Judicial Independence in Burma: Constitutional History, Actual Practice and Future Prospects*

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Introduction

One of the cardinal aspects of the Rule of Law is that of judicial independence: that is the judicial branch of the government should be free as much as possible from the influence and dictates of the other branches of government. This article discusses the concepts and practice concerning judicial independence in Burma, especially since the time of independence in 1948. Constitutional provisions concerning the (non-)independence of the judiciary in the two defunct provisions of the post-independence constitutions of Burma[1], namely the 1947 and 1974 constitutions will be analysed and briefly commented upon. The focus of this article is mainly on the post -1948 and post-1962 developments.[2] Since parts of

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[1] The State Law and Order Restoration Council (SLORC) (which on 15 November 1997 reconstituted and renamed itself as 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. But 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 organisations, 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 see Mya Maung, "The Burma road from the Union of Burma to Myanmar" in 30(6) *Asian Survey* (June 1990) 602, 602 at note 1. This paper will generally follow the "politically incorrect" (or correct) 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.

[2] For a brief survey in historical perspective, of the practice of judicial independence (or non-independence) in the days of the Burmese Kings of the pre-colonial era see Myint Zan "Judicial Independence in Burma: No March

Burma were under British colonial rule for over a hundred years it is necessary to briefly consider the impact of British rule on the general concepts of rule of law and judicial independence.

The Impact of British Law and Judicial Independence During Colonial Times

As far as the British influence on the rule of law is concerned it would be appropriate to quote the late Dr Maung Maung who wrote in 1956 that: "the British established the rule of law in Burma, and that is good".[3] 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...[4]

And again more specifically:

> 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.[5]

In yet another of his pre-1962 books Dr Maung Maung had 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

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Backwards Towards the Past" (2000) 5 *Asian Pacific Law and Policy Journal* <http:www.hawaii.edu/aplpj/1/05f.html>, pp 1-6.

[3] Maung Maung, *Burma in the Family of Nations*, Djambatan, 1956. The statement was made in the abstract ("Stellingen") dated 27 June 1956 and at Point 5 of the 10 point summary at the beginning of the book.

[4] Maung Maung, *Burma's Constitution*, Martinus Nijhoff, The Hague, (revised ed) 7 (foot note omitted).

[5] Maung Maung, Note 4.

> 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 legal settlement will be taken to the courts and peaceably settled ... These virtues of the rule of law are most highly extolled today, [Maung Maung was writing around 1961 before the 1962 coup] and kept alive, to the extent that values can be given life in statutes, in the constitution and the laws[6]

In his pre-1962 writings Dr Maung Maung did acknowledge that the introduction by the British of the rule of law had its less laudatory and negative effects too:

> 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 soul-less.[7]

These quotations from Dr Maung Maung's pre-1962 writings are mentioned here to highlight his generally, indeed almost overwhelmingly positive views about the good influence the British had on Burma as far as the "rule of law" is concerned.

However, in his later writings of the post-1962 era, Maung Maung was severely critical of the "colonial British judicial system", ascribing to it entirely negative connotations. Almost all of the post-1962 writings 'reversing' some of his earlier writings were in Burmese and this author cannot give full citations of them.[8]

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[6] Maung Maung, *Law and Custom in Burma and the Burmese Family*, Martinus Nijhoff, The Hague, 1963, p 24.

[7] Note 6, p 25.

[8] 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 the "bourgeoisie (post-independence) Parliamentary system" can be found in Maung Maung, *Taya Upadei Ahtweidwei Bahuthuta* (General Law Knowledge) (Win Maw Oo Publications, Rangoon, 1975) and also in the foreword to *Taya Yone Myar Lett*

In those later writings Maung Maung asserted that the judicial system that the British brought about was formalistic and oppressive. He also stated that it made the Burmese more litigious; it favoured the gentry and capitalist class, and provided a fertile ground for British and a few Burmese barristers and lawyers to exploit the unsophisticated clientele. Most of all claimed Dr Maung Maung, the system was such that the "person who had the most money, wins the case".

What then should be the appropriate conclusion regarding the impact of British law as far as the rule of law is concerned? It would be fair to say that the impact of British law on the Burmese legal scene has been, in its different aspects, good, bad and neutral. Even though Dr Maung Maung was mainly praising the impact and legacy that the British left in his pre-1962 writings there were many criticisms of the negative effects of British law on Burmese social life. For example, Robert Taylor states 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". Taylor adds 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.[9]

Swei (Courts Manuals) of 1970, 1971, 1972, 1973. When the "General Law Knowledge" was published Dr Maung Maung was a member of "The Council of State," an "Organ of State power" under the defunct 1974 Constitution. When the foreword to the Courts manual was written Maung Maung was either Chief Justice or Judicial Minister during the era of the Revolutionary Council (1962-1974).

Dr Maung Maung's brief comments, in English, on the 1974 Constitution can be found in Blaustein AP & Flanz GH, *Constitutions of the Countries of the World*, Oceana Publications, New York, 1990, "Union of Myanmar (formerly Union of Burma)" under the heading "Commentary".

[9] Taylor RH, *The State in Burma*, C Hurst and Co, London 1987 at 104, 107.

The discussion as to the impact of British law has, so far, been limited to the general influence of the idea and notions of rule of law during colonial times. The writings of Dr Maung Maung have been cited to make the point that concepts of the rule of law – with its good and bad points - was brought about by the British. This author would argue that the British impact on Burmese law might not be as 'rosy' as Dr Maung Maung described in his pre-1962 writings or as dark or 'sinister' as his post–1962 assertions. While there *were* bad effects on Burmese legal and social life, the good points of the rule of law which (in Dr Maung Maung's words) was brought by the British, should not be denied.

Nevertheless acknowledging the British legacy (although not a long-lasting one) of the concept of the rule of law on the Burmese legal scene is not tantamount to saying that there was judicial independence during the colonial era. Although the colonial court structure was separate from the executive arm of the British colonial administration it would not be correct to state that there was full judicial independence during the colonial era. In any case, the author is not aware of any instance in which the acts of the executive and the British colonial government can be challenged in British colonial courts in Burma. Hence the checking and rechecking between the executive, legislative and judicial arms of the government did not happen 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 would be to limit rather than enhance executive power.

Though the courts during the colonial era were not fully independent their contributions in other areas of the law have been notable. It was scholars from or those sponsored by the British colonial administration which compiled, translated and categorise the *Dhammathats.*[10] And it was the British judges who through their decisions interpreted and transformed them into case law. During the British rule of the whole country the decisions of appellate courts were compiled into various law reports. These rulings, all of them in English, started with *Selective Lower Judgements of Lower Burma* (SJLB) (1872-92). The last series of Law Reports which compile the judgments of

[10] See Maung Maung, Note 3, at 9. See also Okudaira R, "The Burmese Dhammathat" in Hooker, MB (ed) *Laws of South-east Asia: The Pre-Modern Text*, 1, 41-56.

the courts of the British era (before Burma gained independence in 1948) were the *Rangoon Law Reports* (RLR) (1937-47).[11] The influence of the British rule as far as the notions of judicial independence is also discernible in the provisions concerning the independence of the judiciary of the 1947 Burmese constitution.

Judicial Independence under the 1947 Burmese Constitution (24 September 1947 to 1 March 1962)

There is an authoritative study of the 1947 Burmese constitution. It was written by Dr Maung Maung and the first edition was published in 1959. A revised edition was published in 1961[12] 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.

