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How an Authoritarian Regime in Burma Used Special Courts to Defeat Judicial Independence

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Why do authoritarian rulers establish special courts? One view is that they do so to insulate the judiciary from politically oriented cases and allow it continued, albeit limited, independence. In this article I present a contrary case study of an authoritarian regime in Burma that used special courts not to insulate the judiciary but to defeat it. Through comparison to other Asian cases I suggest that the Burmese regime's composition and character better explain its strategy than does extant judicial authority or formal ideology. The regime consisted of war fighters for whom the courts were enemy territory. But absent popular support, the regime's leaders could not embark immediately on a radical project for legal change that might compromise their hold on power. Consequently, they used special courts and other strategies to defeat judicial independence incrementally, until they could displace the professional judiciary and bring the courts fully under executive control.

José Toharia (1975) argues that in Spain the Franco regime partly protected judicial independence by removing political cases to separate courts. According to Toharia, there existed two parallel systems, one handling ordinary cases and the other handling cases of real or perceived political relevance. The judges in ordinary courts were not politically indoctrinated and carried on their business free from much interference for the very reason that the regime did not allow them to decide upon important matters. The Franco regime could thereby reconcile limited judicial independence with controlled administering of justice. "By preserving the independence of ordinary courts (even at the cost of reducing them to practical powerlessness)," Toharia concludes, the regime had "been able to claim to have an independent system of justice and, as such, to be subject to the rule of law" (495).

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Although Toharia limits his argument to Spain, other scholars have suggested that it applies more generally. Juan Linz cites Toharia's thesis to assert that "most authoritarian regimes tend to leave to the regular judiciary its traditional degree of independence while they shift the politically relevant cases to special courts" (2000: 109). Toharia's thesis has continued to receive endorsement or comment of authors studying judiciaries in authoritarian settings from the Americas to Asia and the Middle East (Hilbink 2007: 27–28, Moustafa & Ginsburg 2008: 4; Osiel 1995: 500; Tate & Haynie 1993: 715).

In this article I describe a case study that runs contrary to Toharia's, one in which special courts were used not to insulate judicial independence but to defeat it. This is a study of the Special Criminal Courts (SCCs) set up under the Ne Win regime, which seized power in Burma in 1962.[1] Contrary to Toharia's assessment of the parallel courts in Spain, the purpose of the Burmese courts, and in particular their appellate bench, was not to isolate the judiciary from politically oriented rulings but to accomplish the exact opposite goal. It was to bring policy-based jurisprudence into the ordinary courts, to subordinate them to their special counterparts, and finally, to eliminate the professional judiciary completely.

I outline the case study in three sections. In the first, I give a truncated background of the legal system in Burma prior to full military takeover, from political independence in 1948 to the coup of 1962. This was a period of judicial assertiveness despite intense political and social challenges. In the second, as I examine the new military regime's project to dislodge the independent judiciary, I concentrate on the setting up of courts to try special criminal cases and the making of a key judicial appointment. Third, I look at how these two moves converged in a new special appellate court, which within five years became the most important judicial body in the country, and I follow events through to the demise of the professional judiciary in 1972, when it was replaced with "people's courts" comprised of army officers, government officials, and party cadres.

In contrast to the expansive literature on how Burma's military steamrolled its parliament, and to a lesser amount of scholarship on how the regime grew from rather uncertain beginnings to take power in little over a decade, only one academic researcher has, to my knowledge, touched on its strategy to defeat the formerly independent judiciary (Myint Zan 2000). Nor has there been any scholarship of note on the role of special tribunals in this strategy. Therefore, my interest in researching and writing on Burma is not only to raise analytical and comparative questions

[1] As prior to 1989 the country now officially known as Myanmar was referred to in English as Burma, in this article I use the old name.

about authoritarian regimes' use of courts, but also to contribute to the limited body of knowledge on this often overlooked but nevertheless large and increasingly important country at the juncture of South and Southeast Asia.

Having set out the case study, in a fourth section I turn to two problems that it poses. First, why did the Ne Win regime defeat rather than contain judicial independence? And second, why did it use special courts for this purpose? Why go to the lengths that it did when, if the regime wanted to defeat judicial independence, it had the power to shut down the courts and install a new system under its direct control much sooner? I explore these two problems with reference to the status and power of the judiciary at the time of military takeover, and with reference to the character and composition of the regime itself. I argue that the regime's strategy to defeat judicial independence contrasted with strategies of containment adopted by its counterparts in the Philippines, Indonesia, and Pakistan for reasons that were regime specific, rather than for reasons particular to the judiciary. Although the strategy was justified with reference to socialist ideology, it was also unlike leftist programs adopted by mass-based revolutionary regimes in the region, such as in Vietnam, since it was aimed foremost at protecting military power by neutralizing the populace, rather than mobilizing people for radical social or economic change. Consequently, the project to build a people's justice system in Burma was gradual, inherently conservative, and ultimately incomplete.

In concluding, I argue that how authoritarian regimes respond to judicial power depends on a complex array of factors that can be revealed through detailed study of specific cases. Belief in a common practice or set of practices for how authoritarians manage and use courts can be sustained only through insistence upon schemata for the classing and comparing of regimes in very broad terms. If indeed the type of authoritarian legality practiced in Ne Win's Burma was anomalous, what really does this mean? What does it tell us about the peculiar mix of factors that motivated the regime to behave in the way that it did? And what does it say about the limitations of typologies for explaining regime behavior?

Judicial Independence in the Prelude to Authoritarianism

The 1947 Constitution of the Union of Burma established a liberal democratic state, specified the fundamental rights of citizens, and guaranteed judicial independence. The superior court judges who had taken part in writing the constitution were bent upon giving life to its terms, even amid the chaos of civil war and widespread social and political unease in the weeks, months, and

years after the new country came into existence at the start of 1948. Chief Justice Ba U made clear from the beginning that his court, "having been constituted by the Constitution as a protector and guardian of the rights of the subjects, will not hesitate to step in and afford appropriate relief whenever there is an illegal invasion of these rights" (*U Htwe alias A.E. Madari v. U Tun Ohn & One* 1948: 560–561).[2] The body of substantive constitutional rights, together with the affirmation of judicial independence, afforded petitioners and judges alike a platform on which to build a new edifice of law.

If the superior courts were ready to assert their independence, then police and government administrators were ready to test it. Fighting to bring order to the country, officers routinely arrested people without evidence and held them in preventive detention. Judges ordered many of these detainees released on both substantive and procedural grounds. Ba U's successor, Acting Chief Justice E Maung, strongly asserted constitutional rights and the responsibility of the courts to protect them. In the documentation of one case he scoffs at police who detained a man who had allegedly distributed pamphlets calling for rebellion because "in the language of politicians these days 'rebellion' (*tawhlan-ye*) does not necessarily mean much and no undue importance should, in our opinion, be attached to its use" (*Ma Khin Than v. Commissioner of Police, Rangoon & One* 1949: 17). The High Court of Burma—which the colonial regime had established in 1923 and which had continued on after independence as a subordinate to the new Supreme Court of Burma—held that a person who claimed to have confessed because he was afraid of the police did not have to prove that they had treated him poorly, only that his fear was justified (*Maung Nyi & One v. Union of Burma* 1952). The law reports in the first decade of Burma's nationhood contain many other cases that assert the rights of citizens against the excesses of the state.

