THE RIGHT TO A FAIR TRIAL IN BURMA

KHIN MAUNG AYE (aka) AUNG HTOO

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.....
Mr. Aung Htoo(aka) Khin Maung Aye
Candidate

.....
Asst. Prof. Suvajee Good, Ph. D.
Chair

.....
Assoc. Prof. Withaya Sucharithanarugse, Ph.D.
Co-Advisor

.....
Mr. Kees Wouters, LL.M.
Co-Advisor

.....
Assoc. Prof. Rassmidara Hoonsawat, Ph.D
Dean
Faculty of Graduate Studies

.....
Ms. Sriprapha Petcharamesree, Ph.D.
Chair
Master of Arts Programme
in Human Rights
Faculty of Graduate Studies

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.....
Mr. Aung Htoo(aka) Khin Maung Aye
Candidate

.....
Asst. Prof. Suvajee Good , Ph. D.
Chair

.....
Assoc. Prof. Withaya Sucharithanarugse, Ph.D.
Member

.....
Mr. Charnchao Chaiyanukij, LL.M.
Member

.....
Mr. Kees Wouters, ~~LL.M~~
Member

.....
Assoc. Prof. Rassmidara Hoonsawat, Ph.D
Dean
Faculty of Graduate Studies
Mahidol University

.....
Assoc. Prof. Rassmidara Hoonsawat, Ph.D.
Dean
Faculty of Graduate Studies
Mahidol University

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KHIN MAUNG AYE (aka) AUNG HTOO 4236015 GRHR/M

M.A. (HUMAN RIGHTS)

THESIS ADVISORS : SUVAJEE GOOD, Ph.D., WITHAYA SUCHARITHANARUGSE, Ph.D., KEES WOUTERS, LL.M

ABSTRACT

Justice is an esteemed value that has been sought by society for ages. In seeking justice for the crime committed by any perpetrator – whether it be an ordinary citizen or a government official - trials play a significant role in every society. This paper will explore the elements of fair trial and identify the major factors which should be reformed in a future democratic Burma for the emergence of a fair trial.

In spite of the fact that seeking justice from a legal perspective was supposed to be more practical than from sociological one, it has been proven that static legal formula alone has not been beneficial to either individual victims or the whole society. This paper scrutinizes the essence of the 'Trials' in Burma, from both sociological as well as legal perspective. Library research, in conjunction with in depth interviews, forms the basis of this research.

In a state that exercises rigid centralization, individual liberty is terribly limited, the independent judiciary is rejected, judicial processes are strictly controlled, and, as a consequence, the fair trial does not exist. For the emergence of fair trials in a society, the background social environment is of paramount importance. As long as 'feeling of fear' prevails among people, they may not be willing to defend their fundamental rights, including the right to a fair trial. To establish fair trial, society needs to highly value individual liberty, establish an independent judiciary based on the separation of powers, guarantee judicial tenure, select the judges by independent institutions, establish a monitoring system on the function of courts, and apply due process of law, based on the Rule of Law, that will cover three stages – pre-trial, trial and post trial events.

KEY WORDS: SEEKING JUSTICE THROUGH A FAIR TRIAL

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LIST OF ABBREVIATIONS

GPO	Government Prosecution Officer
CPO	Court Police Officer
IMT	International Military Tribunal
ICC	International Criminal Court
ICTY	International Criminal Tribunal (Yugoslavia)
ICTR	International Criminal Tribunal (Rawanda)
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
HRC	Human Rights Committee
SC	Supreme Court
HC	High Court
CC	Chief Court
CRPC	Code of Criminal Procedure
BSPP	Burma Socialist Programme Party
NLD	National League for Democracy
SLORC	State Law and Order Restoration Council
SPDC	State Peace and Development Council
CPB	Communist Party of Burma
NMSP	New Mon State Party
PPC	Paddy Purchasing Centre
AFPFL	Anti-Fascist People's Freedom League

CHAPTER I
INTRODUCTION

Since 1962 up till now, Burma has been under the rule of military dictators. They ignored the genuine principles of the Rule of Law including one, "every person is equal before the law". Instead, a new doctrine on "Observance of Law and Order" was introduced. Within this context, the people are forced to obey the laws provided merely by the ruling military elite, reasoning that the stability of a state should be a major priority. Many of those laws deny the basic concept of human rights. Judicial system and judiciary has become an instrument of the ruling military to prolong its rule, instead of being social mechanism to protect the rights of people. As a result, in Burma, gross human rights violations remain unabated; fundamental freedoms of individual citizen are deprived; and, justice for the victims cannot be sought through the existing trials in Burma in spite of the fact that Burma, at one time, exercised an effective common law system.