The 1947 Burmese constitution was drafted by a 111 member Constituent Assembly which met from June to September 1947. Even though the majority of members of the Constituent Assembly were non-lawyers a few of them were Burmese barristers and British-trained lawyers. Foremost among them was the late U Chan Htoon (1906-1988) who was in (pre-1962) an Attorney-General as well as a Judge of the Supreme Court of Burma (ie: the Supreme Court that was established under the 1947 constitution.). U Chan Htoon was one of the main drafters of the 1947 constitution. Dr Maung Maung stated that during the drafting of the 1947 constitution:

> [t]he 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[13]

The main drafters of the 1947 constitution were British trained lawyers. From this one could perhaps argue that notions concerning the rule of law and the independence of the judiciary could have been incorporated into the provisions of the 1947 constitution mainly through the efforts of these British-trained lawyers. This argument garners further support

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[11] See Maung Maung, Note 3, at 146 for a list of Law Reports that were compiled during the colonial era.
[12] Maung Maung, Note 4.
[13] Note 4 at 82.

from a comment of another Burmese barrister, the late U Myint Thein (1900-1994)[14] who also happened to be the third Chief Justice of independent Burma. He served in that post from October 1957[15] to 2 March 1962 when he was together with the President, Prime Minister, Cabinet Ministers and other important figures were arrested in the military coup.[16] On 30 March 1962 U Myint Thein's services were formally terminated by a decree of the Revolutionary Council.[17] U Myint Thein was released from "protective custody" on 28 February 1968.[18] In an article entitled "Comments on Dr Htin Aung's Dialogue with the Princess Learned in the law"[19] U Myint Thein 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.

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 had 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. It is in this context that the underlying theory of judicial independence as derived from

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[14] For an obituary-tribute of U Myint Thein by the author see Myint Zan "U Myint Thein, MA, LLB, LLD" in *Australian Law Journal* (1995), 225-27.

[15] For a profile of U Myint Thein at the time of his appointment as Chief Justice of the Union of Burma see Maung Maung, "Profile (U Myint Thein)", October 1957 *The Guardian* Magazine, Rangoon, Burma.

[16] See the news item "Army Takes Over Power, President, Chief Justice of Union, Prime Minister, Cabinet Ministers, Federal Leaders Detained for Security, Revolutionary Council Formed" in the 3 March 1962 of the [Rangoon] The *Guardian* newspaper.

[17] See Rangoon's *The Guardian* of 31 March 1962.

[18] See 1 March 1968 issue of *The Guardian* concerning U Myint Thein's (and other important figures) release from protective custody.

[19] The article appears in *The Working People's Daily* (Rangoon, Burma) in 24, 25 and 26 April 1974 issues. U Myint Thein was commenting on his younger brother Maung Htin Aung's article " A Conversation with Princess Learned-in-the-Law" which appeared in the 28 and 29 March issues of *The Working People's Daily.*

British traditions found its way into the provisions of the 1947 constitution. Some of the provisions of the 1947 constitution dealing with the independence of the judiciary and how they were put into effect through case law by the Supreme Court of Burma in the 1940s and 1950s is considered here.

Chapter VIII, sections 133 to 153 of the 1947 constitution, dealt with the "Union Judiciary". Section 136 established the Supreme Court, which was the Court of final appeal. Section 136 (2) stated that the "head of the Supreme Court shall be called 'the Chief Justice of the Union'". Section 140(1) stated that "the Chief Justice of the Union shall be appointed by the President ... with the approval of both Chambers of the Parliament in joint sitting".

Section 140 (2) stated that "all the judges of the Supreme Court and all the judges of the High Court shall be appointed by the President ... with the approval of both Chambers of Parliament in joint sitting". Section 142(1) laid down the qualifications necessary for appointment as a Supreme Court judge which, among others, include experiences as a judge of the High Court of Judicature of Rangoon (during the British times) or that the person must be an advocate of the High Court of at least fifteen years standing.

Section 144 stated that:

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

In his 1956 book *Burma in the Family Nations*, Dr Maung Maung reproduced this section with the apt comment that "this is another safeguard of the independence of the judiciary".[20]

However this particular section of the 1947 constitution became the object of scathing criticism, if not outburst, by President U Ne Win[21] in a speech he delivered sometime during

[20] Maung Maung, Note 3, at 121. See also Maung Maung, Note 4, at 150.
[21] General Ne Win took power in the military coup of 2 March 1962, and retired from the Army on 20 April 1972 - hence his formal title became "U" instead of General - and he became the first President of the Socialist Republic of the Union of Burma under the 1974 Constitution on 5 March 1974.

May 1974. President U Ne Win was giving a speech in a "report-back" session with the voters of his *Mayangon* Township (1) constituency about the events that occurred in the first session of the first *Pyithu Hluttaw* (People's Congress) which was held in March 1974.[22] U Ne Win recounted that Supreme and High Court judges under the 1947 constitution were too powerful. He said that the salary of Supreme and High Court judges could not be changed without their consent. His voice discernibly rising in anger, U Ne Win said that "this was a fact. It was written in the [1947] constitution". A few moments later assuming an air of magnanimity and perhaps not wishing to further harm an entity which had already been slain, President U Ne Win said, "Enough. My speech is having a slant against others [criticising other people]", and abruptly changed the subject of his speech.[23]

To illustrate the independence of the judiciary under the 1947 constitution, a limited number of cases and decisions by the Supreme Court and High Court of Burma from the period of 1948 to 1962 will be discussed here. In 1956, Dr Maung Maung wrote 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".[24]

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[22] On 2 March 1974, the Revolutionary Council, "handed over power" to the "people's representatives" in the first *Pyithu Hluttaw*. U Ne Win was chosen by the first *Pyithu Hluttaw* 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, of the experiences of the first session of the first *Pyithu Hluttaw* which had elected him President.

[23] The author listened to the speech on radio in May 1974 and clearly remembers the change of tone in U Ne Win's voice from slight anger: "Go and look at the [1947] constitution..." to "magnanimity": "Enough. My speech is having a slant on other people". A full text of this speech together with many others he had given from the period of 1962 to 1984 is reproduced in the two-volume *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") published by the Burma Socialist Programme Party, Party Central Committee Headquarters Press in 1984 and 1985. The speech was delivered on 11 May 1974 and the excerpt from that speech in the original Burmese can be found in Volume 4 (April 1983) of the collection of speeches stated above at pp 71-2. The English translation of U Ne Win's speech can also be found in 12 May 1974 issues of *The Guardian* and *The Working People's Daily*, Rangoon, Burma.

[24] Maung Maung, Note 3, at 122.

Later, in 1961, Dr Maung Maung wrote that the "ideal of the independence of the Judiciary and the rule of law has been a fixed and shining beacon on the shifting scene in Burma"[25].

Therefore a few cases which would illustrate the "fixed and shining beacon" of the judiciary maintaining its independence and the rule of law will be mentioned here.

In a case decided by the Supreme Court in 1949, a year after Burma achieved independence, the distribution of Communist party propaganda leaflets entitled "[m]urderer Thakin Nu's Fascist Government" was held [to be] no justification for preventive detention under the Public Order Preservation Act".[26] It is an irony of the changed times and the erosion of democratic rights and freedom of expression when one "fast-forward" events from 1949 to 1995. About Forty- five years after this decision was given former Prime Minister U Nu – who was detained twice for about a total of seven years and spent eleven years in self-imposed exile - died in 1995. Students who sang democracy songs and shouted slogans - in honour of U Nu and in protest against the government - at U Nu's funeral were arrested and sentenced to several years in imprisonment

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[25] Maung Maung, Note 4, at 151.

[26] Maung Maung, Note 3 at 122 citing the case of *Ma Ahmar v The Commissioner of Police and One*, 1949 BLR (*Burma Law Reports*) SC (Supreme Court) 39. The ruling was written in English. 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*. However several years after independence 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 (1907-1995) was Prime Minister of Burma from 1948 to 1956 and 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". The State Law and Order Restoration Council (SLORC) repeatedly demanded U Nu to withdraw his announcement and to disband the government which he had announced. 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, Burma, on 14 February 1995.

for doing so.[27] 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 honoured U Nu by singing democracy songs at his funeral had no "Supreme Court" to turn to have their convictions quashed.[28]

Similarly in other preventive detention cases the late Supreme Court[29] had shown its independence by striking down many of the actions of the executive. In *Ma Thaung Kyi* v *The Deputy Commissioner, Hanthawaddy and One*[30] the late Supreme Court held that "rubber stamp" detention orders, ie. those which were automatically passed by authorised officers on list of names submitted by their subordinates, were illegal. In *Daw Mya Tin* v *Deputy Commissioner, Shwebo and One*[31] the late Supreme Court also held that it was illegal to delegate the powers of preventive detention which were entrusted by law only to certain officers.

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[27] See *Report on the Situation in Myanmar*, prepared by Yozo Yokota, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution, 1995/72, UN Document E/CN.4/1996/65, 5 February 1996 (hereafter quoted as "Special Rapporteur") at paragraph 95: "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'.