The courts after 1948 also demonstrated their independence by expressing concern for procedural justice, upholding the rights of both complainants and defendants to be heard, to know of formal charges in open court, and to call and cross-examine witnesses. The higher courts sought to maintain an appearance of judicial impartiality: if a magistrate was a friend of a government officer in a case before him, this was sufficient ground for the case to be transferred, as it created doubt about possible bias and fairness of trial; it was not necessary to prove that the judge had actually done anything wrong (*U Ba Khin v. Union of Burma* 1954). And if a judge had made inquiries about a case, not so as to understand the facts but to fill

[2] All cases cited are from Burmese-language text unless, as in this instance, otherwise indicated in the citations at the end of the article. All translations from Burmese are my own.

gaps in the prosecutor's argument, his verdict was unlawful (*T.S. Mohamed & One v. Union of Burma* 1953).

Burma's judiciary guarded its independence for a decade, throughout which nearly all parties, including the military, at the very least paid lip service to the constitutional order. Party politicking and litigating were fierce, but politicians at no time attempted to eclipse the authority of the judiciary. Rivalry between the courts and the parliament took the form of the judiciary's reaching unfavorable verdicts for the latter, and the parliament, which a single party dominated, in turn passing new acts or amendments to override those verdicts. But the courts remained principally sites of contest rather than subjects of contest, and they endured.

The first serious threat to judicial independence came in 1958, when the military forced Prime Minister U Nu to transfer government to the army commander, General Ne Win, or face a mutiny. Despite taking power by threat of bloodshed, the caretaker administration was at pains to adhere to the language and procedures of the rule-of-law state. As interim prime minister, Ne Win went to the parliament in 1959 to report on progress and to obtain a constitutional amendment with which to extend his term in office. His administration did not abrogate the fundamental rights in the constitution; rather, it claimed that the number of persons seeking writs under its rule increased (Director of Information 1960: 60). The Supreme Court continued to enjoy formal independence and also issued strict instructions concerning the taking of confessions so as to protect the rights of the accused (Courts General Letter no. 15/1959). Everything, it seemed, was being done by the book.

But contemporaneous records hint at another story, suggesting that the coup had a chilling effect. The 1959 law reports contain virtually no cases on fundamental rights of the sort that take up many pages in earlier volumes. Nor do they contain any petitions for habeas corpus. This does not mean that the government was not ordering and making arrests, or that arrests were not being challenged. Nu alleged various forms of "fascistic" police torture and abuse of his party members, as well as widespread use of illegal arrest and forced confession (Nu 1959). Police and army personnel rounded up thousands accused of being involved in insurgency or criminality. Hundreds of political prisoners—along with teenagers, small businessmen, and others caught in the sweep inadvertently—were sent to the remote Great Coco Island, which was both geographically and legally beyond judicial oversight, since high seas cut it off throughout the monsoon, and since it was classed as a military territory (Chit Yi 1960: 132; Ko Ko Lay 1960: 93). The island prison was not shut until shortly before the caretaker government ended its tenure.

So whereas throughout the 1950s the courts asserted their independence from other parts of the state under difficult circumstances, at the turn of the decade the security that they enjoyed was less certain than it had been a few years earlier. They survived the first coup by avoiding any serious conflicts with the army-led temporary government, and after an elected parliament took control again in 1960 they continued to assert strongly the supremacy of law. But these days were numbered. The armed forces were shortly to push back to the forefront of national political life, and this time they would not leave again.

The Military Coup and Moves against Judicial Independence

On March 2, 1962, Ne Win executed his second decisive military coup, this time without any constitutional pretense. He listed economic collapse, the insistence of some ethnic groups on federalism, and "flawed administration of law" as grounds for the takeover (Central Organizing Committee 1966: 43). Some years later he would describe the flaws in administration of law as including the dictatorial character of the presidency and excessive powers of senior judges under the constitution, the scheming of self-interested lawyers, foreign influences, and the use of the courts for political ends (Central Organizing Committee 1970: 45–70). But these justifications did not emerge until after the coup. In its first days, the junta, which named itself the Revolutionary Council, sought for the most part to reassure the domestic populace and the international community that life would go on as usual for the time being.

Life did not go on as usual for anyone considered an immediate threat to the army's new grip upon power, however. On the day of the coup, the military detained the chief justice at gunpoint, along with the prime minister, the president, and senior politicians. The manner in which they were taken into custody symbolizes the country's uncertain shift from fraught, post-colonial legality to altogether new terrain. When a unit of soldiers came to take Chief Justice U Myint Thein from his house, naturally he demanded to see an arrest warrant. The soldiers, still doubtful of their own authority, sent a message back to their commander. The officer came in person and informed the chief justice that as the army had seized power, no warrant was required (Mya Han & Thein Hlaing 1991: 212). Myint Thein remained in custody, along with over 200 others arrested at the time, for six years. Prime Minister Nu was released after four.

The day following the coup, Ne Win dissolved the parliament. Over the coming days, his council replaced state governments with new regional administrative bodies consisting of both military and civilian personnel. It announced that all existing laws would remain in effect and that all courts would also continue to exercise enacted authority until otherwise declared. At the end of the month, Ne Win reconstituted the two topmost courts, the Supreme Court and the High Court, into the single Chief Court, an act that was described later as necessary to eliminate judicial bias toward the interests of the bourgeoisie and landholders (Burma Socialist Programme Party 1971: 56).[3] The bench of the new court did not yet consist of political appointees, but instead was comprised of U Bo Gyi—a chief justice recruited from the Supreme Court—and four former High Court justices.

Having been unequivocally warned away from interference in political affairs, the judiciary was initially left to carry on with its work in nonpolitical cases according to the same procedures and practices as before. In other institutions and professions, too, day-to-day activities at first continued as they had earlier. Despite some leafleting campaigns and political-party announcements condemning the takeover, public response to the coup was muted in March and April.

It was not until two months later that the regime began to set down guiding principles for the future state. The socialist ideology it adopted was not novel. Mainstream politics in Burma at this time were leftist. Throughout the 1950s, weighed down by ongoing insurgency and an economy that had not recovered from the damage of World War II, the government had struggled to build some kind of socialist democratic system. Senior army officers had studied and articulated leftist ideas. According to historian Mary Callahan, the new regime's move to turn Burma into a socialist country "was simply a revival of the rhetoric of the anticolonial nationalist movement of the 1930s and 1940s" (2003: 209). By taking up a socialist banner, the new regime could situate itself in a convenient historical narrative of anti-imperial and anticapitalist struggle while creating opportunities to target political and economic adversaries through legal and administrative measures.

As military plans to retain power became increasingly obvious, opposition grew. Three days after it established the Burma Socialist Programme Party on July 4, the army killed protesters when it violently put down demonstrations at Rangoon University, and in the early hours of the following morning it dynamited the student union. On the night of July 8, when Ne Win went on the radio to

[3] For a summary of the changing structure and nomenclature of Burma's upper courts, see Myint Zan (2004).

describe the protests as the doings of evil political influences, he stated bluntly that the time for talk was over and anyone aiming to destroy his government's work would be met "sword with sword, spear with spear" (Mya Han et al. 1993: 45). Thereafter, the regime moved increasingly to silence dissent, to censor the media, and to eliminate opponents.

