered by deep-rooted conservative-authoritarian institutional cultures, and limited technical capacities. This is also the case with Myanmar’s diverse NSAGs. Furthermore, the government (composed mostly of ex-military personnel) exercises only limited control over the Myanmar Army. One consequence of the Kachin conflict has been to activate and empower “hard-line” elements within the Myanmar Army, who actively oppose civilian control over the military. Perhaps the greatest challenge facing the government is therefore to ensure that the Myanmar Army implements its policy, and to build new civilian institutions. For many actors and observers, such reforms will require significant changes to the 2008 constitution.

The President having promised so much, Myanmar may experience a “revolution of rising expectations”: prospects of change have been talked up, and people may become frustrated if the government and its partners are unable to deliver. The reform process in Myanmar may be likened to taking the lid off a pressure cooker. In a society where tensions have been building for more than half a century, ethnic and other grievances can easily spill over, with disturbing consequences. One example is the recent violence and ethnic hatred in parts of Rakhine State and central Myanmar. These events remind us that there is not just conflict between the government and Myanmar Army and various armed ethnic groups, but also intra-communal conflict, with the potential to be extremely violent, between some ethnic communities. Outbursts of horrific violence

in Rhakine constitute a complex phenomenon, beyond the scope of this paper, involving deep-seated mistrust of the “other”, and the politics of citizenship, immigration and representation—issues which have been exacerbated and mobilised by local and national-level political entrepreneurs. Among other things, these events indicate that there are spoilers on the side-lines, waiting to utilize tensions to provoke violence in order to undermine the reforms.

Despite apparent commitment to the peace process, the government and Myanmar Army leaders still seem to regard ethnic communities as “children”, whose lives must be developed and improved by the state (with international assistance)—rather than see ethnic communities (and NSAGs?) as primary actors in their own stories. Such patrician tendencies are notable among the government’s peace envoys, such as the (predominantly ethnic Burman) staff of the Myanmar Peace Centre (established in mid-2012 as a quasi-governmental secretariat to U Aung Min). As noted, the peace process is often experienced by conflict-affected communities “on the ground” as the penetration of top-down state services and governance structures into previously inaccessible, conflict-affected areas—which can undermine trust in the peace process.

For many years, citizens of the country were denied access to news and information, and suffered severe restrictions on freedom of speech and association. Particularly in urban areas, majority (ethnic Burman) communities have not been exposed to the grievances, concerns and aspirations of ethnic nationalities. There is therefore a risk—should political negotiations result in a settlement (as discussed above)—of a backlash among the majority community, elements of which could be mobilised by populist politicians to oppose any deal struck between government and ethnic elites (e.g., in relation to federalism—a concept which is not well understood by the Burmese public). There is therefore a need for public education, exposing the Burman majority community to the realities of their ethnic brethren. Ultimately, what is required is a national conversation on the nature of citizenship and the state in Myanmar. This will have to be a long-term undertaking, with implications for other minority communities in Myanmar—such as Muslim groups, which have recently been subject to terrible intra-communal violence.

At the international level, there is often a lack of understanding among aid agencies, donors and diplomats regarding the issues affecting conflict-affected communities in remote, ethnic nationality-populated parts of the country. There is considerable risk that peace and political actors will avoid difficult challenges, preferring self-congratulation and easy options, to addressing the many problems still affecting ethnic communities and state-society relations. In this case, opportunities to build a better Myanmar may be lost. In the run-up to elections in 2015, the window of opportunity to act on these issues will likely begin to narrow.

TOWARDS “FEDERALISM FROM BELOW”?

Political talks between the government and ethnic nationality political elites may be drawn-out, top-down and blueprint-driven. Negotiations could get trapped in legalistic discussions (e.g., around constitutional reform), with key actors adopting “zero-sum” approaches—especially in the run-up to the 2015 elections.

It would be helpful if the government could make some symbolic and practical concessions and gestures, in order to demonstrate good faith and awareness of ethnic grievances. For example, measures to allow the use of ethnic languages in government schools and State/Region-level administrations, and action to address widespread land grabbing, would do much to build confidence in the peace process on the part of ethnic communities.

International and national actors should support local activities which help to address the urgent concerns and needs of ethnic communities—including those identified by credible NSAG and other ethnic leaders. Concrete and sustainable attempts to build peace “on the ground” are particularly important, given the likelihood that political negotiations will not produce a deliverable settlement until late 2014 or 2015 (if we are lucky). Government and donors should undertake peacebuilding needs assessments in partnership with NSAGs, civil society and conflict-affected communities—in order to build common understandings of needs, and a joint agenda for addressing these.

It is necessary to promote activities which help to build trust and confidence on the part of key stakeholders, testing the peace process. This would involve seeking out and supporting good practice on the ground (“appreciative enquiry” approach)—e.g., in the fields of education and livelihoods. Donors and policymakers should support “convergence” between state and non-state governance regimes and service delivery systems, in ways which build on local practice—demonstrating to communities (and NSAGs and civil society) that the peace process can create spaces to support local agency. Less helpful will be large-scale international assistance delivered only through government channels, without the participation of key stakeholders, including NSAGs and conflict-affected communities, women and civil society actors. International programs which bypass local community and civil society actors can also be very damaging. Concrete, locally-owned and sustainable attempts to build peace “on the ground” are particularly important, given the likelihood that political negotiations will not yield quick results.

Such concerns are particularly evident in relation to “sector policy reform”. In a number of fields (e.g., education, but also health and general governance reform), donors are eager to engage with the previously pariah Myanmar government. In well-intentioned efforts to support the government and its reform of state structures and institutions, donors and diplomatic actors may be pushing the aid agenda beyond the momentum of the peace process—and strengthening state structures, and their expansion into previously contested or (semi-) autonomous areas, with deleterious effects on the peace process.

THE AID INDUSTRY AND THE “ANTI-POLITICS MACHINE”

The peace process in Burma/Myanmar is indigenous, driven in the first instance by government initiative. In the context of limited international involvement, the process has been quite ad hoc in nature. Furthermore it is highly complex, with some 20 parallel sets of discussions underway between the government and various NSAGs.

Given the essentially indigenous nature of the peace process in Myanmar, the role of the international community context is necessarily limited. On the one hand, international stakeholders should continue to remind the government, and NSAGs, of their commitments and responsibilities under international human rights and humanitarian law, of the need to resolve outstanding armed conflicts, and of the necessity for an inclusive political dialogue, and ultimately a substantial political settlement acceptable to key stakeholders. Beyond that, the international community can support peace-building initiatives which build trust and confidence in the peace process, and at the same time test the sincerity of the Myanmar government and Army, and NSAGs, to deliver the peace which citizens long for. One way of doing so is to engage constructively with various parties to the process including civil society actors, encouraging their participation in and principled support for the peace process.

Among the more high-profile interventions has been the Myanmar Peace Support Initiative (MPSI), which aims to build trust and confidence in—and to test—the peace process, by supporting agreements between the government and NSAGs.⁹ The MPSI was initiated in January 2012, when Myanmar asked the Norwegian government to help support the peace process. Since then, a number of other governments and donors have become involved. The MPSI has sought to move quickly in response to political imperatives, in a fast-changing context. It is committed to substantial consultations with conflict-affected communities, civil society, and government and non-government political and military actors, and to sharing information with a broad range of stakeholders. The MPSI is committed to working in a manner which does not expose vulnerable populations or other partners to increased danger (including due to any future breakdown in the peace process). It is supporting local partners (CBOs and NSAGs) to implement projects in Rhakine, Chin, Shan, Karen and Mon States, and Bago and Tanintharyi Regions.¹⁰ International responses such as the MPSI are premised in part on a desire to avoid the mistakes of the 1990s, when foreign donors failed to support the previous round of ceasefires in Myanmar, missing opportunities to move from peace-making towards an environment of genuine peace-building.

There are continuing needs for humanitarian assistance and longer-term development aid in ethnic, armed conflict-affected areas. However, large-scale aid in these

⁹ The author is a Senior Consultant for the MPSI.

¹⁰ For regularly updated information on the MPSI, see <http://www.peacedonorsupportgroup.com/myanmar-peace-support-initiative.html>.

areas before the ceasefires are consolidated and political dialogue has been seen to have started could be dangerously counter-productive. Many ethnic communities are concerned that the government has an “economic development first” agenda, to use aid as an alternative to needed political dialogue. Ethnic communities are concerned that aid interventions represent efforts by the Myanmar government to intensify its presence in and control over ethnic communities. For large-scale aid to be welcomed, it should in most cases be delayed until *after* political dialogue is started. Furthermore, aid needs to be delivered in ways that reflect respect by donors, the government and implementing partners for the principle of ethnic autonomy.

Turning from political economy to ideology, an appreciation of international support for the peace process in Myanmar must take into account critiques of the “liberal peace”, and the notion of western interventions in conflict-affected societies being undertaken in order to promote the triumvirate of liberalism, democracy and market capitalism. The “liberal peace” has various attributes and articulations, but is usually understood as interventions to end armed conflict, paving the way for the extension of western-style state-building and market-based political economies. Although profoundly ideological, such approaches often obscure the political struggles at the heart of armed and state-society conflicts.¹¹

Other than in contexts where the state’s legitimacy is very clearly and persistently challenged (e.g., Myanmar pre-2011), or when regional or global powers’ interests are directly involved, donors tend to frame issues in terms of technical problems to be fixed by professional aid regimes, rather than issues as sites of contestation, needing (at least in part) political solutions. In *The Anti-Politics Machine* (1994)¹² James Ferguson argues that “development” can de-politicise contentious issues, by framing these as amenable to technical solutions—to be implemented by government, in partnership with aid professionals—rather than sites of political struggle. Is the same thing happening to ethnic grievances and political agendas as part of the peace process?

If ethnic concerns are addressed through political negotiations, it might be appropriate to transfer some issues from the political agenda onto the aid and development agenda (e.g., in the fields of language use and education, livelihoods etc.). Certainly, conflict-affected areas are in desperate need of economic development, and particularly private investment which can produce jobs and sustainable livelihoods. However, economic development without widespread consultation—and particularly in the absence of political progress—is unlikely to solve the deep and long-standing problems

¹¹ Kim Jolliffe, *People’s War: People’s Peace - How can International Peacebuilders Facilitate Reconciliation of the KNU Conflict and Address Local Security Concerns?* (MA Dissertation, King’s College War Studies Department, 2013).

¹² James Ferguson, *The Anti-Politics Machine: Development, Depoliticization, and Bureaucratic Power in Lesotho* (Minneapolis: University of Minnesota Press 1994).

of armed and state-society conflicts in Myanmar. Peacebuilding in Myanmar cannot be achieved solely by technical “fixes” and the delivery of aid and economic development.

KEY ISSUES

The dynamic and continuing nature of the peace process in Myanmar means that this paper must be provisional in nature, with only tentative conclusions possible. However, a number of key issues can be identified, and questions raised:

- Will the current round of ceasefires see NSAGs continue to control autonomous “liberated zones”, mostly in the borderlands (like the ceasefires of the 1990s)—in which case, what will be the status of these areas, and how/will such issues be addressed as part of political negotiations?
- The peace process has seen NSAGs enter a (no doubt, long and contested) transformation from insurgent groups, towards—what? State and international actors mostly assume that if a political settlement can be negotiated that is acceptable to key stakeholders, NSAGs will disarm. Some NSAGs may eventually lay down arms, and even become political parties; others may prefer to retain their weapons—perhaps as part of a transformed Myanmar Army.
- NSAGs have been illegal (according to the Myanmar government, which itself has been regarded as illegitimate); also, NSAGs are generally not recognised under the international states and legal systems. The President has promised to rescind laws criminalizing contact with NSAGs. What are the status and expected roles of NSAGs, for the Myanmar government and Army, and international actors (diplomats, donors, aid agencies)? How should non-state governance and service delivery regimes relate to (integrate with?) state structures?
- The status of NSAGs as political representatives of ethnic groups is problematic—but they do have (varying amounts of, often contested) legitimacy among minority communities. The peace process has brought NSAGs into partnerships with government and international actors, and provided some opportunities for armed groups to organize among previously inaccessible communities in government-controlled areas. Where does this leave other ethnic political actors (e.g., political parties which contested the 2010 elections)?
- Do government leaders understand ethnic grievances and aspirations? How can *Bama* communities—at the elite and popular levels—be helped to gain a better understanding of ethnic realities? Are the Myanmar government and Army willing to address ethnic concerns substantively in political negotiations?
- Can donors act with strategic coherence, utilising assistance and political leverage to support progress in the peace process? Will the government and its

international partners be willing to ensure that activities to build peace and bring development to conflict-affected areas are undertaken jointly, in partnership with key stakeholders? Donors and aid agencies need to demonstrate better conflict sensitivity, and act in ways which support political and social transformations in conflict-affected areas (not just building the capacity of state structures.)

- If ceasefires are not consolidated, political talks do not start soon, and issues of urgent concern to communities are not addressed, “hardliners” among ethnic (particularly diaspora and exile) communities are likely to criticise the leaders of armed ethnic group for “allowing themselves to be put in the pocket” of the government (“selling out”). Therefore NSAG leaders need to communicate better with their publics, and demonstrate that they are actively pursuing a political change agenda, and engaging the government on issues of concern.
- The peace process is an opportunity for NSAGs (e.g., the KNU) to break out from their border-based jungle enclaves, and re-connect with the Karen community “inside” Myanmar. Many Karen people regard the KNU as legitimate, and seek its leadership—but they are expressing serious concerns about the peace process. The peace process represents an opportunity to mobilise the community, and demonstrate to the public that the KNU is aware of and working to address its constituents’ concerns.

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Religious Violence and the Role of the State in Myanmar

Maung Zarni

BURMESE BUDDHIST ISLAMOPHOBIA

The military-ruled state has been relentless in its attempts to erase the Rohingya ethnic identity, which was officially recognized as a distinct ethnic group in 1954 by no fewer than Myanmar's four successive governments, including the democratic government of Prime Minister U Nu (1948-58), the Caretaker Government headed by General Ne Win (1958-60), the second Nu government (1960-62) and the military government of General Ne Win during its first half (1962-78).¹

Besides the official ethnocide—that is, the systematic and official denial that the Rohingya were ever a constitutive ethnic community of Myanmar—the Rohingya have been on the receiving end of both state-directed and state-outsourced Rakhine-led mass violence. In the worst mass violence against the Rohingya, beginning in June 2012, the Rohingya have suffered over 90 per cent of the total death toll and property destruction, including the devastation of entire villages and city neighbourhoods. Following the initial eruption of violence in western Burma, several waves of killing, arson, and rampage have been directed at the Rohingya, backed by Burma's security forces.²

In the past year, the world has been confronted with images of the same Saffron-robed monks with their shaven heads publicly demonstrating against Islamic nations' distribution of aid to 130,000 Muslim Rohingya, displaced into sub-Sahara-like refugee camps in their own country following Rakhine Buddhist attacks.³ The rise of genocidal Buddhist racism against the Rohingya, a minority community of nearly one million

¹ For select official evidence of the state-recognized Rohingya ethnic identity and full citizenship rights see <http://www.maungzarni.com/2012/08/the-official-evidence-of-rohingya.html>.