This research paper observes the essence of the criminal trials in Burma from the perspective of a Fair Trial with reference to historical, political, sociological and legal background with an aim to seek the elements of a Fair Trial. Altogether six chapters mainly constitute this paper. Chapter one is this 'Introduction' which includes the statements of the problems, literature review, objectives and research questions, a brief hypothesis, methodology, research limitation, and operational definitions. Chapter one will also bring into notice the glimpses of other chapters.

In chapter two, the norms of a Fair Trial are explored from a Burmese legal perspective, legal theoretical outlook and overview of the international human rights laws with a sociological underpinning. In this chapter, the relationship between law and sociology is scrutinized. Then, harmony between 'protection of individual rights' and 'fostering the welfare of a society' is also observed. On the basis of the rule of law, the relevant factors such as the source of law, background legal system, judiciary, the status of legal profession etc. are studied in search of a Fair Trial. In

addition, the importance of procedural justice is examined in comparison with the substantive justice. Chapter two is the realization of researcher on a Fair Trial by which the influential factors on a trial and a criminal trial system in Burma will be explored in later chapters.

Chapter three describes current situation on administration of justice in Burma. There, altogether four case studies are mentioned. The first two cases are the incidents of victims occurred at the pre-trial stage while being investigated. The second case is an analysis on the trial of eighteen foreigners. The third case is an examination of 22 political prisoners whom were tried again in Insein prison for their attempts to contact the outside world. In the end of chapter three, a brief analysis on each case was made from sociological and legal perspectives with a special focus on procedural due process.

Chapter four mentions the status of a criminal trial system in Burma. It starts from system of justice at post-colonial time. Then, it continues to mention how the judges are selected, and why the judges' subservience only to constitution and the laws are important. Based on the experiences after independence of Burma, this chapter pointed out that when the judiciary is independent from executive, a Fair Trial largely existed. It also examined how 1974 Constitution, ethnic cease-fires and the existence of unjust laws influenced the status of a trial in Burma. In addition, with reference to the Code of Criminal Procedures and other relevant existing laws in Burma, this chapter analyses detailed procedural defects when a trial is held. Finally, chapter four explores how the existence of just laws and unjust laws influence the status of a trial and how social environment creates a trial fair or unfair.

Chapter five scrutinizes the factors that obstruct a Fair Trial in Burma such as sociological landscape where 'fear' is prevailing, the existence of unjust laws and special criminal tribunals, the application of strong state concept, legalization of military's continuation in power, lack of the rule of law foundation and constitution, deprivation of victims' rights, the existence of secret detention centers, the exercise of arbitration detention and preventive detention, replacement of military intelligent people in the position of police, denial of legal assistance and public hearing, and etc. This chapter highlights that when the society is corrupt, a fair trial rarely exists in spite of the fact that some just laws prevail and legal system is more or less

applicable. Chapter five also analyses the political development of Burma that the application of a certain political ideology largely impacted over the existence of a trial as to whether it is fair or unfair.

Chapter six finally explores and recommends the elements of Fair Trial to be possibly applied in future democratic Burma.

1.1 Statement of the Problems

Moe Min Zaw a student who was arrested in September 1998, for peacefully protesting about the poor human rights situation in Burma. He was accused for agitating unrest and sentenced to 52 years in prison. Under the oppressive laws, hundreds of political prisoners, inclusive of Moe Min Zaw and many other students, youth and democracy activists, are languishing in the jails. A large number of political prisoners are put in prison without being tried for many years. Innocent victims were tortured in the military's detention centers. Many of those passed away while being detained in the prison or in the secret detention centers. The lawyers who attempted to protect their clients were embarrassed and threatened; many times they were also detained, licenses of fifty five lawyers, who got involved in the political movement, were withdrawn. The judges who denied to obey the instruction of the military were dismissed in various levels of judicial positions. Out of six Supreme Court judges, except U Aung Toe, Chief Justice in sitting, other five judges, who were not much subservient to the military, were forced to resign in 1998. Within this background scenario, the Supreme Court and its inferior courts have been keeping silent on the suffering of people attributed to atrocious actions done by ruling military officials: no complaint against the military authorities can be filed in the courts; no effective investigation is made by the police in the event that the military personnel are accused as perpetrators; no action will be taken by the judges despite the fact that authorities severely deprived the liberty of an individual citizen by detaining him or her illegally; and no judgment that may not appease the ruling junta will be rendered by the courts.

