

Judicial Independence in Burma: No March Backwards Towards the Past

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**Asian-Pacific Law
& Policy Journal**

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III. BACK TO THE FUTURE BUT NO MARCH BACKWARDS TOWARDS THE PAST

This paper discusses and analyzes judicial independence in Burma, primarily since independence in 1948. To that end, this paper analyzes and briefly comments on constitutional provisions concerning the independence of the judiciary in the two defunct provisions of post-independence constitutions of Burma,² namely the 1947 and 1974 Constitutions. In doing so, the paper focuses mainly on the post-1948 and post-1962 developments. The post-1962 developments highlight how the military takeover in March of that year eroded and extinguished the independence of the judiciary in Burma. To appreciate the concept of the independence of the judiciary in historical perspective, however, it is helpful to trace briefly the concept and practice of judicial independence in the days of the Burmese monarchs of the pre-colonial era.

² The State Law and Order Restoration Council (SLORC), which on 15 November 1997 reconstituted and renamed itself the "State Peace and Development Council" (SPDC), changed the country's name to "Myanmar" on 18 June 1989 ostensibly on the ground that the name "Burma" does not include the ethnic nationalities that constitute the country's population. Yet, many ethnic nationalities themselves do not accept the name change, claiming that the term "Myanmar," contrary to SLORC assertions, refers only to the majority "Burman" race. Though the United Nations and ASEAN countries, Western business firms, businessmen and businesswomen doing business in Burma, and others have referred to the country's name as "Myanmar," a large number of Western governments, non-government organizations, Burmese as well as foreign scholars continue to refer to the country as "Burma." For a late Burmese scholar's argument that the "new name 'Myanmar' or Myanma given to Burma ... is wrong both phonetically and politically." Mya Maung, *The Burma Road from the Union of Burma to Myanmar*, 30(6) ASIAN SURVEY 602 n.1 (1990). This paper will generally follow the "politically incorrect" usage of Burma in referring to the country, "Burmese" in referring to all peoples of the country as a whole, and "Burman" to the majority "Bamar" race.

Further, it is necessary to analyze briefly the impact of British law on the notions and practice of judicial independence in the colonial era.³

I. STATE OF JUDICIAL INDEPENDENCE IN PRE-COLONIAL AND PRE-INDEPENDENT BURMA

A. *The Extent of Judicial Independence in Pre-Colonial Burma*

1. *Arguments that judicial independence did not exist*

The judicial, legislative, and administrative functions were not delineated, nor separated in the days of the Burmese monarchs. Robert Taylor claims that in the administration of justice, “there was little effort made to distinguish between the state’s executive officers and its judicial officers or functions, and the judicial system was marked by a high degree of personalized behavior, with little procedure other than prevailing notions of status and etiquette.”⁴

The lack of clear delineation of administrative and judicial functions can also be discerned at the highest level of governmental functions in pre-colonial Burmese history. The King’s *Hluttaw* (an Assembly of the King’s Ministers, which met occasionally and over which the King sometimes presided) was both a legislature, in that edicts of the King were issued and,

³ The influence of British notions of the rule of law and their impact on the provisions of the 1947 Constitution of Burma concerning the independence of the judiciary is discussed in the next two sections of this paper. Therefore, an impression could be created that this author views the concept of judicial independence in the Burmese context as “British-generated” or even that the author considers the concept to be predominantly of Western origin. This is not the case. As will be discussed in the next sub-section, inchoate notions of the judicial independence or some form of constitutional discourse can be discerned in episodic periods in pre-colonial Burmese history. Additionally, the concept of judicial independence can be found in other non-British, non-Western legal systems especially (but by no means limited to) Islamic law. For a non-Muslim author’s exposition of the rich tradition of Islamic jurisprudence and as it relates to judicial independence, see C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* (1988).

Yet the influence of “modern” and “Western” notions of judicial independence cannot be utterly ignored in an analysis of legal or political systems in a country like Burma. This is so since at least some parts of Burma came under the direct influence of an imposed Western legal system and Western legal concepts for over a century. (The first Anglo-Burmese war occurred between 1824 and 1826, the second in 1852, and the third in 1885. On 1 January 1886, the whole country was annexed and Burma became a province of the British-Indian Empire.) One landmark Western text that laid down the concept of the separation of powers, which essentially provides for judicial independence, was Montesquieu’s *The Spirit of Laws*. See, e.g., CHARLES DE SECONDAT & BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS: A COMPENDIUM OF THE FIRST ENGLISH EDITION* (David Wallace Carrithers ed., 1977). In his important work, Montesquieu laid down the principle that the three branches of government should be as independent as possible and should act as a check against one another. See generally *id.*

⁴ R. TAYLOR, *THE STATE IN BURMA* 53 (1987).

at times, a court of final appeal. The *Hluttaw*, in essence, performed legislative, administrative, and judicial functions.

Hence, there was no separation of powers during the reign of the Burmese King. There was rather a concentration of legislative, administrative, and judicial functions in one source, namely, the King or the *Hluttaw*.⁵ The fact that there was not, at all times, a separate judicial branch of the government indicates that in pre-colonial Burmese legal history, the concept and practice of judicial independence were not widespread or prevalent.

2. *Arguments that judicial independence did exist*

Andrew Huxley⁶ cited a pronouncement of the 17th century Burmese King Thalun to demonstrate that “Burmese constitutional history started in the 13th not the 19th century.”⁷ In part, King Thalun’s edict stated that “[i]rrespective of what the *Dhammathats* provide, what the King ordains is law and must be followed in disputes relating to property, life, and injury to the human body. In these three matters, what the King commands must prevail.”⁸

Huxley classifies this particular pronouncement as “a modest enough claim” by the King and expresses his view that it could amount to an acknowledgment that “outside the three areas

⁵ See Ryuji Okudaira, *The Burmese Dhammathat*, in 1 LAWS OF SOUTH-EAST ASIA, THE PRE-MODERN TEXTS 1, 69 (M.B. Hooker ed., 1986). Okudaira writes that the “Hluttaw exercised all the powers of a senate, a cabinet and a high court. Accordingly its functions were legislative, executive and judicial functions.” *Id.*

⁶ Andrew Huxley is with the Department of Law at the London School of Oriental and African Studies.

⁷ Andrew Huxley, *The Importance of Dhammathats in Burmese Law and Culture*, 1 J. BURMA STUD., 1, 16 (1997) [hereinafter Huxley, *Dhammathats*]. *Dhammathats* (roughly “legal treatises”) were written from about 900 years ago to about 200 years ago and consisted of

“rules which are in accordance with custom and usage and which are referred to in the settlement of disputes relating to person and property” They are not codes of law in the strict sense, and there is wide variance among them in content and quality. They reflect the social customs of the day, and expound rules of wisdom as guides for King, ministers, and judges to rule by and for the people to live by. They record decisions, real or imaginary, to establish rules of persuasive force.

MAUNG MAUNG, LAW AND CUSTOM IN BURMA AND THE BURMESE FAMILY 7 (1963) [hereinafter MAUNG, LAW AND CUSTOM] (quoting 1 Kinwunmigyī DIGEST OF DHAMMATHATS 2). Later, with British rule came the systematic compilation and translation of the *Dhammathats*, and courts in colonial Burma began to interpret and apply these rules and develop them in case law. For the significance and role of *Dhammathats* in Burmese legal history, see generally Okudaira, *supra* note 5. For the definition and nature of the *Dhammathats*, see *id.* at 30-35 and 125-28.

⁸ Huxley, *Dhammathats*, *supra* note 7, at 16 (citing Kaingza Maharajathat). Kaingza was the Minister of King Thalun who issued the decree. *Maharajathat* means edicts of the “King” or “Royal Law Making.”

of *rajathat* (royal law-making), the *Dhammathats* are the sole source of law.”⁹ Okudaira also makes a similar point stating that though the King “was indeed the Lord and master of the life and property of his subjects ... [he] was not totally free from restraints in his use of absolute power.”¹⁰ Still, Okudaira tellingly adds, “in practice [the King] could ignore the rules and regulations binding on [him] since there was no law nor *institution* that could *legally* control [the] King’s power.”¹¹

3. Generalizations about judicial independence in pre-colonial Burma

One could agree with Huxley that there was constitutional discourse as to the forms and limits of kingly governance in episodic periods of Burmese legal history. From one particular King’s abnegation of jurisdiction and his implicit acknowledgment that, aside from the areas of life, property, and injury, the *Dhammathats* were “the sole source of law,”¹² one could suggest that, at least during the King Thalun’s reign, judges could issue rulings freely and independently based on the *Dhammathats*, unless the areas were exclusively within the King’s jurisdiction. Hence, arguably some form of judicial independence, i.e., justice according to the *Dhammathats* free of ‘Kingly’ interference, might have existed, albeit to a limited degree, in periods of Burmese legal history.

Okudaira’s observation, however, that “there was no law, nor institution that could legally control the King’s power”¹³ shows that there was no separation of powers or checks and

⁹ *Id.*

¹⁰ Okudaira, *supra* note 5, at 68.

¹¹ *Id.* (emphasis added). A Burmese scholar, the late Dr. Maung Htin Aung, however, gives a somewhat different analysis. In his book *Burmese Law Tales: The Legal Element in Burmese Folklore*, Dr. Maung Htin Aung wrote that the King,

like his fellow-judges of the supreme court [*Hluttaw*] was under the jurisdiction of this very court, and could be sued. That was not a mere empty theory, because as late as the year 1810, the powerful King, Bodawpaya, was a defendant in a suit for wrongful seizure of land.

MAUNG HTIN AUNG, *BURMESE LAW TALES: THE LEGAL ELEMENT IN BURMESE FOLKLORE* 7 (1962). Regrettably, Dr. Maung Htin Aung did not provide any references or explanations about this case or suit against the King. Consequently, one can only infer from Dr. Maung Htin Aung’s writings that the notion and practice of judicial independence existed in episodic periods of Burmese legal history.

¹² Huxley, *Dhammathats*, *supra* note 7, at 16.

¹³ Okudaira, *supra* note 5, at 68.

balances on executive, i.e., kingly power, a la Montesquieu, in the days of the Burmese King. This author, too, has independently reached a similar conclusion. Though there were Ten Duties of King in Burmese as well as Buddhist political thought apparently to limit a King's powers, the Ten Duties remained mainly moral guidelines and principles.¹⁴ The Ten Duties of King were never transformed into legal or political rights a la "Magna Carta or the French Declaration of Rights of Man."¹⁵

The following generalizations reflect judicial independence in pre-colonial Burmese history during the reign of the Burmese King:

1. The concept and practice of judicial independence were neither widespread nor firmly established because the governance of Burmese King was generally autocratic, and there was no separation of powers or checks and balances among the executive, legislative, and judicial branches;
2. Nonetheless, there seems to have been episodic appearances of some forms of constitutional discourse even if the discourses were "top down;"¹⁶
3. The independence of the judiciary lay in matters outside the King's jurisdiction (life, crime, and property), so judges could freely and independently issue rulings according to the major source of the laws, the *Dhammathats*.¹⁷

¹⁴ See generally Myint Zan, *Law and Legal Culture, Constitutions and Constitutionalism in Burma*, in EAST ASIA: HUMAN RIGHTS, NATION-BUILDING, TRADE 180, 195 (Alice Erh-Soon Tay ed., 1999) (hereinafter Zan, *Law and Legal Culture*).

¹⁵ Zan, *Law and Legal Culture*, *supra* note 14, at 195.

¹⁶ See, e.g., King Thalun's edict, *supra* note 8 and accompanying text.

¹⁷ There was a Burmese saying that "the Dhammathat[s] are overridden by the command of the Sovereign, and the latter is overridden by the mutual consent of the parties. The Dhammathat was intended to be consulted in making a decision, but such a decision was subjected to authority, and to agreements usually based on local custom." Okudaira, *supra* note 5, at 127 (footnote omitted). Hence it would appear that the King's authority could, at times, prevail (even in matters that were beyond his jurisdiction in cases concerning life, crime and property) over that of the *Dhammathats*. In any cases there were Royal Orders of King in which the King "instructed" judges which particular *Dhammathats* "must" be referred to when deciding cases. See, e.g., the order of King Hsinbyushin of 22 July 1767, cited in Okudaira, *supra* note 5, at 67. The significant part of this statement, however, is not that the *Dhammathats* are subject to kingly authority but that "mutual consent of the parties (subject to local custom)" can override the King's authority. Okudaira does not elaborate further on this matter but one can infer that the areas in which mutual consent could prevail over the King's authority would not be substantial and that it would mainly be in aspects of civil and family laws.