² "All You Can Do is Pray: Ethnic Cleansing and Crimes against Humanity of the Rohingya Muslims in Burma's Arakan State", *Human Rights Watch*, 22 April 2013 (see <http://www.hrw.org/reports/2013/04/22/all-you-can-do-pray-0> Accessed 20 May 2013).

³ "The Hidden Genocide", *Al Jazeera English*, 16 January 2013 (see <http://www.aljazeera.com/programmes/aljazeerainvestigates/2012/12/2012125122215836351.html>, accessed 20 May 2013), hereafter "The Hidden Genocide".

people in the western Burmese province of Rakhine (also known as Arakan), has led to a very serious international humanitarian crisis.

Over the course of the past few years, a very potent strain of racism has spread exponentially among Burma's Theravada Buddhists. Feeling that their faith and Buddhist social order is under attack from Islam and that the economy is being swallowed by the Muslims, the otherwise acquiescent people have participated in the destruction and expulsion of the entire population of Rohingya Muslims. This organized violent campaign has since the pogroms at Meikhtila in late May 2013 been extended to targeting *all* Muslims across the country. The atrocities occurring in the name of Buddhist nationalism in Burma are impossible to reconcile with the ideal of *metta* or universal loving kindness. Buddhist Rakhine threw young Rohingya children into the flames of their own homes before the eyes of family members.⁴ On June 3, ten out-of-province Muslim pilgrims were pulled off a bus in the Rakhine town of Taunggoke, about 200 miles west of the former capital, Rangoon, and beaten to death by a mob of more than 100 Buddhist men.⁵ The crime occurred in broad daylight and in full view of both the public and local law enforcement officials.

One of the most shocking aspects of anti-Rohingya racism is that the overwhelming majority of Burmese, especially in the heartland of upper Burma, have never met a single Rohingya in person, as most Rohingya live in the Rakhine State of western Burma adjacent to Bangladesh. The state's ethnocidal propaganda has been so effective that very few people, especially millions of younger generation Burmese who were born and brought up during the latter years of General Ne Win's rule, have never even heard of the word "Rohingya".

For those who are slightly better-informed than the average Burmese, the term means little more than "illegal Bangalis" from neighbouring Bangladesh who have crossed the borders in search of greener pastures. Popular misperception notwithstanding, the fact of the matter is that the Bangladeshi economy is twice as big as Myanmar's, and Rakhine State, the alleged destination of Bangali economic migrants, is one of Myanmar's poorest regions, pushing even the Rakhine Buddhists to search for livelihood opportunities both in other economically vibrant parts of Myanmar and across Southeast Asia's middle-income countries such as Malaysia and Thailand.

The virulent hatred and oppression directed at Muslims extends to any Buddhists who are considered to have helped them. In October 2012, local Rakhine Buddhist men were named, degraded, punished, and paraded around public places wearing handwritten signs that said, "I am a traitor."

Their crimes? Selling groceries to a Rohingya.

⁴ "The Hidden Genocide".

⁵ "Muslims killed in attack in Burma's Rakhine province", *BBC World News*, 4 June 2013. See <http://www.bbc.co.uk/news/world-asia-18324614> accessed 20 May 2013.

Elsewhere, 969 monks are rallying the public to get behind the former's push for the enactment of a new law that will ban interracial marriages between Buddhist women and Muslim males in a yet clearest sign of their blatant regard for international human rights law against discrimination. Buddhist activists and religious leaders argue that "Burmese women are not intelligent enough to protect themselves" (against the predatory Muslim men).⁶

THE STATE AND ITS NAZI TURN

On its part, the State in Myanmar, the de facto patron of Buddhism, is busy trying to re-enforce the two-child eugenic measures⁷ originally adopted a decade ago and applicable only to the Rohingya in direct violation of international law on racial and ethnic discrimination, a measure that drew a sharp criticism from the United Nations.

The rose-tinted Orientalist take on Buddhism as "a religion of peace and compassion" is so hegemonic that Westerners are often shocked when they hear of the atrocities carried out by militarized Buddhist masses and the political states that have adopted or manipulated Buddhism as part of the state ideological apparatus. Buddhism's popular image as a peaceful, humanistic religious doctrine immune to dogma contradicts a long history of violent Buddhist empires—from Emperor Ashoka's on the old Indian subcontinent to the Buddhist monarchies of pre-colonial Sri Lanka and Siam, and the Khmer and Burmese kingdoms—some of whom sanctioned war with recourse to the dharma. The oppression carried out under Burmese President Thein Sein and his Sri Lankan counterpart, President Rajapaksa, is just the latest from a long line of violent Buddhist regimes.⁸

Prejudice arises wherever communities of different faiths, classes, and ethnicities coexist and interact. But genocide is *not* an inevitable outcome of group prejudice; there have to be institutional mechanisms and an organized harnessing of forces, generally enacted by the state. Reuters' Special Report released on 27 June 2013, identifies the Religious Affairs Department of Myanmar's Ministry of Home Affairs as a crucial mechanism whose director conceived and disseminated the most virulent strain of anti-

⁶ "Monks and religious leaders back interfaith marriage ban", *Democratic Voice of Burma*, 26 June 2013 <http://www.dvb.no/news/politics-news/monks-and-religious-leaders-back-interfaith-marriage-ban/28988>, accessed 28 June 2013.

⁷ "Myanmar minister backs two-child policy for Rohingya minority", 11 June 2013 <http://www.reuters.com/article/2013/06/11/us-myanmar-rohingya-idUSBRE95A04B20130611>, accessed 28 June 2013.

⁸ "Anti-Muslim Monks: Sri Lanka Redux?" Alex Bookbinder, *Myanmar Times*, 3 December 2013. See <http://www.mmtimes.com/index.php/opinion/3489-anti-muslim-monks-sri-lanka-redux.html>, accessed 20 May 2013.

Muslim racism—all under the direct order of then head of state the late Senior General Saw Maung.⁹

Burma's lay public and political society, while supposedly informed by the world-wide ideals of human rights and democracy that spread across formerly closed leftist polities, have evidently failed to undergo what Aung San Suu Kyi famously called "the revolution of the spirit".¹⁰ Instead, they have chosen to pursue a destructive nationalism that is rooted in the fear of losing property, land, and racial and religious purity.

The Burmese state has mobilized its society's Islamophobia through various institutional mechanisms, including the state media outlets and social media sites, and the presidential office's Facebook page among them. Burmese-language social media sites, which thrive out of the purview of international media watchdogs, are littered with hate speech. Postings of graphic images of Muslim victims, including Rohingya, on Facebook—easily the most popular social media website in the newly opened Burma—have been greeted with approving responses from the country's Buddhist netizens, both within the country and throughout the diaspora. The few Burmese and foreign human rights activists and journalists who dare to speak out against this rising tide of racist, fascist tendencies in Buddhist society have been increasingly subjected to slander, cyber-threats, and hate speech. Journalists have repeatedly expressed dismay over the volume of angry hate email they receive from Burmese citizens whenever stories are published condemning the recent violence.¹¹

ROHINGYA GENOCIDE

In a documentary first aired by Al Jazeera on December 9, 2012, Professor William Schabas of Britain's Middlesex University, one of the world's foremost experts on genocide and until recently the president of the International Association of Genocide Scholars, characterized the sectarian violence against the Rohingya as genocide. "We're moving into a zone where the word can be used," Schabas said "When you see measures preventing births, trying to deny the identity of the people, hoping to see that they no longer exist, denying their history, denying the legitimacy of the right to live where they live, these are all warning signs that mean that it's not frivolous to envisage the use

9 "Myanmar gives official blessings to anti-Muslim monks" <http://preview.reuters.com/2013/6/27/special-report-myanmar-gives-official-blessing-to>, accessed 28 June 2013.

10 See page 2 of <http://www.cfwd.org.uk/uploads/Aung%20San%20Suu%20Kyi%20Speech.pdf>, Accessed 20 May 2013.

11 Personal communications with journalists from various agencies including AP, *The Straits Times*, etc. For typical English language slander-soaked attacks, written by those working for or sympathetic to the Burmese regime, on anyone, Burmese or international advocates and supporters of religious and ethnic equality among Burma's multiethnic and multi-faith communities, see http://hlao1980.blogspot.com/2012/09/zar-ni-traitor-on-islamists-payroll_25.html & <http://hlao1980.blogspot.com/2013/02/who-really-is-so-called-journalist.html>, accessed 20 May 2013.

of the term genocide.” A similar conclusion has been reached by another noted expert in genocide studies and Director of Genocide Watch, Greg Stanton, Research Professor in the School of Conflict Analysis and Resolution at George Mason University, USA. In a videotaped analysis shown at the Myanmar Muslim Genocide Awareness Convention at Los Angeles, California on 9 June 2013, Stanton detailed his eight stages of genocide which the Rohingya have been going through.¹²

The United Nations Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force on January 12, 1951, states:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The ruling Burmese, both the Buddhist society and the Buddhist state, have committed the first four of these acts, though the state denies wrongdoing by their security forces during the nearly six months of violence in 2012 that left 167 Rohingya Muslims dead and caused 110,000 refugees.

As for paragraph (e), malnourished, poorly educated Rohingya children have not been “forcibly transferred” to another group, but there have been instances of Rohingya children being brutally murdered—stabbed, drowned, or burned alive—by the Buddhist Rakhine.

BURMESE BUDDHISM AND NATIONALISM

Buddhism, as a religious and philosophical system that rests on its radical rejection of “concrete and tangible Self”, has absolutely nothing to say about the political, economic, and cultural organizations that we call nation states. Buddhism is not about people imagining a national community predicated upon adversarial relations but rather about using one’s own intellectual faculties to see through the non-existent core-essence of self. From a Buddhist epistemological perspective, nation states are an anti-thesis of Buddhism. As Thailand’s foremost thinker and practitioner Ajan Sulak Sivarsaksa put

¹² Watch Stanton’s expertise here: <https://www.facebook.com/photo.php?v=525954167464887>, accessed 28 June 2013.

it at a public forum on “Violence in the Name of Buddhism” in Bangkok in the spring of 2013, “nation-states are extended collective egos while Buddhism is about non-ego”.¹³

Yet in Burma, this humanistic philosophy has proven itself indisposed to guard against overarching societal prejudices and their ultranationalist proponents, those Burmese who vociferously profess their adherence to Buddhist faith, practice religious rituals and patronize Buddhist institutions, and then proceed to commit unspeakable atrocities against anyone they imagine to be an enemy of Buddhism, the Buddhist state, Buddhist wealth, Buddhist women, and Buddhist land. Instead of propagating the guiding societal principles of religious tolerance, non-discrimination, and social inclusion among lay devotees, the influential Buddhist clergy themselves have, in their outspoken criticism and picketing against the Rohingya, become an entire people’s most dangerous threat.

Throughout the alien British rule from 1824 to 1948, the Buddhism of colonial Burma contributed to the formation of a common national identity, providing a basis for concerted anti-imperialist efforts among disparate social classes and ethnolinguistically diverse Buddhist communities with conflicting political interests. The current resurgence of racism is a direct result of a half century of despotic military rule. The careful construction of an iron cage—a monolithic constellation of values, an ad hoc ethos—locks in and naturalizes a singular view of what constitutes Burma’s national culture. The dominant population remains potentially ethno-nationalist, essentializing Buddhism as the core of an authentic Burmese national identity.

For a minority of Burmese Buddhists, the combination of Buddhist nationalism and strong racial distinctions that served as an ideological springboard and a rallying cry against the British Raj is now scorned as a thing of the past. But for many Burmese Buddhists, the same ethno-religious nationalism that once served the Burmese independence movement has provided an environment in which their racism can flourish.

Ethno-economic nationalism has long been a pillar of Burmese nationalism throughout both historical and post-independence eras. Yes, the primitive but popular understanding of “race” and “ethnicity” as immutable and blood-based—as opposed to fluid, imagined and manufactured—has played a role in the recent revival of nationalist fervour. Yes, Buddhism and violence have always been an empirical paradox and historical oxymoron. But it is really the state and its leaderships that have modulated, mobilised and facilitated multiethnic and multi-faith communities’ prejudices against Myanmar’s peoples of Chinese, Indian and mixed ethnic origins, as well as religious minorities?

The late dictator Ne Win, the founder of Myanmar’s modern military rule, and his Western-educated advisers, including the British and Dutch-trained lawyer and president Dr Maung Maung and the Australian-trained Rakhine historian Dr Aye Kyaw,

¹³ Watch Ajan Sulak’s incisive observation here: http://www.youtube.com/watch?feature=player_embedded&v=Rt7x-TThAq8, accessed 28 June 2013.

developed the current strain of “Buddhist” ethno-nationalism. It was informed largely by their own personal xenophobia towards Muslims, Christians, and Burmese of Indian sub-continent and mainland China origins, groups they referred to as “mixed-blood persons” or “impure breeds”.

Over the past 50 years, successive military leaders—from General Ne Win to the recently retired despot Senior General Than Shwe—have not only played the race and faith cards as a matter of political and military strategy, but they have also enshrined “Buddhist” racism as a key foundational pillar of what is known to many as the Golden Land of Buddhists, reference to the country’s many gilded temples and gold-coloured, harvest-time paddy fields.

Buddhist-inspired social forces have proven to be a double-edged sword over the years. In the newly independent post-WWII Burma of the late 1940s, Marxist-inspired revolutionary nationalists led by the martyred Aung San (Aung San Suu Kyi’s father) set out to forge a new multiculturalist, secular, and civic nationalism.¹⁴ In 1948, after Aung San was assassinated by a rival Burmese politician (and less than 90 days after the country’s newly acquired independence), Burma plunged into a long series of armed revolts against the central state. Aung San’s successors gradually abandoned any attempts to secularize Burmese nationalism along the lines of civic nationalism, which would have moved the Burmese away from the pre-modern provincialist blood- and faith-based view of national identity.

