

Seeking Judicial Power: With a Special Focus on Burma's Judiciary

by

Aung Htoo

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This Occasional Paper is written by Aung Htoo, who visited the Centre from March to May 2010, as a Sohmen Visiting Scholar. Mr. Htoo is an internationally known human rights lawyer from Burma. He is the General Secretary of the Burma Lawyers' Council, an organisation which he co-founded in 1992 and is constantly under attack by the Burmese regime. He has been a long-time democracy and human rights activist and has had to live in exile as a result of recent repression.

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Centre for Comparative and Public Law
Faculty of Law, The University of Hong Kong
Pokfulam Road
HONG KONG
Tel: (852) 2859 2941
Fax: (852) 2549 8495
Email: fkleung@hku.hk

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Abstract

In today's world, the rule of law has become a dominant legitimizing slogan,¹ despite the fact that universal agreement has not yet been reached on the nature of the doctrine. Even governments who reject or express reservations about democracy and human rights as cultural and political inventions of the West nonetheless claim that they abide by or are working towards achieving the rule of law.² It is also evident that, with the existence of an independent, competent and impartial judiciary, the rule of law will be entrenched. This paper will not discuss rule of law issues in-depth. However, it will discuss the underlying common concept of the rule of law as it bolsters courts, giving them their institutional status and enabling them to move toward a redesigned judiciary from diverse societal backgrounds. In addition, this paper will explore what those institutions should look like, distinguishing between two quite different judicial functions – judicial review and the ordinary administration of justice – as a comparative study of jurisdictions of some countries. Finally, with a special focus on Burma, it will suggest how to move toward good judicial institutions, what those institutions should look like, whether it is possible to achieve such institutions from the current status quo, and what judicial institutions we can reasonably hope for in Burma.

¹ "The Rule of Law for Everyone?", Brian Z. Tamanaha, Conference on Comparative Conceptions of the Rule of Law in Asia, the University of Hong Kong, Hong Kong, China, 20-21 June 2002, p. 2, 32-33. See also the Commentary on the IBA Council 'Rule of Law' Resolution of September 2005: www.ibanet.org

² Ibid.

The Factors that Influence the Rule of Law

The Rule of Law in France

With reference to the Declaration of Rights of Man and of the Citizen, in which individual rights and freedoms were enshrined, Laurent Pech stated that even if no synthetic term was formulated in the history of France, the concept of the rule of law has been implicitly present since as early as 1789.³ Freedom of the people is the beginning of law and is the essential feature of justice.⁴ The people themselves are in fact the nation and in consequence, the people, acting through their representatives, can adopt a constitution and rule the country on behalf of the nation. The rule of law was thus identified with rule by legislation, and the supremacy of law understood as the supremacy of Parliament.⁵ However, unstable executive power under the Fourth Republic caused growing dissatisfaction among the French people with the traditional conception of parliamentary sovereignty, and it paved the way for the emergence of the Constitutional Council, a unitary judicial apparatus.⁶

The Rule of Law in the United States

In the United States, which is widely considered to be a bastion of the rule of law, the doctrine is intimately connected to a liberal culture and liberal political system. Individual liberty is championed by liberalism and its goal is to curb the intrusion of governmental authority against individuals and to seize control of the power to exercise that authority.⁷ With the background of liberal culture and liberalism, the US Supreme Court stands as the most powerful institution, which is exercising the power of judicial review, protecting individual rights and maintaining the rule of law. According to the concept of liberalism, tolerance for other community views is forced upon the people by the fact of coexistence;⁸ nevertheless the values of collectivism, harmony and social cohesion cannot be found.

³ “The French Conception of the Rule of Law”, Dr. Laurent Pech, Conference on Comparative Conceptions of the Rule of Law in Asia, the University of Hong Kong, Hong Kong, China, 20-21 June 2002, p. 4.

⁴ See also “The Principles of the Rule of Law”, Paul Bockelmann, Professor of Criminal Law and Criminal Procedure, Law and State Journal, Vol. IV 1971, p. 99.

⁵ Ibid. No. 3, p. 10.

⁶ Ibid., p. 20-25.

⁷ “The Rule of Law in the United States”, Brian Z. Tamanaha, Conference on Comparative Conceptions of the Rule of Law in Asia, the University of Hong Kong, Hong Kong, China, 20-21 June 2002, p. 1, 2 and 10.

⁸ Ibid., p. 9.

The Rule of Law in China

The Chinese legal system emanated from Chinese culture which is represented in the philosophy, "Heaven and Man combining into one, and all things on earth is an organic whole".⁹ Accordingly, the value of collectivism was formed. However, although social stability, emperor's rule, and hierarchy in society were maintained, individual value was neglected and individualism was strictly controlled.¹⁰

Law exists not to empower and protect individuals from the state, but as an instrument of governmental control; any rights that do exist are granted by the state and may be retracted.¹¹ During the Mao period, the purpose of law was to serve the state, not to protect individual rights.¹² With this background, the Cultural Revolution (1966-1976), was sanctioned, and a decade-long catastrophe during which people were deprived of their individual rights and freedoms resulted.¹³ The rectification of the Cultural Revolution with the desire for social justice and the needs of a market-based economy,¹⁴ initiated by Deng Xiao Peng with the underpinning of modern Chinese nationalism, dictated the application of the formal features of the rule of law in China.¹⁵ The 15th Congress of the Chinese Communist Party embraced the rule of law in 1997 after the reconstruction of its legal system in 1978.¹⁶ The rule of law first found expression in the constitution of China in 1999.¹⁷

A new campaign on the “socialist rule of law theory”, accentuating Hu Jintao's theory of a “harmonious society” was implemented in China in 2006.¹⁸ With the exception of the element of "following the leadership of the party", the remaining four elements "ruling the

⁹ “The Tradition of Legal Culture in East Asia - the Forming of Chinese legal family”, Sun Yaogang Ph.D., 4th Conference of Asian Jurisprudence, University of Hong Kong, 17-19 Jan 2001; “The Rule of Law in East Asia: Formation and Development”, Vol. II.

¹⁰ Ibid.

¹¹ Tom Ginsburg, *Judicial Review in New Democracies*, Cambridge University Press, 2002.

¹² “Competing Conceptions of the Rule of Law in China”, Randall Peerenboom, Conference on Comparative Conceptions of the Rule of Law in Asia, the University of Hong Kong, Hong Kong, China, 20-21 June 2002, p. 9.

¹³ “Mao's China and After: A History of the People's Republic”, by Maurice Meisner, Third Edition, p. 445.

¹⁴ Zhu Suli, “The Party and the Courts”; “Judicial Independence in China: Lessons for Global Rule of Law Promotion”, published in 2010, p. 62-63.

¹⁵ The Constitution of the People's Republic of China; Introductory Notes. On the role of the Constitution in the PRC's one-party system, see p. v.

¹⁶ Benjamin L. Liebman “China's Courts: Restricted Reform”, The China Quarterly, 2007, p. 624.

¹⁷ Article 5 of the Constitution of the People's Republic of China, “The People's Republic of China exercises power in accordance with the law and establishes a socialist country under the rule of law.” It was inserted by Article 13 of the Third Constitutional Amendment Law of March 15, 1999, adopted at the Second Session of the Ninth National People's Congress.

¹⁸ Benjamin L. Liebman, “China's Courts: Restricted Reform”, The China Quarterly 2007: p. 626.

country by law," "implementing law for the people," "maintaining fairness and justice," and "serving the overall situation" are not contrary to the doctrine of the rule of law adopted by western countries. It is unlikely that the rule of law does not prevail in China as the courts follow the leadership of the Chinese Communist Party (CCP). The status of courts in China would be controversial if they were observed only from the aspect of the independence of the judiciary.

The Rule of Law, Independence of the Judiciary and Interactions between Political Parties and the Judiciary

The International Bar Association ranks "an independent and impartial judiciary" first out of many principles which constitute the rule of law.¹⁹ Although unhappy law professors have sharply criticized the US Supreme Court decision in *Bush v Gore*, which awarded the presidency to George Bush,²⁰ and many US citizens worried that the Court had gone too far,²¹ the US Supreme Court illustrated its status, as an independent judicial institution.

In spite of the fact that the independence of the judiciary plays a major role in maintaining the stability of society and promoting the rule of law, it cannot be construed that whenever there is independence of the judiciary, the rule of law will prevail and society will be stable. Recent incidents in Thailand indicate that although independence of judiciary formally exists,²² stability of society cannot be guaranteed and the rule of law has been threatened. In Thailand, the political party system has not been functioning well; the courts efforts to find a reasonable solution adaptable to the changing democratic development of Thailand has not yet worked, and the confidence of a number of people in the courts, particularly in adjudicating politically-oriented cases, has lessened.

Similarly, previous incidents in Bangladesh have proved that stability of society can also be threatened where an independent judiciary formally exists.

¹⁹ See "Commentary on the IBA Council 'Rule of Law' Resolution of September 2005": www.ibanet.org

²⁰ Brian Z. Tamanaha, "The Rule of Law in the United States," in Asian Discourses of Rule of Law, edited by R. Perenboom (London: Routledge 2004), p. 1.

²¹ See, for example: Friedman, Richard D., "Trying to Make Peace With *Bush v. Gore*". Florida State University Law Review, Forthcoming. Available at: <http://ssrn.com/abstract=270294> or doi:10.2139/ssrn.270294

²² Dr. Thammanoon Phitayaporn, "Strengthening the Independence and Efficiency of the Judiciary in Thailand", 8th ASEAN Law Association General Assembly, November 29, 2003- December 2, 2003.

Constitutional law in Bangladesh is premised on an independent and competent judiciary, separate from the two other organs (executive and legislative) of government based on the separation of powers and constitutional checks and balances. The role of the judiciary is central to justice, the rule of law and good governance that Bangladesh has strived to achieve since its independence in 1971. The judiciary of Bangladesh has recently been at the centre of controversy in relation to its transparency, impartiality and accountability. Judges in higher courts are accused of according priority to extralegal and political considerations involving questionable standards of judicial conduct. Judges in lower courts are accused of involvement in rampant corruption and bribery scandals.²³

Constitutional law in Burma is not premised on an independent and competent judiciary, separate from the two other organs of government. Under the 2008 Constitution of Burma, the President has the power to appoint and dismiss the Supreme Court Justices at his own discretion;²⁴ thus, judicial tenure is not guaranteed. The existing civilian judicial system, which is totally subservient to the military, will remain in place. In the case of Burma, it becomes obvious that without reforming the incumbent political party system in effect, the rule of law will never prevail nor will stability of society be facilitated. The rule of law will essentially only prevail if an independent judiciary is created with the underpinning of a stable political party system.