Within days, Ne Win added two more weapons to his armory. First, he passed Law no. 15/62 authorizing the setting up of the Special Criminal Courts to try cases outside of the ordinary criminal justice system. Second, he appointed Dr. Maung Maung as a sixth justice on the new apex court. The remainder of this section deals with each of these actions in turn.

The Special Criminal Courts were part of a project to disperse and dilute judicial authority through a variety of agencies under executive control, on the pretext of building a socialist economic system. As early as 1963, the regime began experimenting with tribunals of lay jurors to try minor criminal cases in lieu of professional judges. In 1966, it set up "people's courts" to hear cases against individual accused. These courts' decisions carried punishment of up to three years in prison under the 1965 Law Granting Authorizations for the Building of a Socialist Economic System. The law designated certain commodities that could be placed under government monopoly and imposed harsh penalties for anyone interfering in the building of a new economy. The courts consisted of representatives from local and regional administrative bodies, as well as workers' and peasants' councils. Initially, losing parties could appeal their verdicts in the ordinary courts, but in 1967 the regime established an appellate tribunal with an army officer as its chairman and a retired policeman and some bureaucrats as members. An executive board headed by another army officer took on the job of interpreting the law. Aside from these bodies, the government established special agencies to decide land and labor disputes, and other matters that were previously in the judicial domain. All had the effect of eroding and scattering judicial authority into a gamut of quasi-judicial bodies under executive control. But none can compare in terms of power and importance to the Special Criminal Courts and their appellate bench.

The SCCs were three-member panels consisting of serving or retired soldiers, police, bureaucrats, judges and prosecutors, and others, set up in towns around the country to try specific offenses. The law initially charged the new courts with trying crimes of insurgency, crimes of obstructing state policy and programs, crimes against society, and other "important" crimes, but a 1963 amendment deleted the schedule of offenses, thus making the choice of cases to come before the courts a matter of official discretion. The law also gave the government authority to intervene directly in the

court process at any time by ordering the transfer of cases in midhearing to other special courts, or to ordinary courts, and from ordinary courts to the special courts. And where a tribunal member was unable to continue hearing a trial, the executive would appoint a new member and the hearings were to continue uninterrupted. Nor were tribunal decisions final: after each verdict was handed down, it went to a "confirming panel," which could alter the original ruling out of public view as it saw fit. The law did not stipulate any criteria for members of the panel; however, until 1970 the 12 appointees were all senior army officers. Later the government set up more than one confirming panel and also assigned seats to civilian ministers and deputy ministers.

Like military tribunals established under martial law, the SCCs could impose only three penalties: at least three years' imprisonment with hard labor, full life imprisonment, and death. They had wide powers outside the ambit of the ordinary courts that narrowed or removed accused persons' ordinary procedural rights and expanded the authority of the trial benches. They could try accused in absentia (*U Tin Maung Han v. Socialist Republic of the Union of Burma* 1975). At any time during trial their judges could—with government permission—add, remove, or alter charges; add defendants on the same or related charges; and take action against any person found to have given false evidence. And where there was a conflict between the SCC Law and the Criminal Procedure Code, the former prevailed (*Maung Ko v. Union of Burma* 1966).

At the same time that the regime was diverting cases from the mainstream courts into the SCCs, Ne Win also moved to obtain tighter control over the professional judiciary. The justices of the Chief Court had submitted to his authority, but they were also all men who had come from the earlier system, and they still adhered to old habits and thinking. Ne Win needed someone on the court who owed him allegiance personally. Therefore, two days after passing the law authorizing the SCCs, he appointed an outsider, Maung Maung, to join the five other justices on the top court.

Maung Maung had never been a judge, but he was a barrister and had a doctorate in law from Utrecht University. He had participated in the independence struggle and had been an assistant attorney general under the first Ne Win government. He had lectured on law at Rangoon University and on politics at Yale, but had stayed out of party politics. He had also been a newspaper editor and author of various books—many in English. Ironically, in his books he waxes lyrically about the value of democracy and the independence of the courts and forewarns that,

> [i]f leaders should burst upon the scene who are schooled in totalitarian thinking and practice, then indeed the independence

> of the Judiciary, and its role as an essential and important feature in democratic life, must wither and die. (1961: 155)

Barely a couple of months before the second coup, Maung Maung wrote that "the independence of the Judiciary is not merely a desirable window-dressing but a vital necessity" (1962: 286). But as a justice of the Chief Court and legal lieutenant to Ne Win, he quickly changed his tune. In 1964 he started dabbling with ideologically oriented jurisprudence and making pronouncements on the superiority of executive orders to law. He cited a Soviet text to explain that an old doctrine was nonetheless compatible with a socialist justice system. He then took the unprecedented step of adding a note to the ruling in which he cited a number of paragraphs from another book, on the Soviet theory of evidence, in support of the judgment (*Daw Si Si v. Union of Burma* 1964). In documentation of a case calling for judicial interpretation of an executive decree, Maung Maung rejects an attempt by a lower court to interpret the meaning of a 1963 general amnesty for persons accused of a variety of offenses because "the Amnesty Order is an act of high policy of the Revolutionary Government and it overrides all existing laws. It is not for the Courts to subtract from or add to the General Amnesty Order by way of judge-made law. The Courts must . . . avoid, as far as possible, the making of new law in judicial pronouncements" (*U Ba Kyi v. Union of Burma* 1964: 308).

While Maung Maung narrowed judges' role, the legal view of a case also began to lose its primacy. Law became only one factor for a judge to weigh against administrative policy, the state-run *Working People's Daily* reports, in a case where a magistrate had denied bail on nonlegal but nonetheless legitimate grounds, since,

> [i]n the past, the chief criteria in dealing with bail applications were (1) whether the accused was likely to abscond and (2) whether if enlarged on bail he was likely to tamper with witnesses. At present, however, Magistrates have to consider not only these questions but also the policy of the Government. (1965: 8)

Whereas lawyers and judges could enumerate the legal bases for dealing with applications for bail according to written procedures, they could not do the same with government policy. The statutes set down identifiable bounded criteria for decisionmaking; policy did not. It was just something with which magistrates were somehow expected to comply.

In 1965 Ne Win made Maung Maung chief justice, over the heads of all his counterparts on the Chief Court. Maung Maung's predecessor, Bo Gyi, was a judge of 40 years' experience who had joined the High Court at independence and had been on the

Supreme Court since 1955. With his departure from the bench, as well as that of the two judges who had been next in line for the chief judgeship—San Maung, an Oxford graduate who had entered the judiciary from the Indian Civil Service and who had been on the High Court since 1948, and Saw Ba Thein, who had joined the bench in 1958—the court was now firmly under regime control.