Against this backdrop, the popular racism of the Buddhist majority presents itself as a potent social force that can be appropriated by Burma’s national security state to unify and rally anti-Muslim Burmese citizens. Burma’s state authorities, consisting predominantly of generals and ex-generals, are also generous patrons of Buddhist institutional activities such as *dana* (or charity) and pagoda and temple building. These military leaders will continue to feed the masses their opiate—the pretension of Buddhism, with its effect of normalizing human suffering—as long as the Buddhists believe that their faith, and not their political economy, promises better rebirth. As one regime official told me, “The bottom line is, we don’t want any more ‘Mus’ in our country, but we can’t possibly kill them all.” As a solution, the reformist state leadership has outsourced the job of cleansing its Golden Land to the Rakhine Buddhists.

BUDDHIST MONK-LED “969” MOVEMENT¹⁵

Since the two waves of pogroms in western Burma in June and October in 2012, which left hundreds of the Rohingya dead and over 140,000 displaced from about ten different

¹⁴ See Sarpay Beik Man (197?), *The Collected Speeches of General Aung San*. Government Printing House, Rangoon.

¹⁵ “Myanmar’s neo-Nazis get free reign”, Maung Zarni, *Asia Times*, 9 April 2013. See http://www.atimes.com/atimes/Southeast_Asia/SEA-01-090413.html, accessed 20 May 2013.

towns and cities, the country has seen a dramatic rise in the popular neo-Nazi movement known as “969 movement”. The movement has been central in the recent brutal pogroms against minority Muslims that have left at least 40 dead and 12,000 displaced so far in 2013. The Buddhist monk-led group, however, cannot be understood outside of the interface between President Thein Sein’s government and the country’s racist society at large. Nor can it be explained without examining the respective roles of a) the State, which in effect offers the country’s neo-Nazi Buddhists impunity, b) President Thein Sein’s inaction, even amid indications of ethnic cleansing against minority Muslims, and c) the Aung San Suu Kyi-led opposition’s moral bankruptcy throughout the crisis. The orgy of violence has raised several important questions about the country’s direction and hopes for reform.

As a new nationalist movement with a clear message of “racial and religious purity”, a false sense of Buddhist victimhood, and cultural and economic nationalism—not dissimilar to Germany’s Nazism in the 1930s—969 is gaining popularity for three main reasons.

First, some of the militant Buddhist preachers from nationally well-connected Buddhist teaching colleges (such as 969 leaders Wirathu and Wimala¹⁶) effectively scapegoat the country’s Muslims for the general economic hardships and cultural decay in society, portraying the ethnic Burmese as victims at the hands of organized Muslim commercial leeches and parasites. Second, 969 preys on the historical and popular anti-Muslim racism among the majority Buddhists. Last but not least, virtually all state institutions at all levels—including the police, intelligence agencies, the army, local civil administration and even fire departments—under Thein Sein’s management have offered this Buddhist neo-Nazi movement impunity and passive cooperation.

Curiously and as a move designed to deflect official responsibility, Thein Sein’s official report to parliament on the anti-Muslim violence against ethnic Rohingya last year in western Burma/Myanmar’s Rakhine State blamed political parties and Buddhist monks for spreading “ethnic hatred”.¹⁷ Yet his administration has not taken a single action against anyone who openly incited anti-Muslim hatred or ethnic hatred towards the Rohingya. Nor has his government detained or even deterred a single Buddhist preacher of hate for acts of spreading anti-Muslim hatred in society and inciting blatant calls for phase-by-phase elimination of Muslims and their influence in society. Quite the contrary, after *Time* published its cover story “The Face of Buddhist Terror”¹⁸ 1

¹⁶ “The 969 catechism”, *Reuters*, 26 June 2013 <http://www.reuters.com/article/2013/06/27/us-myanmar-969-monk-idUSBRE95Q04G20130627>, accessed 28 June 2013.

¹⁷ “Burma violence: Myanmar president says monks, politicians kindling hate”, *AFP*, 24 August 2013. <http://tribune.com.pk/story/425674/burma-violence-myanmar-president-says-monks-politicians-kindling-hate/>, accessed 28 June 2012.

¹⁸ “The Face of Buddhist Terror”, *Time* magazine, 1 July 2013 <http://www.time.com/time/magazine/article/0,9171,2146000,00.html>, accessed 28 June 2013.

July 2013, Myanmar has come out to openly back the neo-Nazi 969 campaign and its leading hate-preachers such as Wirathu, calling the latter as “peaceful sons of Lord Buddha”.¹⁹

“Political parties, some monks and some individuals are increasing the ethnic hatred. They even approach and lobby both the domestic and overseas [Arakan] community,” Thein Sein’s report, submitted to parliament last August, said. There is thus an unbridgeable gap between Thein Sein’s messages of coexistence and tolerance, to which the Western mainstream media has given wide coverage, and his government’s inaction, which the same media has failed to report beyond the observation that local police have stood by idly when organized mob violence unfolded before them.

All over Burma/Myanmar, one can easily find numerous publications, DVDs, CDs and other anti-Muslim propaganda materials. It is not illegal to spread anti-Muslim misinformation and hateful views in the country’s more open environment. Instead, the government sued the *Voice Weekly* newspaper for printing a single article about corruption at the ministry of mines. Unless Thein Sein’s government systematically cracks down on those who promote and organize Islamophobic violence and hate speech and effectively ends its long-standing policy of impunity for those who commit crimes against Muslims (and other ethnic minorities), it will run the risk of 969 morphing into a full-blown genocidal movement. Despite its pretensions towards democracy, Thein Sein’s military-propped regime has over 50 years of proven experience in suppressing organized opposition movements. For decades, the military was effectively able to censor and stop any news or messages it didn’t want disseminated in society.

MILITARY-BACKED ANTI-MUSLIM CLIMATE

In his article “Challenging the Authoritarian State: Buddhist Monks and Peaceful Protests in Burma, Issues and Policy”, published in the Fletcher Forum of World Affairs in 2008, Kyaw Yin Hlaing, a Burmese academic from the City University of Hong Kong and now a top adviser to Myanmar’s officially anti-Muslim government, observed the military’s central role in inciting anti-Muslim riots in the past:

In 1997, the junta became aware of the monks’ plan to protest against the regional (military) commander’s improper renovation of a famous Buddhist statue in Mandalay. Before the monks could launch the protests, a rumour emerged that a Buddhist woman had been raped by a Muslim businessman. The government diverted their attention from the regional commander to the Muslim businessman, eventually causing an anti-Muslim riot. Some observers noted that intelligence agents

¹⁹ See “Burma president backs anti-Muslim ‘hate preacher’ Wirathu”, *Democratic Voice of Burma*, 24 June 2013, <http://www.dvb.no/news/politics-news/burma-president-backs-anti-muslim-%E2%80%98hate-preacher%E2%80%99-wirathu/28955>, accessed 28 June 2013.

often instigate anti-Muslim riots in order to prevent angry Buddhist monks from engaging in anti-government activities (pp. 137-138)²⁰.

As recently as March 30, Professor Donald Seekin, author of *The Disorder in Order: The Army-State in Burma since 1962*, wrote, in a response to a *New York Times* op-ed on March 29 entitled “Kristallnacht in Myanmar”:

Hatred of Muslims is deeply rooted in Burmese society, and was actively encouraged by both the Ne Win and SLORC/SPDC regimes during the 1962-2010 period. One of their favourite tactics was to spread rumours that Muslims had raped Burmese Buddhist women, and plotted to convert the entire Buddhist population to Islam. The “divide and rule” tactic used by the authorities in the recent past possibly grew out of the British colonial regime’s policy of fostering a “plural society” with minimal national unity.²¹

In light of the fact that Burma/Myanmar’s military rulers have a well-documented history of exploiting religious and ethnic prejudices in the multi-ethnic society for their own political and strategic ends, it is not necessarily conspiratorial to suggest that Thein Sein’s government may want such anti-Muslim sentiment spread in society for its own political ends, including the notion that the public is unsafe without the steady dictatorial hand of top generals and their military in politics.

In spite of Thein Sein’s softly-softly official messages of religious harmony and co-existence in society, he has so far done virtually nothing to nip the neo-Nazi Buddhist movement of 969. Nor has the military suddenly embraced unconditional free speech after overseeing decades of harsh media censorship. Rather, the impunity and inaction are more likely anchored in Naypyidaw’s strategic calculation to create a general climate of fear and uncertainty, consistent with the divide-and-rule tactics it has always used to exert un-rivalled control and influence over the state and economy.

Incomprehensibly, Suu Kyi herself is complicit in the spread of Islamophobic hatred and fear, both by her silence²² over the violence perpetuated against Muslims and by spreading equally moral responsibility for the death and destruction across both Muslim and Buddhist communities. For whatever reason, she has ignored blatant facts, including: 1) the violence and hate campaigns are one-directional in that they target only Muslims and are organized by Buddhist mobs which are made up of both out-of-towners and local community members; 2) the Muslims (and other minorities such as

²⁰ “Challenging the Authoritarian State: Buddhist Monks and Peaceful Protests in Burma”, Kyaw Yin Hlaing, *The Fletcher Forum of World Affairs*, Vol. 32:1, Winter 2008.

²¹ See comments after the blog here: <http://latitude.blogs.nytimes.com/2013/03/29/violence-against-muslims-in-meiktila-myanmar/>, accessed 20 May 2013.

²² “Aung San Suu Kyi: Silence to Genocide”, Mohamed Sacirbey, *Huffington Post*, 9 April 2013. See http://www.huffingtonpost.com/ambassador-muhamed-sacirbey/aung-san-suu-kyi-silence-_b_3032958.html, accessed 20 May 2013. (Ambassador Sacirbey is former Foreign Minister of Bosnia and Ambassador to the UN).

the Kachins) bear the brunt of the violence, death and devastation; and 3) the military and security forces have 50 years of experience in crowd control.

To be sure, Suu Kyi has not been entirely quiet on the anti-Muslim violence. After the three days of attacks against Muslims in the central town of Meikhtila, she spoke out in defence of the way the local security forces handled the situation, despite widespread evidence that security forces sat on their hands while organized mobs went on sprees of slaughter and arson. For three days, security forces let roaming gangs of armed Buddhists burn down nearly 1,000 buildings, including mosques, Muslim-owned businesses and houses. In her Burmese language press interviews, Suu Kyi defended the deliberate inaction of the local security forces, offering the excuse that they weren't experienced in riot control in the country's new democratic context.

Despite serving as chairwoman of an inquiry of commission into protests and violence at a Chinese and Myanmar military-invested copper mine in central Burma/Myanmar, Suu Kyi's comment overlooked security forces' recent use of white phosphorous-laden firebombs to crack down on protesters who lost their land and Buddhist monks who lent their demonstration moral support. Rather than visit Muslim victims of the recent violence in Meikhtila, Suu Kyi instead attended the annual military parade on March 27, where she shared intimate moments with highly decorated generals, most of all with the head of the notorious Border Affairs Ministry Major General Zaw Win, who "openly laughed at a teary-eyed Rohingya man in an internally displaced persons camp who pleaded: 'We are real Rohingya—please recognise us.'"²³

Will recent rumours and violence persuade more people to participate in anti-Muslim actions? And from where do these rumours claiming expansionary designs of Islam in Burma/Myanmar originate?

Rumours have been the lifeblood of cultural and political life in Burma/Myanmar for the past half-century, ever since the generals came to power in the absence of elections and without a free and professional press. The Burmese/Myanmar public soaks up rumours, slander and racist narratives perpetuated by the military like a sponge. Even in the new "reformist" age, the free media is often jingoistic and has played a key role in fomenting anti-Muslim hatred and nationalist fears²⁴.

Frighteningly for the country's Muslims—who make up about 4% of the total 60 million population—one of President Thein Sein's own spokespersons, ex-Major Zaw Htay, or Hmu Zaw, has served as a major source of anti-Muslim rumours and slanders

²³ "Aung San Suu Kyi surprise spectator at Burma Armed Forces Day parade", *The Guardian*, 27 March 2013. See <http://www.guardian.co.uk/world/2013/mar/27/aung-san-suu-kyi-burma-parade>, accessed 27 March 2013.

²⁴ "A Jingoist Media Foments Violence in Burma's Arakan state", Sai Latt, *Asia Sentinel*, 30 October 2012. See http://www.asiasentinel.com/index.php?option=com_content&task=view&id=4938&Itemid=208, accessed 20 May 2013.

since the first wave of violence against the Rohingya last June.²⁵ On his Facebook page, the spokesman for the President's Office has posted several one-liners designed to stoke popular anti-Muslim hatred and fear. One example: "We have just received information about a group of armed Muslim terrorists who are crossing the Burmese-Bangladesh borders. Stay tune [sic]."

The state media, meanwhile, has published several articles with anti-Muslim slants and used the word "kalar", the Burmese language equivalent of "nigger", in referring to Muslims and people of Indian sub-continental origin. With state security and propaganda agencies, as well as culturally and ideologically influential figures, working in unison to stoke anti-Muslim hatred and fear, public opinion naturally follows.

Culturally, Buddhist monks are very influential in Burmese society—more so than dissidents and generals. This is extremely worrying given that demographically the overwhelming number of monks and novices are drawn from ideologically and intellectually isolated rural communities where people believe that "drinking liquid made out of dried human excrement" is medicinal.²⁶ Ideologically, the racist public tends to swallow the government's anti-Muslim rumours and narratives, in spite of the fact that in most other cases, they distrust government-issued news and narratives.

It is extremely difficult to draw a line between the government's anti-Muslim activities and propaganda and those carried out by influential skinhead monks. Anti-Muslim postings on Facebook, including those with images of the recent deaths and destruction in Meikhtila, have been "liked" by thousands and solicit approving howls from Burmese netizens who show no restraint in expressing their neo-Nazi views in public on-line domains.

The anti-Muslim, neo-Nazi, Buddhists in Burma are convinced that the Muslims are hell-bent on conquering the world in the 21st Century, pointing on the spread of Islam in the Malay world of Indonesia, Malaysia, and Brunei, erasing Buddhist and Hindu legacies from the face of the soil.²⁷

It seems unlikely that a preacher like Wirathu, who was jailed for his public incitement which resulted in the death of an entire Muslim family in an arson attack in the small town called Kyauk Hse in 2003, would suddenly feel repentant for his inflammatory rhetoric. To date, he has shown no sign of remorse or regret about his role in recent anti-Muslim violence.

²⁵ In a BBC Burmese Service radio debate in the 3rd week of June 2013, a Myanmar Muslim blogger named KTZ Oo confronted Major Zaw Htay, the Director of President's Office, accusing, with good reason, the latter of spreading anti-Muslim rumours and news in his social media sites that have turned out to be patently incorrect. The government spokesperson denies the accusation saying he is only attempting to counter Muslim propaganda with "truths".