In the US, United Kingdom (UK), India, Germany, France, Japan, Australia, Scandinavian countries and elsewhere where political party systems operate well, political parties are powerful. In such political backgrounds, when political parties and 'independent judiciaries' interact with each other effectively, the rule of law prevails, stability is facilitated, and society moves forward.

Common Practices of the Rule of Law

In today's world, the rule of law has become a convergence of diverse concepts, adopted by both western and eastern societies: the former focusing on individual freedoms whereas the latter seeks the collective value of society, despite the existence of mixed practices in many countries. The two concepts need not ostracize one another, and the coexistence and practice of both, albeit a unity of opposites, may foster the stability of society. Western democracies apply the rule of law from the aspect of civil and political

²³ M Rafiqul Islam and SM Solaiman, "Public confidence crisis in the judiciary and judicial accountability in Bangladesh", *Journal of Judicial Administration*, 2003, Vol.13, No.19, p. 30.

²⁴ Article 299, 302, 308, 311, 327 & 334 of the Constitution of the Republic of the Union of Myanmar (Burma).

liberties whereas China does so with the concern of most people about stability and economic growth.²⁵ Nevertheless, common practices of the rule of law found in both jurisprudences include the following:

- the conduct of each individual in his relations with others is regulated by law;
- individual conduct is left to the individual's caprice;²⁶
- operation of government is governed by law; and
- no one is above the law.²⁷

Courts and the Rule of Law

Courts were central entities within feudal societies. One of the most significant political achievements of the Persian monarchy, for example, was the creation of the *satrapal* system, which proved an effective means of governance for over two centuries, and within which a key aspect of court society can be detected.²⁸ Courts are state actors in the sense that they function in support of the exercise of state power, within the institutional framework of independence, impartiality and the rule of law, and they act to reinforce power - both public and private - by enforcing obligations and duties created by legislation, in conjunction with other state actors.²⁹

Comparison of the Supreme Courts of Bangladesh and India

Although the Supreme Court of Bangladesh has marked important advances for individual rights, its general outlook towards women's rights still represents the conservative and restrictive approach, emphasizing formality rather than gravity of crimes.³⁰ The Supreme Court's approach seems more conducive to suppressing dowry remedies than to facilitating

²⁵ Ibid. Peerenboom, p. 4.

²⁶ Paul Bockelmann, "The Principles of the Rule of Law", Law and State Volume IV, 1971, p. 97.

²⁷ Article 5 of the Constitution of the People's Republic of China; Article 14 of the Constitution of the Republic of India; Article 14 of the Constitution of Japan; Article 11 of the Constitution of the Republic of Korea; Section 30 of the Constitution of the Kingdom of Thailand;

²⁸ A. J. S. Spawforth, "The Court and Court Society in Ancient Monarchies", Cambridge University Press 2007, p. 2 and 20.

²⁹ Carl Baar, "The Emergence of the Judiciary as an Institution", Journal of Judicial Administration (1999) 8, by p. 217, 218, 226.

³⁰ Afrozen Begum, "Judicial activism versus judicial restraint: Bangladesh's experience with women's rights with reference to the Indian Supreme Court", Journal of Judicial Administration, 2005, Vol. 14, No. 4, p. 231 & 237.

the effective enforcement of the Dowry Act 1980.³¹ Dowry is an amount of money or property which a woman's parents give to the man she marries. Crimes relevant to dowry are usually committed by husbands against their wives, who cannot afford to provide dowry.

By contrast, the Supreme Court of India, with a few exceptions, has taken a very strong approach to remedying dowry violence and it has also adopted a far broader approach by analysing how cruelty associated with dowry disputes has provoked women to commit suicide and how society should undertake a firm commitment to get rid of the social menace.³²

Both India and Bangladesh inherited a common law system from the British, and the constitutions of both countries guarantee an independent judiciary. In spite of having such a common legal and historical background, the Supreme Court of India practices judicial activism whereas its counterpart practices judicial restraint, at minimum, as far as the dowry issue is concerned, in which women are treated as property. The discrepancy is the realm of cultural background, the strength of civil society, and disparities in economic status.

In terms of institutional independence, both Bangladesh and India's courts enjoy similar status in a general sense. However, no court in the world can stand in isolation; it constitutes a part of society. As such, court cannot circumvent influence of society in one way or another. In Bangladesh and Pakistan, Islamic cultural influence is mainly in place and as such women suffer negative aspects of culture, particularly in the rural areas. "Numerous violations relating to violence against women have occurred as the result of misinterpretation of Islamic teachings due to incomplete readings of religious texts and explanations of such violence that are influenced by patriarchal culture."³³ Cultural influence over the justices of the Supreme Court of Bangladesh, where over 90% of the total number of justices are believers in Islam, will certainly take place. Judges and police are inclined to deal with domestic violence as a family problem; they are hesitant to take action in such society where

³¹ Ibid., p. 238.

³² Ibid., p. 238.

³³ United Nations Economic and Social Commission for Asia and Pacific (ESCAP)'s report, "Violence Against Women: harmful traditional and cultural practices in the Asian and Pacific region", 26-27, April 2007, p. 27. Available at: www.unescap.org

women's status is like chattel and in the whole cultural scene men are powerful. It is therefore difficult for women to get relief from the justice system in cases of domestic violence.³⁴

Similar cultural influence over the justices of the Supreme Court of India may also be in place although it may be less than its counterpart in Bangladesh. However, civil society in India is much stronger than that of Bangladesh. In India, criminal justice continues to be adversarial in nature; normally it is adjudication between the State and the accused.³⁵ Also, participation of people other than the accused or the State is exceptional and not allowed where a normal trial under the Criminal Procedure Code is available.³⁶ Nevertheless, public participation in the criminal justice system did commence when four professors of law wrote an open letter to the Chief Justice of India against the decision of the Court in *Tukaram v. Maharashtra*.³⁷ The case concerned two constables who allegedly raped a tribal girl Mathura in police custody, but the Supreme Court acquitted the accused, reflecting the strong patriarchal bias.³⁸ The letter catalysed women's organizations' movement against the decision; although the decision remained unchanged, the debate paved the way for a change in judicial attitude in India.³⁹

The Role of Law and the Role of Courts

The Role of Law

From the beginning of the study of the state by classical scholars, down to modern behavioral studies, law has sprung from society. Problems such as communalism, self-determination, and national integration, for example, are primarily social, rather than legal issues. They have their roots deeply entrenched in society. Ruling political ideas and cultural practices very often dominate social values and beliefs. They have tremendous impacts on their respective societies, and they undoubtedly shaped the values and beliefs of respective societies to a great extent.

³⁴ Sher Zaman "Women's Role in Pakistan, Customs and Violence Against Them and Situation of Their Rights", submitted at Mahidol University, Bangkok, Thailand, p. 22, 23 & 34.

³⁵ S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, New Delhi, Oxford University Press 2002, p. 227.

³⁶ Ibid.

³⁷ AIR 1979 SC 185: (1979) 2 SCC; see *Sathe* (above), p. 228.

³⁸ Ibid., p. 228.

³⁹ Ibid., p. 228.

Law encompasses the legal aspects of society to preserve social order and enable social progress. However, law focuses only on the conscious phenomena of society and views man as a natural being rather than a social animal. As such, although law constitutes an intrinsic part of society, it keeps its distance from unconscious phenomena of society. To apply the rule of law effectively in any society or state, the limited role of law must be realized at the outset.

The Role of Courts

In order to maintain their independence and avoid being drawn into the territories that belong to the other branches of government, courts must not cross the parameters of their judicial function.⁴⁰ First and foremost, the role of courts should be, at minimum, identified as centering on the effective laws in any state.

Citizens can only be constrained or punished for violation of the law and in accordance with the law. Where the law ends, constraint ends. Judges and lawyers are boundary riders, maintaining the integrity of the fences that divide legal constraint from the sphere of freedom of action.⁴¹

Social Harmony and the Role of Courts

In response to a statement made by a spokesperson for China's judiciary who emphasized the important role of courts in promoting social harmony, Professor Randall Peerenboom questioned what a judge is supposed to do if promoting social harmony requires redistributing wealth to the most vulnerable and least productive members of society.⁴² Technically, he may be right, as judges do not have any power to do so directly. Nevertheless, judges can substantially maintain social harmony if they are able to distinguish the parameters of law and its connection with society.

Legislators, executives, and judges establish society together despite the fact they may play different roles in terms of separation of power. Legislators make laws focusing mainly on the conscious phenomena of society. The executive administers the country and resolve

⁴⁰ Ibid. No. 27, p. 76.

⁴¹ Hon Justice James Spigelman AC "Judicial appointments and judicial independence", 17 (3) (February 2008) Journal of Judicial Administration, 139-143.

⁴² Randall Peerenboom, *Judicial Independence in China: Lessons for Global Rule of Law Promotion* Cambridge University Press 2010, p. 20.

issues of society regardless of whether they are conscious or unconscious: if they be conscious, law may be applied; if they be unconscious, rather than law, the other ways may be used. Judges, as boundary riders, maintain the integrity of legal fences and citizens may be punished if they violate an effective law. Under any circumstance, legislators, executive, and judges, while standing on their separate positions, pay attention to unconscious phenomenon of society in order to resolve the complicated societal issues and move society from one step to another.

As a result of the interconnectivity of the political system, judges in society cannot stand in isolation even though they enjoy both personal and institutional independence.⁴³ In a society where liberalism prevails, judges might be preoccupied with this concept before they adjudicate any case. Such is the case for judges in China concerning the concept of harmonious society.

The primary responsibility of judges is to know the law. Yet, even though judges may receive their legal qualifications based on their knowledge of laws, such legal qualifications alone may not be sufficient. If judges understand the concepts, ideologies and related issues surrounding the law, it will be beneficial to the efficient operation of the justice system.

In the US, the nomination of judges is made having considered their ideologies. Richard A. Posner, a conservative appeals court judge in Chicago, and William M. Landes, his colleague from the University of Chicago Law School, ranked all 43 justices of the US Supreme Court from 1937 to 2006 by ideology and found that four of the five most conservative are on the current court.⁴⁴ The recent selection of Solicitor General Elena Kagan by President Obama to be the United States' 112th justice was criticized by conservative leaders by pinpointing her background, as she was a judicial activist who adopted progressive liberalism.⁴⁵

In China, by contrast, a spoke person for judiciary, calling for judicial independence, judicial accountability and professionalism maintained that this did not contradict his

⁴³ Peter H. Russell, *Judicial Independence in the Age of Democracy*, University Press of Virginia, 2001, p. 2.

⁴⁴ "Peter Baker, "Still struggling for a counterweight to conservatives on court", International Herald Tribune, May 12, 2010.

⁴⁵ Ibid.

emphasis on the important roles of courts in promoting social harmony.⁴⁶ The practice of judicial independence, judicial accountability, and professionalism does not imply that judges totally disregard the unconscious phenomenon of society, including the societal notions of liberalism and a harmonious society, among others.