In March, 2002, former dictator U Ne Win's son-in-law Aye Zaw Win and three of his grand sons were taken into legal action accusing of planning to overthrow the ruling junta and split the armed forces, eventually restoring the

monarchy. Then they were indicted on charge of High Treason, a serious criminal section provided for in Penal Code. Accordingly, those violating the law can be sentenced into death penalty. The action of a person will fall in ingredients of such a crime only when someone attempts to overthrow the constitutionally elected government. The ruling junta itself is not such a de jure regime but a de facto government that got into power by military coup. However, the accused were tried in the campus of Insein Prison in which fear prevails in the mentality of every person relevant to the trial. Before the commencement of the trial, almost the suspects were detained by the authorities and forced them to become prosecution witnesses. There had been no lawyer who would represent the accused immediately after he was arrested on charge of High Treason. The evidence produced to the court appeared to be circumstantial, and not solid evidence that would prove beyond reasonable doubt. From legal perspective, prosecution site was too weak to prove its allegation on High Treason. However, the accused were sentenced into death penalty. Many observers commented that it was a sham trial fabricated by the junta thereby disseminating information that, any army personnel, who might do similar coup attempt in future will be taken into effective legal action and rendered capital punishment.

The Eighteen foreigners expressed their support to peaceful democratic movement of Burma. They were arrested, tried and sentenced to five years imprisonment. Then, due to international pressure, they were pardoned. In that case, all the judicial processes completed within eight hours.

As such, the trials have become a mockery as they have been manipulated by the junta, as an instrument to rule the country. System of justice in Burma has already been ruined. A great majority of people no longer believe in the criminal justice system of the society. In an attempt to promote and protect their individual rights, instead of mainly resorting to the courts and trials, countless number of people are pleased to choose other alternatives such as revenge, violence, bribery, making cronies with power holders and etc. To correct this, the factors that obstruct the fair trials needs to be observed; merits and demerits of existing criminal justice system has to be properly addressed; and, the sociological factors that might facilitate the emergence of a Fair Trial is to be highlighted. In this account, in search of justice, it

requires to observe the status of the trials in detail and the factors that influence over those trials.

1.2 Literature Review

1.2.1 Justice

With regard to justice, through the ages, political scientists and philosophers have attempted to define it from various perspectives. Jose W. Diokno, the founder of the Free Legal Assistance Group (FLAG), one of the largest and most effective human rights lawyering NGOs in the Philippines, commented as follows:

> Some have argued that justice is what the strong impose and the weak accept; others, that on the contrary, justice is what puts limits on what the strong can impose; still other see no conflict between these two views, for the first describes the real, the second, the ideal in whose image the collective conscience of mankind gradually transforms the real.[1]

John Rawls, a political scientist, defines, inter alia, that:

> "Justice is the first virtue of social institutions, as truth is of systems of thought. A theory, however, elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions, no matter how efficient and well-arranged, must be reformed or abolished if they are unjust."[2]

In "Theory of Justice", John Rawls argues that justice is a way of distributing the rights, duties, benefits and burdens among individuals within society; and every person is inviolable and that even the welfare of society cannot displace this inviolability. He also mentioned that a political conception of justice must address the just relations between peoples, or the law of peoples.[3]

In distributing the rights, duties, benefits and burdens among individual citizen in practice, justice system of a society is of paramount importance; people should have easy access to the courts; the courts play a pivotal role; the judges can

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[1] Jose W.Diokno, "Justice Under Siege: Five Talks"; Manila, the Philippines, Nationalist Resource Centre, 1981; p. 1.
[2] Harold Crouch, "Southeast Asia in 1977: "A Political Overview", in Institute of Southeast Asian Studies, Southeast Asian Affairs, 1978, Singapore; Heinemann, 1978, pp. 10-11. See also Ibid.
[3] John Rawls, "Political Liberalism" New York, Columbia University Press, 1996; p. 12.

adjudicate the disputes among the individual citizen themselves and between the individual citizen and the ruling authorities fairly within the framework of the Rule of Law, by exercising the elements of Fair Trial that have been accepted internationally.