²⁶ Ex-Brigadier and ex-Regional Commander Tun Kyi (2011) *Autobiography*. V. 1. Rangoon.

²⁷ Numerous DVDs and publications containing popular Buddhist sermons from the 969 monks make references to the Islamization of the Malay world.

Ten years ago, Wirathu was a fringe figure, perceived as having fringe anti-Muslim views. Now, with the rise of state-tolerated neo-Nazism, he has emerged as a cultist hate-monger, and a must-meet for visiting international media²⁸. The popularity of this neo-Nazi Buddhist preacher and other anti-Muslim Buddhists, all enjoying official state backing for their campaign of hate and terror, does not augur well for the country's "democratic" future, and most certainly not for its minority Muslims and Rohingya.

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²⁸ "Burma's Bin Laden, the Buddhist monk who fuels hatred—video", *The Guardian*, 16 April 2013. <http://www.guardian.co.uk/world/video/2013/apr/16/burma-bin-laden-buddhist-monk-video>, accessed 20 May 2013.

Local Perceptions of Returning Exiles and their Roles in Shaping Myanmar's Future¹

Kerstin Duell

INTRODUCTION

Myanmar's tumultuous post-colonial history has been characterized by decades of direct and indirect military rule and corresponding political mobilizations that have ranged from armed ethnic and ideological insurgencies to mass protests, student movements, and non-violent pro-democracy uprisings. The nationalization and mismanagement of the economy, the militarization of the state, political surveillance and oppression, and the closure of universities are all factors that have triggered the flight from Burma of millions of Burmese. Several main waves of exit can be distinguished, following major political events—(1) the 1962 military coup; (2) the installation of direct rule by the Burma Socialist Programme Party in 1974 and the U Thant funeral crisis; (3) the 1988 mass uprisings; and (4) the 2007 “Saffron” protests, respectively. The largest exodus occurred in the period from late-1988 until after the 1990 elections (held on 27 May 1990), when the military government indefinitely delayed the transfer of power to the elected opposition. The Burmese diaspora that formed as a result of these movements was comprised mostly of people who had fled repression and conflict, but it also included individuals who had left Burma for educational and professional purposes.

The central defining feature of a diaspora consists of a shared identity that unites people living dispersed in transnational spaces (Sokefield 2006, p. 280) and in transnational “imagined communities” (Anderson 2001). Compared to classical diasporas, the Burmese diaspora of up to four million in Thailand alone and smaller communities across the rest of the world is relatively large. Yet, despite its size, the Burmese diaspora has possessed neither economic leverage vis-à-vis the home government nor has it generated real political cleavage in host countries (Zaw Oo 2006).

¹ This paper presents extracts from Duell, “Sideline or Re-Inventing Themselves? Exiled Activists in Myanmar's Political Reforms.” In *Debating Democratization in Myanmar*, edited by Nick Cheesman, Nicholas Farrelly and Trevor Wilson. Singapore: Institute of Southeast Asian Studies (forthcoming).

This paper focuses primarily on the small politically active subset of the diaspora—political exiles who “engage in political activity, directed against the policies of a home regime, the home regime itself or the political system as a whole, and aimed at creating circumstances favourable to their return” (Shain 1989, p. 15). Silenced at home, exiles exit in order to voice their discontent, but also struggle to return home, at least initially (Ma 1993). The central position of threat in the literature on exile and diaspora is paralleled in social movement theory by threat, opportunity and the cost of contention (Goldstone and Tilly 2004, p. 179f). Burmese political exiles met at least one of three criteria: first, the reason for their flight from Burma was fear of reprisal or experience of realized reprisal for expressing political opinions or participating in political activities; second, anticipation of acute threats to their safety should they go back to Burma prevented a return from exile; and third, they had participated in political activity against military rule in Burma while abroad.

These exiles led a transnational pro-democracy movement that sustained challenges against the powerful military regime for over twenty years—an exceptionally long tenure for a political movement (Tabori 1972, p. 38).² Although exile activism was only one among multiple factors that induced top-down political reform beginning in 2011, activists can be credited with having influenced international attitudes and responses to their homeland, and, to a lesser extent, domestic politics. Transnational activism influenced world opinion towards according the status of international pariah to Myanmar’s military regime, with the resulting limitation on international investment, economic assistance and diplomatic standing.

The unexpected government-driven reform initiative combined with invitations—but no safety guarantees or amnesty—to the diaspora at large to return home has attracted a limited number of political exiles back. They currently contribute to the politico-economic development, including as advisors to the present government. However, while there is general agreement over the important areas where the skills and experience of the returning diaspora could benefit the country’s development, political exiles also meet with distrust from their countrymen. Disagreement among activists who remained in the country prevails when assessing the role and motivation of returnees. Conflicts persist among dissident groups of a movement that was split between home and exile over twenty years ago and that attempts to reconcile different experiences into one combined effort for Myanmar’s transformation.

² Duell (2011) comparatively studies the movement’s leadership predominantly exiled in Thailand with smaller sister organizations in India as well as in Western countries.

THE ABSENCE OF SAFETY GUARANTEES HINDERS A FULL-FLEDGED RETURN

Apparently, the Thein Sein administration realized that well-educated members of the Burmese diaspora could be an asset in dealing with the challenge of transforming Myanmar. In August 2011 at an economic forum, and again in May 2012, the president publicly invited exiles who had not committed “serious crimes” to return to the country. No further explanations, formal procedures or laws were issued and it was left to individual exiles and Myanmar embassies in the respective countries to proceed. Moreover, instead of introducing a nation-wide policy applicable to all exiles wishing to return, the central government delegated responsibility for returnees to the new regional governments, which were to decide on a case-by-case basis (Mizzima 2011). A few prominent exiles started to visit during 2011 but without making permanent arrangements or bringing their families along (Sai Zom Hseng 2011, Murayama 2011). The arrest in August 2012 of a returning lawyer who had defended NLD members in 2007 was taken by the diaspora as an indication that security for returnee exiles was not guaranteed (Zarni Mann 2012).

In September 2012 the president’s office published online a list of some two thousand Burmese and foreign activists, journalists, scholars, diplomats, UN staff and others whose names were to be removed from the immigration blacklist.³ However, over four thousand names remained on the blacklist, which also included Burmese who are prevented from leaving the country. The government imposed a one-year travel ban on former political prisoners before it would issue them with passports (Lawi Weng 2012). In addition, some returning exiles had to sign a five-point statement to give assurance that they would refrain from political activities (Sai Zom Hseng 2011). The fact that President Thein Sein’s verbal invitations neither translated into legal assurances, nor an official amnesty discouraged the majority of exiles from returning home permanently.

³ The blacklist included prominent dissidents such as Dr Sein Win, president of the government in exile; Aung Din, US Campaign for Burma; Zipporah Sein, secretary of the Karen National Union; Moe Thee Zun and Dr Naing Aung, former leaders of the ABSDF; Aung Moe Zaw of the Democratic Party for a New Society; Maung Maung, of the FTUB; Khin Ohmar, from the Network for Democracy and Development; Naw Lay Dee, of the Burmese Women’s Union; Dr Cynthia Maung, director of the Mae Tao Clinic in Thailand; Bo Kyi, Tate Naing and other members of the Assistance Association for Political Prisoners; Aung Htoo, from the Burma Lawyers Council; as well as the two sons of Aung San Suu Kyi, well-known authors Bertil Lintner and John Pilger, and some diplomats (Nyein Nyein. “Burma Releases Names of Those Removed from Blacklist”. *Irrawaddy*, 30 August 2012. <<http://www.irrawaddy.org/burma/burma-releases-names-of-those-removed-from-blacklist.html>>. Accessed 10 November 2013.).

In general, the lack of systematic, transparent policies applied to exiles and in-country activists alike.⁴ The 88 Generation Group, for instance, was not registered as a group at all, and therefore needed the assistance of registered local NGOs to hold training programmes funded by third parties.⁵ The best-known student organization, the ABFSU, did not even maintain membership lists or cards, since university rules stipulate that students must not be part of any organization. The ABFSU complained about being watched by the authorities, and campaigned to be given legal status and for the passing of a new university law to replace the law of 1917.⁶ All local and international organizations have to undergo lengthy registration processes at several administrative levels.

In addition to the legal limbo, exiles also faced very practical obstacles to settling back home after decades abroad, including the risk of giving up secure careers, incomes and homes that could not be matched by opportunities, least of all salaries, in Myanmar. Families also considered the dearth of international schools for their children, who had never attended classes taught in the Burmese language.⁷

THE ROLE OF EXILED ACTIVISTS IN THE POLITICAL TRANSFORMATION

Previously, exiles filled the crucial role of intermediaries for relaying political messages from imprisoned leaders to the exiled movement and the outside world, and vice versa, and also acted as brokers between foreign donors and in-country activists. Various interlocutors became important channels through which transnational and international players learned about the opposition movement inside the country. In the process, power inequalities between Burmese exiles on the one side and their donors, coalition and network partners within transnational advocacy networks in the global North on the other side were reproduced to some extent in interactions between Burmese exiled and domestic activists. With the opening of political space in Myanmar, including increased freedom for the media and improved access to the government, exiles may only play this role a little longer, until local activists have acquired similar skills and connections and have no further need of their help.

Exiles watched closely the events that unfolded after the 2010 elections, and especially the authorities' treatment of different social movement organizations, political parties and protesters. They approached the government through local intermediaries,

⁴ Numerous laws needed to be passed or amended at this point to transform state and society. Nonetheless, the Thein Sein administration gave priority to, for example, passing the foreign investment law, while leaving seemingly more pressing political issues unlegislated.

⁵ Interview with Ko Ko Gyi, Yangon, October 2012.

⁶ Interview with ABFSU, Yangon, December 2012.

⁷ Interview with returned exile, Yangon, October 2012.

such as the civil society organization Myanmar Egress. U Tin Maung Than from the exile Vahu Development Institute based in Chiangmai was among the first to return. He faced strong criticism in 2011 from exile groups that opposed engagement with the government's reform agenda, but others such as U Zaw Oo, also from Vahu, soon followed his example.⁸ One of the president's advisors, economist Dr U Myint, proposed the establishment of an "independent, non-political, and legal institute of excellence ... the Myanmar Development Resource Institute (MDRI)" (U Myint 2011). Several Vahu members and prominent exile leaders soon joined MDRI.

The NLD's strong showing in the April 2012 by-elections and Aung San Suu Kyi's entry into parliament were taken as a definite sign of a political opening. This encouraged exiles to spend more time in their home country in order to take part in Burmese politics and to shift some or most of the activities of their organizations there.

Exiles have so far focused on building the capacities of the main political actors in the country—the government and parliament, leaders of political parties, and groups associated with the opposition movement. As a result, well-known dissidents are represented on the MDRI and presidential advisory boards, as well as in special commissions—for instance, to investigate the Buddhist-Muslim communal violence or the security forces' treatment of the protestors at the Letpadaung copper mine. The executive committee members of the government-founded Myanmar Peace Centre, which oversees peace negotiations with the ethnic armies, includes a returned political exile and a scholar from the diaspora. Another scholar from the diaspora, U Winston Set Aung, served as Deputy Minister for National Planning and Economic Development.

Exiles from ethnic minorities, in contrast, focus on building the capacities of their respective communities but are less involved with government initiatives at the centre.

The area of human rights offers another focus for exile expertise. Due to the extreme sensitivity surrounding this subject, in the past very few organizations inside Myanmar were able to operate openly on human rights issues. Exile organizations based in Thailand and India are widening the scope of their existing capacity-building initiatives for the documentation of local human rights issues and improving the knowledge and skills of those who defend human rights, while also expanding their (underground and aboveground) networks across the country.

Obviously, the degree and willingness to work with state actors differs among returning activists. Having defined their identity over a period of twenty years by opposing the military regime, some political exiles feel that the recent pragmatic co-operation with what is a new but also a partially old leadership in Myanmar is a major compromise.

⁸ Interview with activist, Yangon, October 2012.

ATTITUDES OF ACTIVISTS WHO REMAINED IN THE COUNTRY TOWARDS EXILES

Many activists in Myanmar are acutely aware of their lack of formal education, theoretical knowledge, international exposure and organizational capacity that has been the result of decades of censorship, the undermining of the education system, and in recent times a lack of Internet access. They also lament the fact that no one in the country has ever experienced the democratic freedoms and practices that are envisioned for Myanmar's future (Hkun Htun Oo 2012). Representatives of youth organizations have, therefore, stressed that the primary contribution of returning exiles should consist of bringing know-how, international experience and organizational skills for the development of the country.

Another important area of exile experience has been interaction with people from minority ethnic groups, and hence they have an understanding of ethnic relations that differs from that of people within Myanmar. In exile, ("majority") ethnic Burmans were in regular contact with ("minority") ethnic movement organizations as well as with the armed groups. Not least, key organizations such as the exile government NCGUB, the Democratic Alliance of Burma (DAB) and the National Coalition of the Union of Burma (NCUB) were founded in Manerplaw, the former Karen National Union headquarters, at the inception of the pro-democracy movement between 1988 and 1990. During the exodus into territories controlled by the respective rebel armies, minority groups provided vital help for the activists' survival in the jungle and eventual crossing into neighbouring countries. Although Burman-ethnic relations were far from smooth, identifying common goals, as well as exposure to international perspectives on ethnic rights, increased mutual acceptance.

Beyond politics, many activists living in Myanmar believe diverse fields could benefit from the valuable expertise and skills of foreign-educated Burmese returnees, whereas a minority seems to think that returnees would be too out of touch to make valuable contributions to the country's development. For instance, exile media organizations could become catalysts for media development, through training young journalists, setting standards for journalistic ethics, connecting local and international media, and otherwise contributing to putting Myanmar indigenous media outlets on the global news network map. While the government appears to encourage returning exile media organizations, these organizations still need to struggle with cronies owning some of the private media as well as with local journalists who oppose this new competition.⁹

In-country activist leaders are proud of the sacrifices they made over many years to maintain, at great personal risk, underground networks across the country and contacts with the people at the grassroots level. A common criticism voiced by youth activists

⁹ Interview with former 1988 activists, Yangon, February 2013.

of the 1988 exiles is that they remain close to their peers from the 88 Generation Group and to political prisoners but are not close to ordinary people in the Myanmar population; accordingly, exiles work mostly with the political leaders and stakeholders but hardly at all with the broader civil society that does not focus on strictly political issues.¹⁰ There is a perception that exiles fail to approach and to understand the general population's needs and aspirations.¹¹ Yet, considering the circumstances of their previous transnational or in-country clandestine work, it is no surprise that exiles have had limited exposure to people at the grassroots level. However, such criticism contradicts the claims of exile organizations such as the ABSDF, DPNS and FTUB to have worked extensively at the grassroots during the years of dictatorship.¹² Whatever the case, as 88 Generation Group leader Ko Ko Gyi has pointed out, returning exiles need to intensify their approach to the grassroots in order to work efficiently with the population and use funds wisely.¹³

Incongruent expectations pose another point of contention between activists living in Myanmar and exiles. Local activists are well aware that decades of pent-up frustration and grievances fuel the extremely high expectations of ordinary people to see immediate improvements in matters of daily survival such as food, housing, electricity, transport, land issues and other matters. Exiles seem to hold equally unrealistic expectations, but in terms of fundamental institutional changes rather than in relation to daily hardships. With education and experience often acquired in established democracies and industrialized countries, exiles tend to measure Myanmar against the political freedoms of their host countries.¹⁴ On the one hand, such comparisons imply how removed from current local conditions some exiles may have become. On the other hand, the vision of a fully fledged federal democracy will drive the country's reform ahead and prevent it from stagnating at an early stage.