The Values of Collectivism, Harmony, and Social Cohesion in Courts

The concept of a harmonious society emanates from the values of collectivism, harmony, and social cohesion which liberalism never formally adopted. Collectivism instigates the people's spirit of togetherness, harmony spurs people not to ignore vulnerable sectors of society, and social cohesion enlightens people to the importance of sharing the benefits of individualism with each other.

The harmonious society doctrine aims to diffuse any volatile trends by way of "people-centered reform," whereby the fruits of development are more equitably shared. Goals of the platform include: providing adequate social services in rural areas, correcting regional development imbalances, addressing labor dislocation, expanding health services and education, and placing greater emphasis on environmental and sustainability concerns.⁴⁷

What are judges supposed to do with this background concept of harmonious society? Actually, the more judges realize not only the value of individualism borne by liberalism but also other concepts including collectivism, harmony and social cohesion, the better they will be able to adjudicate the relevant cases justly, fairly and positively. In so doing, the judges can become qualified boundary riders.

Social Harmony and the Practices of Courts in the Philippines

The concepts of collectivism, harmony, and social cohesion are reflected in the Indigenous Peoples Rights Act (IPRA) of the Philippines (1979). The act recognizes the right to land, self-determination, and cultural integrity of indigenous peoples and stipulates that indigenous peoples have the right to prior consent before development projects

⁴⁶ Ibid. Peerenboom, *Judicial Independence in China: Lessons for Global Rule of Law Promotion*

⁴⁷ Matthew Boswell, "Harmonious Society," *China Elections and Governance*, July 23, 2007, <http://en.chinaelections.org/newsinfo.asp?newsid=9752>

commence on their lands.⁴⁸ IPRA recognizes and promotes the rights of indigenous peoples to ancestral domains and lands, the right to self-governance, economic and social rights, and cultural integrity, including indigenous culture, traditions, and institutions.⁴⁹ This is legal protection for the marginalized indigenous people so that they continue to survive collectively, practice their culture together, and share benefits arisen from their domains, within their communities vis-a-vis their natural environment although they face a number of challenges in enforcing this act.

The action of Mr. Reynato Puno, Chief Justice of the Supreme Court of the Philippines, may be a judicial paradigm: he initiated a writ of Kalikasan, which is equivalent to the writ of habeas corpus in terms of addressing ecological cases.⁵⁰ He also led the High Court and the Supreme Court in pursuing environmental protection.⁵¹ In January 2008, the High Court approved the creation of 117 environmental courts to expedite the resolution of all pending environmental cases nationwide, and in April 2009, the Supreme Court convened leaders from the executive branch, legislature, judiciary, non-government organizations (NGOs) and various environmental stakeholders to take part in its move to push for reforms in the judiciary that would help strike a balance ecological concerns vis-a-vis economic development.⁵² The Chief Justice also quoted Section 16, Article II of the Constitution of the Philippines, which provides that “the State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”⁵³

Social Issues and Practices of Courts in Latin America

Society needs to protect individual rights on one hand while maintaining collective rights of people on the other, particularly people's right to self-determination which can be implemented in accordance with the constitution. Ultimately, the goal is that diverse nationalities may preserve and practice their culture, language, traditions and other designated societal value on the basis of collectivism, harmony and social cohesion. In that sense, can the courts play a role?

⁴⁸ Section 7,8,13,15,16,17,29,31,33, and 46(a) of the Indigenous Peoples Rights Act (IPRA) of the Philippines (1979)

⁴⁹ <http://www.metagora.org/training/encyclopedia/IPRA.html>

⁵⁰ “High Court ruling on writ of Kalikasan” *Sun Star Manila*, May 13, 2010. Available at: <http://www.sunstar.com.ph/manila/high-court-ruling-writ-kalikasan>

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

Life depends on livelihood and livelihood increasingly depends on people's access to required resources⁵⁴. Many times, governments, local authorities, and foreign and local companies manage and exploit natural resources such as the country's oil and gas reserves, forest and mine resources, minerals, river system, and lands, without any restraint or self-responsibility, and without community participation and their informed consent, in the decision making. In such cases, people's access to resources are negatively challenged. As a result, for local people, collective living, harmony and social cohesion collapse. Hence, the courts have a certain role to play to protect the collective rights of people, addressing social issues, centering on unfair exploitation of natural resources, although they need not necessarily redistribute wealth to the most vulnerable members of society directly.

In social issues, Latin America's courts have played a key role in adjudicating the rights of indigenous groups, women, and homosexuals. In the economic realm, judges have ruled on policies ranging from privatization to state employment to the scope of emergency powers during economic crises.⁵⁵

Protection of Collective Rights and the Role of Courts in India

The role of courts in protecting the collective rights of people, is additionally found in India where a number of diverse nationalities, including tribal people, live. Tribal people are deeply attached to their ancestral lands; land and forest for them are essentially communal resources to be used according to their present and future needs. Their view is that land is a substance endowed with sacred meaning, embedded in social relations and fundamental to the definition of a people's existence and identity. Similarly, the trees, plants, animals, and fish, which inhabit the land are highly personal beings which form part of their social and spiritual universes. All lands are necessarily communally owned although there are also some lands that are owned by the clan members within a village or by individual household.⁵⁶

In September 1997, the Supreme Court of India delivered a landmark judgment upholding the rights of tribal peoples to life, livelihood, land, and forests in a case that dealt with issues of mining in tribal lands. Samatha, a non-government organization in Andhra

⁵⁴ Personal interview, anonymous statement by an NGO leader from Sri Lanka.

⁵⁵ Gretchen Helmke, *Courts under Constraints: Judges, General and Presidents in Argentina*, Cambridge University Press, 2005, p. 2.

⁵⁶ Hari Mohan Mathur, *Tribal Land Issues in India: Communal Management, Rights, and Displacement* by p. 1, 2 & 6-8. Available at: <http://www.adb.org/Documents/Books/Land-Cultural-Survival/chap06.pdf>

Pradesh, filed the case on behalf of the affected tribal people. The Supreme Court held that forests and lands in scheduled areas, irrespective of whether owned by the government or by a tribal community, cannot be leased out to non-tribal people or to private companies for mining or industrial uses. It restricted mining activity in these areas to be carried out only by the State Mineral Development Corporation or a cooperative of the tribal people.⁵⁷

In addition to realm of tribal people, the concept of common land and common property resources is also found in other parts of India, for instance, in Madhya Pradesh; and, it is identified by access to the community's natural resources, highlighting that every member has access and usage facility with specified obligations, without anybody having exclusive property right over them.⁵⁸

In 1976-77, the Madhya Pradesh government attempted to prohibit the entry of animals into the state for grazing; they could pass through the state, but within a maximum period of 45 days. The Supreme Court, however, struck this provision down, and the option of excluding the livestock from other states has been outlawed. In its reasoning, the court concluded that "forests of MP are not grazing grounds reserved for cattle belonging to residents of MP only, even as the towns and villages of MP cannot be reserved for the residence of the original inhabitants of MP only". It added: "Accidents of birth and geography cannot furnish the credentials for such discrimination and authorise prejudicial treatment in matters of this nature". The limit of stay of 45 days was also declared unconstitutional.⁵⁹

The Court's Ignorance on Social Issues in Burma: A Case on Grazing Ground and the Court's Standing

In Phaung Daw Thi village, Daik-U, a township in Burma, 452.59 acres of grazing ground, which has been used by the local farmers for their cattle was confiscated by the local government authorities and distributed to a regiment and other organizations as follows: Light Infantry Regiment No (30) 82.50 acres; No. (1) Military Animal Husbandry

⁵⁷ Ibid., p. 14. See also *Samatha v. State of Andhra Pradesh* A.I.R. 1997 S.C. 3297

⁵⁸ Usha Ramanathan, "Common Land and Common Property Resources". Available at: www.ielrc.org/content/a0204.pdf

⁵⁹ Ibid., p. 2.

Association 79.98 acres; Township War Veteran Association 52 acres; Union Solidarity and Development Association 58.82 acres.⁶⁰

The military and its related associations took over 273.30 acres. Furthermore, 44.93 acres of street land and two acres of garden land were also deducted from the grazing ground. This left only 132.36 acres of pasture land for the local farmers to use. This caused about 3,000 cattle of that area to starve. The farmers, dissatisfied with the result, asked an attorney, U Aye Myint, to help them. U Aye Myint sent this information to the International Labour Organization (ILO) and the following problems resulted.

On August 27, 2005, the police arrested U Aye Myint and sued him in Daik Oo township court, accusing him of providing false information aiming to shatter the local administrative mechanism. At the hearing, the Deputy Police officer stated that U Aye Myint had organized the farmers and written a false letter. However, this information was not corroborated by any of the prosecution's witnesses. On October 31, 2005, he was sentenced to seven years' imprisonment on a charge of violating the 1950 Emergency Provision Act Section 5(E) which prohibits the "spread of false news, knowing or having reason to believe it is not true". The Bago district court summarily rejected his appeal.

The news about the scarcity of fodder resulting in the starvation of the farmers' cattle cannot be considered to be false news. The farmers gave such statements before the court as well as ILO officer, Richard Hussey. According to the Burmese Evidence Act, the plaintiff has to provide sufficient proof that the accused clearly committed the crime,⁶¹ but this was not the case. Aside from the deputy police officer who arrested U Aye Myint, there were no prosecution witnesses who stated that U Aye Myint purposely fabricated a complaint knowing that it was false.

Attorney U Aye Myint's case is just one of many glaring examples of how Burma's judiciary abuses its power with ignorance and lawlessness, instead of addressing the social issues of the people, particularly those emanating from unfair exploitation of natural resources. If this case is observed thoroughly, the adversities facing rural people, who constitute 70 percent of total population in Burma, encompassing both Burman and non-

⁶⁰ The USDA, similar to the Golkhar Party in Indonesia, is totally controlled by military leaders, and in April 2010 was transformed into a political party.

⁶¹ Article 101 of Burma Evidence Act.

Burman ethnic nationalities, may be noticed. Those people are deprived of their livelihood due to exploitation of the country's natural resources such as land, forest and marine resources, minerals, and river systems mainly by the ruling military junta, local authorities, and other parties.

As a result of this exploitation in the rural areas of Burma, the collective way of life, harmony and social cohesion have been seriously damaged. About 3 million residents have left their hometowns to earn money in Thailand as illegal migrant workers. In order to rectify these injustices, the role of courts, which are usually the last recourse for people in attempting to resolve disputes peacefully, must take a central role. For this purpose, as far as the judiciary in Burma is concerned, independent existence of the courts alone may not be sufficient. Other relevant factors should also be scrutinized.