B. *The Impact of British Law and Judicial Independence during Colonial Times*

The impact of British law on Burmese legal, political, and social life, at least in the 19th and early 20th century, cannot be denied. This section will not consider the substantive and procedural laws introduced by the British. Rather, it presents the merits and demerits of the “rule of law” and the concept and the practice of judicial independence during the British colonial era.

Regarding the British influence on the rule of law, Dr. Maung Maung, writing over forty years ago, stated that “the British established the rule of law in Burma, and that is good.”¹⁸ Dr. Maung Maung’s unqualified praise of the British rule of law arose in the context of comparing the state of law under the Burmese King to that under British colonial rule. Dr. Maung Maung explained the differences between the rule of law that the British brought and the state of society that preceded the annexation of the entire country by the British in 1886.

The People classified the King and Government among the “five enemies” and prayed that the enemy would stay away ... Government was a fearful and evil thing to be shunned, to hide from if possible and if confronted unavoidably with ... to discreetly offer bribes to. With that basic philosophy it did not really matter much to the villagers that [the Burmese King] had departed from the scene and the British [had] come. They found that the British did not kill and plunder at random[.]¹⁹

Further, he wrote that the “[British colonial] government was certain, the rule of law gave the people a new confidence, and peace and the opening up of communications and trade provided a good living for all.”²⁰

In another of his pre-1962 books, Dr. Maung Maung offered more solid and specific praise for the rule of law that the British brought.

The “rule of law” that British rule established, and left behind as a legacy when Burma became independent ... has come to mean, on the merit side, equality before the law, fair play, uniformity of laws for all—private citizen and public official alike. It also means that disputes and differences that are amenable to

¹⁸ The statement was made in the abstract *Stellingen* dated 27 June 1956 at Point 5 of the ten-point summary at the beginning of MAUNG MAUNG, *BURMA IN THE FAMILY OF NATIONS* (1956) [hereinafter MAUNG, *FAMILY OF NATIONS*].

¹⁹ MAUNG MAUNG, *BURMA’S CONSTITUTION* 7 (1961) [hereinafter MAUNG, *BURMA’S CONSTITUTION*] (footnote omitted).

²⁰ *Id.*

legal settlement will be taken to the courts and peaceably settled These virtues of the rule of law are most highly extolled today, and kept alive, to the extent that values can be given life in statutes, in the constitution and the laws.²¹

In his pre-1962 writings, however, Dr. Maung Maung also acknowledged that the introduction of the rule of law by the British had some negative and fewer laudatory effects.

The rule of law has also come to acquire other meanings. It is identified with form and technicality. “The Burmese people feel” as a scholar complained to a Reforms Committee, “that there is too much of logic and too much of hair-splitting in the system of British law, and too many loop-holes and too many occasions for the benefit of the doubt. So the lawless people, the offenders, who are sharper, enjoy the advantage.” Impartiality and detachment, which the rule of law demands in some degree, can easily degenerate into lack of sympathy and soul Hence the British administration, efficient within its limits, was soulless.²²

These quotations from Dr. Maung Maung’s pre-1962 writings highlight his generally, indeed almost overwhelmingly, positive views about the influence that the British had on Burma as far as the “rule of law” was concerned. In his later writings, however, Dr. Maung Maung was severely critical of the colonial British judicial system. Notably, almost all of the post-1962 writings “reversing” some of his earlier writings were in Burmese.²³

In those later writings, Dr. Maung Maung asserted that the judicial system that the British had brought about was formalistic and oppressive.²⁴ He also stated that the judicial system made

²¹ MAUNG, LAW AND CUSTOM, *supra* note 7, at 23-24 (internal footnote omitted).

²² *Id.* at 24-25 (internal footnote omitted).

²³ This author cannot give full citations of them. For some of Dr. Maung Maung’s writings in the post-1962 era about the “ills,” not only of the British colonial judicial system, but also of the bourgeoisie (post-independence) Parliamentary system, see MAUNG MAUNG, TAYA UPADEI AHTWEIDWEI BAHUTHUTA [GENERAL LAW KNOWLEDGE] (1975); Maung Maung, *Foreword to* TAYA YONE MYAR LETT SWEI [COURTS MANUAL] of 1970, 1971, 1972, and 1973. When Dr. Maung Maung published *General Law Knowledge*, he was a member of “The Council of State,” an “Organ of State power,” under the now defunct 1974 Constitution. When Dr. Maung Maung wrote the foreword to the *Court Manual*, he was either a Chief Justice or a Judicial Minister during the era of the Revolutionary Council (1962-1974).

For Dr. Maung Maung’s brief comments on the 1974 Constitution, see *Commentary to the 1974 Constitution of Union of Myanmar (formerly Union of Burma)*, in 12 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 85-86 (A.P. Blaustein & G.H. Flanz eds., 1990) [hereinafter CONSTITUTIONS OF THE WORLD].

²⁴ See, e.g., MAUNG MAUNG, TAYA UPADEI AHTWEIDWEI BAHUTHUTA [GENERAL LAW KNOWLEDGE] (1975) [hereinafter MAUNG, GENERAL LAW KNOWLEDGE]; MAUNG MAUNG, TAYAR YONE MYAR LET SWEI [COURT MANUAL]. From 1970 to 1971, Dr. Maung Maung served as Chief Justice and from 1971 to February 1974 as judicial minister.

the Burmese more litigious, favored the gentry and capitalist class, and provided a fertile ground for British and a few Burmese barristers and lawyers to exploit the unsophisticated clientele.²⁵ Moreover, Dr. Maung Maung claimed that the judicial system permitted the one with the most money to win.²⁶

The impact of British law on the Burmese legal scene has been good, bad, and neutral. Though Dr. Maung Maung mainly praised the impact and legacy that the British left in his pre-1962 writings, he, as well as others, criticized the negative effects of British law on Burmese social life. As one example, Robert Taylor stated that “Courts and the Law” were instruments used as a “strong arm of the colonial state” and “in the preservation of a system of law which was felt by the British to be more fair and just than that which they had found upon their arrival in Burma.”²⁷ Taylor added that

[t]he administration of law and the courts were important to the colonial state; and the consequences of this change were crucial in shaping the relationship of the individual to the state during the colonial period. The growing depersonalization of the legal system, its increasingly complex and rule-bound nature, and its tendency to rely less and less on Burmese customary law and more and more on British-Indian codified law, meant not only a more expensive and less understandable legal system for the mass of the population, but also in increase in crime and litigation as the customary bonds of society were replaced with what seemed arbitrary and unjust dictates from the foreign-controlled state.²⁸

The impact of British law has, so far, been limited to the general influence of rule of law during colonial times. The general influence of the rule of law, which the British introduced to Burma, has had both good and bad consequences for the Burmese people. The British impact on Burmese law, however, might not be either as rosy as that which Dr. Maung Maung described in his pre-1962 writings or as dark or sinister as his post-1962 assertions.²⁹

Acknowledging the British legacy of the concept of the rule of law on Burmese jurisprudence is not tantamount to saying that there was judicial independence during the

²⁵ See MAUNG, GENERAL LAW KNOWLEDGE, *supra* note 24.

²⁶ See *id.*

²⁷ TAYLOR, *supra* note 4, at 102.

²⁸ *Id.* at 103.

²⁹ See *supra* note 25 and accompanying text.

colonial era. Though the colonial court structure was separate from the executive arm of the British colonial administration, the courts did not have full judicial independence. There is no known instance in which the acts of the executive and the British colonial government were challenged in British colonial courts in Burma. Hence, checks and balances among the executive, legislative, and judicial branches were non-existent in colonial times. Instead courts were “strong arms of the state” and in one sense, enhanced the power of the administration. A truly independent judiciary’s function should limit rather than enhance executive power.

Though the colonial courts were not fully independent, their contributions otherwise are notable. First, scholars from or those sponsored by the British colonial administration compiled, translated, and categorized the *Dhammathats*.³⁰ Second, the decisions of British judges set the foundation of common law in Burma. After the whole country came under British rule, appellate court decisions, all of which were in English, were compiled into law reports. The inaugural series started with *Selective Lower Judgements of Lower Burma* (SJLB) (1872-92). The last series were the *Rangoon Law Reports* (RLR) (1937-47).³¹ Third, British rule helped develop the notions of judicial independence, which later became embodied in the provisions on judicial independence in the 1947 Constitution of Burma.

II. JUDICIAL INDEPENDENCE IN INDEPENDENT BURMA

A. *Judicial Independence under the 1947 Constitution of Burma (24 September 1947 – 1 March 1962)*³²

A 111-member Constituent Assembly met from June to September 1947 to draft the 1947 Burmese Constitution. Though the majority of members of the Assembly were non-lawyers, a few of them were Burmese barristers and British-trained lawyers. Foremost among them was U

³⁰ See MAUNG, LAW AND CUSTOM, *supra* note 21, at 9. See also Okudaira, *supra* note 5, at 41-56.

³¹ See MAUNG, LAW AND CUSTOM, *supra* note 21, at 146 for a list of Law Reports that were compiled during the colonial era.

³² Dr. Maung Maung wrote an authoritative study of the 1947 Burmese Constitution first published in 1959. He revised the edition in 1961 (see MAUNG, BURMA’S CONSTITUTION, *supra* note 19) several months before the 1962 military coup. The coup not only overthrew the democratically elected government of the late Prime Minister U Nu (1907-1995) but also in effect ended the operation, function, and relevance of the 1947 Constitution. There were no more revisions of Dr. Maung Maung’s book after that.

Chan Htoon (1906-1988) who was an Attorney General as well as a Judge of the Supreme Court of Burma that was established under the 1947 Constitution. U Chan Htoon was one of the main drafters of the 1947 Constitution. “The committees, the sub-committees and the special committees worked hard while U Chan Htoon, constitutional adviser, and a small selected staff kept feeding them with draft memoranda.”³³

Some of the main drafters of the 1947 Constitution were British-trained lawyers. Thus, arguably, these British-trained lawyers found it expedient to incorporate provisions concerning the independence of the judiciary into the 1947 Constitution. U Myint Thein³⁴ wrote that

like many others who were trained in British lores and traditions I have believed in Parliamentary democracy with its executive, legislature and judiciary checking and rechecking and sometimes fighting in the process. The concept was totally British to be eagerly adopted by many newly independent countries and yet later to be discarded by many.³⁵

As stated earlier, the British did not actually and fully practice judicial independence during their colonial rule of Burma. Nevertheless, it is also true that those who received their legal training under the British were to a certain extent influenced by “British lores and traditions” of judicial independence and of the executive, legislature, and judiciary checking each other and occasionally fighting with each other in performing their functions. Some of those thus influenced were among the drafters of the 1947 Constitution. In this context, the underlying

³³ *Id.* at 84.

³⁴ (1900-1994) (for an obituary–tribute of U Myint Thein, see Myint Zan, *U Myint Thein, MA, LLB, LLD* AUSTL. L.J. 225-27 (1995). U Myint Thein was a Burmese barrister who became the third Chief Justice of independent Burma and who served in that post from October 1957 to 2 March 1962 when he together with the President, Prime Minister, Cabinet Ministers, and other important figures were arrested in the military coup. For a profile of U Myint Thein at the time of his appointment as Chief Justice of the Union of Burma, see Dr. Maung Maung, *Profile (U Myint Thein)*, THE GUARDIAN MAG. (Rangoon), Oct. 1957. For an account of the coup, see *Army Takes Over Power, President, Chief Justice of Union, Prime Minister, Cabinet Ministers, Federal Leaders Detained for Security, RC Formed*, THE [RANGOON] GUARDIAN, March 3, 1962.