[28] There is currently a "Supreme Court" (in Burmese *TayarYoneGyoke*) in Burma 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 quashed. 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 honour of U Nu were jailed up to a period of seven years without any chance of judicial review.

[29] 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" will be used.

[30] 1949 BLR (SC) 30. The ruling was written in English.

[31] 1949 BLR (SC) 99. The ruling was written in English.

Indeed the late Supreme Court had declared an action of the President of the Union to be ultra vires of an Act under which the President purported to act.[32] The *Bureau of Special Investigation Act* 1949 Section 24 authorised the President to make amendments to the list in the schedules of the Act. However, the President instead of amending the schedule merely inserted another item to the schedule which stated that "Such 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 late Supreme Court, among others, 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".[33] The Supreme Court further 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[34]

And again:

> 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.[35]

Dr Maung Maung has mentioned this case in a positive light in his pre-1962 writings. However writing around 1992 Maung Maung stated that "there has been no major case in which the Myanmar Supreme Court [of the 1947 constitution] has

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[32] *Ah Kam v U Shwe Phone & Others*, 1952 BLR (SC) 222. The ruling was written in English. The summary of the case and the judgement 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 Maung, *Note 4*, at 152-153.

[33] *Ah Kam* v *U Shwe Phone* at 224.

[34] *Ah Kam* v *U Shwe Phone* at 225.

[35] *Ah Kam* v *U Shwe Phone* at 225-26.

declared a legislative act ultra vires." [36] Dr Maung Maung added that the reluctance of the Burmese Supreme Court to strike down legislation might have been due to "the constitutional practice" under the 1947 constitution of putting "a liberal construction on the constitution itself".[37] Maung Maung, who had so solidly and profusely praised the late Burmese Supreme Court added (somewhat cynically) that "Some cynic has observed that the US Supreme Court follows the results of presidential elections. That may also apply to Myanmar."[38]

It is true that there was "no major case" in which the late Burmese Supreme Court did not declare an act of the legislature as ultra vires as per the 1947 constitution. However Maung Maung conveniently forgot 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 Kham* v.*U Shwe Phone* case. Moreover 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. Moreover, Dr Maung Maung who was a visiting scholar at Yale Law School under the Ford Foundation Fellowship (the programmes 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 "US Supreme Court follow[ing] the result of Presidential elections" is not quite correct. (Perhaps he was and the more plausible comment on his statement as it is on most of his statements regarding post-1962 legal and political developments, is that it 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 US Supreme Court regularly struck down the progressive social legislation of President Franklin Roosevelt.[39] In parts of the decade of 1950s a liberal Supreme Court agenda

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[36] Maung Maung, "Burma's Laws and Policies on Foreign Investment" in *Foreign Investments Laws of South East Asia* (Singapore, 1992) (hereafter quoted as Maung Maung, *Foreign Investment*) 614.

[37]Maung Maung, *Note 36.*

[38] Maung Maung, *Note 36.*

[39] See for example, Elliott S. (general editor), *A Reference Guide to the United States Supreme Court*, Sachem publishing Associates, 1986 at 299.

was not in conformity with the policies of the Republican administration of President Eisenhower.[40]

Perhaps it could be said that among all the periods discussed in this article, the period of 1947-1962 was the period in which the independence of the judiciary is most prominent. The above case laws and discussion are only selective. It is intended to give a glimpse of the workings and independence of the judiciary during the period of the 1947 constitution.

It would be appropriate to end the discussion on the independence of the judiciary of the 1947 constitution period with quotations from Dr Maung Maung. In a painful and prophetic statement Dr Maung Maung, writing several months before the 1962 military coup, had this to say concerning the (then future of) independence of the judiciary in Burma:

> If 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.[41]

And again:

> ... 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.[42]

In relation to these comments it should be said that the independence of the Burmese judiciary *did* wither and die and the prospect of the revival of the independence of the judiciary as in the period between the late 1940s and the early 1960s

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[40] See for example the liberal agenda and legacy of the [Chief Justice Earl] Warren Court during Eisenhower's Presidency in *Note 39*, at 349-353.) It is evident that, at least at times, "the US Supreme Court" does not always "follow the result of presidential elections".

[41] Maung Maung, *Note 4*, at 155.

[42] Note 4 at 217. These are virtually the last sentences of the last edition of Maung Maung's book. Several months after its publication, *internal* events, namely the military coup of 1962, signalled the demise of the 1947 constitution.

remains only, to paraphrase Maung Maung, a dim, distant and unpromised prospect.

Judicial Independence during the Revolutionary Council Period (2 March 1962 to 1 March 1974)

The military takeover of 2nd March 1962 has already been alluded to in the previous sections. After the formation of the Revolutionary Council and the Revolutionary Government of the Union of Burma, the Revolutionary Council (RC) by a decree abolished the Parliament on 8 March 1962.[43] The Supreme and High Courts were also abolished by a decree of the RC on 30th March 1962.[44]

This is indicative of the fact that the Revolutionary Council considered the two apex courts and the Parliament, if not a threat to itself then at least a possible obstacle to its grip on, and perpetuation of, power. The control that was exercised by the Burmese military in the aftermath of the 1962 coup was total. Hence there was not a chance that any legal challenge to the Army's usurpation of power could have been made in Burmese courts. Such legal and constitutional challenges against military rule had occurred in other Asian countries with common law backgrounds. 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 laws issued by the military government as a result 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.[45]

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[43] See 9 March 1962 issues of Rangoon's The *Guardian* and The *Nation* for news items concerning the abolition of Parliament.

[44] See 31 March 1962 issues of The *Guardian* and The *Nation* for news items concerning the abolition of the Supreme and High Courts.

[45] See *The State* v *Dosso*. Pak LD (1958) SC 533. For a different view which, in effect, overruled *Dosso* see *Jilani* v *Government of Punjab*, Pak LD (1972) SC 319. In fact 41 years after the challenge of the laws issued by the 1958 military takeover the legality of the 1999 Pakistani military takeover was challenged in the Pakistani Supreme Court. See Nang Mo Kham Hom's article "'Revolutionary Legality': The Coup d'Etat of 1962 and the Burmese Military Regime", this volume, at footnote 4. The fact that spanning a space of over forty years different challenges either to the laws issued by a military regime (regarding the 1958 Pakistani military takeover) or the legality of the military

Soon after the abolition of the Supreme and High Courts of Burma, a new Court called the Chief *Court (Tayar Yone Gyoke)* was established. U Bo Gyi, a judge of the abolished Supreme Court was appointed as the Chief Justice of the Chief Court[46] The Revolutionary Council later appointed Dr Maung Maung as Chief Justice of the Chief Court in 1965. In July 1971 Dr Maung Maung became a member of the ruling Revolutionary Council and Judicial Minister. U Hla Thinn became the Chief Justice of the Chief Court until its abolition and replacement by the Central Court of Justice when the 1974 constitution came into effect in March 1974.

Writing a few months after the 1962 coup, Dr Maung Maung stated that, immediately following the coup 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.[47]

Indeed, one of the first decrees of the Revolutionary Council stated that all existing laws shall continue to be in force unless specifically repealed, a practice which was followed by its

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regime itself (regarding the 1999 military takeover) can be challenged in Pakistan in 1958 and 2000 respectively would indicate that the independence of the judiciary in Pakistan, is in comparison with Burma, operational if not thriving.

[46] 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 again reverted to "Supreme Court" even though the Burmese nomenclature did not revert to *Tayar Hluttaw Gyoke* and remains *Tayar Yone Gyoke*. However to simplify matters 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 again used officially.

[47] Maung Maung, *Note 6*, at 123-124. 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 favouring "secession of the Shan states from the Union". Her husband replied that "personally he didn't, but the right of secession is guaranteed under the Constitution". 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". (Inge Sargent, *Twilight over Burma: My Life as a Shan Princess*, 1994, University of Hawaii Press, 168).