Land Ownership and the Forest Management System

To resolve issues emanating from exploitation of natural resources, the country's land ownership system must first be scrutinized. In contrast to the Chinese Constitution, which primarily guarantees collective ownership of land in the rural and urban areas,⁶² the constitutions of Burma have, since independence was declared in 1948, repeatedly named the state as the sole owner of land.⁶³ For hundreds of years, empirically collective or communal ownership system of land has been a way of life in Burma, particularly in the rural areas inhabited mostly by non-Burman ethnic nationalities. Unfortunately, it has never been recognized by the government nor by the courts. The judges simply consider that the government authorities, in accordance with effective laws on behalf of the State, assume the power to manage or exploit any land in the whole country whenever deemed necessary, regardless of whether such exploitation negatively impacts the lives of local people. Community land rights of local people and community based forest management have never been raised in the courts.

⁶² Article 10 of the Constitution of the People's Republic of China: "Land in the rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law; house sites and private plots of cropland and hilly land are also owned by collectives."

⁶³ Article 37A of the Constitution of the Republic of the Union of Myanmar (2008) provides the following: "The Union is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union."

Motivations to Change the Perspective of Courts

The courts in Burma are generally inward looking, and rarely observe the practices of contemporary jurisdictions in different countries. Restrictions on the relationship of judiciary with the outside world have been imposed by the ruling regime. As a consequence, it is hard for judges to realize the principles being practiced by the international community, *inter alia*, that in the decision-making regarding natural resources, community participation with their informed consent should be required. If they did so, consideration on the merits of the case by the court might be shifted and actions of those like attorney U Aye Myint would not be criminalized. The issue of deciding a dispute relating to grazing ground is civil in nature and has nothing to do with the Emergency Provision Act, which is a criminal law.

If the court views the case of Attorney U Aye Myint from the perspective of individual rights vis-a-vis human rights, it is evident that the suspect exercised his right to freedom of expression, including the right to seek, receive and depart information. Acknowledging the fact that the right to freedom of expression is to be exercised with limitations⁶⁴, a reasonable principle to utilize is that limitations should be minimized and the right to freedom of expression should be promoted. In light of this, U Aye Myint was innocent as he only imparted information on the unfair management of grazing ground to the ILO.

Latin American legal scholarship often views judges in the role of activists using the law to transform society, but this may become a reality only when judges have reasonable perspectives on society.⁶⁵ Additionally, in the Philippines, India, Thailand and elsewhere, people individually or through NGOs acting on their behalf, submit complaints against those who violate people's rights to access natural resources or commit other abuses. These individuals and groups may sue the responsible authorities or parties in courts. These are essential factors to motivate courts to address social issues. Conversely, in Burma, the representatives of the victims were sued by the responsible authorities in a court where the perspectives of judges are inadequately circumscribed and judicial restraint is negatively exercised.

⁶⁴ Article 29 (2) of the Universal Declaration of Human Rights.

⁶⁵ Ibid. Gretchen Helmke, p. 31.

In seeking justice for society, the motivation of courts is necessary so that the courts practice judicial activism rather than judicial restraint, and this can be achieved by enhancing court powers step by step until the independence of the judiciary comes into existence. This way, judicial review may be exercised with its limited scope and boundaries; this review lies at the heart of the separation of powers⁶⁶.

Seeking Judicial Power: Judicial Review?

Judicial review gives a court the power of deciding the validity of the law enacted by a legislative body⁶⁷ and that of checking abuse of executive power. Although the courts are a truly independent and co-equal branch of government, that does not necessarily mean that they have the power of government if they do not exercise judicial review. This is one view. From another view, there can be the rule of law even when the court is not vested with the power of judicial review. This is because the rule of law does not require that courts have the authority to invalidate legislation, but such authority may be enhanced when courts exercise constitutional authority to review legislation and government action.⁶⁸ As such, the status of a court may not be evaluated merely depending on whether it exercises power of judicial review.

Judicial Review and the Independence of the Judiciary: A Brief Comparative Study of Courts in the US and China

If the status of the Supreme People's Court of China is contrasted with the US Supreme Court from the aspect of judicial review, it may not be understandable, as the 'Subtle Judicial Review', articulated by some scholars,⁶⁹ does not meet ideals of judicial review, nor does it constitute the standard being practiced by the US Supreme Court. Although the Supreme People's Court of China is not vested with the power of judicial review,⁷⁰ the status of courts is to some extent respected. Despite the fact that many court decisions fail to provide any discussion of how the particular acts in question will lead to

⁶⁶ John Basten, "Constitutional elements of judicial review", (2004) 15 PLR, 187, p. 187.

⁶⁷ S. P. Sathe, *Judicial Activism in India*, Oxford University Press, 2003, p. 82.

⁶⁸ Ibid. No. 27, p. 224.

⁶⁹ Liu Nanping, "Judicial Review in China: A Comparative Perspective", *Review of Socialist Law* 14 (1982).

⁷⁰ Keith E. Henderson, "Half way home and a long way to go" in *Judicial Independence in China: Lessons for Global Rule of Promotion*, Randall Peerenboom (ed) Cambridge University Press, 2010, p. 30.

instability or endanger the state or public order,⁷¹ the role of the courts is remarkable for China to achieve stability and economic development. The courts have been able to find reasonable spaces adaptable to the changing circumstances of China over the previous three decades, particularly commencing from 1980.

The status of courts may be correctly evaluated only when their connections and interactions with other institutions are observed in the specific history of a society, the incumbent constitutional and legal framework and the framework of state policies. Historically China and the US are different. Feudalism prevailed in China for thousands of years and, as a result, societies were primarily divided until the Chinese Communist Party (CCP) was able to unite the country in 1949. The United States lacked similar historical experiences.

In China, the majority of Chinese social elites accept the political leadership of CCP; it has evolved a national party seeking to advance the fundamental interests of the Chinese people as a whole.⁷² The current state of Chinese society and its judiciary might not have been better off without the modern revolution led by the CCP and its influence upon China's judiciary is positive.⁷³ As a result, the Supreme Peoples' Court of China could not circumvent the influence of CCP.⁷⁴ It is also different from the case of the US.

With reference to the abovementioned situation in China, it is worthwhile to ask whether it will be beneficial for society if complete independence of the judiciary and ideals of judicial review were to be exercised immediately. In this regard, a landmark case of the US should be attended. Many people in the US had concerns about the ruling of the Supreme Court with its 5-4 split decision in *Bush v. Gore*, claiming it was a political, not a judicial, decision. Generally speaking, the US is well-known for its independent court system, and political interference in the judiciary is relatively rare. It may, however, be a case study for Supreme People's Court of China from two aspects.

One important point is that whenever a court is powerful and achieves the confidence of the people, the stability of society is effectively guaranteed. Another is that a court's ruling

⁷¹ Ibid., p. 111.

⁷² Ibid., p. 54-55.

⁷³ Ibid.

⁷⁴ Ibid. No. 66. p. 251

will be binding when the loser has sufficient knowledge that by complying with the decision of the highest court of the land, it will be beneficial for society as a whole in the long run. In the case of *Bush v. Gore*, Al Gore may have complied with the decision of court, because he would have understood that if a similar incident happened in a future election, the Democratic party could gain the advantage from the court's decision and resolve election-related issues peacefully.⁷⁵

The courts' practice of judicial review may become a threat if it is not comprised of judges of the highest integrity, those who are sensitive to constitutional values, and who have great professional competence.⁷⁶ As such, the question of whether the Supreme People's Court of China is vested with the power of judicial review may not be instrumental for now since the court only has 30 years of experience. Conversely, the Supreme Court of the US has been invoking the Constitution of the United States and applying for judicial review for over two hundred years.⁷⁷

From the aspect of constitutional development, China is also not identical to that of India, where right from the inception of the Constitution, judicial review has effectively been exercised by the court.⁷⁸ As such, for now it should be sufficient if the courts in China find some space for autonomy and comply with other fundamental principles of the rule of law. None of these realities, however, justifies abandoning the principles or ideals of judicial independence and of judicial review.⁷⁹

The Cultural Revolution has already proven that the rule of a one-party system without any checks and balances infringes upon individual rights and freedoms of people, and that it is desirable that the Supreme People's Court of China move forward to create an independent judiciary in the future. The judiciary can enhance its power while protecting individual rights and addressing societal issues, thereby achieving the confidence of the public. The growing

⁷⁵ Interview with Visiting Prof. Richard Cullen, Faculty of Law, Hong Kong University, May 21, 2010.

⁷⁶ Afroza Begum, "Judicial Activism v Judicial Restraint: Bangladesh's Experience with Women's Rights with Reference to the Indian Supreme Court." *Journal of Judicial Administration (Australia)*, 5: 221-240.

⁷⁷ *Marbury v Madison*, 5 U.S. 137 (1803).

⁷⁸ K. L. Bhatia, *Judicial Review and Judicial Activism: A Comparative Study of India and Germany from An Indian Perspective*, New Delhi: Deep & Deep Publications, 1997, p. 7.

⁷⁹ Peter H. Russel and David M. O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*, University Press of Virginia, 2001, p. 11.

concern of common Chinese people over political and civil rights may create pressure on the courts to enhance their power until the independence of the judiciary is ensured.⁸⁰

In regard to the protection of individual rights under the General Principle Chapter, Article 11 of the Constitution of China provides: "The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy." In addition, under the Chapter of Fundamental Rights, Article 33 stipulates: "The State respects and preserves human rights". The latter guarantees certain judicially enforceable fundamental rights of individual citizens in accordance with the constitution whereas the former lays down foundation for state policy. As such, in attempting to seek more power, the courts in China can invoke the constitution and enhance their roles in protecting the rights and freedoms of individuals.

By contrast, there is a factor which is identical for both China and US from the aspect of state institutions, which control the judiciary in some developing countries. This institute is the state's armed forces. Both countries have powerful armies. However, having learned lessons from experiences during the feudal era, modern Chinese society does not provide dominant positions of government to its armed forces as an institution,⁸¹ but there are veteran leaders who transformed themselves into civilians and assumed political power individually. A similar practice can be found in the US where the civilian supremacy principle has been adopted.

Although interference in China's courts by other institutions remains to be scrutinized, there is a lack of military intervention in the judiciary.⁸² This is a favorable situation for the courts in China to establish their institutions to be more independent and efficient. This has been the case over the past decade in which court rhetoric had changed from being a tool for enforcing party policy to being a neutral forum for dispute resolution.⁸³

⁸⁰ Interview with an anonymous citizen of China, who is attending LL.M program at Hong Kong University, May 22, 2010.

⁸¹ Interview with Visiting Prof. Richard Cullen, Faculty of Law, Hong Kong University, May 21, 2010

⁸² Ibid. No. 80, p. 97.

⁸³ Ibid. No. 16, p. 627.