On 30 March 1962 U Myint Thein’s services were formally terminated by a decree of the RC. See THE [RANGOON] GUARDIAN, Mar. 31, 1962. U Myint Thein was released from “protective custody” on 28 February 1968. See THE [RANGOON] GUARDIAN, Mar. 1, 1968 (concerning U Myint Thein’s (and other important figures) release from protective custody).

³⁵ *Comments on Dr. Htin Aung’s Dialogue with the Princess Learned in the Law*, THE WORKING PEOPLE’S DAILY (Rangoon), Apr. 24-26, 1974 [hereinafter *WPD Comment*]. U Myint Thein commented on his younger brother Maung Htin Aung’s article: *A Conversation with Princess Learned in the Law*, THE WORKING PEOPLE’S DAILY (Rangoon), Mar. 28-29, 1974.

theory of judicial independence as derived from British traditions found its way into the provisions of the 1947 Constitution.

1. *Judicial provisions in the 1947 Constitution*

Chapter VIII of the 1947 Constitution dealt with the “Union Judiciary.” The Supreme Court was established as the Court of Final Appeal³⁶ and the “head of the Supreme Court shall be called ‘the Chief Justice of the Union.’”³⁷ The Chief Justice of the Union “shall be appointed by the President ... with the approval of both Chambers of the Parliament in joint sitting.”³⁸ Qualifications necessary for appointment as a Supreme Court Justice included being a judge of the High Court of Judicature of Rangoon during the British times or an advocate of the High Court for at least fifteen years.³⁹

Regarding salary and benefits, the Constitution provided that

[n]either the salary of a judge of the Supreme Court or of the High Court nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment, unless he voluntarily agrees to any reduction in his salary in the event of general economy and retrenchment in relation to all the services of the Union.⁴⁰

Dr. Maung Maung appropriately commented that “this [wa]s another safeguard of the independence of the judiciary.”⁴¹ This particular provision, however, became the object of scathing criticism by President U Ne Win⁴² in a report-back session to his constituency about the

³⁶ See 1947 CONST. § 136.

³⁷ *Id.* § 136(2).

³⁸ *Id.* § 140(2).

³⁹ See *id.* § 142(1).

⁴⁰ *Id.* § 144.

⁴¹ MAUNG, FAMILY OF NATIONS, *supra* note 18, at 121. See also MAUNG, BURMA’S CONSTITUTION, *supra* note 19, at 150.

⁴² General Ne Win took over power in the military coup 2 March 1962, retired from the Army on 20 April 1972 (hence his formal title became “U” instead of General) and became the first President of the Socialist Republic of the Union of Burma under the 1974 Constitution on 5 March 1974.

first *Pyithu Hluttaw* (People's Congress).⁴³ Speaking in May 1974, U Ne Win stated that Supreme and High Court judges under the 1947 Constitution were too powerful because their salaries could not be changed without their consent.⁴⁴

2. *The exercise of judicial independence*

With its new freedom, the Burmese judiciary began to exercise its judicial independence. In 1956, Dr. Maung Maung observed that “the Supreme Court and High Court ... deservedly earned credit for having calmly administered the law [and for] uphold[ing] the highest traditions of justice.”⁴⁵ Later, he wrote that the “ideal of the independence of the Judiciary and the rule of law ha[d] been a fixed and shining beacon on the shifting scene in Burma”⁴⁶ To illustrate how the independence of the judiciary operated under the 1947 Constitution, this section will present and discuss a limited number of cases and decisions by the Supreme Court and High Court of Burma from the period of 1948 to 1962.

In 1949, one year after Burma achieved independence, the Supreme Court held that the distribution of Communist party propaganda leaflets entitled “Murderer Thakin Nu's Fascist Government” did not constitute the basis of “preventive detention under the Public Order Preservation Act.”⁴⁷ In other preventive detention cases, the Supreme Court⁴⁸ showed its

⁴³ The first session was on 2 March 1974 when the Revolutionary Council “handed over power” to the “people's representatives” in the first *Pyithu Hluttaw*. The first *Pyithu Hluttaw* chose U Ne Win as “President of the Socialist Republic of the Union of Burma” on 5 March 1974. U Ne Win was speaking in a meeting that was held to report back to the voters of his constituency the experiences of the first session of the first *Pyithu Hluttaw*, which had elected him President.

⁴⁴ The author does not recall the exact date on which the speech was given though he clearly recalls that it was given some time in May 1974 since he heard the speech on radio. He clearly remembers the change of tone in U Ne Win's voice from anger: “Go and look at the [1947] constitution...” to “magnanimity”: “Enough. My speech is having a slant on other people.” For a full text of this speech together with many others he had given from the period of 1962 to 1984, see BURMA SOCIALIST PROGRAMME PARTY, 1 MYANMA HSOSHALIT LANZIN PATI OAKKHTAGYEE EI KHIT-PYAUNG TAW HLAN YEI THAMAINGWIN MEINT KHUN MYAR [literally THE EPOCH-CHANGING, REVOLUTIONARY, HISTORIC SPEECHES OF THE GREAT BURMA SOCIALIST PROGRAMME PARTY CHAIRMAN] (1984); BURMA SOCIALIST PROGRAMME PARTY, 2 MYANMA HSOSHALIT LANZIN PATI OAKKHTAGYEE EI KHIT-PYAUNG TAW HLAN YEI THAMAINGWIN MEINT KHUN MYAR (1985).

⁴⁵ MAUNG, FAMILY OF NATIONS, *supra* note 18, at 122.

⁴⁶ MAUNG, BURMA'S CONSTITUTION, *supra* note 19, at 153.

⁴⁷ MAUNG, FAMILY OF NATIONS, *supra* note 18, at 122 (citing the case of *Ma Ahmar v. The Commissioner of Police and One*, 1949 BLR (Burma Law Reports) SC (Supreme Court) 39. It is an irony of the changed times and the erosion of democratic rights and freedom of expression when one “fast-forwards” events from 1949 to 1995. About forty-five years after this decision was given, former Prime Minister U Nu, who was

independence by striking down many executive actions. In *Ma Thaung Kyi v. The Deputy Commissioner, Hanthawaddy and One*,⁴⁹ the Supreme Court held that rubber stamping detention

detained twice for a total of about seven years and who spent eleven years in self-imposed exile, died in 1995. Students, who sang democracy songs and shouted slogans in honor of U Nu and in protest against the government at U Nu's funeral, were arrested and sentenced to several years in imprisonment for doing so. *See Report on the Situation in Myanmar* (1996) [hereinafter Special Rapporteur] ¶ 95 (prepared by Yozo Yokota, Special Rapporteur of the Commission on Human Rights, in accordance with Commission Resolution 1995/72, U.N. Doc. E/CN.4/1996/65, 5 Feb. 1996).

In February 1995, nine young activists ... were arrested for having reportedly chanted slogans during U Nu's funeral ... In its *note verbale* dated 4 October 1995, the Government provided the Special Rapporteur with the following response ... "Action is being taken against them under section 5 (j) of the 1950 Emergency Provisions Act for having created disturbances at the funeral with the aim of disrupting it and for having instigated the people to unrest."

Id.

More than 45 years after those arrested for distributing leaflets that called the late U Nu's government "murderers and fascists" were freed by the late Supreme Court, the students who honored U Nu by singing democracy songs at his funeral had no "Supreme Court" to turn to have their convictions overturned. There is currently a "Supreme Court" (in Burmese *Tayar Yone Gyoke*) but it is "supreme" in all but name. The author is not aware that the students who were imprisoned for singing democracy songs had been released from prison by an order from the (current) Supreme Court. Their convictions have certainly not been overturned. Contrast the students' fate in 1995 with those who had called the late U Nu "Fascist murderer" in 1949. In 1949, the late Supreme Court (in Burmese *Tayar Hluttaw Gyoke*) quashed the detention order of the pamphlet distributors. In 1995 the students who sang democracy slogans and shouted slogans in honor of U Nu were jailed for periods of up to seven years with no chance of judicial review.

Thakin (later) U Nu was the first and only democratically elected Prime Minister of Burma. *Thakin* (Master) was a "name-tag" adopted by many Burmese freedom fighters against British colonial rule. Nu was among the many Burmese who adopted the name *Thakin* in defiance of the British who would call themselves and who some Burmese would call *Thakin*. Several years after independence, however, Nu refused to be known and called by the name *Thakin* and made it known that he would prefer to use the honorific "U" instead.

The late U Nu was Prime Minister of Burma from 1948 to 1956, from 1957 to 1958, and from 4 April 1960 to 1 March 1962. He was overthrown and arrested in the military coup of 2 March 1962 and was detained from that day to 27 October 1966. In February 1969, U Nu left Burma and on 27 August 1969 at a news conference in London U Nu declared himself to be the "legal Prime Minister of Burma." For several years he lived in Thailand and unsuccessfully tried to fight the regime of General Ne Win. On 29 July 1980 he accepted an Amnesty offered by the government and returned to Burma. At the height of the 1988 democratic uprising on 9 September 1988, U Nu again declared himself to be the "legal Prime Minister." SLORC repeatedly demanded that U Nu withdraw his announcement and disband the government. U Nu refused to do so and he was put under house arrest on 29 December 1989. U Nu was released from house arrest on 23 April 1992. He died in Rangoon on 14 February 1995.

⁴⁸ As the current judiciary under SLORC/SPDC rule is, in English nomenclature, also called "Supreme Court" (though the Burmese nomenclature for the Supreme Court under the 1947 Constitution is different from that of the current SLORC/SPDC Supreme Court) in referring to the Supreme Court that was established under the 1947 Constitution, the term "the late Supreme Court" is used.

⁴⁹ 1949 BLR (SC) 30.

orders was illegal.⁵⁰ In *Daw Mya Tin v. Deputy Commissioner, Shwebo, and One*,⁵¹ the Court also held that it was illegal to delegate the powers of preventive detention, which the law entrusts only to certain officers.

The Supreme Court went as far as to declare an action of the President of the Union to be *ultra vires*.⁵² The Bureau of Special Investigation Act Section 24 authorized the President to amend a schedule to the Act. Instead of amending the schedule, the President merely inserted another item to the schedule that stated that “[s]uch offences within the mischief of Sections 405, 415 and 463 of the Penal Code as are investigated and sent up for trial by the Bureau of Special Investigation.” The Court held that “[s]o far as the offences within the mischief of the said sections are concerned the President has, by the said amendment, given a *carte blanche* to the Bureau.”⁵³ The Supreme Court added:

The legislature trusted the President, relied upon his administrative wisdom and political sagacity, and left it to him to alter the list of offences; but so far as offences under the said sections are concerned, the President has practically refused to exercise his judgment and discretion and delegated his power under section 24 of the Act to the Special Investigation Bureau. ... The President to whose judgment, wisdom and patriotism the duty of amending the schedule has been entrusted cannot relieve himself of the responsibility by choosing another agency upon which the duty should be devolved; nor can he substitute the judgment, wisdom and patriotism of any other body for those to which alone the Legislature has seen fit to confide the trust.⁵⁴

Though the Supreme Court struck down an executive act, it never “declared a legislative act *ultra vires*.”⁵⁵ Dr. Maung Maung felt that the reluctance of the Burmese Supreme Court to

⁵⁰ Authorized officers automatically issued detention orders based on lists of names submitted by their subordinates. See *Ma Thaung Kyi v. The Deputy Commissioner, Hanthawaddy and One*, 1949 BLR (SC) 30.

⁵¹ 1949 BLR (SC) 99.

⁵² *Ah Kam v. U Shwe Phone & Others*, 1952 BLR (SC) 222. The summary of the case and the judgment by the late Supreme Court giving reasons why the President’s insertion of a new item to a Schedule of the Bureau of Special Investigation Act is *ultra vires* can be found in MAUNG, BURMA’S CONSTITUTION, *supra* note 19, at 152-153.

⁵³ *Ah Kam*, 1952 BLR (SC) at 224.

⁵⁴ *Id.* at 225-26.