Freedom, justice and peace is recognized by the Universal Declaration of Human Rights in its first and foremost sentence of 'Preamble' as the inherent dignity of the human family. In a society, without the existence of freedom, it may not be possible to achieve justice; without justice, peace will be meaningless; furthermore, without a genuine peace and freedom, justice will never be realized.

In seeking justice, there may exist a large number of alternatives – exercising revenge and other violent means, publicizing the truth by various medias, lobbying the government authorities, relying on political forces, negotiating among the affected parties and etc. In the aftermath of the September 11 attack against the United States, fear of terrorism has started to prevail in the hearts of millions of people in the whole world. As a consequence, instead of resorting peaceful means to respond to the current and future threat, violence might become a favorable way for the suffered societies. However that should not be encouraged.

1.2.2 Seeking Justice Through Trials

In search of justice in today's world, "Trial" has become the most reliable mechanism in the civilized societies in a way that perpetrators be penalized or the victims be provided with remedy. Whenever there occurs violation of rights - whether be it among the individual citizens or between one country and another or between one group and a state- the perpetrators and victims alike should resort the trial, courts and judicial systems in the national or international levels. With strong references to human rights, seeking justice through the trials, has become an emerging trend in the international community, that should be encouraged.

The international trend to promote human rights has started to change when the International Military Tribunal (IMT) in Nuremberg was established by the joint decision of the Government of the Allies – United States, United Kingdom, France and Soviet Union- in August 1945 after the second world war. In Germany, before the war, the Nazis placed a large number of political opponents and civilians in concentration camps in conditions of great horror and cruelty. Millions of Jews were

also persecuted and murdered ruthlessly, acts which constitute crimes against humanity. Given that these crimes of the Nazis were too heinous to ignore, the Allies had to consider to take effective legal action. Then, the question was that the scope of classical 'War Crime' would not be enough to cover those atrocities committed by the Nazis. In this context, the provision on 'Crime Against Humanity' was included in the IMT the Nuremberg Charter which departed from the international law's longstanding approach to violations of individual rights within sovereign state, which was considered a matter of "domestic jurisdiction" and therefore outside the domain of international regulation.[4] Taking action against the Nazi leaders on charges of crimes against humanity in the Nuremburg Tribunal has opened a new chapter for promotion of human rights. It was the first tribunal that took legal action against the government of a state who committed crimes against their own citizens.

However, in recent years, the academics have reviewed the validity of Nuremberg tribunal and, referencing to its procedural deficiencies, they concluded that the tribunal exercised the 'victor's justice.' The allied forces, as victors, adjudicated the German Nazi leaders, as losers, after the war, thereby denying the procedural fairness for the latter. In terms of human rights, academics have started to debate whether trials should be approached from the perspective of 'fairness' **in search of justice for both victims as well as perpetrators**. Anyway, Nuremberg tribunal was well recorded by the international human rights community as the one which laid down the foundation for the jurisdiction of crimes against humanity to be exercised for crimes committed by Germans against other Germans within Germany. It was also the tribunal that started to challenge the sovereign prerogative of a state, in an attempting to protect individual freedom.

> "Nuremberg proved a springboard for the development of international human rights law, as much, of the international community came to conclude that a state's treatment of its citizens in peacetime was appropriate for general international regulation."[5]

[4] Henkin, Newman, Orentlicher, Leebron, "Human Rights" New York, University Case Book Series, Foundation Press, 1999: 612.
[5] Steven R. Ratner & Jason S. Abrams, "Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy", Oxford University Press, New York, 1997: 6

Following the principles laid down at Nuremberg, the Rome Statute of the International Criminal Court provides that: "official capacity as a Head of State or Government, shall in no case exempt a person from criminal responsibility." These principles also reflected in the two international criminal tribunals: the first one was the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (the International Criminal Tribunal for the former Yugoslavia, or ICTY) established in May 1993; and the second one was the International Criminal Tribunal for Rawanda (ICTR) established in November 1994. "The ICTR has the power to prosecute persons responsible for (enumerated) crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds …."[6]

1.2.3 Making Human Rights National and the Role of National Legal Systems

Some academics have raised the notion that effective promotion and protection of human rights is to make "human rights" national, instead of focusing too much on the establishment of international mechanism for human rights. They highlight that the significant issue is how can human rights be made national and how can human rights concept be adopted into national legal systems.