The Issue of the Stability of Society in Thailand: Judicial Review and the Role of Courts

Mr. Bowornsak Uwanno, former Dean of the Chulalongkong University Faculty of Law selected to serve as Secretary of the Constitution Drafting Committee for the 1997 Constitution of Thailand (“1997 Constitution”), described the primary deficiencies of the then existing Thai political system: “Politics were dominated by the politicians rather than the people, who enjoyed only few rights and liberties. Politics were rife with dishonesty and corruption, resulting in politicians being commonly perceived as lacking legitimacy in their exercise of authority.”⁸⁴ To rectify these deficiencies, the 1997 Constitution explicitly granted an unprecedented number of rights and liberties to Thai citizens, opened new avenues for them to participate in politics, and supported efforts to combat vote buying.⁸⁵ Despite these provisions, however, vote buying continued to take place:

Vote buying was occurring in many rural areas, and the police were unable to prevent it. The practice of vote buying is illegal, but in Thailand, only the buying is criminalized, while vote selling is not (Appendix II, Sections 44, 45 of Thai Election Law). Observers in northeastern Thailand (i.e., Khon Kaen, Sisaket, Buriram, and Surin provinces) heard that vote buying was a major concern and problem during the election. . . . Because the northeast is the poorest region in Thailand, vote buying there is very likely an effective tool in political campaigning.⁸⁶

“The intention of the Constitution has thus been foiled, as most of the independent watchdog agencies have been co-opted, emasculated, or circumvented, leaving Thaksin’s government with almost absolute authority.”⁸⁷ Thaksin Shinawatra’s regime, which came to power among allegations of election fraud and vote buying in particular, ruled Thailand from 2001 to 2006. Under the façade of democracy, Thaksin’s Thai Rak Thai party was able to control parliament with an overwhelming electoral majority, establishing the strongest government in the history of modern Thailand since 1932.

Although Thaksin was ousted from his position as prime minister in the aftermath of the military coup in 2006, the army was not able to resolve Thailand’s underlying political issues. Subsequently, the middle class, NGOs, educated and royalists, and majority leaders

⁸⁴ ANFREL Report on Thai Elections in 2005, Asian Network for Free Elections (ANFREL), p. 12. Available at: www.anfrel.org

⁸⁵ Ibid.

⁸⁶ Ibid., p. 44.

⁸⁷ Ibid., p. 33.

of the army relied on the judiciary, as an independent institution, to be the final arbiter in resolving challenging societal disputes. General Anupong Paochinda, the Army Commander-in-Chief, stated that the judiciary was one of the three pillars of government that everyone must respect to ensure that society continues to function properly.⁸⁸ Former Prime Minister Chavalit Yongchaiyudh also portrayed the judiciary as the chair umpire that has been keeping the balance in society.⁸⁹ Thai media constantly showed its support for the judiciary, particularly in the aftermath of the military coup of 2006. Since then, the judiciary has consolidated its power step by step.

Adjudication of Political Disputes

In May 2007, the Thai Rak Thai party was dissolved by the Constitutional Court, and its executives, including ousted Prime Minister Thaksin Shinawatra, were banned from politics after being found guilty of electoral fraud. Surprisingly, Thai Rak Thai leader Chaturon Chaisang urged party loyalists not to fight the Court's decision or protest the ruling.⁹⁰ Similarly, in response to the ruling, Thaksin himself noted that if the rule of law was to be observed, the ruling must be respected.⁹¹ As a consequence of the above decision, the Court solidified its authority as an independent arbiter capable of imposing checks on the other branches of the government. In the aftermath of the ruling, the Thai Rak Thai transformed itself into the People's Power Party, led by Samak Sundaravej and former allies of Thaksin.

Unfortunately, not much has changed in Thai politics in terms of election fraud since the previous elections. The new elections, held at the end of 2007, were again fraught with instances of vote buying. The People's Power Party, including Thaksin's brother-in-law and future Prime Minister Somchai Wongsawat, assumed power by proxy on behalf of former members of the Thai Rak Thai and Thaksin.⁹² Courts came under increased pressure of the government after Samak Sundaravej assumed the post of Prime Minister. In June 2008, Prime Minister Samak Sundaravej criticized the judiciary, alleging that courts wielded excessive

⁸⁸ “Top judge sees no evidence of political interference in judiciary”, *The Nation*, August 13, 2008.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ http://en.wikinews.org/wiki/Thai_Rak_Thai_dissolved,_ex-premier_Thaksin_banned_from_politics

⁹² <http://news.bbc.co.uk/2/hi/7759960.stm>

power and meddled in politics.⁹³ Similar criticism was also made by deposed Prime Minister Thaksin, who contended that Thailand's judicial system suffered from political interference.⁹⁴ The Supreme Court later rejected these criticisms,⁹⁵ and the courts continued to exercise their power without fear or favor.⁹⁶

On June 25, 2008, the Supreme Court sentenced three of former Prime Minister Thaksin's lawyers found guilty on charges of attempting to bribe court officials with two million baht stashed in a snack bag.⁹⁷ On July 8, 2008, the Supreme Court ruled unconstitutional the government's signing of the Preah Vihear Joint Communiqué with Cambodia on June 18, citing Article 190 of the 2007 Constitution, on the grounds that the communiqué was a kind of international treaty.⁹⁸ It was one of the landmark judgments of the Supreme Court which checked the power of the government by exercising judicial review. Furthermore, on July 10, 2008, the Constitutional Court disqualified Public Health Minister Chaiya Sasomsap from holding office for failing to declare some of his wife's assets within a specified deadline.⁹⁹ Finally, on July 31, 2008, the Criminal Court delivered another landmark verdict that marked a crucial step towards the restoration of the rule of law and sentenced Khunying Pojaman, Thaksin's wife, to three years of imprisonment on charges of tax avoidance in the alleged amount of 546 million baht arising out of a stock transfer in 1997.¹⁰⁰ According to *The Nation*, "the court cited moral shortcomings in its ruling, saying Khunying Pojaman, while being Thailand's first lady, failed to act as a good example for society."¹⁰¹

The Thai courts continued to solidify their reputation as an institution capable of independently adjudicating politically motivated cases, notwithstanding the constant pressure created by politicians who garnered the support of a majority of the Thai people by means of election fraud. In another such case adjudicated on September 9, 2008, as described in *The Nation*, "the Constitutional Court made a historic ruling by ordering Prime Minister Samak

⁹³ "Judicialisation of politics can help strengthen rule of law", *The Nation*, July 23, 2008.

⁹⁴ "Top judge sees no evidence of political interference in judiciary", *The Nation*, August 13, 2008.

⁹⁵ "Influential Constitutional Justice: its influence on society and on developing a global human rights jurisprudence", World Conference on Constitutional Justice, Cape Town, South Africa, 22-24 January 2009. Available at: http://www.venice.coe.int/WCCJ/Papers/THA_Const.Court_E.pdf

⁹⁶ Ibid.

⁹⁷ "Thaksin's lawyers imprisoned", *The Nation*, June 26, 2008.

⁹⁸ "Court rules the joint communiqué is unconstitutional", *The Nation*, July 9, 2008.

⁹⁹ "Court bans Chaiya from office", *The Nation*, July 10, 2008.

¹⁰⁰ "3 Years Jail for Pojaman", *The Nation*, August 1, 2008.

¹⁰¹ Ibid.

Sundaravej to stand down immediately over the scandal surrounding his TV cooking show."¹⁰²

On December 2, 2008, the Constitutional Court ruled that Prime Minister Somchai Wongsawat, Samak's successor, must step down over election fraud, that his governing People Power Party and two of its coalition partners must be dissolved, and that the parties' leaders must be barred from politics for five years.¹⁰³

The foregoing rulings of the courts have had a far-reaching impact and effect on Thai society and Thai politics, despite the fact that some of those rulings have been met with harsh popular criticism.¹⁰⁴ The Constitutional Court reached the apex of its power by courageously pronouncing controversial, historical decisions while facing pressure from often unruly supporters of three political parties, which are no longer legal:

Although the mob prevented Constitutional Court justices and officials from entering the courthouse and forced the change of venue of the hearing and decision, the ruling of the Constitutional Court is in accordance with the provisions of the Constitution, thus upholding the rule of law without yielding to the pressure from any group.¹⁰⁵

The fact that anti-government protesters terminated their crippling, week-long occupation of Thailand's airports after the courts' December 2 ruling is further evidence of the impact and legitimacy of judicial power.¹⁰⁶

A Comparison of the Constitutional Courts of Korea and Thailand From the Aspect of Judicial Review

Widespread dissatisfaction with political manipulation of legal processes, which resulted in legitimacy crises in Korea¹⁰⁷ and in Thailand,¹⁰⁸ paved the way for the emergence and strengthening of constitutional courts in both countries. In Korea, given that judicial review

¹⁰² "Historic ruling eases tensions for now", *The Nation*, September 10, 2008.

¹⁰³ <http://news.bbc.co.uk/2/hi/7759960.stm>

¹⁰⁴ Statement made by Mr. Chat Chonlaworn, President of the Constitutional Court of Thailand, The First World Conference on Constitutional Justice, Cape Town, South Africa, 22-24 January 2009. Available at:

<http://www.constitutionalcourt.or.th/download/twccjth.pdf>

¹⁰⁵ Ibid.

¹⁰⁶ One more stand for Thailand's rule of law, *The Nation*, November 27, 2008.

¹⁰⁷ James M. West & Dae-kyu Yoon, "The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?", *American Journal of Comparative Law*, Vol. 40, 1992, p. 75.

¹⁰⁸ 1997 Constitution of Kingdom of Thailand, Section 262-265.

of the constitutionality of legislation had previously been inoperative, the Constitutional Court was created to embody a new dedication to constitutionalism.¹⁰⁹

Constitutional courts in both Korea and Thailand have become major institutions in the governance of their respective countries. But whereas the court in Korea has been heavily involved in transforming Korea's military-bureaucratic regime into a constitutional democracy,¹¹⁰ its counterpart in Thailand has played a significant role in checking the political majority by applying judicial review.

The positions of the courts present an interesting contrast. The Constitutional Court of Korea largely avoids direct challenges to dominant political interests¹¹¹ and circumvents decisions that might provoke hostile reactions from prominent political parties.¹¹² In May 2004, the petition for impeachment adjudication of Korean President Roh Moo-Hyun was rejected by the Court on the grounds that the number of the justices required to remove the president from office under Article 23(2) of the Constitutional Court Act had not been met.¹¹³ "During the deliberation of the case, the mid-term election was held and Roh's party received overwhelming support, winning an absolute majority in the Assembly."¹¹⁴

Conversely, the Constitutional Court of Thailand in 2007 encountered a direct challenge and adjudicated the issue against the interests of dominant political forces. This may be why there is no majority rule in the Thai parliament, in contrast to the period between 2001 and 2006 when the Thai Rak Thai party held an overwhelming electoral majority.