⁵⁵ Maung Maung, *Burma’s Laws and Policies on Foreign Investment*, in FOREIGN INVESTMENTS LAWS OF SOUTH EAST ASIA 614 (1992) (hereinafter Maung, *Foreign Investment*).

strike down legislation might have been due to “the constitutional practice” under the 1947 Constitution of putting “a liberal construction on the Constitution itself.”⁵⁶

Among the periods discussed in this article, the period of 1947-1962 was the one in which the independence of the judiciary was most prominent. Though not exhaustive, the case law above gives a glimpse of the working and independence of the judiciary during the period of the 1947 Constitution. In a painful and prophetic statement regarding the future of the judiciary, Dr. Maung Maung wrote several months before the 1962 military coup 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 of democratic life, must wither and die. For the Judiciary may have security of tenure under the constitution and conditions which are congenial to its independence, but it has no guns.⁵⁷

⁵⁶ *Id.* Dr. Maung Maung, who had so solidly and profusely praised the late Burmese Supreme Court, added (somewhat cynically) that “[s]ome cynic has observed that the U.S. Supreme Court follows the results of presidential elections. That may also apply to Myanmar.” *Id.*

It is true that there was no major case in which the late Burmese Supreme Court declared an act of the legislature as *ultra vires* as per the 1947 Constitution. Dr. Maung Maung conveniently forgot, however, to mention that the Supreme Court had indeed held a Presidential act to be *ultra vires* as discussed above in relation to the Supreme Court’s decision in the *Ah Kam* case. Moreover, Dr. Maung Maung’s statement was a veiled criticism of and an implication that the Burmese Supreme Court of the 1947 Constitution was not actually independent of the political arms of the then Burmese government: an assertion that was totally contrary with all his pre-1962 writings.

Dr. Maung Maung, who was a visiting scholar at Yale Law School under the Ford Foundation Fellowship (the programs and links with the Ford Foundation were abolished by General Ne Win soon after his takeover of March 1962) from 1960 to 1962, should have been aware that his claim of “U.S. Supreme Court follow[ing] the result of Presidential elections” is not quite correct. (Perhaps he was aware that what he wrote was not quite true, and the more plausible comment on his statement, as on most of his statements regarding post-1962 legal and political developments, is that the comment was reflective of a lack of intellectual honesty and integrity.) In the 1930s until the change of mind by Justice Owen Roberts in 1936, a conservative U.S. Supreme Court regularly struck down the progressive social legislation of President Franklin Roosevelt. *See, e.g.,* A REFERENCE GUIDE TO THE UNITED STATES SUPREME COURT 299 (Stephen Elliot ed., 1986) (hereinafter U.S. SUP. CT. REF.). In parts of the 1950s, a liberal Supreme Court agenda was not in conformity with the policies of the Republican administration of President Eisenhower. *See, e.g., id.* at 349-353, for the liberal agenda and legacy of the Warren Court during Eisenhower’s Presidency. It is evident that, at least at times, “the U.S. Supreme Court” does not always “follow the result of presidential elections.”

⁵⁷ MAUNG, BURMA’S CONSTITUTION, *supra* note 19, at 155. He further stated that

the peoples of Burma keep going on the chosen path, holding on to certain faiths and beliefs, placing their hopes in the Constitution and the essential goodness of man. Whether they will reach the Promised Land, or whether the circumstances of the outside world will let them, it is for the future to tell.

Id. at 217. These are virtually the last sentences of the last edition of Dr. Maung Maung’s book. Several months after its publication, *internal* events, namely the military coup of 1962, signaled the demise of the 1947 Constitution.

In the wake of the 1962 coup, the independence of the Burmese judiciary *did* wither and die. Those who had the guns are still in power in Burma and are still using totalitarian practices. Consequently, reviving judicial independence as it existed between 1947 and 1962 remains only a dim, distant, and unpromised prospect.

B. *Judicial Independence during the Revolutionary Council Period (2 March 1962-1 March 1974)*

The military took the reigns of power on 2 March 1962. After the formation of the Revolutionary Council (RC) and the Revolutionary Government of the Union of Burma, the RC abolished the Parliament on 8 March 1962.⁵⁸ On 30 March 1962, the RC also abolished the Supreme and High Courts.⁵⁹

The RC considered the two high courts and the Parliament a possible obstacle or even a threat to its grip on and perpetuation of power. The Burmese military exercised complete control in the aftermath of the 1962 coup. Hence, in Burmese courts, there was no possibility or opportunity to challenge the validity of the Army's usurpation of power as had occurred, albeit indirectly, in other Asian countries that had experienced coups.⁶⁰

Soon after the abolition of the Supreme and High Courts of Burma, a new Court, the "Chief Court" (*Tayar Yone Gyoke*), was established. U Bo Gyi, a justice of the abolished Supreme Court, was appointed Chief Justice of the Chief Court.⁶¹ In 1965, the RC appointed Dr. Maung Maung as Chief Justice. After Dr. Maung Maung became a member of the ruling RC

⁵⁸ See THE [RANGOON] GUARDIAN, Mar. 9, 1962; THE NATION, Mar. 9, 1962.

⁵⁹ See THE [RANGOON] GUARDIAN, Mar. 31, 1962; THE NATION, Mar. 31, 1962.

⁶⁰ For example, the Pakistani Supreme Court had adjudicated and ruled on the constitutionality and legal consequences of at least one military takeover in Pakistan. The legality of the 1958 military takeover in Pakistan was challenged in the Pakistan Supreme Court but the Supreme Court ruled that the then (1958) Pakistani regime, which had taken over power, was legal on grounds of its effectiveness. See *State v Dosso*, Pak LD SC 533 (1958). For a different view which, in effect, overruled *Dosso*, see *Jilani v. Government of Punjab*, Pak LD SC 319 (1972).

⁶¹ The nomenclature of the Chief Court is different in both the Burmese and English languages from those of the High Court and Supreme Court which were the apex courts under the 1947 Constitution. In the early 1970s the nomenclature of the highest court during that time was again reverted back to "Supreme Court" even though the Burmese nomenclature did not revert back to *Tayar Hluttaw Gyoke* and remains *Tayar Yone Gyoke*. To simplify matters, however, when referring to the highest court/judicial organ between the period of April 1962 to March 1974 the term "Chief Court" will be used notwithstanding that in the early 1970s the term "Supreme Court" was used officially again.

and Judicial Minister in 1971, U Hla Thinn became the Chief Justice of the Chief Court until March 1974 when the 1974 Constitution came into effect, which abolished the Chief Court and replaced it with the Central Court of Justice.

1. *The effect of the law without an independent judiciary*

A few months after the coup, Dr. Maung Maung wrote that the “laws and the courts, the public services, and the various organs of the state, as well as the ‘spirit of the constitution’ have been preserved alive and strengthened.”⁶² Indeed, one of the first decrees of the RC stated that all existing laws would continue to be in force unless specifically repealed.⁶³

Most or all civil and criminal laws that were effective before the coup continued to operate. The laws that began to lose their effect were in the areas of public law. Since all the major institutions that had existed under the 1947 Constitution ceased to exist, the previous constitutional structure and the political and legal values that the 1947 Constitution embodied deteriorated or were gradually extinguished. The RC did not formally abolish or suspend the 1947 Constitution either by decree or by announcement, but the 1974 Constitution effectually superseded the prior Constitution.⁶⁴ The Parliament and the Supreme and High Courts (two of the main pillars of the 1947 Constitution), however, were abolished. The loss of the high courts and parliament rendered the major provisions of the 1947 Constitution inoperative or irrelevant.

⁶² MAUNG, LAW AND CUSTOM, *supra* note 21, at 123-24. Perhaps a more realistic assessment can be found in a memoir of an Austrian woman who was married to a Shan chieftain in the Shan States of Burma, and whose husband disappeared on the day of the coup, never to be seen again. In a reconstruction of the events leading to her husband’s arrest and disappearance, Inge Sargent wrote that her husband was accused by a military officer, after his arrest, of favoring “secession of the Shan states from the Union.” INGE SARGENT, TWILIGHT OVER BURMA: MY LIFE AS A SHAN PRINCESS 168 (1994). Her husband replied that “personally he didn’t, but the right of secession is guaranteed under the Constitution.” *Id.* The military officer replied: “The Constitution isn’t worth the paper it is written on. That is why our commander in chief has torn it into pieces.” *Id.*

⁶³ This practice was followed by the RC’s “legatee,” SLORC, twenty-six years later in September 1988. See SLORC Declaration No. 6/88 (Sept. 24, 1988), *available in* 12 CONSTITUTIONS OF THE WORLD *Union of Myanmar (formerly Union of Burma)*, *supra* note 23, at 13. As for the fact of most of the laws remaining in force after both the 1962 and 1988 military takeovers this observation is pertinent:

A revolution occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself. The new legal order will have a new basic norm. Kelsen notes that frequently many of the norms of the old system will remain in force, but the reason for their validity will have changed.

MARGARET DAVIES, ASKING THE LAW QUESTION 84 (1994).

⁶⁴ See 1974 CONST. art. 25.

To understand the extent of judicial independence in the post-coup era, it is necessary to keep in mind the actions of the courts under the 1947 Constitution. In the first fourteen years of Burma's independence, the then functioning Supreme Court issued such writs as *habeas corpus*, *certiorari*, *prohibition*, *mandamus*, and *quo warranto*.⁶⁵ The practice of issuing writs also fell into desuetude though the RC did not formally abolish them. With the abolition of the Supreme Court and High Court, the guardians of the Constitution, these writs also lost their relevance and applicability. Without some of these writs, the citizenry had no method of redressing the excesses of the executive branch in matters of preventive detention.⁶⁶ Consequently, in the RC period (1962-1974), there were hundreds of arrests and "protective custodies" (detentions without charge and trial) and none were successfully challenged.⁶⁷

2. *The structure and composition of the courts*

The structure and composition of the Courts during the Revolutionary Council period also illuminates the state of judicial independence during that time. The RC established the Chief Court, which remains the final court of appeal, as well as other special courts, such as the Special Criminal Courts Appeal Court (SCCAC). A panel of three judges sat on the SCCAC and heard cases from the lower Special Criminal Courts. At least one of the judges on the SCCAC was a member of either the RC or the Revolutionary Government.⁶⁸ Hence, in some instances,

⁶⁵ These writs as applied by the Supreme Court and High Court of Burma from 1948 to 1961 are explained under the heading of "constitutional remedies." See MAUNG, BURMA'S CONSTITUTION, *supra* note 19, at 98-104.

⁶⁶ See, e.g., *id.* at 100-101 (describing the cases and the conditions in which the Supreme Court had issued *habeas corpus* in cases relating to preventive detention laws).

⁶⁷ In the RC period (1962-1974), the 1974 Constitution period (1974-1988), and the post-1988 SLORC/SPDC period, there has not been a single case in which detention orders and/or detentions were successfully challenged by means of writs or otherwise in the highest courts of the land be they named as Chief Court, Supreme Court or Central Court of Justice. This fact, in contrast to the quashing of many detention orders during the period of the 1947 Constitution, tellingly indicates how starkly different was the state of judicial independence in Burma in the pre- and post-1962 periods. For an example of the late Burmese Supreme Court ordering the release of detainees and/or ruling that preventive detention orders were illegal in 1949 alone, see *supra* notes 49-54 and accompanying text.

⁶⁸ Members of the RC and the Revolutionary Government overlap. For example, from 2 March 1962 to 2 March 1974, General Ne Win was "Chairman of the RC and Prime Minister of the Revolutionary Government of the Union of Burma." On 5 March 1974 U (General Ne Win retired from the Army on 20 April 1972 and, therefore, his official designation became "U") Ne Win became the first President of the Socialist Republic of the Union of Burma under the 1974 Constitution. He was reelected by the *Pyithu Hluttaw* (unicameral one party Legislature) to a

there was no clear delineation among the judicial, legislative, and executive branches since members of the legislature and executive also served on the special courts and tribunals.