"legatee" the State Law and Order Restoration Council (SLORC) twenty-six years later in September 1988.[48]

What are the laws which in effect ceased to operate when the Revolutionary Council took over? All, or almost all, civil or criminal laws that existed before its takeover continued to operate. The laws that began to lose their effect are 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 it embodied deteriorated if these were (at least gradually) not altogether extinguished. The 1947 constitution was not formally (ie by a decree or announcement of the Revolutionary Council) abolished or even suspended. However, as stated above, the Parliament and the Supreme and High Courts of Burma -two of the main pillars of the 1947 constitution- were abolished. This, in effect, ended the operation, functions and in many cases relevance of all the major provisions of the 1947 constitution in the Revolutionary Council period. The 1947 constitution was formally superseded by the 1974 constitution when the 1974 constitution came into effect.

To analyse the independence or non-independence of the judiciary in the post- 1962 era in Burma it is helpful to briefly revert back to how aspects of public law or more specifically administrative law operated during the period of the 1947 constitution. In the first 14 years of Burma's independence the late Supreme Court issued such writs as *Habeas Corpus*, *Certiorari* and *Prohibition*, *Mandamus* and *Quo Warranto*.[49] The practice of issuing writs also fell into desuetude even though they were – again - not formally abolished by decrees of the Revolutionary Council. With the abolition of the Supreme Court and High Court of Burma, the guardians of the constitution,

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[48] SLORC Declaration No. 6/88, 24 September 1988. As for the fact of most of the laws remaining in force after both the 1962 and 1988 military takeovers this observation from Margaret Davies, *Asking the Law Question*, (Law Book Company, 1994) 84 is perhaps 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.

[49] 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" in Maung Maung's *Note* 4 at 98-104.

these writs also lost their relevance and applicability. At least some of these writs dealt with checking the excesses of the executive branch of the government in matters of preventive detention.[50] In the Revolutionary Council period, there were hundreds of arrests, and "protective custodies" (or detentions without charge and trial). It would be pointless to turn to the Chief Court of Burma, which succeeded the Supreme Court, to issue such writs. The pinnacle of the Burmese judiciary, the Chief Justice of the Union himself was under detention. To paraphrase the saying "Who would guard the guards?": "Who would protect the protectors?". Far from being able to continue to protect the rights of the Union citizen, the late Supreme Court could not even protect itself.

Indeed in relation to the hundreds of detainees in the Revolutionary Council period (1962-1974), the period of the 1974 constitution (1974-1988) and indeed during the post 1988 State Law and Order Restoration Council (SLORC)/ State Peace and Development Council (SPDC) period (1988 to present) the author is not aware of a single case in which the 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[51], should tellingly indicate how starkly different was the state of judicial independence in Burma in the pre- and post-1962 periods.

The structure and composition of the Courts during the post-1962 period should also throw some light on the state of judicial independence during the post 1962 era. The Revolutionary Council, in addition to the formation of the Chief Court, which remains the final court of appeal, also formed other special courts such as the Special Criminal Courts Appeal Court. The composition of members of the Appeal Court should also give some pointers on judicial independence. Members (Judges) of the Chief Court were (in the 1960s and early 1970s) professional judges. Subtle but severe constraints

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[50] See, for example, Maung Maung, *Note 4* 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.

[51] For an example of the late Burmese Supreme Court in the year 1949, ordering the release of detainees and/or ruling that preventive detention orders were illegal, see case citations and discussions in text and notes accompanying above notes 26, 30, and 31.

(after all the Chief Justice of the late Supreme Court was in "protective custody" during most of the 1960s) might have prevented the judges of the Chief Court from exercising their judicial functions independently. As stated earlier in preventive detention and protective custody cases it is structurally impossible for the Chief Court to exercise its independence by ordering the release of hundreds of those who were in "protective custody", preventive detention or other forms of detention without charge. From 1962 to the time the 1974 constitution was adopted, the Chief Court was the highest judicial arm of the government. It was also separate from the Revolutionary Council, the legislative arm of the government and the Revolutionary Government which is the executive in the governmental structure during this period.

The Revolutionary Council also established by decree the Special Criminal Court Appeals Court. In the Special Criminal Courts Appeal Court (SCCAC), a panel of three judges sat and heard cases from the lower Special Criminal Courts. At least one of the judges in the SCCAC was a member of either the Revolutionary Council or the Revolutionary Government.[52] Hence, in the period of the Revolutionary Council, in some instances, there was no clear line of separation of the judiciary from the legislative and executive arms of the government since members of the legislative and executive arms of the government also served in the special courts and tribunals.

There was also another development that ought to be mentioned here to illustrate the "withering away" of judicial independence, especially in the lower courts. That was the introduction of the "People's Judicial System" in August 1972:

[52] Members of the Revolutionary Council and the Revolutionary Government overlap. For example General Ne Win was from 2 March 1962 to 2 March 1974 "Chairman of the Revolutionary Council and Prime Minister of the Revolutionary Government of the Union of Burma". On 5 March 1974 U Ne Win became the first President of the Socialist Republic of the Union Of Burma under the 1974 constitution. He was 're-elected' by the *Pyithu Hluttaw* (unicameral one party Legislature) to a second term as President in January 1978. He retired from the Presidency on 9 November 1981 but retained the position of the Chairman of the sole and ruling 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 Revolutionary Council were members of the Revolutionary Government though not all members of the Revolutionary Government were members of the Revolutionary Council.

a system which lasted till about 1989 when SLORC abolished the name of 'People's' from the names of the 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. On 7th August 1972, the People's Judicial System was introduced. Professional judges were removed from their posts and People's Judges sat on committees of three persons to administer justice.[53] The People's Justices were appointed and were members of the Party. More than 90% of the People's judges did not have legal qualifications.[54]

At first the People's Courts only handled criminal cases but from 29 June 1973 civil cases also had to be litigated before the People's Courts. Some of the professional judges who were removed from their posts were reappointed as Court Advisers. Their role was to advise the People's Judges but their advice was not binding. To be 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.

The author has elsewhere discussed the situation prevailing at the time of the "People's Judicial System" and how it had operated.[55] Suffice to say it here that the introduction of the People's Judicial System spelled the death knell of the independence of the judiciary at least as far as the lower courts are concerned. For, by removing professional judges and appointing "People's Judges", virtually all of whom were party members and approximately 90% of whom did not have legal qualifications[56], not only the quality of the administration of justice was severely effected but also any vestige of independence disappeared. This was so because all the judges were "Party-appointees" – of the single Party - they always had towed the "Party-line" in the administration of justice.[57] Andrew

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[53] See 8 August 1972 issues of *The Guardian* and *The Working People's Daily*.

[54] See Dr Htin Aung, "A Conversation with Princess-Learned-in-the-Law, Part II", 29 March 1974, *Note 19*, at p.2.

[55] See Myint Zan, "Law and Legal Culture, Constitutions and Constitutionalism in Burma", in Alice Tay (ed) *East Asia: Human Rights, Nation-Building, Trade*, Nomos Verlagsgesellschaft, 1999, at 232-236.

[56] This fact was stated in an article by Maung Htiin Aung, "A Conversation with Princess Learned in the Law Part I" 28 March 1974 of *The Working People's Daily* (Rangoon), Note 19 at p 2.

[57] It should be stated that fulsome praise for the "People's Judicial System" has emanated from the person who initiated the system himself. The late Dr

Huxley has described the "People's Judicial System" as a system where the "[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".[58] With the coming into force of the 1974 constitution the non-separation as well as non-independence of the judiciary and the subjugation of all three branches of the government to the ruling Party became constitutionally formalised and complete.[59]

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's Maung's statements concerning the People's Judicial System and for discussion and refutation of his arguments, see Myint Zan "Law and Legal Culture" n 55 at 232-36. Andrew Huxley has, in his article "The Last Fifty Years of Burmese Law: Maung E & Maung Maung" *Law Asia* (1996-1997) 9-20, *partially* complimented some of the motives for the introduction of the "People's Judicial System". He describes Maung Maung's "reforms" as "unBritish[ing]" the judiciary (at 14). (Note however that Maung Maung had given fulsome praise about the 'rule of law' 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 this author expressing "philosophical disagreement" with Huxley concerning Maung Maung's sincerity and about his "socialism" and Maung Maung's motives in relation to his "judicial reforms" (in introducing the People's Judicial System) see Myint Zan, "Comment on Fifty Years of Burmese Law: Maung E & Maung Maung in *Law Asia* (1996-1997) in *In Camera* (1998) (Deakin University Law Student Magazine) at 39-40.