Bo Gyi had sought to protect as much of his court's authority as possible under difficult circumstances. Maung Maung did the opposite. His role as chief justice was to emasculate his own court and to aggrandize the executive. Less than a month after taking the job, he ruled against the applicant in the last case of habeas corpus to appear in Burma's law reports. In the decision, he writes,

> When speaking of the executive and judiciary as having to be divided into two separate branches, it is not with the intent that they are fixed in place; actually, they must serve as the people's arms, joining together for a singular purpose, both in work for the people's benefit and in defense of the country's security. (*U Aung Nyunt v. Union of Burma (Sub-Divisional Magistrate, Tachilek)* 1965: 582)[4]

The judiciary was now attached to the ruling council not only as a matter of necessity, but also as a matter of principle. The non-separateness of powers was not just a fact; it was ideal. For Maung Maung, this meant not only that the judiciary was bound to the executive, but also, and more important, that its authority was strictly limited to whatever the ruling council allowed it. In 1967, he and another judge heard a case in which an applicant had approached the court to review a matter pending against him in a lower court under sections of law that granted the Chief Court ultimate authority over all other courts in the country. The applicant asked the court to assert its authority as the apex court. Declining to do so, it ruled that its powers were strictly limited to those that the legislative power—which after 1962 resided in the military junta—expressly authorized (*U Thein Zan v. Union of Burma* 1967). On similar reasoning, the court later declined to entertain a petition for an appeal against a ruling of a people's court appellate bench because there was no allowance for the Chief Court to hear appeals from the people's court under the relevant law (*Daw Aye Tin v. Meikhtila District Area People's Court Appeal Court & One* 1971).

To recap, in 1962 the Ne Win regime imprisoned the chief justice and reconstituted the apex court. It also authorized the setting up of new tribunals comprised of soldiers, police, bureau-

[4] On the rise and fall of habeas corpus in parallel with that of Burma's independent judiciary, see Cheesman (2010: 95–96).

crats, and some legal personnel to handle cases that the regime preferred not to take before the ordinary courts. While these courts dispersed judicial authority, the new chief justice simultaneously began abdicating his court's erstwhile powers to executive agencies by laying stress on the superiority of government policy over legal formality.

But in the Chief Court, Maung Maung was still bound by the laws of evidence and procedure of the former system, which the regime did not scrap. No matter how much he insisted on the significance of government policy, there would always be old-style lawyers getting in the way, citing precedents, he later explained derisively, "that Justices Basu, Chowdhry and Bose of the Calcutta, Bombay and Allahabad High Courts, India handed down one time" (Maung 2004: 44). Most of his fellow Chief Court judges also continued to adhere to old laws and precedents from India and earlier periods in Burma with scant regard for the type of socialist legality in their chief justice's rulings. Even with the regime manipulating judicial power through the top judge, habitual judicial resistance remained strong. To overcome this resistance and to beat down the mainstream judiciary further, the regime introduced the Special Criminal Courts' Appeal Court (SCCAC), which is the subject of the next section.

The Defeat of Judicial Independence and the End of the Professional Judiciary

The Special Criminal Courts' Appeal Court began its work in 1965, following a second amendment to the SCC Law the previous year. Out of around 3,000 cases tried in the SCCs up to 1973, the appellate bench heard over 800. But its importance extended far beyond the specific cases on which it ruled, to the role that it played in demolishing the extant structure of the courts in Burma and, thus, defeating judicial independence and eventually terminating the professional judiciary.

Colonel Hla Han, an army officer and the minister for health, education, information, and culture, headed the tribunal. Its second member was the minister for industry and workers, Colonel Than Sein. In 1966 Brigadier General Sein Win came on board. But while soldiers made their presence known through the SCCAC, it was Chief Justice Maung Maung who, in joining them on its bench, allowed the court to realize its potential as an agency for the defeat of judicial independence.

From the beginning the SCCAC had, like the State Security Tribunal in Spain, an undisguised political character (Toharia 1975: 493). Accused persons whose alleged crimes threatened the state

and its nascent socialist economic system risked harsh punishment. The court not only upheld convictions of a group of workers who stole from a government warehouse and made the mistake of appealing, but also doubled their sentences (*Maung Chit Hlaing & 6 v. Union of Burma* 1966). It deplored a police constable who attempted to rape a young woman while she was going to her job, because he was supposed to be protecting her entitlement to travel safely so as to work for the good of the state and society (*Maung Kyaw Tint v. Union of Burma* 1966). And it chastised black marketeers bringing foreign-made car parts, radios, clothes, and other items from across the border not merely for showing contempt of the law but for deliberately upsetting the domestic economy, impoverishing the people, and damaging public morality (*Maung Than Win alias Tin Aung & 2 v. Union of Burma* 1968).

But beyond its political character, the SCCAC had two important elements that were directly relevant to how the regime used it to defeat residual judicial independence. First, in the SCCAC, Maung Maung could make rulings unfettered by ordinary legal procedure, without having to get into arguments about legal niceties and technicalities that would have obstructed or at least delayed the progress of new jurisprudence in the ordinary courts. The SCCAC could justify its verdicts on the basis of policy and purported common sense, and pick and choose from among legal principles to support its findings. Second, Maung Maung could then take the rulings of the SCCAC back into the Chief Court, cite them in judgments he gave as chief justice, and feed them to the lower courts through administrative directives. In this way, Maung Maung could get around the obstacles that he would have faced if he had tried to make such rulings in the Chief Court itself, where old laws of procedure and evidence remained. Bypassing these obstacles through the SCCAC, he could direct the lower courts to comply with army-dictated, policy-based jurisprudence. By so doing, he elevated the SCCAC above the Chief Court and made it the de facto apex court. The remainder of this section is taken up with these two prongs of the strategy to defeat judicial independence and, finally, to depose the professional judiciary in its entirety.

In 1965, Maung Maung introduced to the Chief Court what was to become the new doctrine trumping all old doctrines from Anglo-Indian law during his time as chief justice: that the role of the court was to reveal "the truth" (*Maung Aung Htay Myint v. Union of Burma* 1965). This new doctrine was intimately linked, both intellectually and practically, with the project to defeat judicial independence. It was not, of course, something that Maung Maung thought up himself. It was a principle outlined in the books of Soviet jurisprudence that he had been reading and citing in judgments, including that of A. Trusov, who writes,

> The Soviet theory of evidence, based on the postulates of dialectical materialism, proceeds from the thesis that the truth can be established in court cases, that those engaged in investigation and trial can establish facts with no less success than scientists working in various fields. In the theory and practice of Soviet criminal procedure, the postulate is quite unacceptable that the court, in making decisions on concrete cases, can be satisfied with the probability that the accused is guilty. . . . For this reason it is required that the judiciary, investigators and procurators always strive to establish the actual circumstances in each case exactly as they occurred in reality. This means that every judgement passed by a Soviet court must be based on the truth, on the unconditional authenticity, of the facts presented. (n.d.: 21)

Leaving aside the self-evident inherent practical difficulties associated with striving to uncover the actual circumstances of a case as they occurred in reality, the mischief of the truth as foremost object of judicial inquiry in politically controlled courts is obvious. Emphasis upon the truth entitles a court to exclude other claims to the collateral purposes of the legal system, especially any claims to protect individuals from abuses of official power (Damaška 1997: 305). As the interests of the government and those of the public are supposedly in alignment, such claims are superfluous. Andrei Vyshinsky, in his seminal text on Soviet law, writes, "Safeguarding the interests of the socialist state, the court thereby safeguards also the interests of citizens for whom the might of the state is the primary condition essential for their individual well-being" (1948: 497). Because the interests of the ruling group and those of the citizenry are ostensibly aligned, the state cannot logically infringe upon public interests without infringing upon its own.