Resentments that have built up over a twenty-year history of activism continue to affect relations between the in-country and exile opposition movements. Activists in Myanmar have tended to perceive themselves to be the real martyrs and crucial players, while to varying degrees portraying exiles as hypocrites who lead their lives in security and material comfort. Beyond the issue of who shows real dedication to the country's political progress, what lies at the core of the matter is the question of power. In 2007, for instance, some former political prisoners of the 88 Generation stressed their unwillingness to grant political positions to returning exiles in the event of transition.¹⁵

¹⁰ Interview with youth activists, Yangon, October 2013.

¹¹ Interview with youth activists, Yangon, October 2012.

¹² Duell 2011.

¹³ Interview with Ko Ko Gyi, Yangon, January 2013.

¹⁴ Interview with peace movement organizer, Yangon, December 2012.

¹⁵ Interviews with former political prisoners, Yangon, March 2007.

In 2012, in-country activists were still questioning whether returnees are driven by concern for their country or by personal gain. As a member of the Myanmar Youth Union explained, “We need to call the exiles back to see their attitudes—whether they return for their own interests or to really help the country.”¹⁶ Others, in contrast, believe the returnees to be very committed to broad-based reform and therefore actively working with many different groups and parties.¹⁷

There is also conflict over past exile activities—focussing on the exact nature and effectiveness of programmes and the use of funds.¹⁸ Exiles account for any lack of transparency in the use of aid money as being due to the clandestine nature of their previous work. Despite this, it appears that some activists inside Myanmar continue to doubt the exiles’ honesty. It is ironic that the previous competition for funding that exacerbated some of the internal problems of the exiled opposition movement now causes friction between exiles and activists inside Myanmar.

CHANGING DONOR AGENDAS SINCE 2011 AND THEIR IMPLICATIONS

The reform process has had substantial ramifications for donors. In the last two years the flow of people, capital and information into Myanmar has greatly increased. The suspension of most international sanctions has paved the way for formal bilateral and multilateral engagement by foreign governments and other international bodies with the new administration. International non-governmental organizations (some of which have a long history of supporting Burmese refugees, IDPs, and migrant workers in the region as well as political exile organisations) are increasingly entering Myanmar to carry out their humanitarian programmes. Several trends can be observed.

First, some organizations that traditionally donated to the exile movement have shifted their focus to supporting projects inside Myanmar, projects that are run by newly established organizations or returning exiles. Even regime critic George Soros visited Myanmar in January 2012, underscoring how circumstances and priorities have changed.

Second, a different set of donors—international and multilateral agencies that support political parties, parliaments and multi-party platforms—are setting up or expanding Myanmar-specific programmes and staff.¹⁹

¹⁶ Interview with Myanmar Youth Union, Yangon, December 2012.

¹⁷ Interview with Generation Wave, Yangon, December 2012.

¹⁸ Interview with NLD Youth, Yangon, December 2012.

¹⁹ The organizations include IDEA, International Foundation for Electoral Systems, Inter-Parliamentary Union, Danish Institute for Parties and Democracy, Netherlands Institute for Multiparty Democracy, Commonwealth Local Government Forum, Canadian Parliamentary Centre, National Democratic Institute, Konrad Adenauer Foundation, Friedrich Ebert Foundation, Friedrich Naumann Foundation, Asia Foundation, and the Burma Centre Netherlands/Transnational Institute.

Third, funds for exile and cross-border projects are drying up. The major donors to the opposition movement—the Soros Foundation (OSI), the National Endowment for Democracy (NED), and the International Republican Institute (IRI)—continue to support some initiatives, but most grants are being phased out. Donors may also feel compelled by their respective governments to officially enter Myanmar. Yet this quick shift combined with “donor fatigue” has had detrimental effects on humanitarian assistance to IDPs and refugee communities in border areas and neighbouring countries.

As a result of these changes, exile organizations will need to re-invent themselves in order to stay relevant. The political opening-up of Myanmar undermines arguments to “stay behind” in exile. The government in exile, the NCGUB, was dissolved in September 2012 after twenty-one years. With Aung San Suu Kyi in parliament and progress being made in other areas, the NCGUB had lost its *raison d’être*, in addition to which the group’s budget was reduced to a quarter of what it was five years ago (interview with Dr Sein Win 2012).

At the same time, human rights groups working in exile continue to publicize repression by the government, restriction of freedoms, and Myanmar’s many unchanged problems. Perhaps the last role for exile organizations would be, over the next few years, to keep a check on whether progress is being made towards true democratization, rule of law, and respect for human rights.

Myanmar’s lack of development, its desperate need for humanitarian aid, and the changes in its political system have together engendered a “gold rush” of investors as well as donors of political, humanitarian and technical assistance. International firms have been seeking skilled members of the Burmese diaspora in Asia to staff their new offices in Yangon. As a result, non-political members of the diaspora have met with a comparatively better situation for return than members who had been politically active.

For their part, what activists have mainly requested from international organizations and donors has been training and capacity-building. These requests have brought a flood of training programmes, offered by a multitude of international and exile organizations, which has resulted in some duplication of effort and lack of transparency. Attempts to increase transparency and minimize such duplication have led to the establishment of various informal donor working groups, none of which seems to be particularly influential. While several donor forums that focus on political education alone have emerged, plans to share information on programmes, strategies and recipients of funds have not been realized and links to local NGO forums such as the Local Resource Centre or Paung Ku remain limited.

Furthermore, power asymmetries between donors and recipients, between exiles and insiders, and between local well-established and newcomer organizations, have created a difficult web of dependencies. In addition, the sudden availability of resources has also triggered a mushrooming of smaller Burmese organizations, due mainly to the fact that youth in particular feel that they are finally able to do more projects and

work more openly, especially since everyone is preparing for the next general election in 2015. Genuine efforts notwithstanding, some organizations also appear to have been set up hastily in order to siphon off some funds without actually offering useful programmes.

OUTLOOK

While the tangible results of exile transnational activism between 1988-2011 are not highly visible, a path for exiles to contribute to the current reforms can be discerned.

As for the present situation, local activists express clear expectations about the roles that returning exile activists will be able to play in the transition to democracy, and about the potential role of the broader diaspora in Myanmar's overall development. Exiles in turn demonstrate commitment to positive change and are making their skills and experience available to their respective peers as well as to the president and other state actors. The extent to which returning exiles have political ambitions remains unclear, but more than one former exile has openly declared an intention to run for election in 2015.²⁰ It is likely that such ambitions will fuel competition over power among a greatly increased spectrum of stakeholders in Myanmar politics that now includes the government, the national and regional parliaments, opposition parties, ethnic leaders, returned exiles and other members of the diaspora, and international players. Many of these have already started to position themselves strategically for the 2015 general elections and various post-election scenarios.

How things will balance out for former exiles will hinge in part on the will of local activists to integrate them into existing organizations, and in part on the government's willingness to embrace its former critics with a full amnesty. A pivotal external factor affecting local politics will be international donor agendas, changes in which may cause shifts in programme priorities, and whose funding flows may engender competition instead of cooperation, increasing the proverbial tendency among Burmese activists to establish ever more organizations.²¹

So far it seems that the transfer of know-how is perceived as a one-sided process from "outside" to "inside", but missing in this perception are the issues about which the returning members of the diaspora could learn from peers in the country. Returning exiles will only be able to engage in a sustained and effective way with Myanmar's political process if they are able to cooperate closely with local activists and people at the grassroots level. It is not surprising that conflicts exist among dissident groups in a movement that was split between home and exile over twenty years ago. Now, however,

²⁰ Interview with activist, Yangon, January 2013.

²¹ Many exiles said in interviews over the years that where there are two Burmese, there will be three organizations.

these different realities and experiences need to be forged into one combined effort directed towards a transformation in Myanmar that will prevent a return of dictatorship.

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PROCESSES

Economic Transition amid Ethnic and Resource Conflict: Myanmar's Economic Transition under the Thein Sein Government

Anders Engvall and Soe Nandar Linn

For five decades, Myanmar's economic development was held back by isolation, conflict and mismanagement by a succession of military-led governments. Distortionary inward-looking policies diverged from the export-led development models in many of the country's East Asian high-growth peers. The Myanmar economy was burdened by a confusing multiple-exchange rates regime, an unstable regulatory environment for businesses and bursts of high inflation as the Central Bank of Myanmar monetised the budget deficit by printing money. There was not even basic transparency regarding export earnings from the sale of natural resources and, importantly, the economy was dominated by monopolies under state-owned Economic Enterprises and crony capitalists with connections to the military leaders. Access to the government's budgetary information was limited and media scrutiny of economic policies non-existent. The military governments largely prioritized large-scale infrastructure projects for development—physical infrastructure such as bridges, railways and road construction—rather than investing in the population through improvements in health and education. The lack of transparency and chronic corruption rendered much of the infrastructure obsolete and unable to serve the needs of the population.

The decades of failed economic policies left the country at the bottom of the UNDP Human Development Index; in 2012 Myanmar was ranked 149th out of 187 countries (UNDP, 2013). The outcome is a metric of the legacy of earlier governments, but also of current budget priorities. The Myanmar government devoted a comparatively small share of the budget to health and education, while the privileged Ministry of Defence got a substantial allocation at more than 20 percent of the ministerial budget in 2013/14 fiscal year. The country also has a comparatively small state in economic terms, as tax revenue to GDP ratio of Myanmar is only 3.2 percent¹, the lowest among the ASEAN²

¹ *New Light of Myanmar* (2011).

² ASEAN is the Association of South East Asian Nations. Myanmar became a member of ASEAN in 1997.

countries. Besides the state budget, there is a substantial flow of income from natural resources directly to fund special projects and the national defence sector.

After introducing a parliamentary system and a civilian government, primarily made up of former top military officers, Myanmar initiated an economic reform process in early 2011³. In the transitional period, the new government declared poverty alleviation as the key economic policy priority, a marked change from earlier governments that preferred to ignore or even deny the existence of widespread economic deprivation.⁴ Apart from that, Myanmar is trying to reduce poverty from 26 percent (2010) to 16 percent in 2015. However, poverty in rural areas is still considerably high at 29.2 percent. The government has drafted a key document, the Framework for Economic and Social Reforms (FESR), to identify mid-term reform priorities—commonly referred to as quick-wins—to guide policies between 2012 and 2015.

In its first two years in power, President Thein Sein's administration has undergone a range of economic reforms, commonly distinguished according to the fiscal year. In the first phase of reform in the 2011/12 fiscal year, the government focused on national reconciliation by releasing political prisoners, conducting high-profile negotiations with the leader of National League for Democracy (NLD), Aung San Suu Kyi, and agreeing to ceasefire agreements with ethnic armed groups. In the second phase of reform, macroeconomic issues were addressed, especially and most significantly, the exchange rate management⁵ and budgetary reform. Fiscal year 2013/14 is devoted to public administrative reform, which is challenging as the government must take on red tape, build capacity and implement regulatory liberalization to strengthen governance and improve the business environment.

There are several mid-term challenges as Myanmar has to prepare for joining the ASEAN Economic Community (AEC) in 2015 and before that take on the ASEAN chairmanship in 2014. The general election in 2015 will provide a key judgement on the electorate's view of the reforms implemented by the Thein Sein government.

DEVELOPMENT CHALLENGES: VIOLENT CONFLICT AND THE RESOURCE CURSE

Myanmar displays a large variation in the level of economic and social development between different areas of the country, and similar differences exist between ethnic

³ Myanmar establishes the presidential system of governance with a bicameral legislature.

⁴ Poverty issues were highly sensitive to address under the military government which ruled the country till 2011. Workshop on Rural Development and Poverty Alleviation in Myanmar, Naypyitaw, May 20-21, 2011.

⁵ Myanmar had exercised multiple exchange rates until April 2012. The official exchange rate was fixed at 8.5087 Kyat per the International Monetary Fund's Special Drawing Rights (SDR) (Myint, 2009); while the black market rate was over a hundred times the official rate (Lin, 2011). Currently, Myanmar applies a managed floating exchange rate system.

groups. Variations in development can to some extent be explained by fundamental economic factors—differences in endowments and opportunities for economic activities, trade and labour migration. However, these differences have been accentuated by political factors—as policies favoured the centres of Yangon and Mandalay at the expense of the peripheral border areas.

While the Government of Myanmar has cease-fire agreement with 11 of 12 ethnic armed groups there are negative developments, most markedly the continuous heavy fighting in Kachin and the outbreaks of communal violence in both Rakhine and areas in central parts of the country. The economic impact of armed conflicts is another avenue by which politics has held back development in ethnic minority areas. This suggests a negative cycle whereby conflict holds back development and under-development in itself feeds a sense of relative deprivation. It is clear that economic development in post-conflict areas will be key to bringing about long-term stability together with political settlements as part of national reconciliation.

Reliable information about the geographic pattern of development is scarce and there is even less data on the economic gap between ethnic groups. One source of information is the two national household surveys implemented by the Ministry of National Planning and Economic Development and UNDP Myanmar with donor support. By collecting information on economic welfare from more than 18,000 households across all States and Regions, this Integrated Household Living Conditions Assessment (IHLCA) survey collected rich data on socio-economic welfare across the country in 2005 and 2010.