> A comprehensive study of human rights recognizes that the international law and institutions of human rights depend heavily on national rights system. In a real sense, there are no "international human rights"; human rights are claims by human beings upon and within their national societies.[7]

With reference to the notion to adopt "human rights" into national legal systems, it has become necessary to scrutinize the national criminal justice system of Burma from the perspective of the right to a Fair Trial. The question is that "fair trial"

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[6] Supra Note 4: 625.
[7] Henkin, Newman, Orentlicher, Leebron, "Human Rights" New York, University Case Book Series, Foundation Press, 1999: viii.

cannot be sought merely within the bound of effective criminal procedural law, and within the framework of current judicial and legal system of Burma. Nevertheless, this is not to discard all the existing provisions provided for in the Code of Criminal Procedure and other relevant national laws but to promote those components which might be in line with the Fair Trial perspective. Furthermore, the notion, principles and practices of other democratic countries and international community, which might facilitate the emergence of Fair Trials, are to be incorporated into the national criminal justice system of Burma with the background structural changes of the society.

1.2.4 Fairness

The term "fairness" would have a broad scope once it is measured from different social sectors. However, it would be more accurate should the issue is considered from legal perspectives. A trial is "fair" if it satisfied substantive and procedural due process protection. Despite the fact that the law itself was valid, a due process issue still plays a major role in the administration of justice. When the victims were tried in the courts the major concern is in terms of trial procedures.

"Fairness" does not refer only for "judgment" in the court. In this decade, the scope of a trial in conjunction with "fairness" has become wider and the academicians recommended to cover the three stages – pretrial, trial and post trial events. In seeking "justice" by a society for victims of crime, "fairness" should be rendered to the suspected accused, as perpetrators, under the presumption of innocence. It may not be fair if a detained suspect is denied to get the assistance of legal council immediately after he or she is arrested, to communicate with his or her family and outside world, to be granted bail in accordance with the effective laws; to receive basic needs from prison authorities, or his or her family or outside world before he or she is indicted in the court. It may not be fair if equality before the law cannot be guaranteed in practice for the poor due to lack of free legal aid system. It may not be fair if there exist no civil society organizations which will provide assistance to the vulnerable sector of the society such as women, children and disables who are victims of crime. It may not be fair if the society does not take

responsibility for unlawful or wrong judgment made upon the innocent as remedy for the victims.

1.2.5 Rule of Law, Separation of Power and Fair Trial

In the event that the Rule of Law does not prevail in a society, Fair Trial might rarely exist. According to J.H. Baker, "the principle known as the 'rule of law' treats all exercise of authority as subject to the control of the regular courts of law and furnishes the subject with a legal remedy when any official, however mighty, exceeds the power which the law gives him."[8] "Every person is equal before the law" has become one of the major principles on the Rule of Law in the same way as "The government must be bound by the same laws that bind individual."[9] Mr. B.K. Sen, a senior advocate who has been a practicing lawyer in Burma since 1952, commented that Burma inherited such a fundamental concept of the Rule of Law from British colonialist.[10] U Hla Aung, professor of law, Rangoon University, made a comparison between the English Law and Burmese law, mentioning that "A British judge has once described the law of his own country as 'the government of the living by the dead'; if this is true of English law, it is certainly not true of Burmese law which over the centuries, has grown and adapted itself to the changing needs of the country."[11]

As U Hla Aung commented, the development of English law and Burmese Law might be diverse. But many legal academics accepted that "the principle of equality before the law," as one of the major principles of the Rule of Law, originated from the British. This principle can become a reality only when the society practices the doctrine of separation of power, that is, the judiciary is to be separated from the executive.[12] The issue on Fair Trial is to be observed with the background situation of independence of judiciary within the framework of the Rule of Law. U Myint Zan, law lecturer at Deakin University (Melbourne) and the