Although truth finding entered Burma's jurisprudence through the Chief Court, the SCCAC gave it life and used it to attack procedural safeguards for accused persons' rights, among them the benefit of the doubt. Up to 1962, by consistently applying the doctrine of the benefit of the doubt, courts in Burma had found in favor of defendants when unsure about the facts of a case or the intent of the accused. The Chief Court continued to apply the doctrine, including in cases that Maung Maung himself handled. In 1963 the then–chief justice issued a notice to all district and sessions judges advising them to study and understand the doctrine in order to avoid miscarriages of justice (Courts General Letter no. 5/1963). But two years later, shortly after beginning its work, the SCCAC insisted that there was no unqualified resort to the benefit of the doubt. Explaining that there could be various reasons for inconsistent evidence from a witness, it held that this did not necessarily cast doubt on the grounds upon which to convict:

> As throughout history the administration and judiciary in our country have consisted of oppression instead of working for the benefit of the masses, the people are irked to go to the police department and courts so as to bear true witness to all that they know. In this kind of situation, in cases where the expression the "benefit of the doubt" cannot be unequivocally applied, it is important for the examining courts in revealing the whole truth to issue verdicts based on that truth. . . . If in practicing this principle the potency of the "benefit of the doubt," "burden of proof" and other similar expressions is thus necessarily lost, in the process, the potency of the truth will be discernibly increased. (*Maung Saw Hpe & 2 v. Union of Burma* 1966)

With this ruling and subsequent ones, the SCCAC shifted the benefit of the doubt from firm doctrine to one principle among others that could aid a judge in arriving at the truth. It stressed that the "doubt" to be applied in any case should not be given easily (*Daw Tin Oo, U Aye Hpe & One v. Union of Burma* 1966). And it emphasized that the expression itself was unimportant: all that it meant was that a verdict should be based not on guesswork but on evidence (*Major Win Hpe v. Union of Burma* 1969).

In 1970 the SCCAC moved against the doctrine of the burden of proof, which placed the onus on the prosecution to show that the accused had committed an offense. The appellate court had made a virtue out of citing few judgments at all—and then mostly its own. Now it cited an important ruling from 15 years earlier so as to get rid of it. In *M. Muthiah Servai v. Union of Burma* (1955) the High Court had found that a plausible story for the defense, even if not believed by the court, would cast doubt on the case and entitle an acquittal because of the prosecutor's failure to discharge the burden of proof. In its documentation of the ruling, the SCCAC continues,

> We are aware that this ruling has been frequently relied upon in the criminal courts. Although we accept that remarks from precedents can point towards justice, it is a little rich to say that even though a court does not believe the explanation that the accused has submitted then he must go free. This seems to be misguidance in the uncovering of the truth. . . . If it is in effect saying that a court that has not accepted an explanation must allow the accused to go free, then the court will probably do little to fulfill its duty. A court's duty is merely to decide whether a charge is right or not, having weighed up whether witnesses are trustworthy or not from examining them well, and whether the evidence is firm or not. In uncovering right and wrong, the supporting evidence and the court's reasoning are what are critical. Justice ought not be determined by words; what is needed is to stay focused on uncovering just the truth with which to decide. Legal maxims, precedents, etc., are not to be dogmatically applied. One case is different from

> another. It is necessary to uncover the facts well, from which to decide on right and wrong in keeping with commonsense. (*Ma Khin Myint alias Ma Khin Nyunt Kyi v. Union of Burma* 1970: 5)

This ruling is conspicuous for its attack on the procedural doctrines of the former system, yet its subtext is more remarkable, speaking to how the SCCAC had by now significantly shifted the concept of law from something bound by general principles to something highly discretionary. Before 1962 it would have been trite for a judge to remark that one case was different from another; the point was not that all cases were in some way unique but that there existed principles that the courts could apply in order to make an appraisal of the facts and to issue findings that could be verified according to known, established criteria in a superior court. By persistently insisting upon the truth as the legitimate object of legal inquiry, the SCCAC exempted itself, and other courts, from a duty to adhere to established standards as long as they reached a satisfactory outcome according to the facts of the individual case. The truth, while appearing to be a substitute for the doctrines that it displaced, was no substitute at all. The burden of proof had—prior to the SCCAC's ruling, at least—a universal applicability, because it provided benchmarks against which the case of a prosecutor could be measured. The doctrine of the truth, on the other hand, while appearing to establish a general principle, did the exact opposite, entitling each court to issue a verdict on the basis of the "unconditional authenticity" of the facts brought out before it, rather than according to any consistent objective criteria. As no two cases were alike, they could therefore not be subject to any single principle for adjudication. Only the individual verdict in the individual case mattered.

While amplifying and expanding the new jurisprudence in the SCCAC, Maung Maung used his seat on the Chief Court to push its rulings on to the mainstream judiciary. To do this, initially he had to deal with a jurisdictional problem. That the SCCAC was the only court of appeal for cases coming from the SCCs was clear from the 1964 amendment that authorized its establishment. But its status in relation to the Chief Court was unclear. Technically, the Chief Court was still the peak judicial body in the country, but it was not explicitly authorized to review SCCAC rulings. This created a new and hitherto unknown difficulty. In past decades, the top courts had authorized special tribunals under separate statutes that, like the SCCs, greatly limited defendants' rights. But the Supreme Court and, before it, the colonial-era High Court had penultimate authority over those tribunals. By contrast, the Chief Court apparently had no effective authority over the SCCAC, even though it

was technically still the superior court. So what would happen in the event of a conflict between a finding from the Chief Court and one from the SCCAC?

This question arose in mid-1965 when the SCCAC interpreted the 1963 amnesty order in a manner that appeared to be at odds with the Chief Court's own rulings (*Maung Mya Han & One v. Union of Burma* 1966). The registrar distributed copies of the SCCAC ruling to judges and instructed that when they had cases that were caught between the two interpretations, they were to refer the cases to the Chief Court for guidance (Courts General Letter no. 6/1965). Before the year was out, the Chief Court declared that the SCCAC's interpretation was correct, not because it was more legally sound but because it more closely adhered to state policy (*Union of Burma (Dr. Pyi Soe) v. Daw Tin Tin* 1965). The following year the Chief Court sent a further directive to all district and sessions judges instructing them to study carefully the SCC law and rules, as well as the SCCAC rulings, and to adhere to them faithfully in performance of their duties generally (Courts General Letter no. 4/1966).