[58] Huxley, see Note 57, at 15.

[59] 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 Revolutionary Council 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 *Guardian* and The *Working People's Daily* of 24 March 1964.) Article 11 of the 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". 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 multi-party 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 multi-party elections see 12 September 1988 issues of The *Guardian* and The *Working People's Daily*.) On 18 September 1988 the State Law and Order Restoration Council took over power and on the same day it abolished by decree "The Law Protecting National Unity". (See 19 September 1988 issue of The *Working People's Daily*)

Judicial Independence in the period of the 1974 Constitution (2 March 1974 to 18 September 1988)

A "referendum" to adopt the 1974 constitution of the "Socialist Republic of the Union of Burma" was held from 15th to 31st December 1973. The constitution was adopted on 3rd January 1974.[60]

The provisions concerning the judiciary can be found in Chapter VII under the heading of "Council of People's Justices"(CPJ). Article 95 stated that the members of the CPJ are to be elected from "The *Pyithu Hluttaw* whose names are on the list submitted collectively by members of the Council of State". [The *Pyithu Hluttaw*, under the 1974 constitution, is a unicameral single party Legislature. "Elections" to the first *Pyithu Hluttaw* under the 1974 constitution – the lower House of Parliament, the Chamber of Deputies, under the 1947 constitution is also in Burmese nomenclature called the *Pyithu Hluttaw*- was held from 27 January 1974 to 5 February 1974. There was only one candidate to the *Pyithu Hluttaw* for whom the voters have to for or against in 451 constituencies throughout the country. Almost all candidates were 'preassigned' the constituencies in which they participated in these elections and almost all, if not all are members of the single ruling party BSPP. Members of the *Pyithu Hluttaw* dutifully always 'support' whatever legislation that was put forward in the *Pyithu Hluttaw*. All members of the organs of State Power, the Council of State (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), the Council of Ministers (the cabinet), the Council of People's Justices (CPJ) (the top judicial organ), the Council of People's Attorneys (the 'Attorney-General Office'), the Council of People's Inspectors ('Auditor-General Office') are all members of the *Pyithu Hluttaw*. And the *Pyithu Hluttaw* accepts 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".

The Council of State nominates and the *Pyithu Hluttaw* elects, among its own members, the members of the CPJ. Moreover

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[60] 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" above Note 55 at 232-45.

Article 104 stipulated that the CPJ "shall be responsible to the *Pyithu Hluttaw* on the state of the administration of justice". Members of the top judicial "organ of power" were, under the 1974 constitution, members of the Legislature. In addition, they had to report to it and were "responsible to it". This situation is in stark contrast to the provisions of the 1947 constitution in which both the members of the Supreme Court and High Court were not members of either Chamber of Parliament. (Under the ordinary conventions and practice 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, however, contained a provision which was absent in the 1947 constitution. Article 104 of the 1974 constitution stated that:

> 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 guarantee in all cases the right of defence and the right of appeal under law; and (h) to aim at reforming moral character in meting out punishment to offenders.[61]

On the other hand there were no provisions in the 1974 constitution regarding the minimum qualifications for a person to become a member of the Council of People's Justices. This can be contrasted with the provisions concerning the Union Judiciary which were also under Chapter VII in the 1947 constitution. Section 142(1) of the 1947 constitution laid down the requirements to be fulfilled for a person to become a Judge

[61]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".

of the Supreme Court. Section[62] 142(1)(b) stated that, in addition to other requirements a person to be appointed as a judge of the Supreme Court must 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.

Indeed in the First *Pyithu Hluttaw*[63] among the five members of the CPJ only one was a lawyer. The first Chairman of the CPJ was U Aung Pe, a former Colonel and a Divisional Commander. He served as Chairman of the Council of People's Justice from 1974 to 1981.[64] The second Chairman of the CPJ was U Moung Moung Kyaw Win, a former Brigadier, Judge-Advocate-General and barrister, and on his death, U Tin Aung Hein succeeded him in about 1983. U Tin Aung Hein has a law degree.

The Supreme and High Courts under the 1947 constitution had the power of judicial review and also the power to interpret the constitution and the laws.[65] As stated earlier, writing in 1992 Dr Maung Maung stated that "there has been no major case in which the Myanmar Supreme Court [of the 1947 constitution] has declared a legislative act *ultra vires*"[66]

Dr Maung Maung should have mentioned that the judiciary under the 1974 constitution also never "declared a legislative act *ultra vires*", which in any case is a contradiction if not a

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[62] It is to be noted that though the Burmese term *Poke-Ma* was used for both Sections/Articles under the 1947 and 1974 Constitutions, the English word Section was used in the 1947 Constitution and Article was used for the 1974 Constitution.

[63] Under Article 43 of the 1974 constitution, "The regular term of the *Pyithu Hluttaw* is four years from the date of the first session".

[64] MMT (pen name of U Myint Thein, see n 14, n 15, n 16 above), 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." U Aung Pe was re-elected once in the second *Pyithu Hluttaw* and served as Chairman of CPJ for about seven years.

[65] See text and notes accompanying n 24-26.

[66] See text and notes accompanying n 36-38.

legal impossibility, taking into account the structure of the 1974 constitution. The judiciary did not even have the power to interpret the laws and the constitution. Article 200 (c) of the 1974 constitution stated:

> 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*.

Article 201 stated that:

> The *Pyithu Hluttaw* may publish interpretations of this constitution from time to time as may be necessary.

Hence interpretation of the constitution and laws under the 1974 constitution is the exclusive role of the Legislature (*Pyithu Hluttaw*).

The author recalls that during his law student days in Burma constitutional law was taught by a Burmese advocate who was then a central committee member of the (single and ruling) Burma Socialist Programme Party. The lecturer compared the provisions of the 1974 constitution with those of the Eastern European countries. He dictated[67] to us that the concept of separation of powers was a selfish action taken by the capitalists and the bourgeoisie. 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) nationalised major Indian banks, the banks argued in the Indian Supreme Court that the Indian Parliament's action of nationalising the Banks was unconstitutional. The Indian Supreme Court, consisting of capitalist judges, agreed, thus thwarting the elected Indian Legislature's socialist development plans. Therefore, the lecturer asserted, the power to interpret the constitution and the laws must be given only to the Legislature.

It needs to be mentioned that even if, for argument's sake, the Council of People's Justices under the 1974 constitution, were given the power to interpret the constitution, it would not have

[67] The word "dictate" is used here literally. The Lecturer "dictated" from prepared notes. The comparisons were made with then Eastern European one-party constitutions. The author clearly remembers that the Lecturer once dictated "Yugoslovakia". (He may have meant either Yugoslavia or Czechoslovakia.)

deviated in any way from the wishes of the *Pyithu Hluttaw* and the Party since all members of the CPJ were also members of the *Pyithu Hluttaw* and the Party. The Judiciary thwarting the wishes of the elected Legislature is only possible, and can only occur, in a situation in which the Judicial arm of the Government is separate from the Legislative arm, as in the 1947 constitution, and not when members of the Judiciary are also members of the Legislature, as was the case under the 1974 constitution.

Hence the rejection of "separation of powers", and an "independent judiciary" in legal thinking, education and practice pervaded the period of the 1974 constitution. Indeed, the 1947 constitution itself was attacked in negative, colourful terms in the preamble of the 1974 constitution.[68]

The concept of judicial independence therefore became both formally, constitutionally rejected and actually non-existent during the period of the 1974 constitution. A brief comparison can be made with the structure and composition of the judiciary or the top judicial organs of the State in the period of the 1974 constitution with those of the days of pre-colonial times.[69]The fact that members of the "Legislature"(*Hluttaw*) such as the King's Ministers also acted as a court of final appeal during the days of the Burmese Kings can be compared with the structure and functions of the "Council of People's Justices" in the 1974 constitution. As in the pre-colonial times members of the Council of People's Justices were also members of the *Pyithu Hluttaw*.