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[8] Baker J.H., *An introduction to English Legal History*, 3rd ed, Butterworths, Sydney, 1990: p. 165.
[9] Nicholas Cowdery and Adrian Lopscomb, The Just Rule of Law, Southern Cross University Law Review, Southern Cross University, Lismore, New South Wales, Australia, Volume 4, December 2000: p. 11.
[10] Interview with Mr. B.K Sen in August, 2000.
[11] Hla Aung, The Burmese Concept of Law, Journal of the Burma Research Society. Rangoon: University Estate, December 1969. Volume 52. p. 37.
[12] Ibid

University of New England in Australia, analyzed that although colonial court structure was separate from the executive arm of the British colonial administration it would not be correct to state that there was full judicial independence during the colonial era.[13] He also mentioned that he was not aware that the acts of British colonial government could be challenged in British colonial courts in Burma.[14]

With reference to the 1947 Constitution, which was a supreme law of the land after independence of Burma, Dr. Maung Maung, a famous legal academic and former President of the Union of Burma, wrote that "The ideal of the independence of the Judiciary was accepted by the framers of the constitution, and they also appreciated that to ensure independence, the Judiciary must be given security of tenure, and must be placed far above the daily ebb and flow of politics and affairs."[15] However, writing around 1992 Maung Maung stated that "there has been no major case in which the Myanmar Supreme Court (of the 1947 constitution) has declared a legislative act ultra vires."[16] Dr. Maung Maung took responsibility as the last President of Burma under the 1974 Constitution.

In this regard, U Myint Zan, responded that Dr. Maung Maung should have mentioned that the judiciary under the 1974 constitution also never "declared a legislative act ultra vires, which in any case is a contradiction if not a legal impossibility, taking into account the structure of the 1974 constitution; and, judiciary did not even have the power to interpret the laws and the constitution."[17] In search of Fair Trial, the debate on "Separation of Power" and "Independence of Judiciary" among the Burmese legal academics has remained continued. U Myint Zan commented as follows:

> Hence the rejection of "separation of power" and an "independent judiciary" in legal thinking, education and practice pervaded the period of the 1974 constitution.[18] ---------- The concept of judicial independence

[13] Myint Zan, Judicial Independence in Burma: Constitutional History, Actual Practice and Future Prospects. New South Wales, Australia: Southern Cross University Law Review, Southern Cross University, Lismore, , Volume 4, December 2000: p.21.
[14] Ibid p. 21.
[15] Maung Maung, *Burma's Constitution*, The Hague, Martinus Nijhoff, 1959: p. 148.
[16] Supra Note 13. p. 29.
[17] Ibid p. 40.
[18] Ibid p. 42.

therefore became both formally, constitutionally rejected and actually non-existent during the period of the 1974 constitution.[19] ---------- it is arguable that a system whereby the "Legislature, the Executive, and the Judiciary operate as aspects of the one party State" is no longer acceptable to the majority of the Burmese.[20]

1.3 Objectives and Research Questions

1.3.1 General Objective

To explore the elements of a Fair Trial to be possibly applied in a democratic political system in Burma with reference to the international principles of fair trial, the previous and current practices of trials in Burma and the comments and analysis made by Burmese legal academics and human rights activists.

1.3.2 Specific objectives

1. To overview the procedures of the trial such as Code of Criminal Procedures and other relevant laws, rules and regulations from the perspective of the protection of human rights;
2. To explore the internationally accepted principles of fair trial; and,
3. To identify the major factors which should be reformed so that the judicial system can become a reliable institution of the state that might take into action on the perpetrators who are accountable for the previous human rights abuses once a genuine democratic transition take place in Burma.

1.3.3 Justification of Research

Burma will have to follow suit of other nations which have already transformed from the rule of dictatorship to democracy. Then, to achieve stability with a genuine national reconciliation in Burma, it is crucial that individuals

[19] Ibid p. 42.
[20] Ibid p. 43.

emerging from massive human rights abuses develop appropriate state mechanisms in order to deal with the previous human rights abuses as well as the remaining challenges for new human rights abuses. In peaceful ways, justice is to be sought for the victims, whose rights were violated by the state authorities in the past. Not only for the whole nation but also for individuals, the past experiences, in terms of human rights violation, should be addressed through a process of justice based on the rule of law. Only then, negative impacts on the whole society will be avoided and it will affect the present and future in positive ways. Furthermore, foundation for promotion of justice needs to be laid down so that the repeated criminal actions and all other forms of revenges can be avoided. This is to draw a line between times past and present.