The RC's actions also weakened the lower courts. From 1962 to 1972 administration of justice in the civilian courts was in the province of courts most of which were served by professional judges. In August 1972, the RC established the "People's Judicial System."⁶⁹ The vast majority of People's Judges was Party members and did not have legal qualifications.⁷⁰ The People's Judges replaced the professional judges who had formal legal training. Though some of the professional judges who lost their posts were reappointed as Court Advisers,⁷¹ their role was to advise the People's Judges but their advice was not binding. The People's Judges sat on committees of three to administer justice in People's Courts.⁷²

The introduction of the People's Judicial System spelled the death knell of the judicial independence in the lower courts. By removing professional judges and appointing People's Judges not only did the quality of the administration of justice severely suffer but also any vestige of independence faded as all the judges were Party appointees who towed the Party line.⁷³ Andrew Huxley has described the People's Judicial System as a system where the

second term as President in January 1978. He retired from the Presidency on 9 November 1981 but retain the position of the Chairman of the ruling and single Burma Socialist Programme Party (a post he had held since the establishment on 4 July 1962) until his resignation as Party Chairman on 23 July 1988. In the 1960s, all of the members of the RC were members of the Revolutionary Government though not all members of the Revolutionary Government were members of the RC.

⁶⁹ For a more detailed analysis of the People's Judicial System, see Zan, *Law and Legal Culture*, *supra* note 15, at 232-36. This system lasted till about 1989 when SLORC abolished the name of "People's" from the names of the courts.

⁷⁰ Upwards of 90% of the People's Judges were not legally trained. See Maung Htin Aung, *A Conversation with Princess Learned in the Law Part I*, THE WORKING PEOPLE'S DAILY, Mar. 28, 1974 at 2; Dr. Maung Htin Aung, *A Conversation with Princess Learned in the Law, Part II*, THE WORKING PEOPLE'S DAILY, Mar. 29, 1974 at 2.

⁷¹ To be an adviser to the People's Courts ("Judicial Officer"), one had to have legal qualifications. In criminal cases, the prosecution officer ("Law Officer") also had to be legally qualified.

⁷² For reports on the first day on which the "People's Judicial System" was put into effect in Burmese courts dealing with criminal cases, see THE [RANGOON] GUARDIAN, Aug. 8, 1972 and THE WORKING PEOPLE'S DAILY, Aug. 8, 1972.

⁷³ It should be stated that fulsome praise for the "People's Judicial System" had emanated from the person who had initiated the system himself. The late Dr. Maung Maung was the initiator, and defender, both to Burmese and international audiences, of the "People's Judicial System." For a summary of Dr. Maung Maung's statements concerning the People's Judicial System and for discussion and refutation of his arguments, see Zan, *Law and Legal Culture*, *supra* note 15, at 232-36. See also Andrew Huxley, *The Last Fifty Years of Burmese Law: E Maung and Maung Maung*, LAW ASIA 9 (1996-97) (hereinafter Huxley, *Fifty Years of Burmese Law*) (partially

“[l]egislature, executive, and judiciary were to become three aspects of the one party state, rather than rivals operating independently in their own autonomous zones.”⁷⁴ Within about eighteen months after the adoption of the “People’s Judicial System” in August 1972, the 1974 Constitution became effective. After the 1974 Constitution became effective, the non-separation of powers, the non-independence of the judiciary, and the subjugation of all three branches of the government to the ruling Party became constitutionally formalized and complete.⁷⁵

C. *Judicial Independence in the Period of the 1974 Constitution (2 March 1974 to 18 September 1988)*⁷⁶

The 1974 Constitution contained provisions concerning the judiciary in Chapter VII “Council of People’s Justices” (CPJ). Most importantly, CPJ members were elected from the “*Pyithu Hluttaw*”⁷⁷ whose names are on the list submitted collectively by members of the Council

complimented some of the motives for the introduction of the “People’s Judicial System”). He describes Dr. Maung Maung’s “reforms” as “unBritish[ing]” the judiciary. *Id.* at 14. Note, however, that Dr. Maung Maung had given fulsome praise about the rule of law that the British brought in his pre-1962 writings. For a correction of one major error among quite a few factual errors in Huxley’s article and for this author’s “philosophical disagreement” with Huxley concerning Dr. Maung Maung’s sincerity and about his “socialism” and Dr. Maung Maung’s motives of his “judicial reforms” (in introducing the People’s Judicial System), see Myint Zan, *Comment on Fifty Years of Burmese Law: E Maung and Maung Maung in Law Asia* (1996-1997), IN CAMERA (DEAKIN U.L. MAG.) 39-40 (1998).

⁷⁴ Huxley, *Fifty Years of Burmese Law*, *supra* note 73, at 15.

⁷⁵ The Burma Socialist Programme Party (BSPP) was founded on 4 July 1962 with General Ne Win as its Chairman. In the first few years of its existence, the BSPP nominally allowed other parties to exist, but on 23 March 1964 the RC promulgated *The Law Protecting National Unity*, which banned all political parties except the BSPP. For news items concerning the *Law Protecting National Unity*, see THE [RANGOON] GUARDIAN, Mar. 24, 1964; THE WORKING PEOPLE’S DAILY, Mar. 24, 1964.

1974 Constitution stated that: “The State shall adopt a single Party system. The Burma Socialist Programme Party is the sole political party and it shall lead the State.” 1974 CONST. art. 11. At the height of the 1988 uprising on 11 September 1988, the unicameral one party Legislature the *Pyithu Hluttaw* “overcoming the [1974] constitution” suspended the operation of Article 11 and decided to hold multiparty elections not earlier than “forty-five days” and not later than “ninety days.” For the resolution of the *Pyithu Hluttaw* suspending Article 11 of the 1974 Constitution and the decision to hold multiparty elections, see THE [RANGOON] GUARDIAN, Sept. 12, 1988; THE WORKING PEOPLE’S DAILY, Sept. 12, 1988. On 18 September 1988, SLORC took power and abolished the decree, *The Law Protecting National Unity*. See THE WORKING PEOPLE’S DAILY, Sept. 19, 1988.

⁷⁶ A “referendum” to adopt the 1974 Constitution of the “Socialist Republic of the Union of Burma” was held from 15 to 31 December 1973. The constitution was adopted on 3 January 1974. The author has described in more detail, the genesis, the “drafting”, the “referendum” and adoption and certain aspects of the 1974 Constitution in *Law and Legal Culture*, *supra* note 15, at 232-45.

⁷⁷ The *Pyithu Hluttaw*, under the 1974 Constitution, was a unicameral single-party legislature. Though the 1947 Constitution used the same term, “*Pyithu Hluttaw*,” the term under the 1947 Constitution referred only to

of State.”⁷⁸ First, members of *Pyithu Hluttaw* always dutifully supported whatever legislation the *Pyithu Hluttaw* enacted or promulgated. All members of State organs, the Council of State,⁷⁹ the Council of Ministers (the cabinet), the Council of People’s Justices (the highest judicial organ), the Council of People’s Attorneys, and the Council of People’s Inspectors are also members of the *Pyithu Hluttaw*. In other words, every member of “the organs of power,” which included the judiciary, were members of the *Pyithu Hluttaw*. The *Pyithu Hluttaw* accepted the “leadership of the BSPP” as per Article 11 of the 1974 Constitution, which stated that “The State shall adopt a single Party system. The Burma Socialist Programme Party is the sole political Party and it shall lead the State.”⁸⁰

Second, the Council of State nominated *Pyithu Hluttaw* members and the *Pyithu Hluttaw* elected members to the CPJ from its own ranks. Moreover, the CPJ was “responsible to the *Pyithu Hluttaw* on the state of the administration of justice.”⁸¹ Thus, under the 1974 Constitution, members of the top judicial organ were members of the legislature and they were subservient to the legislature. This situation contrasted starkly to that under the 1947 Constitution in which neither the members of the Supreme Court nor High Court were members of either Chamber of Parliament.⁸²

the Lower House of Parliament and roughly translated means the “Chamber of Deputies.” Under the 1947 Constitution, the Upper House of Parliament was called *Lumyosu Hluttaw* (Chamber of Nationalities).

In the first elections to the *Pyithu Hluttaw* under the 1974 Constitution, each of the 451 constituencies in Burma had only one candidate for the *Pyithu Hluttaw* for or against whom the citizenry could vote. The first election was held from 27 January 1974 to 5 February 1974. All candidates were pre-assigned to the constituencies in which they participated in the elections and almost all were members of the single ruling party, the Burma Socialist Programme Party (BSPP).

⁷⁸ 1974 CONST. art. 95.

⁷⁹ This was the legislative organ which, among others issued laws when the *Pyithu Hluttaw* was not in session and was somewhat comparable to the “Presidium of the Supreme Soviet” during the days of one party rule of the former Soviet Union.

⁸⁰ 1974 CONST. art. 11.

⁸¹ 1974 CONST. art. 104.

⁸² Under the ordinary conventions and practices of Parliamentary democracy, it is so obvious that members of the top judicial organs are not members of the Legislature that the drafters of the 1947 Constitution did not find it necessary to mention that members of the Supreme and High Courts must not be members of both Houses of Parliament. Yet, it is a fact that members of the Supreme and High Courts were not members of Parliament during the period of the 1947 Constitution.

The 1974 Constitution also contained a provision not in the 1947 Constitution. That provision stated:

Administration of justice shall be based on the following principles—

- (a) to protect and safeguard the Socialist system;
- (b) to protect and safeguard the interests of the working people;
- (c) to administer justice independently according to law;
- (d) to educate the public to understand and abide by the law;
- (e) to work within the framework of law as far as possible for the settlement of cases between members of the public;
- (f) to dispense justice in open court unless otherwise prohibited by law;
- (g) to guarantee in all cases the right of defence and the right of appeal under law;
- (h) to aim at reforming moral character in meting out punishment to offenders.⁸³

Moreover, the 1974 Constitution did not provide minimum qualifications for a member of the Council of People's Justices. In contrast, the 1947 Constitution required a Supreme Court Justice to be

an advocate of the High Court of at least fifteen years standing: Provided that a person shall not be qualified for appointment as Chief Justice of the Union unless he (i) is, or when first appointed to judicial office was, an advocate, and (ii) is an advocate of at least fifteen years standing.

In the First *Pyithu Hluttaw*⁸⁴ among the five members of the CPJ only one was a lawyer. The first CPJ Chairman was U Aung Pe, a former Colonel and a Divisional Commander. He served as Chairman of the Council of People's Justices from 1974 to 1981.⁸⁵ The second

⁸³ 1974 CONST. art. 101. The only provision of guidance and stipulation as it relates to the judiciary that could be found in the 1947 Constitution is Section 141 which mandated that: "All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the laws." 1947 CONST. § 141.

⁸⁴ Under Article 43 of the 1974 Constitution, "[t]he regular term of the *Pyithu Hluttaw* is four years from the date of the first session." 1974 CONST. art. 43.

⁸⁵ MMT (pen name of U Myint Thein, *see supra* notes 34-35), who was the last Chief Justice under the 1947 Constitution, wrote in April 1974 about U Aung Pe thus

To have become a Divisional Commander at a young age shows that he must be highly talented and when he applies those talents to the study of law, he will surely become a great judge.... [However,] there is need for continuity of service for a judge and a smooth flow of judicial administration, and therefore another fervent prayer of mine is that the Chairman will be re-elected at every new election until such time as he gets bored with listening to the submissions of learned counsel who will appear before him.

MMT, *Comments on Dr. Htin Aung's Dialogue with Princess-Learned in the Law Part III*, THE WORKING PEOPLE'S DAILY, Apr. 26, 1974 at 2. U Aung Pe was re-elected as Chairman of the Council of People's Justices in the second

Chairman of the CPJ was U Moun Moun Kyaw Win, a former Brigadier, Judge-Advocate-General, and barrister. Upon U Moun Moun Kyaw Win's death, U Tin Aung Hein became the third CPJ Chairman in about 1983. U Tin Aung Hein, though not a barrister, has a law degree from the University of Rangoon.