Ultimately the status of the SCCAC in relation to the Chief Court was resolved in favor of the former. In 1970, again heading the Chief Court bench, Maung Maung ruled further,

> The Special Criminal Courts' Appeal Court is the vanguard. The Special Criminal Courts system is a significant foundation of the system that we are leading towards in which the people decide on the people's law. Judicial officers and lawyers while studying the Special Criminal Courts system well, rendering assistance effectively and endeavoring together to make it a success need to follow its guidance seriously. (*U Htun Aung & U Htun Thein v. Union of Burma* 1970: 193)

One aspect of the Special Criminal Courts' guidance was that old precedents should be used only for educational purposes and should not be relied upon in reaching verdicts (*Captain Aung Win v. Union of Burma* 1969). In the Chief Court, Maung Maung iterated that foreign precedents were worthless for anything other than general study (*U Htun Aung Tha v. Union of Burma* 1969). The SCCAC's rulings were put forward instead, and at the end of 1970 they were published at the front of the law reports—this distinction was customarily reserved for the highest judicial body—thus making plain the SCCAC's place as the de facto apex court. The following year, the SCCAC republished six years of its verdicts in a special volume, which it distributed to judges around the country. In the volume's preface, Maung (1971) argues not only that the nonindependent SCCAC was the best thing for socialist Burma, since the soldier-administrators sitting as judges knew better than anyone the needs of society, but also that it was consistent with

practice in monarchical times, when the king's ministers and princes heard appeals, and, furthermore, with practice in Britain, where, he argues, the judiciary also was integrated with other parts of the state apparatus.

On the eve of the regime's inauguration of a new judicial system, Maung Maung put the final nails in the Chief Court's coffin. Heading its bench, he held not only that the verdicts of the SCCAC had to be studied and applied in ordinary courts, but also that the Chief Court, too, was beholden to comply with verdicts issued in the SCCAC (*Maung Chit v. Union of Burma* 1972). The court registrar ordered that the judgment be distributed to all sessions and district criminal judges and that they see that their subordinates were apprised of it and that it be followed (Courts General Letter no. 9/1972). The ruling and subsequent order served to put beyond doubt the supremacy of the SCCAC and to underscore its integral role in the defeat of judicial independence.

In 1972, following the SCCAC's triumph, the regime moved administrators across the country to set up new justice committees and to occupy the mainstream courts at all levels. It also abolished the professional judiciary. The new committees were comprised of government administrators, and higher up they also included army officers, judicial bureaucrats, and representatives from workers' and peasants' councils. Panels of three persons, in the style of the SCCs, took the places of individual judges. Among them there had to be "people's representatives" with no legal training, who would instead receive advice from court staff, including ousted judges. Loyalty to the government, rather than knowledge of law, was now the key criterion for persons hoping to hold judicial posts.

Meanwhile, ruling council members removed their military uniforms and got ready to remain in control of the state through a new one-party parliament. The SCCAC carried on, as did the subordinated Chief Court, until 1974, when the parliament began its work. The Chief Court then became a "central court" under the Council of People's Justices, comprised of parliamentarians. This council was the supreme judicial body, which—together with committees of judges at other levels—the army-dominated party appointed and removed in coincidence with the rest of the state apparatus. Chairmen of the peak council, as well as many of its members, were former or serving military officers, as were those at the divisional and state levels. Soldiers thus extended their takeover of the judiciary from certain special courts in the 1960s to the entire system. Both the professional judiciary and judicial independence became things of the past.

In sum, starting in 1965 an appellate bench oversaw the work of the Special Criminal Courts in Burma, thus removing them from ordinary judicial oversight. The bench consisted of soldiers and the

chief justice. Like its counterpart in Spain, it had a range of powers that allowed it to act free from the strictures of ordinary criminal law and procedure. Unlike in Spain, its role was not to protect the mainstream judiciary against politically oriented rulings but to launch a new type of jurisprudence on to all courts through the chief justice and to undermine the foundations of the established legal system. After defeating judicial independence, the regime abolished the professional judiciary in 1972. Beginning in 1974, the apex court was placed under a council of parliamentarians, the new supreme judicial body. In the next section, I consider what lessons can be learned from these events, in comparison to other Asian countries that followed authoritarian trajectories but took different approaches to their judiciaries.

Authoritarian Regimes' Responses to Judicial Independence Compared

Having sketched how the Ne Win regime used special courts to defeat rather than insulate judicial independence, in this section I consider two problems that arise from the case study. The first is the regime's choice to eliminate rather than contain the professional judiciary. The second is the regime's use of special courts for this purpose. Why did the regime not opt for the "veneer of legal legitimation" that, according to Moustafa and Ginsburg (2008: 6), authoritarians typically value? And why, if it aimed to defeat judicial independence, did it take ten years to do it? Why go to the trouble of using special courts and foisting their jurisprudence into the mainstream system via the chief justice? To answer these questions, I compare the approach to the judiciary adopted by the Ne Win regime with a number of its regional counterparts.

To what extent can the authority of the extant judiciary explain the Ne Win regime's strategy to defeat judicial independence through special courts? Compared to Burma, Franco may have had comparatively less to fear from the judiciary than did Ne Win, since the Spanish courts' relative lack of power in public affairs was characteristic of the system prior to his takeover. Toharia himself makes this point when he considers judicial powerlessness in the face of authoritarianism (1975: 486–487). As Spanish judges did not have authority to intervene in public affairs of the sort that the superior judiciary in Burma assumed in the 1950s, perhaps containment through control of the jurisdictional structure sufficed for the authoritarian regime in Spain, whereas in Burma, Ne Win had no choice but to act more decisively.

This argument is cogent, but study of other cases suggests that any judiciary faced with a government that has taken power by

force must necessarily make compromises, and judges infrequently pose a direct threat to dictators once they are entrenched. In Asia, Franco's method of judicial containment had some parallels in the Philippines, where a dictatorship from 1972 co-opted rather than overwhelmed a judiciary structured along Spanish lines. But the Filipino version, fashioned after its equivalent in the United States, had a supreme court with a more substantive political role than that of the courts in Spain. Ferdinand Marcos, a canny civilian lawyer who came to power electorally but clung to it through martial law, insisted that he was not usurping power but rather was protecting democracy with "constitutional authoritarianism" (Marcos 1978: 32). He used an earlier case in which the Supreme Court of the Philippines had already agreed that a state of rebellion existed in the country so as to justify his takeover and to obtain judicial acquiescence. The court thereafter refused to invalidate the dubious process by which the regime passed a new constitution; two of its justices stated bluntly that "if a new government gains authority and dominance through force, it can be effectively challenged only by a stronger force; no judicial dictum can prevail against it" (in Del Carmen 1973: 1059–1060).

Marcos introduced military tribunals to try persons accused of offenses under martial law and removed from the civilian courts authority to rule in matters of importance to the state. The military tribunals, which were under the president's authority, emasculated the civilian judiciary, but they cannot be said to have insulated judicial independence, as Toharia argues of Spain, since Marcos did not stop with the tribunals but also used a range of other methods to undermine the ordinary courts. Among these, he ordered that all judges, along with other government officials—except for the supreme court bench, over whom he could exercise authority under a clause in the transitory provisions of the new constitution—resign their posts and await reappointment, as a means to weed out "notoriously undesirable" personnel (Butler, Humphrey, & Bisson 1977: 45). However, the Marcos regime was consistent with the Spanish dictatorship in its use of special courts to locate certain categories of cases outside of the mainstream judiciary, and in its insistence on maintaining the fiction that it respected judicial independence.