To this end, the structure of Burma needs to be reformed in which judiciary stands as an independent reliable state institution. Furthermore, the new democratic Burma will require to promote its criminal justice system in conjunction with the reformation of other state institutions, that will encourage the emergence of competent, impartial and fair trials. The experiences of the countries in Latin America and South Africa proved that once the judicial system is weak in a particular country, where a democratic transition is taking place, it is not effective to promote the rights of victims whose human rights were seriously abused by the former authoritarian regimes. It was also not effective to protect the rights of suspects whom were accused and charged as perpetrators and this would lead a denial of the principles of Fair Trial. In the case of Burma, judiciary, court and trials should be a reliable structure of state for the people to have recourse for the long term purpose, instead of resorting violent and other uncivilized means. Unfortunately, judiciary in Burma has currently remained incompetent, complaint and subservient; and as such in order to promote this, the supporting and obstructing factors that create the trials fair or unfair needs to be explored.

1.3.4 Research Questions

Major question

What are the factors and procedures that obstruct the values and conceptions of "fair trial" in Burma?

Specific questions

1. What is fair trial from a legal-theoretical point of view i.e. how is it defined in international human rights law?
2. What is fair trial from Burmese legal point of view?
3. Is the criminal trial procedure in Burma fair? Is there any particular trial procedure which creates the situation for violation of human rights?
4. What are the factors that obstruct the fair trial in Burma?
5. Which parts of the judicial system need to be reformed once the cases on previous human rights abuses are to be taken into judicial action after a successful democratic transition?

1.4 Conceptual Framework

Historical, political and sociological underpinnings create the status of the Rule of Law, position of constitution, designation of legal and judicial system, and the existence of just laws or unjust laws in a respective society.

Unless just laws exist, the Rule of Law cannot prevail in any society. Without the protection of a proper constitution that exercises the separation of state powers - legislation, administration and judiciary - independent judiciary may not come into existence. In that case, judiciary may not be able to apply judicial review power over the executive. Contrarily, the executive will enable to interfere in the function of judiciary thereby denying the fairness of trials.

The principle on equality before the law, as a major part of the Rule of Law, can become a reality in a nation "where the law is king." The law, within the context of the Rule of Law, can become king only when the country has independent state institutions which exercise the separation of power in order to check each others' function in accordance with the constitution. Then, exercises of the 'due process of law' within the framework of the Rule of Law, might facilitate a 'Fair Trial'. This is in respect of the legal factors.

The custom, culture and religion practiced by the people, political ideologies accepted by the leaders, and historical experiences encountered by the respective society mainly constitute a status of sociological environment. When the

society is stable; social harmony is equitable; and social landscape is beneficial to the efforts of people in search of justice, that may facilitate the trial procedures to be reasonable enough for a Fair Trial to emerge. This is in respect of the sociological factors.

Sociological and legal factors are contributing and influencing each other. The legal factors such as the prevailing of the Rule of Law, guarantee of constitution on fundamental freedoms of every citizen, the independence of judiciary, and the existence of just laws certainly promote the social settings. However, in the event that sociological landscape is too obscene, derogatory and regressive to resist, the legal factors may not enable to underpin the proper trial procedures through which a Fair Trial be produced.

Sociological underpinning and legal factors create the status of trial procedures as to whether they are qualified enough to lay down foundation for the emergence of a fair or unfair trial.

1.5 Methodology

1.5.1 Documentary Research

For this research work, in order to realize the impact of the historical, social and political background of the society over the legal and judicial system, the relevant documents on Burma were studied. Some research papers written by the Burmese legal scholars were observed. To scrutinize the advantages of and disadvantages of previous and current trials in Burma, the Code of Criminal Procedures, Jail Manual, Burma Police Manual, Court manual, Court Instructions, responsibilities of public prosecutors, Union Judiciary Act, Bar Council Act, Evidence Act, Attorney General Act, The Contempt of Courts Act, The Judicial Officers' Protection Act, State Prisoners Act, 1975 State Protection Act and other relevant laws were observed. Researcher also studied relevant laws on crime and criminal procedures mentioned in Burma Code Volume 1 to 13 in which almost the laws, enacted by the British Colonialists before independence and new Parliament of Burma after independence, were mentioned.