1. *Role and Functions of the judiciary under the 1974 Constitution*

Under the 1947 Constitution, the Supreme and High Courts had the power of judicial review and also the power to interpret the Constitution and the laws.⁸⁶ Though Dr. Maung Maung stated in 1992 that "there [was] no major case in which the Myanmar Supreme Court [of the 1947 Constitution] ... declared a legislative act *ultra vires*,"⁸⁷ he did not mention that the judiciary under the 1974 Constitution also never "declared a legislative act *ultra vires*." Such a declaration under the 1974 Constitution would have been a contradiction if not a legal impossibility because the judiciary did not even have the power to determine the validity of State actions or to interpret the laws and the constitution. First, the "validity of the acts of the Council of State, or of the Central or Local Organs of State Power under this Constitution shall only be determined by the *Pyithu Hluttaw*."⁸⁸ Second, the "*Pyithu Hluttaw* may publish interpretations of this Constitution from time to time as may be necessary."⁸⁹ Hence, constitutional interpretation and review of State actions under the 1974 Constitution were the exclusive roles of the Legislature (*Pyithu Hluttaw*).⁹⁰

Pyithu Hluttaw and he served his second tenure from 1978 to 1981. In total, he served as Chairman of CPJ for about seven years.

⁸⁶ See *supra* notes 44-47 and accompanying text.

⁸⁷ See *supra* notes 55-56 and accompanying text.

⁸⁸ 1974 CONST. art. 200(c).

⁸⁹ *Id.* art. 201.

⁹⁰ *Constitutional Law Lecture* (attended by the author at law school at Rangoon Arts and Science University and taught by a Burmese advocate who was then a central committee member of the (single and ruling) Burma Socialist Programme Party. Notes on file with author.) The lecturer compared the provisions of the 1974 Constitution with those of the Eastern European countries. He dictated to us from prepared notes that the concept of separation of powers was a selfish action taken by the capitalists and the bourgeoisie. The comparisons were made with then Eastern European one-party constitutions.

An example was given of the separation of powers concept under the Indian constitution. The lecturer explained that when the Indian government under the late Indian Prime Minister Indira Gandhi nationalized major

Assuming *arguendo*, the Council of People's Justices had the power to interpret the Constitution, such power would not have made the CPJ deviate, in anyway, from the wishes of the *Pyithu Hluttaw* and the Party since all CPJ members were also *Pyithu Hluttaw* and Party members. The judiciary thwarting the wishes of the elected Legislature is only possible, where the judiciary is separate from the legislature, as under the 1947 Constitution, and not when members of the judiciary are also members of the legislature, as under the 1974 Constitution.

Hence, the 1974 Constitution rejected the separation of powers and an independent judiciary in legal thinking, education, and practice.⁹¹

2. *Similarities between the provisions concerning the judiciary in the 1974 Constitution and aspects of the judicial system in pre-colonial Burma*

The structure and composition of the judiciary or the top judicial organs of the State under the 1974 Constitution is comparable to those under the reign of the Burmese monarchs.⁹² *Hluttaw* members like the King's Ministers constituted a court of final appeal. Under both systems, members of the court of final appeal were also members of the *Hluttaw* (Legislature). Hence, it would appear that the ministers in the days of the Burmese monarchy functioned to some extent like "Council of People's Justices" in the 1974 Constitution.

Indian banks, the banks argued in the Indian Supreme Court that the Indian Parliament's action of nationalizing the Banks was unconstitutional. The Indian Supreme Court, consisting of capitalist judges, agreed, thus thwarting the elected Indian Legislature's socialist development plans. In sum, the lecturer asserted that the power to interpret the Constitution and the laws must be given only to the Legislature.

⁹¹ *Id.* The 1947 Constitution itself was attacked in negative, colorful terms in the preamble of the 1974 Constitution. See 1974 CONST. preamble. For the text of the 1974 Constitution, see 12 CONSTITUTIONS OF THE WORLD *Union of Myanmar (formerly Union of Burma)*. In fact, when the 1990 edition of *Constitutions of the World* was published Burma did not then, as it is still the case in January 2000, have a constitution because the 1974 Constitution became ineffective when SLORC came power on 18 September 1988. See SLORC Declaration No. 2/88 (Sept. 12, 1988), available in *id.* at 12 (abolishing all "Organs of State Power" under the 1974 Constitution but not declaring that the 1974 Constitution is no longer in force). For the text of the 1947 Constitution, see MAUNG, BURMA'S CONSTITUTION, *supra* note 19.

⁹² See *supra* I.A. In particular, see *supra* note 5 and accompanying text.

For the issue whether the 1947 or 1974 Constitution or the ideology embodied in them is more in consonance with the traditional Burman concepts of power as exercised in the days of the Burmese King, see Zan, *Law and Legal Culture*, *supra* note 15, at 242-44.

3. *The people rejected the 1974 Constitution*

Though the 1962 military coup rendered the 1947 Constitution ineffective and the 1974 Constitution officially abrogated the 1947 Constitution, a few of the principles embodied in the 1947 Constitution may be resurfacing if only in rhetoric within the confines of the National Convention. Upon coming to power in 1988, the State Law and Order Restoration Council (SLORC) repealed the “organs of State power” that were formed under the provisions of the 1974 constitution. Though SLORC had abolished the organs of state power established under the 1974 Constitution, the 1988 uprising and 1990 elections revealed that a majority of Burmese people no longer accept a system⁹³ whereby the “Legislature, the Executive and the Judiciary operate as aspects of the one party State.”⁹⁴

⁹³ This “people’s desire” was further expressed in the May 1990 elections when the National League for Democracy (NLD) won nearly 60% of the votes and 82% of the seats in the new National Assembly, which was never convened. The former ruling BSPP, which had changed its name to the National Unity Party (NUP), won 25% of the vote and 10 seats in the National Assembly, which was never held. Other parties won the major shares of the remaining 15% of the vote. If the Parliament or National Assembly, which the voters elected in the May 1990 elections, were to be held, the NLD and the parties allied to it would have obtained more than 4/5 of the seats. Hence, both in terms of popular votes and of seats in the never-convened Parliament, it can safely be said that the overwhelming majority of the peoples of Burma had voted for democratic and accountable government in 1990.

The NLD has occasionally expressed that the 1947 Constitution with some changes and amendments should be the guiding document in drafting a constitution for the nation’s future governance. The 1947 Constitution embodied, among others, the independence of the judiciary. Moreover, the practice of the Supreme and High Courts of Burma under the 1947 Constitution had illustrated and had put into effect the concept of judicial independence that was prevalent in those days.

The majority of the Burmese people’s wish for a democratic and accountable government with an independent judiciary was expressed in the 1990 elections. It is not meant here that most of the Burmese who had voted for the democratic parties in the elections of May 1990 were aware of the issues of constitutionalism or independence of the judiciary or understood them even in their rudimentary forms. Most of them articulated their aspirations for democracy in less sophisticated ways. Aung San Suu Kyi writes:

The people of Burma view democracy not merely as a form of government but as an integrated social and ideological system based on respect for the individual. When asked why they feel so strong a need for democracy, the least political will answer: ‘We just want to be able to go about our business freely and peacefully, not doing anybody any harm, just earning a decent living without anxiety and fear’. In other words they want the basic human rights which would guarantee a tranquil, dignified existence free from want and fear.

AUNG SAN SUU KYI, *FREEDOM FROM FEAR AND OTHER WRITINGS* 173 (Michael Aris ed., 1991).

Alice Tay, however, was more specific in describing and analyzing the struggles of other peoples for democracy. Also, the outcomes of such struggles have been more positive than those of the Burmese. Describing the revolutions and uprisings that erupted in Eastern Europe in from 1989 to 1991 Alice Tay wrote that the people of Eastern Europe were struggling for

free elections, the independence of the judiciary and the power to interpret law and review both government legislation and government action, and of entrenchment of fundamental rights and

D. *Judicial Independence in the SLORC/SPDC era and the National Convention Draft's Constitution*

On September 18, 1988, SLORC came to power⁹⁵ and abolished all organs of State power that were formed under the 1974 Constitution.⁹⁶ Hence, the “Council of People’s Justices” was abolished, but SLORC soon filled this lacuna. Nine days after its takeover, on 27 September 1988, SLORC, referring to Section 3 of the 1948 Union Judiciary Act appointed a “Supreme Court” (*Tayar Yone Gyoke*),⁹⁷ which consisted of five members. SLORC appointed U

liberties of citizens as maintainable against the state, its officials and organs [and for these causes people] have rallied in Beijing and Shanghai, in the Baltic States, in Budapest, Prague, Berlin and Leipzig, Timisoara and Bucharest.

See Preface to Constitution-making and Restructuring in the Present and Former Communist World, 58 *Bulletin of the Australian Society of Legal Philosophy*, No. 5, iii (Alice Erh-Soon Tay and Conita S.C. Leung eds.).

Interestingly but not that significantly (perhaps even deceptively) the rhetoric emerging from the National Convention occasionally espouses such concepts as separation of powers and the notion of judicial independence to be materialized in the “future democratic State.” Yet, notwithstanding these statements, in the current circumstances and as is explained in the next section, the reintroduction of genuine constitutionalism and judicial independence in Burma, to a very large extent, remains only a pious hope.

⁹⁴ See *supra* note 74 and accompanying text.

⁹⁵ For a discussion of the events concerning the 1988 uprising and the takeover of power by SLORC, see Zan, *Law and Legal Culture*, *supra* note 15, at 251-54.

⁹⁶ See SLORC Announcement No. 1/1988 (Sept. 18, 1988), available in 12 CONSTITUTIONS OF THE WORLD *Union of Myanmar (formerly Union of Burma)* at 11 (announcing the formation of SLORC and the fact that it has taken over power); SLORC Announcement No. 2/1988, *supra* note 91 (announcing that the *Pyithu Hluttaw*, the Council of State, Council of Ministers, Council of People’s Attorneys, Council of People’s Inspectors, as well as the State/Divisional People’s Councils, Township People’s Councils, Ward/Village Township People’s Councils, all of which were formed under the provisions of the 1974 Constitution were also abolished). Additionally, SLORC announced that the Deputy Ministers were “dispensed” of their duties. *Id.*

Under the 1974 Constitution, there were provisions concerning the formation of the Council of Ministers, the cabinet, but there were no provisions concerning the appointment of Deputy Ministers. During the period of the 1974 Constitution, however, Deputy Ministers were appointed. To make sure that the Deputy Ministers, who were not specifically included under the organs of power that were formed under the 1974 Constitution, were also relieved of their duties, SLORC probably felt it necessary to state specifically that the Deputy Ministers’ appointments had also been terminated.

⁹⁷ The Burmese nomenclature that was used in the period between 1962 to 1974 was used for the Supreme Court was established by SLORC. The English nomenclature also reverted back to the term “Supreme Court” and the Chief Justice was also called *Tayar Thugyi Gyoke*, which was the nomenclature used in the days of the Chief Court/Supreme Court from April 1962 to March 1974. SLORC also changed the country’s socialist sounding name from “the Socialist Republic of the Union of Burma” to the “Union of Burma” before changing the name again to “Union of Myanmar” on 18 June 1989. SLORC also changed the title of “Chairman of the Council of People’s Justices” under the 1974 Constitution to “Supreme Court Chief Justice.” To distinguish SLORC appointed

Aung Toe,⁹⁸ a retired Registrar of the abolished “Central Court of Justice,”⁹⁹ as Chief Justice of the new Supreme Court.

Further, SLORC abolished the “People’s Courts” system that was in force since 1972. SLORC renamed the courts by dropping the term, “People’s.” The author has also learnt, though it cannot be cited with reference to published sources, that apparently, in non-political, non-security cases, professional judges (i.e., those with legal qualifications) are now presiding in the civilian courts. In political cases, however, the defendants are tried in military tribunals and courts.¹⁰⁰ Even after the abolition of military courts, the judges do not and were not able to exercise any degree of judicial independence. A jurist, who has written a detailed report, stated that judges are “in practice subjected to tight control by SLORC at all times. Judges enjoy[] no tenure of office, and [are] under clear instructions to take the lead from their military masters in the discharge of their functions.”¹⁰¹ The International Commission of Jurists also reported that

Supreme Court from the late Supreme Court of the 1947 Constitution, as the occasion requires, the Supreme Court of the post-1988 is termed “SLORC Supreme Court.”