The issue as to which constitution - the 1947 or the 1974 constitution or the ideology embodied in them - is more in consonance with the traditional Burman concepts of power as

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[68] The text of the 1974 Constitution can be found in Blaustein & Flanz, Note 8, under the heading "Union of Myanmar (formerly Union of Burma)". In fact when the 1990 edition was published Burma did not then, as is still the case in February 2001, have a constitution - the 1974 Constitution having come to an effective end with the ascension of the State Law and Order Restoration Council on 18 September 1988. Blaustein & Flanz do reproduce Declaration No. 2/88 (18 September 1988) of the State Law and Order Restoration Council which abolished all "Organs of State Power" under the 1974 constitution but they do not make it explicit that the 1974 constitution is no longer in force. The text of the 1947 constitution can be found in all the editions of Maung Maung, *Burma's Constitution (Note 4)*.

[69] See the section on "The Extent of Judicial Independence in Pre-Colonial Burma" in "Judicial Independence in Burma: No March Backwards Towards the Past" above Note 2 especially text and notes accompanying n 5.

exercised in the days of the Burmese Kings is discussed elsewhere by the author. [70] Suffice to state here briefly that the 1947 constitution came to an end through a military coup and the 1974 constitution ended through a people's uprising – even though SLORC were formally responsible if not for abrogating the 1974 constitution then for abolishing the "organs of State power" that were formed under the 1974 constitution. Therefore from these events it is arguable that a system whereby the "Legislature, the Executive and the Judiciary operate as aspects of the one party State"[71] is no longer acceptable to the majority of the Burmese.

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 NLD has occasionally expressed its view 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 late 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 1974 constitution did not accept, indeed it rejected, the concept of judicial independence. By an overwhelming majority the Burmese people have spoken of their preference for a democratic rule[72], which among others, include the concept of judicial independence.[73] The majority of the Burmese people's wish for a democratic and accountable government with an independent judiciary has been expressed in the 1990

[70] See Myint Zan, Note 55, at 242-44.
[71] See text accompanying n 58 above.
[72] The main opposition party, the NLD, won just under 60% of the votes. 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, it should be mentioned, was never held. Other parties won the major shares of the remaining 15 % of the vote. If Parliament or National Assembly – that were elected by voters in the May 1990 elections - were to be held the NLD and the parties allied to it would have obtained more than four fifths of the seats in the Parliament. Hence both in terms of popular votes and in terms of seats in the never-convened Parliament it can safely be said that the overwhelming majority of the peoples of Burma had in 1990 voted for democratic and accountable government.
[73] See notes accompanying n 74 below.

elections.[74] 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 materialised in the "future democratic State". Yet notwithstanding these, in the current circumstances and as is explained in the next section, the reintroduction of genuine constitutionalism and judicial independence in Burma would, to a very large extent, remain only a pious hope.

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

The events concerning the 1988 uprising and the takeover of power by the State Law and Order Restoration Council (SLORC) is discussed elsewhere by this author.[75] On the day of its takeover on September 18,1988 SLORC abolished all organs of

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[74] It is not meant here to imply that most of the Burmese who had voted for the democratic parties in the elections of May 1990 were aware of, or understood them even in their rudimentary forms, the issues of constitutionalism or independence of the judiciary. Most of them would have 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, "In Quest of Democracy" in *Freedom from Fear and Other Writings*, (ed Michael Aris) (Penguin, 1991) 167 at 173.

However Alice E-S Tay was more specific in describing and analysing the struggles of other peoples for democracy. And - it should be added - the outcomes of such struggles has 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 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" in Tay AE & Leung CSC (eds), "Constitution-making and Restructuring in the Present and Former Communist World", (58/5) *Bulletin of the Australian Society of Legal Philosophy* at iii.

[75] See Myint Zan, "Law and Legal Culture" n 55 at 251-54.

State power that were formed under the 1974 constitution.[76] Hence the "Council of People's Justices" – the top judicial organ that was formed under the 1974 constitution- was abolished. This lacuna was soon filled. Nine days after its takeover on 27th September 1988 the SLORC, referring to Section 3 of the 1948 Union Judiciary Act appointed a "Supreme Court" (*Tayar Yone Gyoke*)[77], consisting of five members. U Aung Toe[78], a retired

[76] SLORC Announcement No. 1/1988 announced the formation of SLORC and the fact that it has taken over power. Announcement No. 2/1988 of announced 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. In addition, in the same order SLORC also announced that the Deputy Ministers had also been "relieved of their duties". (Under the 1974 Constitution there are provisions concerning the formation of the Council of Ministers- the cabinet- but there were no provisions concerning the appointment of Deputy Ministers. However during the period of the 1974 constitution 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 the SLORC probably felt it necessary to specifically mention that the Deputy Ministers' appointments had also been terminated.)

[77] The Burmese nomenclature that was used in the period between 1962 and 1974 was used for the Supreme Court that 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* – the nomenclature that was used in the days of the Chief Court/Supreme Court from April 1962 to March 1974. The socialist sounding – the SLORC also changed the country's 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 - "Chairman of the Council of People's Justices" of the 1974 constitution was eschewed for the SLORC-appointed Supreme Court Chief Justice. To distinguish the SLORC-appointed Supreme Court from the late Supreme Court of the 1947 constitution, as the occasion requires, the Supreme Court of the post-1988 years would be described as "SLORC Supreme Court".

[78] As of February 2001, U Aung Toe has served as head of the judiciary for more than 12 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. He was succeeded by the late U Thein Maung (1890-1975) who served from 1952 to 1957. U Thein Maung was succeeded by the late U Myint Thein (1900-1994) as the third and final Chief Justice to be appointed under the provisions of the 1947 constitution. The late U Bo Gyi, a puisne judge of the late Supreme Court, was appointed by the Revolutionary Council as the Chief Judge of the Chief Court (*Tayar Thugyee Gyoke*) in 1962 and he served in that post to about 1965. In 1965 the Revolutionary Council appointed the late Dr Maung Maung (1925-1994) as Chief Judge. In 1971 Dr Maung Maung became Judicial Minister and a member of the Revolutionary

Registrar of the abolished "Central Court of Justice"[79], was appointed by SLORC as Chief Justice of the Supreme Court.

The SLORC did abolish the "People's Courts" system that was in force since 1972. In any case it renamed the courts dropping the terms " People's" in front of the names of the courts. The author has also learnt – though it cannot be cited with reference to published sources –that in non-political, non-security cases professional (ie judges with legal qualifications) judges are presiding in the civilian courts. However in political cases the defendants are tried in military tribunals and courts.[80] 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 on *Burma: Beyond The Law* stated that judges "were in practice subjected to tight control by the SLORC at all times. Judges enjoyed no tenure of office, and were under clear instructions to take the lead from their military masters in the discharge of their functions."[81] The International Commission of Jurists also reported that most cases are tried in a summary manner and verdicts are determined in advance of the trials.[82] Another

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Council and the Revolutionary Government of the Union of Burma. Dr Maung Maung was succeeded by U Hla Thinn as Chief Justice in 1971 (the nomenclature in English was changed from Chief Judge to "Chief Justice" in the early 1970s) and he served in that post till March 1974 when the Chief Court/Supreme Court was abolished with the coming into force of 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 Moung Moung Kyaw Win until his death and 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 18th September 1988. Hence U Aung Toe is the longest-serving Chief Justice or Head of the judiciary in post-independence Burma.

[79] "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" (In 1978 the membership was extended to seven). Three of them sat as the "Central Court of Justice" and as a final Court of Appeal from the lower courts). Only in very rare cases when there is a reference or revision (in Burmese *Saw-Daka-Ahhmu*) case would the full membership of the Council of People's Justices sat as a "full bench" of the Central Court of Justice.

[80] For a detailed analysis of the functioning of martial law, military tribunals and civilian courts during SLORC rule (till about 1996) See Venkateswaran KS, *Burma: Beyond the Law* (Article 19 Publications) 34-40 (hereafter cited as *Beyond the Law*).

[81] Beyond the Law, *Note 80* at 38.