Judicial Review and Dissolution of Political Parties in Thailand

The constitutional courts in both Korea and Thailand are entrusted with the power to dissolve political parties.¹¹⁵ In Korea the relevant provision allows dissolution "if the

¹⁰⁹ Ibid.

¹¹⁰ Tom Ginsburg, "The Constitutional Court and the Judicialization of Korean Politics." in *New Courts in Asia*, Andrew Harding et al (ed). Routledge, 2009, p. 4.

p. 4.

¹¹¹ Ibid., p. 11.

¹¹² Ibid., p. 20.

¹¹³ Constitutional Court of Korea, case no. 2004 Hun-Na1. Available at: http://en.wikisource.org/wiki/Impeachment_of_President_Roh_Moo-hyun

¹¹⁴ Tom Ginsburg, "The Constitutional Court and the Judicialization of Korean Politics.", *New Courts in Asia*, Andrew Harding et al (ed). Routledge, 2009, p. 7.

¹¹⁵ Article 111 of the Constitution of the Republic of Korea; section 65 of the Constitution of the Kingdom of Thailand (2007).

objectives or activities of a political party are contrary to the democratic basic order."¹¹⁶ The scope of the law is wide and ambiguous. A similar provision is enshrined in the Constitution of the Kingdom of Thailand.¹¹⁷

Notwithstanding the foregoing provisions, the Constitutional Court of Korea has not yet exercised this power, and no political party has been dissolved.¹¹⁸ It may remain unexercised for the foreseeable future "due to circumstances that raise other important constitutional considerations."¹¹⁹ The Korean Constitutional Court expressed its appreciation of the role of political parties. The Constitution in its Article 8 Paragraph 2 states

Political parties ----- shall have the necessary organizational arrangements for the people to participate in the formation of the political will." Article 2 of the Political Parties Act states "For the purposes of this Act, the term 'political party' means a national voluntary organization that aims to promote responsible political arguments or policies and to take part in the formation of the nation's political wills in order to promote the national interests by endorsing or supporting candidates for public offices.¹²⁰

The Constitutional Court of Thailand, on the other hand, has already dissolved several political parties and there are indications that the Court may continue exercising its power. There are positive as well as negative aspects to the Court's actions. It is positive because the Court is able to check majority rule and deter abuses of power by politicians who gained power by means of election fraud. It is negative because with the repeated dissolutions of political parties it will be hard to establish a stable political party system in Thailand. More importantly, dissolution of an entire party on grounds of unethical action by a party leader or party elites by election fraud may damage the political spirits of all other innocent members of the dissolved party.

¹¹⁶ Article 55 of the Constitutional Court Act of Korea.

¹¹⁷ Section 65 of the Constitution of the Kingdom of Thailand (2007): "The internal organisation, management and regulations of a political party shall be consistent with the fundamental principles of the democratic regime of government with the King as Head of State."

¹¹⁸ James M. West & Dae-kyu Yoon "The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex", by The American Journal of Comparative Law, Vol. 40, 1992, p. 87

¹¹⁹ Ibid.

¹²⁰ Decisions of the Korean Constitutional Court (2006), Constitutional Court of Korea, p. 27.

Interactions between the Judiciary and the Political Party System Within a Rule of Law Framework

Notwithstanding the political violence occasionally arising out of deeply rooted social divisions, Thailand is largely on its way to peace and development. This is because the foundation of the rule of law, centered on judicial independence, has been laid down by the Thai society in the form of a respectable constitution. Almost all political leaders respect the judiciary. They comply with the ruling of the courts, regardless of whether or not they agree with the ruling. They may also criticize the judiciary, but they dare not, at least in public, stand against the courts' decisions even when their political parties occupy a majority of the parliamentary seats. The Thai judiciary has solidified its power. In attempting to resolve underlying political problems, facilitate the stability of society and restore the rule of law, the role of courts in Thailand should not be underestimated.

However, the judiciary alone, be it independent, impartial and efficient, will not be able to resolve deeply rooted societal issues, whether conscious or unconscious; thus the judiciary needs to continue positioning itself as a 'boundary rider' while emphasizing the separation of powers. As such, in order to further the judiciary as a final arbiter of underlying societal issues, interactions with and based on an efficient political party system are of paramount importance. The rulings of courts may not be effectively binding nor facilitate the stability of society so long as the operating political party system is weak and the way in which politicians achieve power – at minimum into the legislative body – cannot be managed properly.

Exploring effective interactions between an independent judiciary and a functioning political party system will be the best way in the long run to address the underlying issues being faced by Thai society. The judiciary and political systems may continue to interact, but the interaction should be reformed in order to support this. Dissolution of political parties should no longer be promoted by the Constitutional Court as a major method of dealing with unlawful political platforms and means, even though, as the Court noted, the patient may be cured by the doctor getting rid of the disease. Instead, the Court may consider the principle that prevention is better than a cure. Only when the latter is unworkable should the former be done.

Judicial Supervision of Elections

In order to take advantage of the respected position currently enjoyed by the courts, Thai society may also advocate an expanded role for judges through judicial supervision of elections, as has occurred not only in the US but also in many countries in Europe. There, when the public has lost its confidence in other branches of government, judicial intervention in the political arena has proven acceptable to the public.¹²¹ When elections are convened, judges can play a role by securing an equal platform for the candidates¹²² and promoting the values of basic fairness and ethics¹²³ while exercising stricter supervision of electoral regularity,¹²⁴ campaign finance laws and regulations,¹²⁵ and the good standing of candidates. Robert Badinter, former President of the Constitutional Council of France, explained this approach as follows:

[T]he more you open up the possibility of criminal prosecutions and the more powerful is the threat. In France as in Italy, indeed as in all Western nations, the opening of a criminal prosecution against a very important politician is itself sufficient to ruin his career. In the eyes of the public, no presumption of innocence prevails. The fact that a judge has decided to investigate what has happened, the fact that the judge has found that corruption is possible, that is enough to lead the public to conclude that corruption exists. The fellow is politically wounded, if not dead.¹²⁶

How to Improve Judicial Institutions (With a Special Focus on Burma)

Burma and the Issue of Independence of the Judiciary

The independent judiciary is not a new concept for Burma. Following its independence, Burma established an independent judiciary in accordance with the 1947 Constitution, which lasted under the democratic regime from 1948 to 1962. The return to an independent judiciary is essential for Burma today.

¹²¹ Robert Badinter & Stephen Breyer (eds). *Judges in Contemporary Democracy: An International Conversation*, New York and London: New York University Press. 2004, p.132.

¹²² Ibid., p. 126.

¹²³ Ibid., p. 131.

¹²⁴ Ibid., p. 146.

¹²⁵ Ibid., p. 147-149.

¹²⁶ Ibid., p. 160.

U Ba Oo was the first Chief Justice of the Union appointed by the President with parliamentary approval post independence. U Ba Oo's appointment was a controversial issue among political leaders because when Burma was under British rule, the British government had awarded U Ba Oo the title "Sir" in recognition of his service in the judiciary. The superficial giving of this title was an attempt by the British to restrain rebellious farmers, led by Saya San, struggling against the British rule during an uprising in 1930-1931.¹²⁷ For this reason, some political leaders objected to the proposed appointment of U Ba Oo as Chief Justice of the newly established democratic state. Nevertheless, U Nu, U Ba Swe and U Kyaw Nyein, the then most influential political leaders, strongly supported U Ba Oo, and were instrumental in making his appointment a reality. The Burman political leaders' major consideration in U Ba Oo's appointment was not to use him as an instrument for their political support, but to endeavor to seek justice by applying his legal and academic skills to an independent judiciary.¹²⁸

U Ba Oo officially left his post as Chief Justice in 1952 and became President of the Union in the same year. Then, he retired in 1956. Thereafter, the country was forced to find another leader to replace him. Dr. Thein Maung, then the Chief Justice of the Union, was qualified to take Presidential responsibility. Big debates spread through Parliament as to whether Dr. Thein Maung should replace U Ba Oo as President.

Parliaments' justification for rejecting the proposal to elect Dr. Thein Maung as President lay in their fear that the public would misconstrue the appointment as establishing a tradition. The explanation provided was that if the retired Chief Justice were appointed and assumed the Presidential position, then others would presuppose that this tradition was law. Then the new Chief Justice, who would replace Dr. Thein Maung, might attempt to get support from political leaders aiming to become President of the Union; and as a result, he might ignore his major responsibility to administer the justice without fear of being threatened from the executive.¹²⁹

The refusal to elect Dr. Thein Maung as President proved that the new democratic Burma placed great emphasis on an independent judiciary. As a result, in spite of having some

¹²⁷ Ba-maw Tin Aung, *History of Burma in the Colonial Era*, Rangoon, Myanmar: Pyi-thu-ah-lin Printing Press, 1964, p. 369.

¹²⁸ Interview with Mr. B. K. Sen. A Senior Advocate from Burma.

¹²⁹ Ibid.

weaknesses in the judiciary of independent Burma, the roles of the Supreme and High Court were highly regarded by both the people and scholars from the international community. Unfortunately, immediately after independence, Burma was plagued by insurrections. In early 1949, the democratic regime could defend only Rangoon, the capital of Burma, while other remaining areas in the country were under the control of insurgent forces.

The judiciary continued to function independently and the executives were not permitted to communicate with the judiciary under any circumstances. The executives, often to their dismay, had to observe the judgments of the Courts without redress. U Nu, the then Prime Minister of Burma, commented on this situation as follows:

The government was angry at times in being thwarted, and Ministers often complained that the judiciary was not helping in the drive for law, order, and progress. The Government was often angry, and it often winced with pain, but generally it took the decisions gracefully. Beyond the normal conflicts that occur between the Executive and the judiciary in any country in times of peace and more sharply in times of war and emergency, there has not been any mortal struggle for supremacy Our Courts have always acted freely Often times, we have wrung our hands in despair because a person whom the government wanted to imprison is set free by the Courts, and often times the Government has appealed against the decision of the Lower Courts only to have it confirmed by the Higher Court. When we have followed the case right up to the highest court of law, and find that the decision still goes against the desire of the Government, we can fold our hands, and watch the person go free.¹³⁰

The Issue of Independence of the Judiciary: Ethnic Nationalities and the Foreseeable Political Scenario

For several decades there has been a lack of awareness of and training in the concepts and practice of judicial independence in Burma. The military junta has exercised total control over the judiciary, and institutional judicial independence has never been a subject of discourse within the regime's legal system. Fortunately, some major ethnic armed organizations such as the New Mon State Party, the Karen National Union, the Karenni National Progressive Party, Chin National Front and several Kachin and Palaung youths have to some extent been exposed to the concepts with the facilitation of the Burma Lawyers' Council, although exposure has not yet been sufficiently widespread.