The so-called constitutional authoritarianism of Marcos had a counterpart in the "constitutionalism as far as possible" of the Suharto regime, which sought what Daniel Lev (1978: 49) describes as "a kind of generalized legitimacy divorced from the military base on which it rested," absent of genuine commitment to the rule of law. In Indonesia, the emerging regime used a special military tribunal to try soldiers accused of organizing a failed coup in 1965 and to construct a narrative of a communist plot to seize power

(Notosusanto & Saleh 1968: 86–94), upon which the 1965–1966 massacres of alleged communist party members were premised. Although the tribunal had an emphatic political purpose, as in the Philippines it was peripheral to the regime's larger project to render the mainstream judiciary politically impotent through administrative bureaucratic control (Pompe 2005: 112–113). Official claims to uphold rule of law were premised not upon the removal of fraught cases to the special tribunal, but upon statutory guarantees of formal independence that were hollowed out through arrangements designed to guarantee that judges could not afford to make decisions contrary to executive interests.

Neither Marcos nor Suharto came to power through a coup of the sort that Ne Win carried out. The former consolidated democratically obtained control through authoritarian measures, and the latter took power and gradually extended it on the claim of having rescued the country from a coup. In Pakistan, on the other hand, General Ayub Khan in 1958 did take control through a constitutional coup, but one having more sweeping immediate consequences than Ne Win's first takeover of the same year. With the parliament dissolved and martial law in effect, Ayub Khan held comprehensive powers rivaling those of Ne Win in 1962. Nonetheless, the Pakistani dictator still approached the supreme court to have it rule that "pursuant to the unfettered legislative powers of a regime born of a successful revolution, the regime could disregard any pronouncement of the superior courts" (Mahmud 1993: 1245).

Ayub Khan set the pattern for subsequent military rulers in Pakistan. Each insisted upon—and obtained—a judicial stamp of approval. In exchange, judges have been able to fix some parameters on the executive and have asserted limited judicial authority over parts of the state. However, the courts for a long time avoided direct challenges to authoritarian rule. Pakistan's supreme court took up the constitutionality of Ayub Khan's martial-law regime only after a new constitution was already in force (Newberg 1995: 92). In 1972, it finally revoked the doctrine that had allowed him to claim that his rise to power was legal, three years after he had left office. In the 1980s, the courts slowly began challenging the verdicts of martial law tribunals once then-dictator General Zia ul Haq revived the constitution in 1985, and they eventually extended their authority to judicial review of legislative and executive action (Newberg 1995: 190–195). But Zia himself remained untouched and held office until his death in a plane crash.

Where courts do occasionally reject coup makers' attempts to obtain legal legitimacy, aspiring dictators can refuse to take no for an answer. In 1970 Nigeria's supreme court declined to validate a military coup on grounds that its decrees were unconstitutional and in violatation of judicial authority. The military government

subsequently issued a further decree in which it effectively nullified the court's ruling (Mahmud 1994: 69–73). In 2001 the Court of Appeal of Fiji invalidated a military-installed government and reinstated a constitution that the military had abrogated the previous year (Williams 2001). The interim government bowed to the ruling and returned the country to democracy under the 1997 constitution; however, in 2008 Fiji's high court endorsed a 2006 coup by ruling that the army's actions were no more than an emergency response to a political crisis aimed at protecting rather than defeating the constitutional order (Williams 2008: 4–5). Between the time of the coup and the ruling, the chief justice was suspended from office and six foreign judges resigned, "saying that it was apparent that their services were not wanted" (Fraenkel 2008: 24). In 2007, the president of Pakistan, General Pervez Musharraf, encountered unprecedented and historic resistance after he attempted to force the chief justice from office. The two-year struggle that followed succeeded in restoring the sacked superior judiciary and also in forcing out Musharraf, not through judicial defiance of the executive alone, but through the combined and determined forces of the bar and bench, a sympathetic media, and a supportive public (Ahsan 2009; Ghias 2010).

In the 1950s Pakistan and Burma shared Anglo-Indian legal culture and codes, and had judiciaries of comparable stature and bars made up of politically active lawyers. If the prevailing authority of the judiciary and political activism of the legal profession in each country were the key determinants of authoritarian responses to the courts, then the military regimes that took power in Pakistan and Burma should have had similar strategies. Instead they adopted entirely different ones, the former containing judicial independence, the latter defeating it. The reason for this variance, I argue in the remainder of this section, is that the factors motivating the Ne Win regime to defeat judicial independence through the use of special courts were largely consequences of the regime's distinctive composition and character.

As in Pakistan, the Ne Win regime emerged from a coup launched by top soldiers against elite civilians. But whereas Ayub Khan was a Sandhurst graduate and an officer of the British tradition who played at having an apolitical role while emphasizing the administrative efficiency and economic development that his regime could bring, Ne Win was a former postal worker who had received basic military training in imperial Japan and who had sharpened his skills in the field. He and his men were "war fighters who never mastered the art of politics" (Callahan 2003: 8). Most of them learned state building from two decades of hands-on soldiering and hard-fought battles against myriad enemies in jungles and villages. They went about redesigning and reorganizing the state as

they went about their military campaigns. Indeed, for the Ne Win regime the state-building project was an extension of the warfare in which its members had been engaged since the 1940s.

The Ne Win regime did not want to accommodate the courts because there was no strategic advantage to doing so. It had no concept of using the existing judiciary for political gain. Its members were not part of the old professional elite, and they had no need for it. But out of self-interest, they could not simply shut down the old courts and set up new ones. They had to avoid creating unnecessary confusion and provoking needless resistance. The legal principles and powers that the courts habitually used to defend their independence had to be mapped out and occupied one point at a time, through strategies to break down resistance from the inside as well as attacks from the outside. To do that, the right man to lead the assault had to be identified and recruited. Meanwhile, judges had to be kept working. New institutions had to be built up and fit in to the project of gradually expanding military control by situating judicial authority in regime hands while creating a sense of progress toward ideological targets, which could be used to justify a complete takeover of the system once conditions allowed for it.

As the project to build a "people's justice system" in Burma was driven by military authoritarian imperatives, it was more incremental and less comprehensive than comparable projects in Asian countries under genuinely revolutionary regimes, like Vietnam. There, during the 1940s and 1950s, special military and civilian courts were set up not to displace judicial authority steadily and locate it in the hands of the army or its subordinates, as in Burma, but to bring about dramatic social and economic change within a relatively short time. Land-reform courts caught up in this tumultuous period sometimes handed out arbitrary and violent rulings and, in certain places, had little if any regard for the orders that enabled them (Nicholson 2007: 67–70). Later, as the Communist Party consolidated and organized the system, from 1959 it prohibited the use of French colonial laws and practices, purged it of old legal terminology, and eventually imported an entirely new legal system from the Soviet Union (Gillespie 2005: 92–95). Sweeping changes meant that the system ultimately bore little resemblance to the prerevolutionary model.

Whereas the ruling regime in Vietnam emerged from a successful national liberation struggle, its counterpart in Burma lacked popular backing. The Burmese regime's underlying objective was not to effect radical social and economic change of the sort that the Vietnamese attempted—this would have threatened its own hold on power—but to ensure hierarchical, bureaucratized command through a one-party system under military control. Although army

ideologues had been articulating socialist ideas since the 1950s, the Ne Win regime's leftist ideology came about essentially as a "tactical decision" (Callahan 2003: 209), not because it was seized with the objective of liberating the country's peasants and workers from the colonial and capitalist past. Where its authoritarian objectives were consonant with ideological ones, state institutions did indeed appear to be building a new socialist society in accordance with official pronouncements. But where authoritarian imperatives departed from ideology, the gap between rhetoric and reality was stark.