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

report by *Asia Watch* stated that 62 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.[83]

The above discussion is a summary of the analyses and comments concerning judicial independence under SLORC rule especially in its early years. The future (possible) constitutional arrangements that may (or may not) materialise will now be discussed as regards the role and independence of the judiciary. The SLORC has been holding a "National Convention" (NC) since January 1993[84] with the avowed purpose of laying down principles for a new constitution which, among others, would enshrine and perpetuate military rule.[85]

A shift - though mainly in rhetoric - 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. (For the principles that have been reported as "agreed upon" by the National Convention will be mentioned henceforth as "National Convention Draft Constitution", NCDC, henceforth. However it is not clear as to 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.[86])

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[83] Asia Watch, *Human Rights in Burma*, (New York, 1990) 12.

[84] 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 Myint Zan, "Law and Legal Culture", note 55, at 258-67. For a discussion, of the genesis, composition, structure and functioning of the National Convention from an international law perspective, see *Beyond the Law, Note 80* at 66-71.

[85] Even before the National Convention began in January 1993 SLORC had already laid down six objectives of the NC, 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." The NC had already 'agreed' 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 "Law and Legal Culture", note 55, at 263-65.)

[86] See *Beyond the Law*, Note 80 at 67.

Principles such as the independence of the judiciary, the separation of powers,[87] and reciprocal control, checks and balances between the three branches of State power[88] have been periodically heard again within the confines of the National Convention after being neglected and treated with contempt during the Burma Socialist Programme Party regime.[89]

According to the NCDC there will be a Supreme Court of the Union (*Pyidaungsu Tayar Hluttawgyoke*) as well as High Courts of the Regions (Region *Tayar Hluttaw*), High Courts of the States (State *Tayar Hluttaw*) and courts of the self-administered zones, district courts, township courts and "in accordance with the constitution or other laws, courts-martial and the Constitutional Tribunal". Only the appointment and functions of the Supreme Court will be discussed here to discern the concept of judicial independence that has emerged from the NCDC.

At a session of the National Convention in 1994, Chief Justice U Aung Toe[90] proposed that the following provisions concerning the judiciary be included in NCDC:

> In 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.[91]

The provisions concerning the judiciary in the NCDC have more affinity with the 1947 constitution rather than with its 1974 predecessor. The 1947 constitution, in Sections 135 to 137, also established a Supreme Court and a High Court. Section 140(1) stated:

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[87] See for example SLORC's former Foreign Minister U Ohn Gyaw's speech at the United Nations General Assembly on 11 October 1994. (Summary of U Ohn Gyaw's speech as provided in *New Light of Myanmar* (NLM), as reported in Burma Press Summary (University of Illinois, Urbana-Champaign, Issue 10, October 1994 (hereafter quoted as NLM/BPS)

[88] Excerpt from speech of Chief Justice U Aung Toe to the National Convention in September 1994 as reproduced in NLM/BPS, October 1994, at 57.

[89] See text and notes accompanying n 67-69.

[90] U Aung Toe was, when the National Convention was in session, the main "clarifier" of the principles of the NCDC. As of February 2001 the most recent session of the National Convention was held in March 1996.

[91] NLM/BPS, September 1994, 58.

> The Chief Justice of the Union shall be appointed by the President by an order under his hand and seal, with the approval of both Chambers of the Parliament in joint sitting.

The NCDC also 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."[92] However in actual practice under the 1947 constitution, it is Parliament which recommended and the President who appointed the Chief Justice. In the NCDC, it would be the President who nominates the Chief Justice for approval to the *Pyidaungsu Hluttaw*. Moreover:

> *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.

It should be noted that the President would also appoint the Judges of the Supreme Court "after coordinating with the Chief Justice of the Union". Moreover the President of the State can instruct the Chief Justice of the Union or a Judge of the Supreme Court:

> 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.[93]

The *Pyithu Hluttaw* [roughly translated as "House of Representatives" or the lower House of Parliament in the NCDC] or *Amyotha Hluttaw* [roughly translated as "House of Nationalities" or Upper House of Parliament in the NCDC] can also impeach the Chief Justice or Supreme Court judges. In the case of impeachment "it shall be done so in accord with the provisions of the constitution regarding impeachment of the

[92] *Note 91.*
[93] *Note 91* at 59.

President or Vice-President of the State"[94] 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.[95]

Thus the Chief Justice and Judges of the Supreme Court are:

> to hold office ... unless asked to resign by the President of the State or removed from office, or unless being removed from office after impeachment in accordance with the provisions of the constitution.[96]

A joint reading of the NCDC's provisions concerning the removal of Supreme Court Justices would indicate that the President could instruct the Chief Justice or Judges of the Supreme Court to resign or remove them from office for treason, violations of the constitution etc without the approval of the *Hluttaws* or after a successful impeachment by the *Hluttaws*. This is in contrast to Sections 143 (2) to (8) of the 1947 constitution in which the President can remove a judge of the High Court or Supreme Court only after a Special Tribunal has investigated and approved the charges and a majority of members of Parliament in joint session approved the charges.

The President's power to "instruct a Chief Justice or a Supreme Court Judge to resign or to remove him from office" even though it is qualified "on grounds of treason, violation of the constitution, misbehaviour" etc is not conducive to a real independence of the judiciary.

As stated earlier in the section on the Judiciary in the 1974 constitution, all members of the judiciary (Council of People's Justices) were members of the unicameral Legislature and were subservient to it and through it to the ruling Party. In the NCDC one of the requirements to be Chief Justice or a Judge of the Supreme Court is that the judges must "not be a *Hluttaw* representative". Perhaps the NCDC deemed it necessary to

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[94] 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. (An 'unofficial' translation of the principles of the NCDC can be found in Burma Lawyer's Council, *The Military and its Constitution*, May 1999). The particular provision concerning the impeachment of the President is taken from this publication.

[95] *NLM/BPS*, September 1994 at 60.

[96] *Note 95.*

mention specifically that Judges must not be members of any of the *Hluttaws* due to the fact that for 14 years, from 1974 to 1988, under the 1974 constitution, judges *were* members of the Legislature.

Other qualifications that are necessary for the Chief Justice and Supreme Court Judges in the NCDC are "loyalty to the State and citizens", as well as being "non-members of a political party, and the age requirement that they must not be younger than 50 years or older than 70".[97] The NCDC also specifies that a Supreme Court judges possess, apart from the age limit, the qualifications prescribed for a *Pyithu Hluttaw* representative, which include, among others, ten years continued residence in the country.

While judges are required to be "loyal to the State and its citizens" in the NCDC (which is not stated in the two previous constitutions) the stipulation in Section 141 of the 1947 constitution that all "judges shall be independent in their exercise of their judicial functions and subject only to this constitution and the laws" or a similar provision to this effect is not mentioned in the NCDC.

Moreover a provision of the 1947 constitution, set out in full above, which has been a subject of attack by no less a person than U Ne Win is not provided for in the NCDC.[98]

If the NCDC would, as one of its basic principles ensure that:

> the three branches of State power, legislative power, executive power and judicial power are separated as

[97]Note 95 at 59. 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. 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.

[98]For a reproduction of section 144 of the 1947 constitution see text preceding note 20. For U Ne Win's criticism of and comments on this provision of the 1947 constitution see text and notes accompanying text accompanying n 21-24.

> much as possible and exert reciprocal control, check and balance among themselves[99]

- it is pertinent to question why such or a similar provision which Maung Maung had in 1956 called "a safeguard for the independence of the judiciary"[100] is not stated in the draft of the National Convention. This is especially so when the control by the Executive, through the President, of the Judiciary in the NCDC is much stronger than in the 1947 constitution.

There are also professional qualifications for appointment to the Supreme Court in the NCDC which are very similar, indeed almost identical with the provisions of the 1947 constitution. For instance Section 142 (1) (a) and (b) in 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.

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) of at least 20 years standing or have been assumed to be a legal expert of prominent reputation.[101]

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

There is one more factor which should be mentioned which appears to be unique in the NCDC. That is the proposal for a Constitutional Tribunal, the jurisdiction and functions of which are different from those of the Supreme Court, since the NCDC mentions that the Supreme Court is the "supreme law court of

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[99]NLM/BPS, September 1994 at 59.
[100]See text accompanying n 20.
[101]NLM/BPS, September 1994 at 59.

the State which shall not affect judicial powers vested in the Constitutional Tribunal and courts-martial".[102]

In the 1947 constitution, the power to interpret the constitution and to review whether acts of the Executive and the Legislature were constitutional essentially belonged to the Supreme Court. In the 1974 constitution, Article 200 (c) stated that:

> 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*.