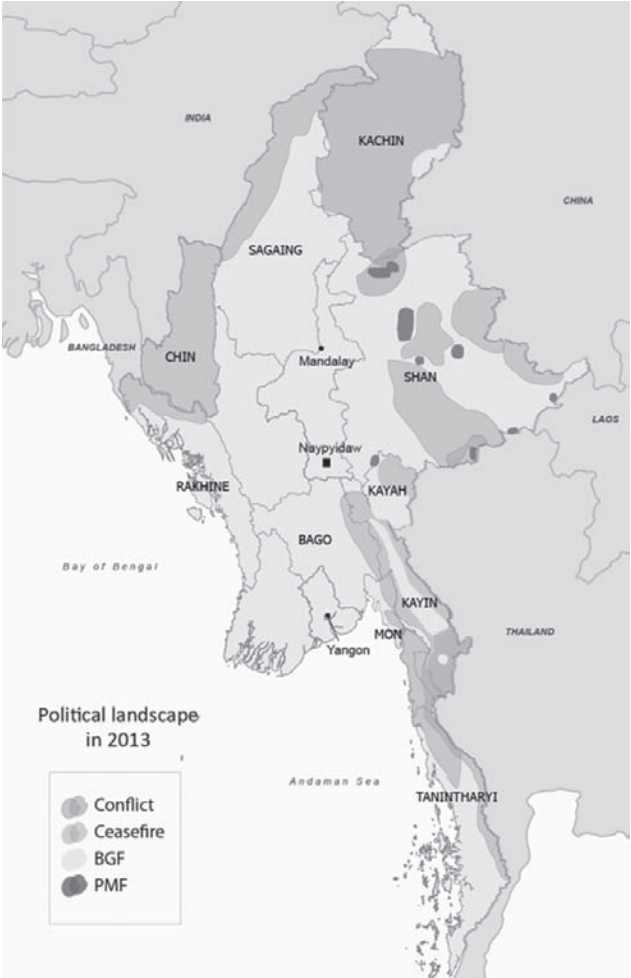
The survey showed an encouraging decline in poverty, albeit at alarmingly high levels. Poverty was estimated at 25.6 percent in 2010, compared to 32.1 percent five years earlier. In both reference years, poverty was considerably higher among the rural population, with 29 percent of the rural population in poverty in 2010 while urban poverty incidence in the same year was 16 percent.

According to the survey, 26 percent of Myanmar's population is living in poverty (IHLCA, 2011). It is significant to note that poverty incidence in Chin State (73.3 percent) was the highest followed by Rakhine (43.5 percent), Tanintharyi (32.6 percent), and Shan (33.1 percent). It is remarkable to note that three out of the four poorest areas are ethnic minority states, with the far southern Tanintharyi Region being the exception. Similarly stark differences among the 17 States and Regions are found in the entire range of correlates of poverty: in such areas as quality of housing, access to safe drinking water, access to improved sanitation, access to electricity, morbidity, immunization coverage, prenatal care, and other social and economic factors.

The close association between prevalence of conflict (Map 1) and high levels of poverty (Map 2) is illustrated below. The district-level map, based on the IHLCA survey, shows that the highest rates of poverty incidence is in the western Chin and adjoining parts of Rakhine as well as the northern Kachin—all areas affected by conflict.

Similarly, the conflict-affected areas in Shan State display high rates of poverty. This indicates a spatial correlation consistent with a negative spiral of poverty and conflict in Myanmar's ethnic minority States.

Map 1: Conflicts, Ceasefire, Border Guard Force and Peoples Militia Forces Areas, 2013.



Source: BNI, 2013.

Map 2: Poverty Headcount by District, 2010.



Source: Authors calculation based on ILHCA, 2010.

The legacy of conflict clearly takes a great toll on ethnic minority areas. While violent struggles are fundamentally political—resistance against a dis-trusted central government and demand for self-determination—conflict over natural resources aggravate the problems. Resource-rich ethnic States have been targeted for predatory resource extraction by the military governments for decades, serving to perpetuate the animosity towards the Union government. Weak statistical data about revenue from timber, jade and mineral resources extracted by the military government reinforced the sense of exploitation among the ethnic groups. Over the past decade, under the military

government, unethical international partners could easily do business in Myanmar without considering the causes and consequences of effects especially in the conflict-afflicted areas. These businesses were mostly based on natural resources extraction industries such as gems mining and illegal teak logging. Myanmar is still depending on natural resources and greater inclusiveness of its citizens in benefits from resources exploitation (Asian Development Bank, 2012).

In ethnic States, with the openness of media, the public has become aware of mega projects by the government in joint-ventures with contractors and investors in Regions, such as the Lapadaung copper mining project in the Sagaing Region and the Dawei-Deep Sea Port Project in the Taninthayi Region.

While the Thein Sein government has purported more concerted peace efforts, the ongoing violence in Kachin, Shan and Rakhine tells a different story. Natural resources has contributed to the recent outbreaks of violence, and are blocking positive developments towards a peaceful settlement. In June 2011, the Kachin Independence Army (KIA) rebelled against the Myanmar government for the Chinese Dam Project in the Myitstone⁶ area (BBC, 2011).

REFORMS OF UNION AND SUB-NATIONAL GOVERNMENTS

The Institutional Imperative

Breaking the cycle of poverty and conflict will be essential for the future of Myanmar. After decades of conflict, trust in the central government is virtually non-existent and any declarations of good intentions from Naypyitaw will inevitably be viewed with scepticism by the ethnic minorities. There are no quick-wins that will settle conflicts and it will be imperative to focus on trust-building through long-term commitments by the government. While the current constitution outlines the basic structure of sub-national governments, it will be necessary to institutionalize power sharing, contributing to political self-determination, and revenue sharing, whereby States may take a larger control over development policies.

Administrative Power Sharing

Under the provisions of the 2008 constitution, Myanmar is formed with seven States⁷ and seven Regions⁸, one Union Territory, five Self-Administrated Zones and one Self-Administrated Division. One chief minister and nine ministers are formed as a sub-national cabinet. All States and Regions except Chin State have s National

⁶ <http://www.bbc.co.uk/news/world-asia-pacific-15123833>

⁷ States are dominated by the ethnic-minorities.

⁸ Regions are formerly known as Divisions where the majority of population is Burman.

Races Affairs Minister. However, the size and formation of the State and Regional governments vary according to the areas.

To decentralize power, the Union government has set up 24 departments as the regional-level departments. However, administratively, these departments are not under the control of the Chief Minister. Although there is collaboration between the sub-national cabinet and the regional-level departments, the former has very limited role in managing these agencies.

Fiscal Sharing

Although State and Regional governments are given authority to prepare for the ceiling-based budget and budget can be discussed at the sub-national parliaments, the fiscal authority of sub-national level governments is limited. The combined budget allocation to them is relatively low, i.e., only 7.2 percent of the total budget in 2011/2012 fiscal year. Regarding the tax collection, the constitution gives the sub-national governments the right to collect 15 types of taxes; however, union ministries are still managing the work of tax collection.

Starting from the fiscal year 2011/2012, the poverty reduction and rural development fund⁹ has been granted to State and Region level. In this case, it is likely that there is a certain space for the local governments to initiate the activities that can contribute to poverty reduction.

The deficit of State and Regional governments are monetized in terms of grants for the regional-level departments and loans for the regional-level State-owned Economic Enterprises. Yet, there is no mechanism for budget allocation between central and sub-national agencies. In fiscal year 2012/13, Magwe Region registered the largest deficit whereas the smallest is in Kayah State. Not all States and Regions received the grants in equal proportion. For Yangon Region, although it contributes the largest share of revenue to the Union Account, the central government only financed 37 percent of its deficit.

EITI AND NATURAL RESOURCES

Most importantly, having ethical business partners in resource-based industries is crucial. With the support of international communities and civil society organisations, large-scale projects can be monitored to make the government more accountable.

As Myanmar has the potential to receive increased revenue from oil and gas, hydropower projects and mining resources, it is important for the government to allocate benefits among States and Regions systematically. In addition, a sound macroeconomic policy is needed to manage the upward pressure on inflation and the exchange rate by the vast amount of revenue flowing in from these sectors. Since the government

⁹ One billion Kyat of poverty reduction and rural development fund is allocated to all States and Regions.

has committed to initiate Extractive Industry Transparency Initiative (EITI) and public finance management reform, it is likely that the revenue will be more transparent and government spending on human capital will be increased. An indicator of the lack of transparency is the Revenue Watch Institute (2013) ranking of Resource Governance, where Myanmar ranked the lowest out of 58 countries studied.

Since May 2012, international donors have promoted the Myanmar Peace Support Initiative to provide both political and practical support to the Myanmar Government and non-state armed groups for peace in general and the provision of aid in conflict-affected areas.

CONCLUDING NOTES

As Myanmar goes through an economic and political transition, the developments in the ethnic minority states are crucial for stable change. As there are complex links between natural resources, conflict and poverty, these issues will need to be forcefully and jointly addressed by any reformist government. Current developments are encouraging as EITI, peace processes and economic development policies with poverty alleviation at the centre seek to address these key challenges. Success will hinge on both implementation of the plans, delivering concrete results and institutionalizing a more balanced economic relationship between the centre and the sub-national level.

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Myanmar Civil Society's Role in Raising Social and Environmental Standards in a Country Growing on Extractives

SiuSue Mark

As the 22nd World Economic Forum concludes in Naypidaw Myanmar on 7 June 2013, there are strong signals of interest by western businesses to start doing business here. On the other hand, the majority of the investments may still hinge on the gas bounty, as indicated by 59 global energy companies lining up for a share of Myanmar's estimated \$75 billion bounty of the fuel, according to the country's energy ministry.¹ According to McKinsey's recent report, energy and mining is currently the fourth-biggest contributor to Myanmar's GDP, at \$8 billion in 2012 followed by agriculture at \$21.2 billion, infrastructure at \$10.5 billion and manufacturing at \$9.8 billion. But the energy and mining sector is projected to grow to \$21.7 billion by 2030, according to the report, and will serve as the driver of the projected 6.75 percent annual growth, according to the International Monetary Fund. The role of the mining and energy sector in driving investments is consistent with the trends of the past decade: power, oil and gas and mining made up the top three sectors of approved investments from FY 2000-01 to FY 2010-11 for a total of 98.1% of all approved investments over that decade.

In a country where extractive sector investments (which beyond gas, oil and mining, could be broadened to include sectors such as agri-investments and timber extraction) is expected to be a major driver for its growth, and where traditionally social and environmental standards associated with investments have not met international standards, this raises important questions about the way the social and environmental standards will be upheld in Myanmar.

BALANCING PROTECTION FOR PEOPLE AND INVESTORS

Whenever governments announce that they will review the terms of old contracts for ongoing investments, namely in extractive industries, as Indonesia did last year in the

¹ <http://www.bloomberg.com/news/2013-06-06/myanmar-as-economic-miracle-hinges-on-natural-gas-bounty-energy.html>

“country’s national interest,” investors immediately put up arms. Governments often worry that revisiting old deals will lead to a backlash, especially if, like Myanmar, they are still seeking new investments. There is fear that such reviews will “scare away investors,” who might balk at the idea that contracts negotiated now might be subject to unpredictable changes later. Myanmar’s leadership is also concerned that this will anger other countries, namely China, Myanmar’s closest political and trading partner, having made the largest share of investments for several decades before 2011.

On the other hand, governments in many countries have often inherited deals made under former regimes that may not have considered the longer term negative social or environmental impacts of extractive deals. For example, in March 2011, the Angolan Oil Ministry announced that it would prosecute Chevron for oil spills by their operations in the country, a claim which Chevron denied. Since incidents like this, the Angolan government has been seeking to enforce stricter environmental and workforce laws in the energy sector. Similarly, the Letpadaung Commission concluded that the mine project in Sagaing Division had been launched without proper social and environmental impact assessments, nor an environmental management plan, and recommended that those requirements be fulfilled by the companies involved².

It can hardly be denied that many old deals, beyond the extractive sector, used laws that were outdated and unrealistic. Prior to last year, investments relied on the 1988 Foreign Investment Law, which did not have any references to social and environmental safeguards. Some may counter-argue that these laws were created by the old regime, and therefore, any social or environmental costs should be borne by the current government. On the other hand, governments around the world have, on hindsight, created stricter standards for regulating social and environmental damages from industrialization only after these damages have become apparent. They have regulated old deals based on their duty to protect the health, safety and welfare of their citizens.

As extractives still make up the majority of approved investments and are projected to continue to do so, as most of the extractives projects will continue to operate for decades to come, the question now is how will this government translate its new standards to regulate the costs to the country’s people and environment? The rest of the paper will address the role that civil society can play in pushing forward this agenda as well as technical lessons that have been learned from other countries in raising such standards.

HOW CIVIL SOCIETY CAN SERVE AS A CATALYST FOR ACTION

While it is laudable that the government has passed new legislation such as the Environmental Protection Law that calls for higher environmental standards and environmental and social impact assessments (ESIA), and will soon apply to become a

² Complete Final Report of Investigation Commission into Letpadaung Taung Copper Mining Project, Sarlingyi Township, Monywa District, Sagaing Region; Paragraph 85 (a).

member of the Extractive Industries Transparency Initiative which, at a minimum, obligates governments to report on its earnings from all extractive sector deals, it is the actual implementation of these standards that will be the real test. On a positive note, debate of these kinds of issues is already on the table as indicated by a recent Asia Foundation report that states, “Apparently, the government is preparing to renegotiate all previously agreed-upon projects to ensure that appropriate safeguards are in place and to subject future projects to stricter social and environmental controls.”³

These are the kinds of openings that present opportunities for civil society to engage constructively on these issues. Civil society, particularly those who have been at the forefront of Myanmar’s own nascent but dynamic environmental work, can play a key role in calling for and supporting the government to start taking action on these important issues.

Learning from the noticeable successes that civil society groups have had in the last two years on policy advocacy on environmental and land reform issues, civil society’s success in pushing forward an agenda for raising social and environmental standards in Myanmar will require a multi-pronged approach.

1. Fluid and empowered alignment

Coalitions of interest formed spontaneously in opposition to the Myitsone Dam, as well as in the case of the Letpadaung copper mine. As opposed to the civil society groups under the former government, which acted quietly and often separately, civil society groups are learning to network across the country and to rely on each other’s strengths. The dynamic nature of these issues has called for coalitions to come together and move apart depending on need. For example, it wouldn’t be uncommon for the actors most active in the Myitsone case to then re-align under the issue of pro-poor land reform. With increasing experience of civil society groups in self-organizing and strategizing and launching campaigns, civil society can present a strong position with regard to raising social and environmental standards investments.

2. Coalitions with strong linkages upwards

The alignment of interests also relies on rapid strategizing and learning to engage formally with power brokers. For example, recently, the residents from Sagaing Region’s Tigyain township collected information on environmental damages and filed a lawsuit against Great Wall Company’s four factories—a sugar mill, an ethanol and methanol factory, a distillery and a plywood factory—for causing massive pollution to the local environment, including pumping wastewater directly into the Ayeyarwady River, making the water unfit for human use.⁴ Because it was dismissed by the Sagaing Region High Court, the group brought the case to the Supreme Court in Naypidaw.