⁹⁸ As of January 2000, U Aung Toe has served as head of the judiciary for more than eleven years. He is post-independence Burma’s longest-serving Chief Justice or head of the judiciary. The first Chief Justice (in Burmese nomenclature *Tayar Wungyee Gyoke*) of independent Burma was the late Sir (later Dr.) Ba U, who served from 1948 to 1952 before becoming President under the 1947 Constitution. The late U Thein Maung (1890-1975) who served from 1952 to 1957, succeeded him. U Thein Maung was succeeded by the late U Myint Thein (1900-1994) as the third and final Chief Justice appointed under the 1947 Constitution. The late U Bo Gyi, a puisne judge of the late Supreme Court, was appointed by the RC as the Chief Justice of the Chief Court (*Tayar Thugyee Gyoke*) in 1962 and he served in that post to about 1965. In 1965, the RC appointed the late Dr. Maung Maung (1925-1994) as Chief Justice. In 1971, Dr. Maung Maung became Judicial Minister and a member of the RC and the Revolutionary Government of the Union of Burma. Dr. Maung Maung was succeeded by U Hla Thinn as Chief Justice in 1971 and he served in that post till March 1974 when the Chief Court /Supreme Court was abolished by the 1974 Constitution and replaced by a Central Court of Justice under the supervision of the “Council of People’s Justices.” The first Chairman of the Council of People’s Justices was U Aung Pe who served from 1974 to 1981 and was briefly succeeded by the late U Mounng Mounng Kyaw Win until his death. Then, U Tin Aung Hein became Chairman of the Council of People’s Justices in about 1983 until the Council of People’s Justices was abolished by SLORC on 18 September 1988. Hence, U Aung Toe is the longest-serving Chief Justice or Head of the judiciary in post-independence Burma.

⁹⁹ “The Central Court of Justice” (*Baho Tayar Yone*) was the highest court of appeal during the period of the 1974 Constitution. The Central Court of Justice was a three-judge panel, which sat in Rangoon and Mandalay. There were originally five members of the “Council of People’s Justices,” but in 1978, the membership was increased to seven. Three judges sat as the “Central Court of Justice,” which functioned as a final Court of Appeal from the lower courts. Only in very rare cases when there is a case of reference (in Burmese, *Saw-Da-Ga-Ahmhu*) or one to be reversed would the full membership of the Council of People’s Justices sat as a “full bench” of the Central Court of Justice.

¹⁰⁰ For a detailed analysis of the functioning of martial law, military tribunals and civilian courts during SLORC rule (till about 1996), see K.S. VENKATESWARAN, *BURMA: BEYOND THE LAW* 34-40.

¹⁰¹ *Id.* at 38.

most cases are tried in a summary manner and that verdicts are determined in advance of the trials.¹⁰² Another report by Asia Watch stated that sixty-two judges were reportedly deprived of office in 1989 after failing to comply with SLORC instructions to sentence political dissidents to prison terms longer than those permissible than in the prescribed laws.¹⁰³

Notably though, SLORC has been holding a “National Convention” (NC) since January 1993¹⁰⁴ with the avowed purpose of laying down principles for a new constitution which, among others, would enshrine and perpetuate military rule.¹⁰⁵ A shift on constitutional issues and of the general structure of government has become discernible in the pronouncements that had emerged from SLORC government officials in and out of the National Convention.¹⁰⁶ Principles such as the independence of the judiciary, separation of powers,¹⁰⁷ and reciprocal control, check and balance between the three branches of State power¹⁰⁸ have been periodically heard again within

¹⁰² The International Commission of Jurists, *The Burmese Way to Where?*, Report of a Mission to Burma (Geneva, December 1991) at 50.

¹⁰³ ASIA WATCH, HUMAN RIGHTS IN BURMA 12 (1990).

¹⁰⁴ For events and discussions concerning the National Convention (and to those relating to the principles emerging out of the NC which deals with the Head of State, the Legislature and the Executive), see Zan, *Law and Legal Culture*, *supra* note 15, at 258-67. For a discussion, from an international law perspective, of the genesis, composition, structure, and functioning of the National Convention, see VENKATESWARAN, *supra* note 100, at 66-71.

¹⁰⁵ Even before the National Convention began in January 1993 SLORC had already laid down its six objectives of the National Convention, the sixth of which is “for the Tatmadaw [the Army] to be able to participate in the national political leadership role of the future State.” Zan, *Law and Legal Culture*, *supra* note 15, at 263. The NC had already come to an agreement on the 1/4 representation (appointed by the future Commander in Chief of the Armed Forces) of *Tatmadawmen* (Armed Forces Personnel) in both Houses of Parliament. See *id.* at 263-65.

¹⁰⁶ The principles that have been reported as “agreed upon” by the National Convention will be mentioned henceforth as “National Convention Draft Constitution” (NCDC). It is not clear, however, whether the National Convention itself will draft the constitution or whether it will lay down principles to be considered in drafting the constitution. Neither is there any indication when the process of National Convention will be completed. The only certainty of the NC is that the draft constitution would have to be SLORC’s liking and SLORC would have to approve it. See VENKATESWARAN, *supra* note 100, at 67.

¹⁰⁷ See 8 BURMA PRESS SUMMARY, No. 10, 13 (1994) (summarizing SLORC’s former Foreign Minister U Ohn Gyaw’s speech at the United Nations General Assembly on 11 October 1994, *provided in NEW LIGHT OF MYANMAR*).

¹⁰⁸ See 8 BURMA PRESS SUMMARY, No. 9, 11, 57 (1994) (excerpts from the speech of Chief Justice U Aung Toe to the National Convention in September 1994).

the confines of the National Convention after being neglected and treated with contempt during the Burma Socialist Programme Party regime.¹⁰⁹

According to the National Convention Draft Constitution (NCDC), there will be a Supreme Court of the Union (*Pyidaungsu Tayar Hluttawgyoke*), High Courts of the Regions (Region *Tayar Hluttaw*), High Courts of the States (State *Tayar Hluttaw*), courts of the self-administered zones, district courts, and township courts, which will function “in accordance with the Constitution or other laws, courts-martial and the Constitutional Tribunal.” At a session of the National Convention in 1994, Chief Justice U Aung Toe¹¹⁰ proposed that “[i]n the State is constituted one *Pyidaungsu Taya Hluttawgyoke* (Supreme Court of the Union). [The] *Pyidaungsu Taya Hluttawgyoke* is the supreme law court of the State which shall not affect judicial powers vested in the Constitutional Tribunal and courts-martial.”¹¹¹

1. *Appointment and removal*

Generally, NCDC provisions have more affinity with the 1947 Constitution than with the 1974 Constitution. First, the NCDC states that the “President shall appoint the person nominated by him and approved by the *Pyidaungsu Hluttaw* [joint session of both Houses of Parliament as envisaged in the NCDC] [as] the Chief Justice of the Union.”¹¹² Under the 1947 Constitution, Parliament chose the nominee and the President appointed the nominee as Chief Justice. The NCDC provides that the President nominates the Chief Justice and the *Pyidaungsu Hluttaw* approves the nominee. Yet, the

Pyidaungsu Hluttaw shall not have the right to reject the person nominated by the President for appointment of the Chief Justice of the Union unless it can clearly prove that the person does not meet the qualifications for the post [of] the Chief Justice of the Union [as] prescribed by the Constitution.¹¹³

¹⁰⁹ See *supra* notes 88-91 and accompanying text.

¹¹⁰ When the National Convention was in session, U Aung Toe was the chief “clarifier” of the principles of the NCDC. As of January 2000, the most recent session of the National Convention was held in March 1996.

¹¹¹ See 8 BURMA PRESS SUMMARY, *supra* note 108, at 58.

¹¹² *Id.*

¹¹³ *Id.*

The President may only appoint the Judges of the Supreme Court after coordinating with the Chief Justice of the Union.¹¹⁴

The President, however, may dismiss the Chief Justice of the Union or a Judge of the Supreme Court. First, the President can ask the Justice or a judge

to resign and proclaim the removal from office in the event of failure to comply with his instruction [in cases of] treason, violation of provisions of the Constitution, misconduct and being disqualified for the post of the Chief Justice of the Union or Judges of the Supreme Court under the Constitution.¹¹⁵

Second, the *Pyithu Hluttaw* (House of Representatives)¹¹⁶ or *Amyotha Hluttaw* (House of Nationalities)¹¹⁷ can impeach the Chief Justice or Supreme Court judges. Impeachment procedure “should be the same as the way to impeach the President or Vice-President of the State.”¹¹⁸ If the *Hluttaw* concerned “submits a report that the charge has been substantiated ... the President of the State shall proceed to proclaim the removal of the Chief Justice of the Union.”¹¹⁹ Hence, the Chief Justice and Judges of the Supreme Court are “to hold office ... unless asked to resign by the President of the State ... or unless being removed from office after impeachment in accordance with the provisions of the Constitution.”¹²⁰

Read together, the NCDC’s removal provisions permit the President (1) to instruct the Chief Justice or Judges of the Supreme Court to resign or (2) to remove them from office without the approval of the *Hluttaws* or after approval through successful impeachment by the *Hluttaws*. Such a Presidential power is not conducive to a real independence of the judiciary. In contrast, under the 1947 Constitution, the President could only remove a judge of the High Court or

¹¹⁴ See *id.*

¹¹⁵ *Id.* at 59.

¹¹⁶ The Lower House of Parliament in the NCDC.

¹¹⁷ The Upper House of Parliament in the NCDC.

¹¹⁸ 8 BURMA PRESS SUMMARY, *supra* note 108, at 59. The impeachment of the State President and Vice President can be initiated by 2/3 of one House of Parliament (Assembly) and the other House (Assembly) investigates and again 2/3 of the investigating Assembly are needed to remove the State President according to the NCDC. See BURMA LAWYER’S COUNCIL, THE MILITARY AND ITS CONSTITUTION (1999). For an unofficial translation of the principles of the NCDC, see *id.*

¹¹⁹ 8 BURMA PRESS SUMMARY, *supra* note 108, at 60.

¹²⁰ *Id.*

Supreme Court after a Special Tribunal had investigated and approved the charges and a majority of Parliament members in joint session had approved the charges.¹²¹

2. *Judicial qualifications*

To delineate and perhaps distinguish itself from the overlapping roles between the legislature and judiciary that had existed under the 1974 Constitution, the NCDC requires that judges “not be a *Hluttaw* representative.”¹²² Other NCDC qualifications include “loyalty to the State and citizens,” being “non-members of a political party, and the age requirement that they must not be younger than 50 years or older than 70”¹²³ as well as the qualifications prescribed for a *Pyithu Hluttaw* representative, which include, ten years’ continued residence in the country.

There are also professional qualifications for appointment to the Supreme Court in the NCDC, which are almost identical to the provisions of the 1947 Constitution. For instance, the 1947 Constitution stipulated that

a person shall not be qualified for appointment as a judge of the Supreme Court unless he has been for at least five years a judge of the High Court of judicature at Rangoon or of the High Court established under this Constitution; or is an advocate of the High Court of at least fifteen years standing.¹²⁴

The NCDC also requires that a Judge of the Supreme Court must

have been for at least five years a Judge of the High Court of a region or State or have been for at least 10 years a judicial officer or a law officer at not lower than region or state level or have been an advocate of the *Tayar Hluttaw (High Court)*

¹²¹ 1947 CONST. § 143(2)-(8).

¹²² 8 BURMA PRESS SUMMARY, *supra* note 108, at 59.

¹²³ *Id.* All of these provisions concerning “loyalty to the State and citizens,” non-membership of a political party and minimum and maximum age requirements were not mentioned in the 1947 or the 1974 Constitution as requirements to be appointed at the higher levels of the judiciary. Though judges are required to be “loyal to the State and its citizens” in the NCDC (which the two previous constitutions did not require), Section 141 of the 1947 Constitution states that all “judges shall be independent in their exercise of their judicial functions and subject only to this Constitutions and the laws.” 1947 CONST. § 141. The NCDC does not provide a similar section or article.

As for age, all three Chief Justices of the Union who were appointed under the 1947 Constitution were in their late 50s or early 60s when they were appointed as Chief Justices. In the fourteen years of the existence of the Supreme and High Courts of Burma under the 1947 Constitution, there was never an impeachment of any of the Supreme or High Court Judges.

¹²⁴ 1947 CONST. § 142 (1)(a)-(b)

of at least 20 years standing or have been assumed to be a legal expert of prominent reputation.¹²⁵

In contrast, the 1974 Constitution did not require any professional qualifications for a person to become a member of the Council of People's Justices.