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 be set up:

> to interpret provisions of the State constitution, to scrutinise whether or not laws enacted by the *Pyidaungsu*[Union] *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.[103]

The author is not aware of the separate existence of a Constitutional Tribunal, in addition to or separate from the Supreme or High Court in Asian countries which have a heritage of British common law such as India, Pakistan, Bangladesh, Malaysia and Singapore, as well as in Australia and New Zealand.[104]

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[102]Note 101 at 58.
[103]Note 101 at 56-7.
[104]Under the 1972 Republican Constitution Sri Lanka had a "Constitutional Court". (See H.M Zafrullah, *Sri Lanka's Hybrid Presidential and Parliamentary System and the Separation of Powers Doctrine*, University of Malaya Press, 1981) but under the 1977 Republican Constitution there is no provision for a Constitutional Court (*Id* at 77). But Sri Lanka, in comparison with other

Constitutional Tribunals exist in civil law countries such as Egypt, Germany, Russian Federation, South Africa, South Korea and Turkey. Burma's post-1972 legal system was comparable to "socialist" and to a much lesser extent civil law countries.

Does the move to establish a Constitutional Tribunal, generally prevalent in civil law countries, indicate an adoption of a civil law judicial institution in Burma which in the initial years of its independence, for nearly a decade and a half, had a common law based Parliamentary form of Government?

However, a more crucial question concerning judicial independence in the future constitutional scheme as laid down in the NCDC, is: how independent and effective would this Constitutional Tribunal be if and when it comes to operate? Would it, in the future, like the late Burmese Supreme Court in 1952, have the power and the audacity to declare an act of the President *ultra vires*?[105] Suppose that if and when the NCDC becomes the future constitution, the President removes from office a Supreme Court judge for alleged "violation of the constitution". Can the sacked Supreme Court Judge seek redress in the Constitutional Tribunal? Would that Tribunal give a decision against the President, if needs be, as the late Burmese Supreme Court did under the 1947 Constitution?

The almost total lack of the independence of the Judiciary (which, until 1962, was according to Dr Maung Maung, writing in 1961, "a fixed and shining beacon on the shifting scene in Burma"[106]) since 1962 makes the author sceptical about the prospects of its reintroduction, notwithstanding the occasional rhetoric that can be discerned in the NCDC.

Yet another factor that needs to be considered in trying to revive an independent judiciary is the lack of legal culture and specifically proper legal education regarding judicial

British colonies or protectorates of Australia, Burma, Malaya and British India, had not only the British common law system as a legacy but also aspects of the civil law system as Ceylon was for centuries a colony of the Dutch and the Portuguese as well.

[105]*Ah Kam v U Shwe Phone & Others*, 1952 BLR (SC) 222. See discussions concerning the case in text and notes accompanying notes 32 to 38 above. For the workings of a vigorous and independent constitutional court in the Republic of Korea (South Korea) since 1987 see Healy G (note) "Judicial Activism in the New Constitutional Court of Korea", 2000, 14 (1), *Columbia Journal of Asian Law*, pp 213, 218-234.

[106]Maung Maung, *Burma's Constitution* at 151.

independence among the present and younger generation of judicial personnel in Burma. 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 Peoples' Judicial system) would not have been brought up in a legal culture of a strong and independent judiciary. They might not fully appreciate the significance and substance of an independent judiciary since they have been brought up under the authoritarian culture in a "strong State".

The judiciary would be separate from and arguably more independent of the Executive in the NCDC in comparison with the 1974 constitution. However even if the judges appreciate and would like to maintain its independence from the Executive, the strong Executive-Military Presidency and the President's substantial power over the appointment and removal of Supreme Court Judges in the NCDC is discouraging. It should temper any fond hopes that a full-fledged march backward to the pre-1962 days of the independence of the judiciary is a viable option in Burma's future constitutional development.

The above discussions concerning judicial independence in the post-1988 era should among others, indicate the gap between the reality on the ground[107] with the occasional rhetoric emanating from within the confines of the National Convention[108] and in pronouncements of government officials at the United Nations General Assembly.[109]

Conclusion

The evolution of both the concept and practice of judicial independence in Burma since independence has indeed been a rocky one. From 1948 to 1962, the judiciary in Burma was fully 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,

[107] See text and notes accompanying n 80, n 81, n 82, n 83.
[108] See text accompanying n 87 above.
[109] See text accompanying n 88 above.

citizens could seek remedies through the availability of various writs and by "invoking the jurisdiction of the highest court"[110]

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

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 Peoples' Courts virtually extinguished any vestige of the independence of the judiciary. The completion of the process was capped and formalised with the promulgation and adoption 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, and 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 Party.[111] These provisions negated any vestige of separation – not to say independence- of the judiciary from the ruling Party 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 the SLORC in that no member of SLORC presides as a judge in the current

[110] MMT above n 19, (26 April 1974 issue of *The Working People's Daily*, p.20

[111] 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". This provision was in the Chapter entitled "Basic Principles".

Supreme Court. However, it is a telling fact that it is the SLORC and the current State Peace and Development Council (SPDC) which have in the past appointed and dismissed and 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 in the National Convention[112] and in speeches given by SLORC Foreign Minister U Ohn Gyaw to the General Assembly of the United Nations.[113] 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 the some of the provisions of the NCDC regarding the appointment of judges and the present state of affairs[114] 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 practice of judicial independence even if genuine efforts were to be made in that regard. 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 rhetoric and on the broader issues of human rights there has 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 "We fully prescribe to the human rights norms enshrined in the Universal Declaration of Human Rights". Yet around the same time, in an interview with the BBC, Dr Kyaw Win, Burmese Ambassador to the United Kingdom (as of October 1999), was arguing that "there is a geographical divide in understanding this problem [about human rights]".[115] It is true that concepts such as those of separation of powers and the independence of the judiciary are

[112] See text accompanying above n 88.
[113] See text accompanying above n 87.
[114] See text and notes accompanying above n 80 to n 82.
[115] Both the Foreign Minister's speech and the comment of the Burmese Ambassador to the United Kingdom are taken from *Burma Net News*, (Electronic Mail Service) No. 1357 September 27, 1999.

espoused and endorsed in the occasional rhetoric that has emerged from the pronouncements in the National Convention. However such statements as those of Dr Kyaw Win that "Democracy is a very delicate flower, it doesn't grow easily anywhere and is not easily transplantable"[116] could well be "transplanted" into notions of judicial independence and in rejecting "judicial independence" as a "Western imposition"[117]. In the same interview Dr Kyaw Win also "dismissed ... a United Nations report that had condemned Burma's human rights record as a simple cultural difference between east and west". Ambassador Kyaw Win also stated 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".[118]

The obstacles to a reintroduction of judicial independence in Burma are considerable. The lack of a proper culture and training of judicial personnel in a climate of genuine constitutionalism and judicial independence makes their implementation a gargantuan task even if democracy were to be restored. In this regard, it is worth reiterating that the restoration of democracy in Burma – a pre-requisite for the exercise of judicial independence – appears to be extremely unlikely if not almost impossible, at least for the near future.[119]

In 1963, soon after the March 1962 military coup, a magazine by the name of *Forward* was established by the then

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[116] News Item "Give Democracy Time" by Tim Sebastian from *Burma Net News*, No. 1357.

[117] For an argument that the notion of judicial independence can be found in various legal cultures, including that of Burmese, see text and notes accompanying n 2, n 9, n 10.

[118] "Give Democracy Time". 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" and "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 ... his government" is "willing and ready to receive sensible suggestions and take whatever action we possibly could" to promote human rights. As for Dr Kyaw Win's comment about "geographical divide" the UN Secretary-General Kofi Annan has stated that "It was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so". United Nations High Commissioner for Human Rights <http://www.unhrchr.ch> (accessed on 30/10/99).

[119] See the author's more detailed arguments on the technical difficulties that had to be overcome in establishing the practice of judicial independence in Myint Zan, "Law and Legal Culture" note 55, at 277, fn 336.

Revolutionary Government. In Burma, for the foreseeable future it would be "forward" with total control of the judiciary by the military and no march backwards to the days of judicial independence.