³ <http://www.scmp.com/business/economy/article/1268557/myanmar-renegotiate-huge-resource-deals-think-tank>

⁴ <http://mmtimes.com/index.php/national-news/7067-sagaing-villagers-lobby-to-close-factories.html>

Civil Society Organizations (CSOs) working on environmental issues are making direct connections with policy bodies, sometimes with members even taking part in advisory bodies to them. For example, the inter-ministerial Land Use and Allocation Committee formed an advisory body in which civil society leaders are included. As such, CSOs can more easily submit to policymaking bodies data on the real costs that are accrued over time in the absence of environmental regulations.

Recently, donors such as USAID and EU have placed technical advisors to sit in the Ministry of Environment, Conservation and Forestry to support the ministry to work out issues such as fair compensation for land acquisitions. Increasingly, there is greater appreciation for consultation with civil society groups about such issues, and this presents an opportunity for CSOs to influence the kinds of standards that will be put in place.

3. The strong support of media

Civil society voices were further amplified through the use of media to amplify and strengthen messages. Groups have become more astute at targeting individuals with background understanding of specific issues, as well as journals with a particular audience slant. Likewise, the lessening of restrictions on media and various forms of media outreach by a range of “media training” groups have resulted in a more informed and engaged media capable of questioning the decisions of the government and various other power holders. For example, as a result of media groups giving exposure to CSOs in Dawei who publicized their own ESIA calls for improved compensation to local communities, investors in the Dawei SEZ have entered into prolonged negotiations with local communities to work out agreements that would be more amenable to the communities forced to relocate.

TECHNICAL SOLUTIONS TO BE STRENGTHENED

As Myanmar is a latecomer to industrialization, there are a number of lessons that may be learned from advanced countries that have undergone their own challenges with regulating the negative social and environmental impacts of industrialization. Quite significantly, where the government was successful in getting companies to comply with stricter environmental standards, these cases did not require a revision of company contracts.

1. Environmental regulations for existing deals

Evidently, these types of problems are not new and countries around the world have grappled with them. In the United States, governmental regulation of private property, namely land, has become a prominent issue in the past two decades as state and local governments have started seriously confronting social and environmental problems caused by urban and industrial growth. There are numerous instances where the US

Supreme Court have found that state courts have reasonably concluded that “the health, safety, morals, or general welfare”⁵ would be promoted by prohibiting particular uses of private property.

Some of these court rulings have based their analysis on the 1972 Clean Water Act (CWA) and the Clean Air Act (CAA), last revised in 1990 to expand federal powers. The CWA established the goals of eliminating releases of high amounts of toxic substances into water, eliminating additional water pollution, and ensuring that surface waters would meet standards suitable for human use. The CAA is an example of how the United States sought to control air pollution through a package of regulations to protect the public from emissions hazardous to human health, enforced by the national Environmental Protection Agency. Implemented by the states, the CAA included provisions whereby the state could fine companies for violating air pollution limits or take away operating permits if companies did not produce and implement plans for managing their pollution limits going forth.

A case that was settled between the State of California and Conoco Phillips in April 2007⁶, highlighted the power of federal regulation to mandate not only emissions control technology to reduce pollution going forward, but also creative ways to mitigate past impacts of air and water pollution, including having the company fund a carbon-offset fund managed by the State of California and reforestation projects.

The United States’ experience in regulating environmental damages has also demonstrated some elements of new laws being applied retroactively to offset past environmental damages. While it is universally accepted that criminal laws cannot be applied retroactively or they would violate the principle of “legal certainty,” in which laws stay consistent so that those who are governed under them can regulate their behaviour accordingly, the experience of the United States in successfully getting industry to clean up surface water of accumulated pollutants demonstrates that in certain civil law cases, it has successfully applied a degree of retroactivity.

2. ESIA for new deals

ESIAs should identify potential negative environmental and social impacts of a proposed project, and then come up with a plan for mitigating those impacts that can be reasonably mitigated (improvement in project design). In rare occasions, the ESIA process may lead to a finding of unreasonable impact that would lead to approval of the project being denied.

Passed on 30 March 2012, Myanmar’s Environmental Conservation Law clearly states that the Ministry’s powers include “formulating and executing environmental impact assessment system and social impact assessment system to determine if any

⁵ <http://www.nevadaindex.com/health.htm>

⁶ http://ag.ca.gov/globalwarming/pdf/ConocoPhillips_Agreement.pdf

project or activity to be undertaken by any Government department, organization or person may have a significant impact on the environment.”

While many companies consider ESIA's to be a hindrance to fast implementation of projects, and in Myanmar, they are still being conducted as a check-box exercise with findings often manipulated to hide the true social and environmental costs, there is now more emphasis on the value of public consultation and scrutiny of large-scale projects. Gradually, in places like the EU, ESIA's are being regarded as an effective tool for consensus building, to improve project design and to prevent subsequent legal challenges by providing a platform for stakeholders to voice their concerns.⁷

3. Compensation for land claimed by a project

Land compensation to communities affected by investment projects needs to be guided by clear standards that can be interpreted across the many locations in which investment projects will be carried out. In the absence of such standards, the compensation amounts have for the most part been insufficient in many projects in Myanmar and elsewhere where land was claimed for projects. For example, the use of the Land Acquisition Act of 1894 to determine land compensation is not in line with international best practices. According to that Act, compensation only has to amount for the taxes paid on the land, which would have come to 80 kyats (US\$0.09) an acre, unrealistic in any village in Myanmar. Many countries usually have in their laws a clause stating that “market compensation” must be paid for land claimed for projects, but most struggle to define it.

In more-developed countries, where the land is clearly titled and the land market is regulated with clear documentation, compensation for the land claimed for a project is calculated on the basis of the prevailing market-value of the land, derived primarily from past transactions. This approach cannot be easily replicated in Myanmar, where the majority of those who till the land are still without title and where land sales are often not recorded, and even where they are, values might be underreported to evade formal tax payments or to hide informal payments to those who facilitated the deal. There is also the issue of land speculation, especially in or near cities or larger towns, which has led to drastic inflation of land values. This complicates the calculation of market values.

In Myanmar, a lot more work will have to be done to overcome these challenges, but a good starting point would be to assess the existence of records for past land-transactions, and then to determine other proxies that may be used to assess land values, such as fertility of land or proximity to commercial centres.

⁷ <http://ec.europa.eu/environment/eia/>

ENVIRONMENTAL REGULATION IN ACTION IN ASIA

Undeniably, the governments in the US and Europe have much stronger regulatory powers and are able to enforce the strictest regulations, but environmentalists are gaining ground in parts of developing Asia after years of largely ineffective lobbying, and governments in Asia are now starting to revise their national environmental standards and put into place regulatory bodies to uphold them.

In September 2010, a Thai court suspended \$12 billion worth of investments in the Special Economic Zone of Map Ta Phut—the world's eighth-largest petrochemical hub—due to the absence of ESIA's required under Article 67 of Thailand's 2007 Constitution.⁸ Though the Thai government appealed the ruling and got the court in 2010 to allow seventy-four projects to proceed, it did revoke the operating licenses of two projects, and the National Environment Committee, headed by a former Prime Minister, created a list of eleven types of industrial activities deemed harmful to the environment. What remains to be seen is whether Thailand replicates such standards in the Dawei Special Economic Zone that is currently being developed in the Thaningtharyi Division in Myanmar.

This year, China's Ministry of Environmental Protection (MEP) reopened the process of amending its national Air Pollution Prevention and Control Law, which has not been amended since 2000. The MEP announced that six heavily polluting industries—thermal power, iron and steel, petrochemicals, cement, non-ferrous metal, and chemicals—will have to start complying with international pollution standards starting in 2014.⁹

GAINS FOR MYANMAR AND ITS INVESTORS

Raising the bar on social and environmental standards for extractive investments can result in a number of important gains for Myanmar and investors.

National and regional interests

In terms of Myanmar's national interest, there are many gains from raising standards. The obvious one is that Myanmar will still have rich natural resources available to it generations down the line.

Yet another argument relates to Myanmar's challenge in resolving its ethnic conflicts. At a recent workshop in Yangon, about 40 ethnic groups met in Yangon and called on the government, ethnic rebel militias and the international community to ensure that the recent ceasefires in ethnic areas do not lead to a surge in land-grabbing, deforestation and the damming of rivers. Grievances were raised about existing extractive

⁸ <http://online.wsj.com/article/SB10001424052748704182004575056421383885014.html>

⁹ http://switchboard.nrdc.org/blogs/bfinamore/air_pollution_crisis_gives_new.html

industry projects, for which many concessions have been given in ethnic states. At this workshop, ethnic civil society groups asked that in areas of recent or ongoing conflict, a moratorium be put on all old deals signed under the SPDC government. Therefore, while improved regulations of social and environmental standards for extractive industry projects would not solve all ethnic grievances, they could be an important step towards strengthening trust and contributing to the peace building efforts that are at the forefront of Myanmar's priorities.

Beyond national interests, the modern world recognizes that large extractive deals that do not take into account the environmental and social costs often have implications beyond one national boundary, i.e., rampant deforestation by a foreign logging company contributes to global climate change or a large hydropower dam can cut the lifeline of coastal villages across several countries downstream. The enforcement of stricter environmental and social standards is intended to raise the bar of old deals up to new global standards in a modern world more cognizant of the unsustainability of its current extractive practices.

Evening out the playing field in the era of rising investment standards

With Myanmar recently having submitted its candidacy for the Extractive Industries Transparency Initiative, a global mechanism that obligates the government to report on earnings from the extractive sector, and the pledge by G8 ministers in April 2013 towards responsible investment standards¹⁰, the raising of standards in the extractive industry, which tend to be the most environmentally harmful, can result in two positive outcomes for new investors:

- a) Create a more-even playing field for all companies operating in these sectors. This could translate into flattening the price competitiveness for all companies trading in extractives. New investors could stand to gain from the raising of such standards across the board.
- b) Strongly signal that Myanmar's investments are governed by strong rule of law. As opposed to the past when deals were made opaquely, now, investors can expect a more transparent and competitive process, as is being used for the bidding process for the 30 off-shore gas blocks. By knowing the expectations in advance, investors can calculate their costs in advance, and make rational decisions with regard to their investments.

Myanmar remains a competitive market for extractive investors

Since the lifting of sanctions, Myanmar now has many more choices for investors who would be willing to follow higher standards than the majority of those investors that were here prior to the lifting of sanctions. As a result, the government does not

¹⁰ <http://www.state.gov/r/pa/prs/ps/2013/04/207354.htm>

have to just assign gas concessions to the first bidder; it can now follow an open and competitive bidding process for the new gas blocks. Despite the difficult operating environment, i.e., poor infrastructure, lack of clarity in regulations, continuing conflict in some areas, and now stricter social and environmental standards, investors, particularly for the extractive sector, are still flooding in. It seems unlikely that enforcement of stricter environmental and social standards will suddenly send investors running.

EXPANDING THE DEBATE

While all countries want growth, the question for Myanmar is how fast and in what way. According to ADB (2013), between 2006 to 2010, 90% of Myanmar's export basket is heavy in fuels (45.1%), food (23.1%), and non-food agricultural products and primary commodities such as timber (20.3%). While economic development often requires a degree of transformation, instability could ensue if people are relocated from the land before they can be absorbed into new industries. There is a concern that the flood of investors looking for quick returns will redirect the country's priorities and resources towards rapid growth—whether it is more extractive investments or land concessions for the production of cash crops such as rubber—possibly at the expense of sustainability and equity, and before jobs and social safeguards are put into place.

What is needed from the government is the will to create an enabling environment—strengthening the rule of law, streamlining of regulations, enforcement of social safeguards, and investment in infrastructure—that will allow all people to participate in their own development. As Myanmar continues to open up and provide more space for civil society to voice their concerns, there appears to be a need for government, companies and civil society to come together to discuss not only the governance of the extractive sector, but also the shape of its developmental path going forth.

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Current Efforts of Environmental Decentralization in Myanmar

Aung Soe Naing

TIME OF DECENTRALIZATION IN MYANMAR

In Myanmar, the decentralization process still needs to be accelerated even though some civil society organizations are getting ever more involved in the process. According to the current Myanmar constitution, a new system of political, administrative and fiscal decentralization will be implemented mainly through a union and regional parliamentary structure. Equally important to political and administrative decentralization is the pursuit of economic decentralization through privatization of public-owned enterprises, especially in natural resources-based industries. During the previous, rather fragmented rule and regulations in the country, rent-seeking problems was wide-spread and engendered highly unfair economic competition. To tackle this problem, decentralized economic planning or reforms should focus on enhancing environmental governance. The time is right because such kinds of industries in Myanmar did not comply with local or international business regulations in terms of social and environmental responsibility. On the one hand, the decentralization of practices was the very first step when the new government replaced the military administration but on the other hand, the corruptive, complicated and bloated bureaucratic apparatus continues to hamper governance countrywide. Therefore, it is very interesting to see how Myanmar's new government will strike a balance between decentralizing government functions and institutional reforms with civil society stakeholders. Clearly, the transitional period for Myanmar is full of challenges, especially in light of its paradoxical model of democratization from a dictatorial state.

At present, Myanmar is obviously emerging as a new state and undergoing a transition towards federalism, democracy and broader engagement with civil society in the state-building process. Initial awareness-raising on decentralization will focus on key issues in the political, social and economic areas. Here, to initiate the good practices of decentralized governance in Myanmar, it is also urgently needed to strengthen the capacity of civil servants since they are duty-bearers responsible towards the citizenry. Hence, the main trigger for such efforts stem from the gap between the duty-bearers

and the rights-holders. Again, there were some more intentions such as responsiveness, effectiveness and democracy to make sure there is political accountability in addressing quality of services and the participation of the people. Furthermore, it has been argued that conflicts driven by inequalities of power tend to be fewer in cases where political decentralization is working appropriately. Nowadays, mostly in developing countries, people call for the rights of local communities to access natural resources through increased power sharing and a comprehensive legal framework. Due to the ubiquity of sharing common resources which somehow bypass potential users, the government's protection policies take a long time to take effect under the increasing public demands regarding natural resources.