Perhaps the widest and most glaring gap in the nominally socialist legal system lay between the new people's courts on the one hand and the body of law that they were obliged to enforce on the other. Although the Ne Win regime defeated judicial independence and demolished the professional judiciary, it never got rid of the outdated statutes on which the courts ruled. At no time after 1962 were the British criminal laws and procedures significantly amended or deleted. In fact, the extent of statutory reform under both the Revolutionary Council and its successor, a one-party parliament, was far lesser than it was during the democratic parliamentary period of the 1950s.[5] Although new laws gave the system a socialist overlay and did have important effects in some areas—such as agricultural policy, land tenure, and criminal law—cases continued to be heard according to the same provisions as before. Even the most repugnant legislation remained in effect and was routinely put to use by a regime that shared with its colonial predecessor a concern for the stifling of dissent. In fact, Anglo-Indian statutes were reprinted and distributed to post-1972 courts, and senior officials rebuffed the complaints of lay judges, who found that the laws they were called upon to enforce did not correspond to the stated goal of building a socialist legal system.

By removing the body of personnel who were trained in colonial-era law but retaining and actively using the compendium of law itself, the Ne Win regime showed that its military authoritarian pragmatism outweighed its ideological concerns. The regime had a formal ideology and counted ideologues among its ranks, but it was not inherently ideological. Its revolutionary project concealed more primal military authoritarian designs, and it is these, not socialist legality, that constitute its legacy. When the Ne Win

[5] In the seven years prior to Ne Win's second coup, the parliament passed 334 laws, revoked 156, and amended 120 others. By comparison, in 12 years, the Revolutionary Council passed 182 laws, revoked 70, and amended 36. In 14 years, the one-party parliament passed 125, revoked 31, and amended 29. None of the major colonial-era laws, such as the Penal Code, Criminal Procedure Code, and Evidence Act, were revoked or significantly amended after 1962, and the bulk of cases in the law reports throughout the 1960s, 1970s, and 1980s concern pre-1962 law.

regime collapsed under the weight of nationwide protests in 1988, the new junta that succeeded it did not hesitate to discard the people's justice system and to appoint judicial bureaucrats and administrators to take up posts in a resurrected hierarchy of professional judges. What the new judges inherited was not a body of ideologically bound law and practice, as Maung Maung would have had it, but a system characterized by judicial *non*independence and the *un*rule of law (Cheesman 2009).

Today no soldiers are to be found in Burma's courtrooms, as in previous years. There is no longer any need for uniformed men to hear cases personally. The civilian judiciary is fully subordinated to military interests. In 2011, to set up a body of special criminal courts of the sort that the Ne Win regime used to try cases in the 1960s would be redundant, because there is no independent judiciary either to defeat or to insulate. Whereas for Toharia, the Franco regime, by preserving the independence of ordinary courts, could claim to have an independent system of justice and hence to be subject to a rule of law of some sort, no regime in Burma from 1962 to the present day can rightly make such a claim.

Conclusion

I began this article with José Toharia's argument that because the Franco regime in Spain used parallel security courts to insulate the mainstream judiciary from cases of special interest to the state, it could claim to have guaranteed limited judicial independence. Over three decades later, Toharia's research continues to be cited with approval by other authors challenging "the stereotypical view that courts do not matter for authoritarian leaders" (Solomon 2007: 141). In recent times, many of these authors have published studies of countries where judiciaries can be described as constrained but somewhat independent adjudicators, such as those in Egypt (Moustafa 2007), Turkey (Shambayati 2008; Tezcür 2009), Singapore (Silverstein 2008; Thio 2002), and East Asia as a whole (Jayasuriya 1999). Some of these regimes have used special courts for certain purposes; others have used different techniques to manage judicial authority while still allowing judges varying degrees of autonomy.

In contrast to the Franco regime characterized by Toharia's case study, the Ne Win regime used special courts not to insulate but to defeat judicial independence. Having neutralized the judiciary politically by removing top judges and reorganizing the superior courts, the regime could have introduced special courts simply for the trial of fraught cases, as did others in the Philippines and Indonesia. It could have obtained judicial acquiescence for its takeover of power, at least long enough for it to make other changes

to the judicial system so as to cement its authority, as did its peers in Pakistan. Instead, it opted for a more complicated and ambitious project to defeat judicial independence and eventually to remove the professional judiciary completely through extensive structural changes. However, the military authoritarian imperative for this project meant that the regime undertook the work incrementally, cautiously, and incompletely, in contrast to Vietnam and other countries, where genuinely ideological popular revolutions motivated lasting changes not only to the judicial structure but also to the contents of law itself.

Compared with other authoritarian regimes, the Ne Win regime's strategy to defeat judicial independence gradually through the use of special courts appears to be somewhat anomalous. For researchers of Burma, this finding brings us to familiar territory. The belligerent and protracted quality of the country's military rule means that it often gets cast as the "odd country out" amid democratizing and relatively democratized neighbors (Alamgir 1997: 333); thus, it is a place that offers "useful examples to theorists wishing to illustrate broad concepts—including as an exception to a general rule" (Selth 2010: 427). If Toharia's Spanish case study is indicative of one such general rule, as Juan Linz implies, then the Ne Win regime's use of special courts to defeat rather than insulate judicial independence again seems to prove the point.

But perhaps it is the idea of the anomaly itself that is problem in our understanding of Burma—and of other regimes that resist ready categorization. What this case study suggests is that at least as far as authoritarian responses to judicial independence are concerned, a general rule is hard to find. Only if, as researchers, we ignore or downplay the diversity of specific regime responses to judicial authority in particular countries can we fit data into broad explanatory schemata. As Anthony Pereira demonstrates in his 2005 study of three military regimes in South America, even authoritarians who share political and legal traditions and who could be expected to respond similarly to judicial power may instead go down wildly divergent paths. Pereira urges that instead of getting "trapped by regime typologies that assume relationships and outcomes," scholars should instead "focus more on how authoritarian regimes differ from one another due to variation in their approaches to the law" (2005: 199). I share this view, and I have attempted in this article to do precisely what Pereira recommends.

The amount of critical scholarship on authoritarian legality in Asia is scanty when compared to the body of political and legal research as a whole. Yet, while the number of outright authoritarian regimes is lower than it was in the past, democratizing states like

the Philippines and Indonesia continue to have to deal with the residue of authoritarianism in their legal and administrative systems. And in many countries, new forms of authoritarian legality are emerging, oftentimes couched in rule-of-law and good-governance rhetoric. In his studies of Indonesia, Daniel Lev remarks that the role of law in the postcolonial state seemed "awkwardly peripheral to politics and the exercise of authority" (1978: 37). It is by now clear that the topic is not at all peripheral for those who hold power, and that the relationship between legal systems and the exercise of authority deserves persistent and probing inquiry.

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