Like the 1974 Constitution, the NCDC has also chosen not to protect the judiciary's salaries and benefits as the 1947 Constitution had.¹²⁶ If the NCDC would protect salaries as one of its basic principles though, it could help ensure that the "three branches of State power, legislative power, executive power and judicial power are separated as much as possible and exert reciprocal control, check and balance among themselves."¹²⁷ Such "a safeguard for the independence of the judiciary"¹²⁸ is necessary when the control of the judiciary by the executive under the NCDC is much stronger than in the 1947 Constitution.

3. *The Constitutional Tribunal*

Unique to the NCDC is the proposal for a Constitutional Tribunal, the jurisdiction and functions of which are different from those of the Supreme Court, since the NCDC states that the Supreme Court is the "supreme law court of the State which shall not affect judicial powers vested in the Constitutional Tribunal and courts-martial."¹²⁹ In contrast, under the 1947 Constitution, the power to interpret the Constitution and to review the constitutionality of executive or legislative acts belonged to the Supreme Court. In the 1974 Constitution, the "validity of the acts of the Council of State, or of the Central or Local Organs of State Power under this Constitution shall only be determined by the *Pyithu Hluttaw*."¹³⁰

In his discussion of the proposed Constitutional Tribunal in the National Convention session of September 1994, Chief Justice U Aung Toe did not elaborate on the composition and functions of the Constitutional Tribunal apart from that it would

¹²⁵ 8 BURMA PRESS SUMMARY, *supra* note 108, at 59.

¹²⁶ *See supra* note 44 and accompanying text.

¹²⁷ 8 BURMA PRESS SUMMARY, *supra* note 108, at 59.

¹²⁸ *See supra* note 44 and accompanying text.

¹²⁹ 8 BURMA PRESS SUMMARY, *supra* note 108, at 58.

¹³⁰ 1974 CONST. art. 200(c).

interpret provisions of the State Constitution, to scrutinize whether or not laws enacted by the *Pyidaungsu Hluttaw* [both Houses of Parliament in joint session], Region *Hluttaws* and State *Hluttaws* and functions of executive authorities of *Pyidaungsu*, regions, states and self-administered areas are in conformity with the State Constitution, to decide on disputes between *Pyidaungsu* and states, between regions and states, among regions, among states, and between regions or states and self-administered areas themselves and to perform other duties prescribed in the Constitution.¹³¹

In Asian countries, which have a heritage of British common law such as India, Pakistan, Bangladesh, and Malaysia, there is not a separate and specialized Constitutional Tribunal in addition to a Supreme or High Court.¹³² Constitutional Tribunals, however, exist in civil law countries such as Egypt, Germany, Russian Federation, South Africa, South Korea, and Turkey.

Nonetheless, the more crucial issue concerning judicial independence in the NCDC is how independent and effective a Constitutional Tribunal would be when it becomes functional. Would it, for example, like the late Burmese Supreme Court in 1952, have the power to declare an executive act *ultra vires*?¹³³ Could a judge removed or impeached for an alleged constitutional violation seek redress in the Constitutional Tribunal?

4. *The strength of the legal system*

Another factor necessary to revive an independent judiciary is a properly trained legal personnel. Burma currently lacks an appropriate legal culture and properly educated legal practitioners. For more than thirty years, legal education has been so strictly controlled and regimented that many Burmese lawyers, judges, law officers (Government Advocates), and judicial officers (advisers to the People's Courts under the People's Judicial system) have not been brought up in a legal culture with a strong and independent judiciary. Since the younger

¹³¹ 8 BURMA PRESS SUMMARY, *supra* note 108, at 56-57.

¹³² Under the 1972 Republican Constitution, Sri Lanka had a "Constitutional Court" but under the 1977 Republican Constitution, there is no provision for a Constitutional Court. See H.M. ZAFRULLAH, SRI LANKA'S HYBRID PRESIDENTIAL AND PARLIAMENTARY SYSTEM AND THE SEPARATION OF POWERS DOCTRINE 77 (1981). Sri Lanka, compared with other British colonies or protectorates of Australia, Burma, Malaya, India, Pakistan, and Bangladesh, however, had not only the British common law system as a legacy but also had aspects of the civil law system as well for Ceylon (renamed "Sri Lanka" in 1972), which was a colony of the Dutch and the Portuguese for centuries.

¹³³ *Ah Kam*, 1952 BLR (SC) at 222. See *supra* note 52 and accompanying text.

generation of judicial personnel has grown up under an authoritarian State, notions of judicial independence may be difficult to implement since the younger generation does not fully appreciate the significance and substance of an independent judiciary.

III. BACK TO THE FUTURE BUT NO MARCH BACKWARDS TOWARDS THE PAST

The evolution of both the concept and practice of judicial independence in Burma since independence has indeed been a rocky one. From 1948 to early 1962, the judiciary in Burma was independent. It made landmark decisions, which revealed its independence. Among those landmark decisions, the courts upheld the citizenry's rights, which were protected under the 1947 Constitution. In the words of the late U Myint Thein, the last Chief Justice to be appointed under the 1947 Constitution, "in the days of old" when these protected rights were violated, citizens could seek remedies through the availability of various writs and by "invoking the jurisdiction of the highest court."¹³⁴

With the military takeover of 1962, the concept and practice of judicial independence began to fade quickly. As explained in earlier sections, during the Revolutionary Council Era of 1962 to 1974, the separation of powers that the 1947 Constitution embodied became blurred and eventually non-existent. Though the Chief Court of the 1962 to 1974 period was "separate" from what was in effect the "legislature" vis-à-vis the Revolutionary Council and the "executive" vis-à-vis the Revolutionary Government, there were overlaps in the structure and composition of courts. For example, some members of either the Revolutionary Council or the Revolutionary Government presided as judges in the Special Criminal Courts Appeal Court that was established during that time.

Then, the introduction of the "People's Judicial System" where persons, the overwhelming majority of whom had no legal training, were appointed by the then single ruling party, and where such appointees presided as "People's Judges" in the "People's Courts" virtually extinguished any vestige of the independence of the judiciary. The completion of this process was capped and "formalized" with the promulgation and ratification of the 1974 Constitution wherein the judicial "organ of power," the Council of People's Justices, constituted part of the Legislature (the *Pyithu Hluttaw*). The judiciary's structure, composition, role, and

¹³⁴ MMT, *supra* note 85, at 2.

function under the provisions of the 1974 Constitution, especially Article 11, are predicated on the judiciary following the leadership of the then single and ruling Burma Socialist Programme Party¹³⁵. These provisions negated any vestige of separation—not to say independence—of the judiciary from the ruling Party elite in the days of the 1974 Constitution, which lasted from March 1974 to September 1988.

With the takeover by SLORC in September 1988, the Council of People's Justices together with other "organs of State power" that existed under the 1974 Constitution was abolished. The SLORC-appointed "Supreme Court" is "separate" from SLORC in that no member of SLORC presides as a judge in the current Supreme Court. However, it is a telling fact that it is the SLORC and the current SPDC, which have in the past appointed and dismissed, can still appoint and dismiss the Supreme Court judges.

In the context of the National Convention, occasional rhetoric about "separation of powers" and even "judicial independence" has emerged in speeches given at the National Convention by SLORC-appointed Chief Justice U Aung Toe¹³⁶ and in speeches given by former SLORC Foreign Minister U Ohn Gyaw to the General Assembly of the United Nations.¹³⁷ Some of the draft principles or proposals that emerged from the NCDC can be considered an "improvement" or at least a reversal from the provisions of the 1974 Constitution in which the non-separation as well as non-independence of the judiciary from the single ruling party was the norm. Yet, a study of some of the provisions of the NCDC regarding the appointment of judges and the reality in Burma¹³⁸ strongly indicates that the rhetoric of "separation of powers" and "judicial independence" is illusory, if not deceptive. Additionally, the lack of knowledge of and training in the concepts and practice of judicial independence in Burma also strongly indicates that there are formidable obstacles to be tackled and to overcome in reintroducing the concept and practice of judicial independence even if genuine efforts were to be made in that regard.

¹³⁵ Article 11 of the 1974 Constitution stated that "[t]he State shall adopt a single Party System. The Burma Socialist Programme Party is the sole political party and it shall lead the State." 1974 CONST. art. 11. This provision was in the Chapter entitled "Basic Principles."

¹³⁶ See *supra* notes 107, 109 and accompanying text.

¹³⁷ See *supra* note 108 and accompanying text.

¹³⁸ See *supra* notes 100-103 and accompanying text.

Given the illusory and deceptive nature of the rhetoric the “efforts” are neither genuine nor are they, in any way, substantial.

Yet, even in the level of such rhetoric and in the broader issues of human rights, there have been mixed and inconsistent signals. For example, in an address to the United Nations General Assembly on 24 September 1999, SPDC Foreign Minister U Win Aung categorically stated that “[w]e fully prescribe to the human rights norms enshrined in the Universal Declaration of Human Rights.”¹³⁹ Yet, around the same time in an interview with the BBC, Dr. Kyaw Win, Burmese Ambassador to the United Kingdom, was arguing that “there is a geographical divide in understanding this problem [about human rights].”¹⁴⁰ The concepts of separation of powers and independence of judiciary are espoused and endorsed in the occasional rhetoric that has emerged from the pronouncements in the National Convention. Such statements, however, as those of Dr. Kyaw Win that “[d]emocracy is a very delicate flower, it doesn’t grow easily anywhere and is not easily transplantable,”¹⁴¹ could well be “transplanted” into notions of judicial independence and into rejecting “judicial independence” as a “Western imposition.”¹⁴² In the same interview, Dr. Kyaw Win also “dismissed ... a United Nations report that has condemned Burma’s human rights record as a simple cultural difference between east and west,” that “[t]he UN is controlled by a few countries that are more powerful than the rest,” and that “there is a geographical divide in the understanding of this problem.”¹⁴³

¹³⁹ BURMA NET NEWS (electronic mail service), No. 1357, Sept. 27, 1999.

¹⁴⁰ BURMA NET NEWS, *supra* note 139.

¹⁴¹ Tim Sebastian, *Give Democracy Time*, BURMA NET NEWS, *supra* note 139.

¹⁴² For an argument that the notion of judicial independence can be found in various legal cultures including Islamic law and aspects of Burmese legal culture, *see supra* notes 2, 3, 8, 10 and accompanying text.

¹⁴³ Sebastian, *supra* note 141. This statement was made around the same time when Foreign Minister U Win Aung was informing the United Nations General Assembly that

we fully subscribe to the human rights norms enshrined in the Universal Declaration of Human Rights[,] that the government does not condone any violations of human rights, and the type of democracy we envision will guarantee the protection and promotion of human rights[,] and that ... the government [is] willing and ready to receive sensible suggestions and take whatever action we possibly could [to promote human rights].

BURMA NET NEWS, *supra* note 139.

Regarding the “geographical divide,” note also that the U.N. Secretary-General Kofi Annan has stated: “It was never the people who complained of the universality of human rights, nor did the people consider human rights

The obstacles to a reintroduction of judicial independence in Burma are many and they are very considerable. The lack of proper culture and training of judicial personnel in a climate of genuine constitutionalism and judicial independence makes the implementation of the idea of judicial independence a gargantuan task, even if democracy were to be restored, which, itself, is an extremely unlikely, if not almost impossible scenario, at least for the near future.¹⁴⁴

In 1963, soon after the March 1962 military coup, a magazine by the name of “Forward” was established by the then Revolutionary Government. In Burma, for the foreseeable future, it appears to be “forward” with total control of the judiciary by the military and no march backwards to the days of judicial independence.

as a Western or Northern imposition. It was often their leaders who did so.” United Nations High Commissioner for Human Rights (visited Feb. 2, 2000) <<http://www.unhchr.ch>>.

¹⁴⁴ See Zan, *Law and Legal Culture*, *supra* note 15, at 277 n.336 for the author’s more detailed arguments on the technical difficulties that must be overcome in establishing judicial independence and on his “pessimism” regarding prospects of democratization in Burma in the short- to medium-term future.