DECENTRALIZATION ACROSS THE WORLD

The term decentralization emerged in the 1800s without any exact definition, and is used to refer to the dynamics or bureaucracy of governments in the redistribution of functions or dispersing of powers by different authorized bodies. It is often claimed that decentralization is a process of empowering people to make their own decisions for improving their livelihoods according to their needs, wants and contexts without neglecting the legitimacy of proper institutional arrangements. In many ways, it is the lack of motivation and sense of ownership in centrally planned activities or public policies that can result in poor participation by the population. Looking back at the collapse of the Soviet Union, policy-makers finally realized how much people can suffer from the lack of government services due to the lack of efficiency and accountability in resource allocation. Therefore, globally, the movements toward greater participation of civil society organizations as well as business organizations drew attention to new dimension of governance to meet public demand as much as possible. In 1999, UNDP also declared that decentralization played a role in developing and transitional countries through the growing involvement of civil society and the private sector in the delivery of public services. In fact, it was a holistic approach to making development needs practical and to steering development assistance towards promoting people-centred accountability. However, we need to understand the complexity of decentralization in terms of the different forms and levels of interventions. Commonly, three different forms of decentralization—de-concentration, delegation and devolution—are distinguished. In turn, we need to decide whether the goal is to reorganize or to restructure politically or administratively or fiscally. Given the deteriorating situation of environmental governance, this article focuses on the decentralization of natural resource management during political transition, and in particular on the mis-allocation of resources as well as on environmental problems. However, empirical research revealed that the effectiveness of decentralization in natural resource management hinges on other decentralized policies. Therefore, decentralization might hardly be ideal or well-synchronized for those reformatory issues at the same time.

DECENTRALIZED RESOURCE RIGHTS

In the international context, so far, the devolution of resource rights in pursuing decentralization has become a key policy issue for governments, CSOs and development practitioners. As with other common pool resources, governments always face difficulties in properly managing large-scale natural resources since demand on them grows constantly while many external factors come into play. Therefore, the concept of decentralized natural resource governance became popular among countries in the last three decades, with various forms of devolving management responsibilities to communities and decentralizing the government power to lower levels. Many scholars, however, argued that decentralized policies vary from one country to another even if they cannot ever be successful in a short time. According to the World Resource Institute, decentralized natural resource governance has been initiated in varying degrees in at least 60 countries. Unfortunately, Myanmar is lagging very far behind since parliamentary procedures and decentralized practices are just now being introduced and there is still little awareness among local politicians as well as the population. For many years, government departments solely decided over natural resource conservation and extraction. Recently, the public called for urgent action to control environmental degradation in Myanmar, which received attention from both local and international communities. In fact, some studies also argue that local politicians and officials tend to design more appropriate policies since they have more relevant knowledge and information about local needs compared to national policy-makers.

There was also a practical idea of community involvement in natural resource management which was applied adventurously in Africa, called Community-based Natural Resource Management (CBNRM). In Africa, there was one CBNRM programme experiment with a community-based wildlife management (CBWM) system which included the transfer of management to local government agencies, the formation of community conservation groups and the empowerment of traditional leaders. Furthermore, it was also found that community-based water users' associations (WUAs) could deal with the public irrigation authority in some African countries for maintenance and usage of irrigation water. Similarly, some local NGOs in Myanmar have been implementing CBNRM projects in rural areas for many years. For instance, EcoDev/ALARM, a local NGO, is currently operating a project for improving environmental governance through strengthened community networking by establishing community forests and promoting indigenous rights in Kachin state. Two key aspects of this project were fostering democratic practices within forest users group (FUGs) of indigenous villagers and building their capacity to deal with government departments. However, promoting decentralized practices at the local or regional levels always requires sufficient financial and administrative resources. Besides, several studies have shown that decentralized policies for natural resources are not compatible with term-based political positions since local politicians tend to seek individual benefits within

their terms. In Latin America, local governments preferred to participate actively in a decentralized policy when they could gain fiscal and regulatory benefits from central governments. To some degree, regional parliaments in Myanmar were allowed to make laws for regional development purposes but those must conform with the constitution.

Unfortunately, some findings showed that key forest management objectives in Myanmar are still defined by the government while the community found it difficult to meet these objectives. However, in 1995, the Forest Policy allowed the population's participation in all forest activities although some were arguing about the effectiveness of decentralized planning of forest management in Myanmar. One of the six objectives of this policy was to increase public awareness by educating the community, politicians and decision makers to realize the importance of the sustainability of forests with conservation of biodiversity and ecological balance. For instance, community forest instructions (CFIs) have promoted community participation and demonstrated the sharing of responsibilities and benefits. Principally, the CBNRM approach was based on providing greater economic opportunities to local communities to empower them in decision-making and to conserve natural resources. In fact, CBNRM offers the community the opportunity to take risks at costly conservation and profit from using them, whereas it focused on sustainable resource uses and collaborative actions with government authority. Therefore, some said that CBNRM could lead to the decentralization of management responsibilities not only in conservation but in investment. However, communities must strive for realistic authority if they want a real, long-term change, otherwise they can opt for less changes at the risk of sustainability. We have learnt, no doubt, that organized interest groups or CSOs at the local level can influence policy actions if they can advocate well to the authority or politicians. For example, the mainstream efforts of non-public stakeholders in Myanmar have resulted in some land tenure reforms. Now, the government takes action on granting land rights to communities by issuing land use certificate and there are compensatory processes for land-grabbing.

TRENDS OF DECENTRALIZED NATURAL RESOURCE MANAGEMENT

Over the last two decades, we found that community resource user groups could emerge in many countries but they face tight regulations from government departments and lack of financial support. In some cases, local governments take a role in the decentralization of natural resource management even though their practices were questionable. Again, regarding the real situation in Myanmar, there were no sound clear-cut policies covering the social and environmental responsibility of businesses, particularly extractive industries, and the institutional mechanism to address lack of enforcement is still reluctant or slow with a chronic syndrome of power holding. In addition, protecting the rights of local communities to access natural resources seem difficult and complicated while their management authority was also undermined. For example, according to the

figure of community forests establishments in the country, there is still a long way to go in order to reach the Master Plan's target of 2.27 million acres by 2030. In fact, the government itself tried to increase the protective areas for biodiversity and forest resources after newly forming the Ministry of Environmental Conservation and Forestry. Considerably, the ministry established new wildlife sanctuaries and national biodiversity parks in some parts of the country by targeting 5 percent of the country area and 10 percent of forested area to be protected areas in the medium term. Nevertheless, civil society organisations now can hope that government actors and other stakeholders will comprehend the meaning of institutional change at least to some extent. However, it is crucial to understand that government revenues or taxes from the extractive industries tend to be much lower than they should be, owing to corrupt practices and the loose legal environment. Therefore, some initiatives such as the Extractive Industries Transparency Initiative (EITI) emerged from the 2002 World Summit on Sustainable Development to examine the financial transparency of those industries.

EITI addresses the lack of transparency of payments between private extractive companies and governments, which tend to be shrouded in secrecy. According to EITI worldwide, more than 30 countries became involved in EITI reporting, while nearly 20 countries are trying to meet EITI standards. Three years after the Myanmar elections in 2010, the Centre for Economic and Social Development (CESD) under Myanmar Development Resource Institute (MDRI) has started to facilitate the process of Myanmar's EITI candidacy. Firstly, task forces to implement the EITI process were formed and countrywide awareness-raising activities are in progress. Some important government ministries, such as the Ministries of Mining, Energy, Electrical Power and Industries, etc., were included in this task force. Referring to the problems in decentralization of resource allocation, Myanmar CSOs are likely to become change-makers, keeping a check on the government or individuals who manipulate or fail to enforce laws against exploitation. At this point, Transparency International (TI) is also working on cooperation with the Myanmar government. Regarding anti-corruption mechanisms, Transparency International and MDRI have jointly organized a recent anti-corruption workshop in the capital, Nay-Pyi-Daw, which was attended by the Myanmar Vice-president (1), ministers and members of parliament. The Myanmar parliament's (Hluttaw) Anti-Corruption Committee was then formed. For many decades, it has been argued that the government must relinquish control over natural resources due to severe corruption and the violations of indigenous rights. Simultaneously however, public scrutiny increased due to severe threats to the cultural heritage and environmental quality. Therefore, India and other developing countries strove in past decades to devolve more powers from the central to the local governments in managing land allocation.

CHALLENGES

As explained above, in Myanmar's decentralization process, lots of work needs to be done in terms of regulation and monitoring of all stakeholders. A low level of economic growth is paired with an excessive share of natural resource earnings in GDP for the long term. The country and its population have faced misery over the extraction of natural resources like timber, minerals and natural gas etc. During decades of political stalemate and economic sanctions, military-backed businesses came to monopolise the private sector and indeed the national economy. Consequently, giant investments flowed into quick-win natural resource extraction projects like mineral mining, natural gas, petroleum, and timber production. Unsurprisingly, a number of issues became rampant in the country, such as exploitation of people, low cost-effectiveness, corruption and environmental degradation. In some case, market linkages were not functioning very well due to the poor infrastructure and local instabilities. This was further aggravated by the general depletion of natural resources, the impact of climate change, illegal cross-border exploitation and lack of law enforcement. A large number of government departments were formed in order to conserve and preserve resources but these departments used to struggle with low budgets and capacity shortage.

The private sector has been characterised by nepotism, cronyism and disregard for the rules and regulations of investment, principles and codes of conduct. Therefore, the devolution of or the decentralization of resource rights and the protection of local people from losing accessibility to indigenous natural resources should be a key part of development planning. In China today, pro-growth policies are spreading out because local politicians tend to cement their political positions at the cost of decreased environmental quality. Protecting rights to local resources is crucial since there is low public participation in the government's decentralization process due to fear as well as weak mobilization efforts by local CSOs. For example, at a regional decentralization workshop organized by EcoDev/ALARM in Myanmar's Shan state, government participants concluded that the lack of transparent mechanisms, accountability and clearly defined rules and regulations were the reasons for poor public participation. Other key factors that prevented the formulation and implementation of proper policies include unrealistic expectations of resource sharing and sustainability, ignorance of indigenous rights, local armed conflicts and lack of technology. Unsurprisingly, poor government infrastructure, not so people-centred approaches as well as a centralised administration exacerbate existing problems.

If we look at the Myanmar constitution, local or regional governments were designed as highly decentralized bodies. Myanmar's new president, Thein Sein, also mentioned in his speeches that greater government decentralization is on track while he acknowledged difficulties in sharing power between the central government and local governments. In fact, fiscal decentralization remains dissatisfactory due to a very low percentage of the national budget being allocated to the regional governments.

Similarly, administrative decentralization is also rigid in terms of limited legislative power and regulatory authority. Therefore, countless calls have been made for amending the constitution. A leading argument is that the state's budget allocation does not favour basic social sectors like health and education, as well as environmental conservation. Therefore, environmentalists question how environmental costs could be minimised while there is robust investment in resource extraction. At the same time, the impacts of climate change, such as storms, droughts, heavy rains and desertification, are very obvious in Myanmar. The country's economy is largely based on extractive industries of natural resources undertaken by large-scale, state-owned enterprises and increasingly by foreign investors.

In the absence of sound policies and standardised regulations on environmental impacts, Myanmar increasingly faces issues connected to low accountability of authorised individuals or organizations. Obviously, all of the conditions show that environmental damages made by natural resources-based industries will increase unless extraction is properly undertaken after prior environmental impact assessment (EIA) and social impact assessment (SIA). Reportedly, most of the large-scale business projects in Myanmar have no proper EIA and SIA procedures in place; thus, people feel exploited and unfairly treated. This triggered serious debates and public calls for stopping projects; for instance, the Ayeyarwaddy dam in Kachin state, the Lapadaung copper mining, and natural gas pipelines connecting some coastal regions. Unfortunately, some of these protests ended in bloody intervention by the police, leading to some criticism that the state governments appears to be unable to control the police. However, the problems here stem from government commitments to comply with official contracts made between the previous government and private investors. Importantly, the Myanmar government seems to feel the need to please its business clients. This leads to questions on how transparency and accountability will be implemented.

CONCLUSION▯ WHAT WILL HAPPEN NEXT

Are there any better solutions to handle such problems without a decentralized process or better local politics? To answer this question, we just need to find out more contextualized decentralization before the backdrop of current movements towards greater social activism and political inclusiveness. Very recently, some of the CSOs in Myanmar started advocating for a public consultation process as a precondition for approval of national projects. The role of the media as a fourth pillar of state-building tends to increase while the people are mobilized for civil rights and clean governance in natural resource management. However, as in other countries, the central government delegated limited authority to local governments, with the exception of the urban authority of the three cities—Yangon, Nay-Pyi-Daw and Mandalay. By and large, to offset such deficits, municipal organisations could contribute a large portion of local government revenue. However, they are urged to be more decentralized since some

Myanmar MPs admitted that there were not enough trickle-down effects of decentralization reforms at the regional levels yet. In the real world, most governments struggle with budget deficits in some ways, and adopt measures like selling natural resources and cutting public expenditure on conservation. However, all of these efforts should strive towards generating a general public consensus. In the Myanmar context, political decentralization seems important for this matter and requires a wider participation of politicians and a regular parliamentary process. At the regional level, the local population has high expectations to see fruitful changes while members of parliaments have difficulties dealing with decentralized natural resource policy.

Although some people criticise the slow pace of decentralization in Myanmar, decentralized policies themselves sometimes may enhance the power imbalance within the country in the form of decentralized corruption and loose national unity. Here, a large number of decentralization assessments and literature also highlight the negative outcomes from increasing inequality, empowering local elites and political instability etc. Meanwhile, the government's peacemaking task force has pursued a negotiation process with ethnic armed groups. That might be another interesting point on how to implement decentralization of resources if there is no precondition of agreement. For example, Myanmar still needs to talk about municipal-level politics adjusted with decentralized government structure although it is differently applied in previous administration periods from 1824 to 2010. Nowadays, federalism has become an issue debated amongst the government, politicians and national ethnicities, while the parliamentary structure tends to change. According to the current legal setting on environment, Myanmar has made efforts to pass national policies such as the Environmental Conservation Law, Forest Law, National Biodiversity Strategy and Action Plan (NBSAP) and Disaster Management Law etc. In addition, the Community-based Disaster Risk Management (CBDRM) and natural resource management programmes for all communities in high-risk areas are also formulated through multi-levels implementation. Whereas in the past, communities were marginalized, not least due to unrealistic data and limited political space for CSOs, the current decentralization process has designed more accessible information systems. However, proper research for public awareness and public legal literacy are also required for strengthening the legal framework for environmental issues in particular and democratization in general. It is important to use a *public-private partnership* approach during institutional reforms. In fact, integrated national policies covering all aspects of development are in need of political guidance and an enabling environment.

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Through these events and partnerships, KAS regularly produces publications and newsletters, alongside this bi-annual journal *Panorama: Insights into Asian and European Affairs*.

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