¹³⁰ Maung Maung Dr., *Burma's Constitution*, The Hague, Martinus Nijhoff Publishers, 1959, p. 154.

The ruling military regime's strategy of pressuring the ethnic armed ceasefire organizations into becoming Border Guard Forces has appeared unsuccessful up to this point. Instead, the leaders of both ceasefire and non-ceasefire ethnic armed organizations held a conference in Chiang Mai, Thailand on May 21-23, 2010, following preparatory meetings convened along the Chinese-Burmese border.¹³¹ Asserting a common position, they emphasized their desire to adhere to the spirit of the Ping Long pact, to maintain and protect the character of ethnic nationalities, and to continue struggling for the rights of ethnic groups to equality and self-determination, including the ownership of natural resources within their local areas, subject of course to the need to share for common interest.¹³² This agreement marks the first time in more than two decades that the armed ethnic organizations, ceasefire and non-ceasefire alike, have been to a remarkable extent unified against State policy.

Since 1989, a number of ethnic armed organizations have entered into ceasefire agreements with the military regime for various reasons. Citing these agreements, the regime was able to convince the international community, particularly ASEAN, of Burma's stability. In reality, this is not the case. Even under the ceasefire, ethnic groups have been deprived of not only individual rights and freedoms but also collective rights, including their common property rights. As such, despite what looks like superficial stability, society has become divided. In essence it has never been stable. This is because an independent judiciary has not been established throughout the country, particularly in ethnic areas, as a mechanism to protect individual and collective rights.

The regime's offensive last year against the Ko Kant armed group, a ceasefire organization, resulted in several thousand refugees fleeing into China. Such attacks prove that so-called ceasefire agreements can be broken and fighting can resume at any time. However, the regime hesitated to start fighting as the remaining major ceasefire organizations are much stronger than Ko Kant; China may not be happy to receive more refugees from Burma should fighting break out; and, the regime may wish to implement the result of the 2010 elections first, and to deal with the costly issue of ethnic armed ceasefire organizations only after that.

In reality, both sides – the SPDC military regime and the individual ethnic ceasefire organizations – have their own reasons not to resume fighting. On one hand, the regime is

¹³¹ BBC Burmese radio news broadcast on May 26, 2010.

¹³² Ibid.

quite aware that ethnic armed resistance organizations cannot be completely annihilated by military means, as has been proven through more than six decades of civil war. On the other hand, so long as the military regime has power in one form or another, it will never exert efforts to resolve the underlying issues between ethnic nationalities by peaceful political and legal means. To do so would leave no other alternative except the establishment of a decentralized federal union of Burma, which would destroy the power the military currently holds through rigid centralization.

In conclusion, the military regime will not implement a policy of annihilating ethnic armed organizations, nor will it resolve the underlying issues between ethnic nationalities by establishing a federal union. More importantly, by not applying an annihilation policy, the regime can justify military expansion by referring to the existence of ethnic armed organizations as subversive elements destabilizing society. As such, it will likely continue this policy of deception even after the 2010 elections, restructuring its strategy only in appearance while essentially maintaining the former ceasefire policy.

Seeking Judicial Power and the Possibility for Improvement I

Expected Strategy Shift within the Ethnic Communities

Despite numerous negotiations between the ruling regime and the leaders of the ceasefire organizations, the ceasefire experience over the past two decades has proven that the formal political dialogue expected by the ceasefire organizations never existed. This will continue for the foreseeable future. For this reason, ethnic ceasefire organizations can no longer remain trapped in the political artifice framed by the military regime. Nor can they unknowingly get involved in ineffective arms races with the regime, which is currently working to produce long-range missiles and nuclear weapons.¹³³ Such action by the ethnic ceasefire organizations would undoubtedly result in the continuation of a vicious cycle, not only for the ethnic organizations themselves but also for all citizens of Burma.

This is the time for all ethnic armed organizations – ceasefire and non-ceasefire alike – to consider whether they will move forward by themselves to establish a federal union in practice in which self-determination is to be exercised in accordance with a federal

¹³³ Al-Jazeera television broadcast of a film produced by Democratic Voice of Burma and BBC's radio news on June 4, 2010.

constitution. It is also time for them to consider how to resolve serious disputes between the ethnic organizations over territory and natural resource management through peaceful legal means. In the past, serious fighting has broken out over territorial disputes, including between the Karen National Union and the New Mon State Party in 1988 and between the Shan State Army (South) and the United Wa State Army (UWSA) since 2000. The development of an efficient and independent judiciary in areas under their control will pave the way for a peaceful resolution of the abovementioned underlying issues over the long term.

Most importantly, if the ethnic resistance organizations are committed to establishing a federal union, they must prepare for the emergence of efficient judiciaries in their local areas, because the judiciary usually plays an instrumental role in resolving all major issues in every federal state, both political issues and those arising out of the ordinary administration of justice. Preparing ethnic resistance organizations for military defense on the one hand and participation in negotiations with the military regime on the other can be realized. By not doing so, the ethnic resistance organizations may struggle to survive. It should also be noted that although the common people have been living in a Hobbesian state of nature even under ceasefire for two decades, there is currently no indication that their status will improve.

It is now time for all ethnic armed organizations to shift their strategy and focus more on legal avenues, particularly the operation of the judiciary. They must submit themselves to adjudication by a competent and independent judiciary, which they must create themselves. This will be quite difficult but not impossible. Rome was not built in a day. Preparations to move in the right direction with a focus on a bottom-up approach should begin immediately. The ethnic armed organizations have to prove that people living in areas under their control enjoy the protection of an independent judiciary and that the serious disputes over territory and natural resource management arising between the organizations can be peacefully resolved by recourse to an independent judiciary supported by the rule of law.

Student Leader Salai Tin Maung Oo case

Throughout the history of Burma, particularly after independence from the British, the ethnic nationalities have not fully enjoyed the protection of an independent judiciary. Instead, they have suffered even more since the military regime used the judiciary as a major tool for oppression in the aftermath of the military coup of 1962. The courts, while controlled by the

military regime, applied the death penalty to Salai Tin Maung Oo, of Chin nationality and one of the most prominent student leaders of the peaceful demonstrations of 1974-1976. He was hanged by the neck in June 1976. Such an official execution of a student leader was unprecedented in Burma, even during the era of the British colonialists who ruled for more than one hundred years.

Shan Ethnic Leaders' Case

On February 9, 2005, nine Shan national leaders, including U Khun Htun Oo, Chairman of the Shan Nationalities' League for Democracy (SNLD), were unjustly arrested and charged by the SPDC military regime with allegations that they had formed a "Shan State Academics Consultative Council". They were convicted of serious crimes and given severe punishments on November 2, 2005. U Khun Htun Oo was sentenced to 93 years in prison and the other Shan leaders to prison terms of 79 to 106 years.

U Khun Htun Oo and the other arrested Shan leaders were simply attempting to implement their political aspirations by exercising their fundamental human rights and freedoms, such as of the freedom of expression, assembly and association. None of them committed a crime that should be punished under any section of Criminal Law in Burma. The SPDC was assuredly concerned that this peaceful movement would spread throughout the country and inspire the other ethnic peoples. In response, the SPDC criminalized the peaceful political actions of the Shan ethnic leaders. The simple truth is that U Khun Htun Oo and the other Shan leaders were condemned to outrageously inappropriate prison sentences for attempting to facilitate the struggle of those people who would like to establish a genuine federal union.¹³⁴

Requirement of Sufficient Attention by the International Community to Promote Operation of Judiciaries in the Ethnic Areas

Having noted the foregoing examples, it can be seen why the protection of the judiciary has been disregarded by the ethnic nationalities and organizations. For these reasons, they are more inclined to take up weapons to defend themselves. However, it is time now to change and to focus more on legal means. The initiative taken by the NLD to avail

¹³⁴ Statement issued by the Burma Lawyers' Council on February 12, 2007.

itself of the judiciary and promote the rule of law is quite positive, but it has not yet been taken up at the grassroots level by the people and in ethnic areas.

In order to facilitate the efforts of ethnic armed organizations to reform and promote the judicial systems in the areas controlled by them, sufficient attention by the international community is also of paramount importance, although it has not yet been seen. To encourage the emergence of civil society, the international community has spent several million US dollars within Burma. Unfortunately, many of the human rights activists, social workers and reporters who should constitute a part of any civil society are languishing in prisons. It should be noted that without the protection of an independent judiciary, civil society can rarely develop and will never be entrenched. The international community, which is committed to promoting human rights, peace and justice in Burma, must consider providing to the ethnic resistance organizations the technical and financial assistance necessary for operating an independent judiciary based in the rule of law.

Seeking Judicial Power and The Possibility for Improvement II

Possible Strategic Defection of Judges: A Comparative Study of the Judiciaries in Argentina, Korea and Burma

Both South Korea and Argentina have been ruled by military regimes, beginning in 1961 and 1976 respectively. Despite that past, both countries have been transformed into democracies. Burma, however, is still under the rule of military dictatorship and has been since 1962. In regard to the role of the judiciary in those three countries, a brief comparative study will be made, emphasizing the situations in which judges strategically defected even though they were under the rule of the military.

'Strategic defection' is the term used by Gretchen Helmke¹³⁵ to describe when judges under the bayonet rule against the rulers, despite lacking institutional security, caring about retaining their posts¹³⁶ and facing personal insecurity. With reference to the status of judges under military rule in Argentina, Gretchen concluded that strategic defection may take place

¹³⁵ Gretchen Helmke, "Courts under Constraints: Judges, Generals and Presidents in Argentina", published by the University of Cambridge, 2005, p.20.

¹³⁶ Ibid., p. 20, 75 & 126.

when judges are motivated by lofty goals,¹³⁷ when judges' beliefs and expectations about the threat they face changes,¹³⁸ when the court has to deal with serious human rights issues once the military regime begins to unravel,¹³⁹ when judges' perceptions shift in accordance with the political environment,¹⁴⁰ when judges want to minimize the sanctions they may face from future governments,¹⁴¹ when judges begin to sense that the current government is losing power¹⁴² and when judges perceive that a transition is likely to occur.¹⁴³

Under the military regime in the year 1980, judges ruled against the government on average in 36 percent of cases. But in the final two years of the dictatorship, once it became likely that a transition would occur, judges increased their percentage of anti-government rulings considerably, to almost half of all decisions going against the government.¹⁴⁴

Strategic defection took place in Korea to a notable extent during the period of the Third Republic (1961-72), which was established under General Park Chung-hee. Unlike in Argentina, the defection of Korean judges owed more to legal reasons, particularly constitutionalism, than to the political environment.

A lower court in Korea struck down Article 2(1) of the Government Compensation Law, a provision that excluded military personnel from certain forms of compensation normally available to those who suffered injury from government action.¹⁴⁵ The Supreme Court upheld the lower court decision, reasoning that the Government Compensation Law violated military personnel's constitutional right to equal treatment.¹⁴⁶ President Park was furious at this decision and used his power to re-nominate the Supreme Court judges and exclude every judge who had voted to strike down Article 2(1).¹⁴⁷ Tom Ginsburg argues that the Korean Supreme Court challenged political authority and subsequently provoked a backlash that contributed to the downfall of the entire constitution, leading to the 1972

¹³⁷ Ibid., p. 32.

¹³⁸ Ibid.

¹³⁹ Ibid., p. 127.

¹⁴⁰ Ibid., p. 99.

¹⁴¹ Ibid., p. 118.

¹⁴² Ibid., p. 125.

¹⁴³ Ibid., p. 100.

¹⁴⁴ Ibid.

¹⁴⁵ Tom Ginsburg, "Judicial Review in New Democracies", Cambridge University Press, 2002, p.211.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid. p.212.

establishment of the Korean Fourth Republic.¹⁴⁸ Such was the power of judicial review practiced by a Korean court even under the rule of a military regime.

Similar to Argentina and Korea, strategic defection of judges has also occurred in several cases in Burma even though defecting has a different meaning in Burma. Unlike in Korea, defection in Burma takes place during the ordinary administration of justice rather than in judicial review. A case study follows.

A Death Penalty Case

On November 28, 2003, the North Rangoon District Court imposed the death penalty on nine victims, including Nai Yetkha, who had been charged with high treason under Section 122 of the Penal Code. It was alleged that they had contacted opposition groups in exile, had detonated mines and bombs and were planning to assassinate the leaders of the military regime.

The judgment made no reference whatsoever to any verbal or written testimony or other documentary evidence in support of these contentions. The evidence suggests that the case was concocted behind closed doors by the military authorities, who then sought to give the matter an air of legality.

Questioning of the accused was for the most part conducted in the secret interrogation centres of the Military Intelligence Service. Military Intelligence personnel are not legally accredited criminal investigation officers. The trial was held *in camera*. The prosecution produced a list of articles allegedly seized, but produced neither witnesses from any search party supposed to have seized them nor the articles themselves. The court examined no independent witnesses. There were six witnesses – all of them for the prosecution – of whom five were police officers while the sixth, a supposed accomplice by the name of Ko Than Htun, was produced by the Military Intelligence Service.

The prosecution failed to produce for the court any admissible evidence, whether oral statements or documents, that might support the very grave charge of high treason laid against the accused. The case appears to have been fabricated by the Military Intelligence

¹⁴⁸ Ibid.

Service, and the convictions were based entirely on statements taken by Military Intelligence personnel. All nine suspects were given the death penalty.

During the process of appeals, the Burma Lawyers' Council received the original judgment of the court, translated it into English and distributed it widely along with legal analysis. The International Labor Organization was shocked at seeing the following paragraph in the judgment, finding that four of the nine suspects were given the death penalty simply for their communications with ILO:

Evidence (K), such as three sheets of paper contain with “Structure of unit 1,2,3,4,5” written in English, the original address card of Richard Horsey, deputy coordinator, ILO, four copies of address card, some books and sheets of paper were seized. It was found that those materials were placed behind the painting of Buddha at Nai Min Kyi's house. Therefore, it's clear that he sent false information on the government to ILO and he is also going to be punished.

The media satirized the situation, joking that for the simple receipt of the address card of an ILO official, a suspect deserves to be hanged by the neck. The ILO also effectively applied pressure against the court's judgment. As a result, upon appeal the sentences for all nine suspects were reduced and the four accused of involvement with the ILO were eventually acquitted entirely. Up to now, there have been several cases in which judges have had to shift their positions and strategically defect, willingly or unwillingly, whenever the following conditions exist together:

- (1) the original judgment of the court becomes widely publicized and is revealed to be obviously contrary to principles of justice;
- (2) in addition to human rights violations, evident legal errors are found;
- (3) a public campaign focusing on a particular case increases pressure;
- (4) the international community, particularly international organizations such as the ILO, applies pressure;
- (5) the case does not have a very high profile status politically.

A Forced Labor Case

Another interesting case related to forced labor. The case was brought before the Kaw-hmu township court in 2004. A female activist, Su Su Nwe, from the National League for Democracy (NLD) brought suit against local village authorities for forcing villagers to work illegally on the construction of a road connecting two villages. Even though a small case, the international community took note because of its class action nature. The court sentenced four local officials to eight months imprisonment. Prior to this decision, the courts had never sentenced any government official in response to complaints filed by ordinary citizens. Similar to the local courts in Korea, strategic defection by judges in a local Burmese court had taken place. The case was remarkable because it constituted a judicial review of the actions of government officials and indicated that judges in a local court are not happy with the unjust treatment of their own fellow citizens by local government authorities. Furthermore, it showed that a local court responded positively to the pressure created by local people and the media.

In order to deter an increase in similar efforts by the people, cross complaints were filed against Su Su Nwe by the governmental authorities. To some extent, the court was at the center of the rights movement during that period. Unfortunately, similar peaceful struggles for justice based on the court's power did not increase for the following reasons, among others:

- (1) a non-independent judiciary;
- (2) a lack of campaign strategy, coordination and financial assistance to spread similar actions across the country;
- (3) a lack of adequate knowledge of human rights and the law at the grassroots level;
- (4) insufficient efforts from lawyers' communities;
- (5) thinly-veiled support from political parties and no assistance from so-called civil society.

What Judicial Institutions Burma Can Reasonably Hope For in Burma

In today's Burma, the judiciary, under the military regime, is as corrupt as the administration. A number of judges as well as court officials regularly take bribes and rule in favor of those who can bribe them. The concept and practice of independence of the judiciary alone may not benefit individual citizens or society as a whole if the judiciary is independently corrupt in terms of both power and money. When the judiciary is itself corrupt, taking legal action against public officials on charges of corruption or abuse of power is pointless. As a result, the people's confidence in the judiciary will continue to wane. To avoid this, a system of checks and balances within the judiciary should be implemented. To this end, the court's power should first be delineated.

The Court's Powers

In light of previous human rights abuses committed not only by governmental authorities but also by local non-state actors, the district courts throughout the country should be vested with a power analogous to habeas corpus. In addition to Burma's three apex courts – the Supreme Court, Constitutional Court and Supreme Administrative Court – each state, as a constituent unit of the union, shall have to establish the power of judicial review in its highest court. Judicial power must also be divided between the three apex courts of the union and the high courts of the states.

Additionally, the role of military tribunals must be redefined. If their role is expanded more than necessary, it will circumscribe the power of civilian courts. Military tribunals should not exist on the same level as the civilian courts. They shall have power to adjudicate only disputes in which both parties are in the military. Military courts must be restricted to crimes of a military nature.¹⁴⁹ However, final decisions must be subject to appeal in the civilian Supreme Court. A civilian justice system must be applied in the future Burma, and the military regime's 2008 Constitution will have to be revised.

Society will be stable only when the past is confronted. The courts shall have the power, in line with international law, international human rights law, and humanitarian law,

¹⁴⁹ Yash Ghai, "The 2008 Myanmar Constitution: Analysis and Assessment", p. 29. Available at: http://www.burmalibrary.org/docs6/2008_Myanmar_constitution--analysis_and_assessment-Yash_Ghai.pdf

to deal with heinous crimes committed under the rule of successive military regimes, as has been the case for courts in Argentina and elsewhere. The amnesty provision included in the SPDC's 2008 Constitution, which encompasses all international crimes, must be nullified. Under transitional justice arrangements, amnesties may be considered only for crimes that do not constitute crimes against humanity, war crimes or genocide.

A Jury System

A jury system must be reintroduced in Burma for criminal cases. It should be composed of temporary jurors in order to (1) promote the participation and awareness of the people and (2) make the judiciary less technical and more in dialogue with people at the grassroots level.

Judicial Tenure

Obviously, complete judicial independence from the other two arms of government is not theoretically possible given that most judicial appointments are made by the government. Independence should be further ensured by limiting removal and guaranteeing judicial tenure except in limited cases of proven misconduct or incapacity. The removal process should be institutionalized and controlled by a permanent and independent judicial service commission comprised of the chief justices of the three apex courts, three law school deans, three practicing senior advocates elected by bar associations, and the attorney general.

The Judicial Conference

A Judicial Conference may be created as a national policy-making organ for the judiciary, with authority over such policies as judicial misconduct. It should be facilitated by the Department of Justice. Membership in the conference may be comprised of the justices of all three apex courts, justices of the high courts of each state and a district judge from each judicial region. The judicial affairs committee of the legislative body may request the opinion of the judicial conference if a bill relevant to the judiciary is to be submitted for debate at the parliament.

The Judicial Council of the Constituent Units of the Federal Union

The Judicial Council's main purposes would include: to monitor the conduct of autonomous judges, to certify the permanent mental or physical disability of district and township judges who though eligible for retirement refuse to step down, and to provide recommendations to the Judicial Service Commission regarding removal of a judge. It would also take responsibility as arbiter of disagreements over administrative policies in the lower courts.

Judicial Facilitation Offices

This office would serve as a liaison between the Judicial Conference and legislative body. It would also take responsibility, as the secretariat for the Judicial Conference, for all fiscal and business services, and prepare statistical data and reports on the business transactions of the courts.

Federal and State Judicial Centers

These centers may be established not only at the federal level but also in each and every constituent unit of the federal union of Burma. Their main responsibility would be to support the operation of their respective judiciaries through analysis, research, training and planning in order to deal with the following: corruption; interference from outside influences; interactions with other institutions, including bar associations; congestion and delay; inadequate facilities and finances; uneven distribution of case loads; the general absence of administrative expertise; the observation of contemporary judiciary systems of other countries; and raising awareness within the respective local judiciaries.

Financial Independence and Transparency in Financial Management

The judiciary will rarely be independent if it must fully rely on financial support provided by the government. The judiciary's budget should be separated from the Department of Justice's appropriation. In order to maintain independence in the future Burma, the budget for the judiciary should be allocated separately and determined with the aim of preventing corruption of the judges and judicial staff in mind.

Conclusion

While applying the foregoing norms and practices, Burma's political party system must be reformed. In Thailand, a political party system is fragile whereas, in Burma, it has totally collapsed. As indicated above, in order to further the judiciary as a final arbiter of underlying societal issues, interactions with and based on an efficient political party system are of paramount importance. It is desperately required for the case of Burma.

Only then may Burma achieve a judiciary that is not only independent from legislative and executive controls but also neutral, objective, competent and free from all external influences. To this end, the common law tradition which essentially protects individuals from arbitrary intervention by the government must be re-established in the future Burma, based on the rule of law and underpinned not only by liberalism but also by the value of collectivism. This will facilitate the stability of society in Burma.