Furthermore, in search of internationally accepted principles on Fair Trial, the following subjects were studied in Human Rights Institute, Faculty of Law, Columbia University, New York as a visiting scholar from September 7, 2000 to May 30, 2001:

1. Human Rights and Constitutionalism (Provided by Prof. Louis Henkin)
2. Transitional Justice (Provided by Prof. Paul van Zyl)
3. Transnational Litigation for Protection of Human Rights (Provided by Prof. Reed Brody and Michael Turner.)

In search of regionally accepted principles on Fair Trial, the research documents submitted in the following regional seminars were observed:

1. Regional Seminar on "Media and the Role of an Independent Judiciary", Organized by The Institute For Development Communication (AIDCOM) In Cooperation With the Friedrich Naumann Foundation, Germany, At Emrald Hotel, Bangkok, Thailand, August 27-28, 1996;

2. Regional Symposium on "Law, Justice and Open Society in ASEAN" Conducted by the Konrad Adenauer Foundation (KAF) and the Thammasat University, Faculty of Law, October 6-9, 1997;

3. "Asian Seminar on Fair Trial," Organized by Asian Human Rights Commission & Danish Centre for Human Rights, held at Hong Kong, November 7-12, 1999.

1.5.2 In-depth Interviews And Case Studies

In support of documentary research, in-depth interviews were also made with the political leaders, elected member of parliaments, lawyers, democracy activists, some prisoners who were arrested and tried by the courts in Burma, and a historian, in total of 30 persons. Furthermore, with the assistance of a member lawyer from the Burma Lawyers' Council, interviews were also made with ten leading Burmese lawyers led by U Tin Oo, Vice-chairman of the National League for Democracy (NLD) and also Chairman of the Central Legal Committee of NLD. It was held at the house of U Tin Oo in Rangoon on August 17, 2002 and collected their findings and analysis on current trials in Burma.

1.5.3 Research Limitations

Due to security problem as well as the restrictions of the ruling military junta, researcher could not observe the current hearing processes in the courts in person. As researcher himself is an exile activist, in-depth interviews could not be made with the judges, prosecution councils, criminal police officers, court staff who are functioning the trials under the current judicial system in Burma.

1.6 Operational Definitions

"Fair Trial" mainly refers to a criminal judicial proceeding, that will cover the three stages of the process – pre-trial, trial and post trial events - in order to seek a fair judgment for both perpetrator and victim, through due process of law within the framework of the Rule of Law.

"The suspect" is a person, who is arrested by the police, assuming that he or she might commit a crime.

"The accused" is a suspect, who is produced by the police before the court on charge of any criminal offence, or a person, who is formally accused by a complainant in the court, alleging that he or she commits a criminal offence.

"Offence" means any act or omission made punishable by any law for the time being in force.

"Bailable Offence" is an offence under which the bail is granted for a suspect or an accused as a matter of right both by the police officer and the court.

"Non-bailable Offence" is an offence under which the bail cannot be granted for a suspect or an accused as a matter of right both by the police officer and the court.

"Cognizable Offence" means an offence for which the police have the authority to arrest a person without warrant and investigate the offence without permission of the Magistrate.

"Non-cognizable Offence" means an offence for which the police have the authority neither to investigate without order of the Magistrate nor can arrest the suspect without warrant.

"Confession" is a formal statement made by the accused before a Magistrate, without being coerced or tortured, mentioning that when, where, and how he or she committed a criminal offence.

CHAPTER II
CONCEPTUALIZATION OF A FAIR TRIAL

"The right to a fair trial is a norm of international human rights law designed to protect individuals from unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms."[1] Furthermore, in order to protect the rights of a citizen against their governments' abusive actions, the existence of a national mechanism, that can be applied by its own people, in line with international human rights law, is of paramount importance. In this context, the courts, as a major part of the state institution, play a significant role in the event that they can create fair trials. As such, it entails to conceptualize the existence of a fair trial in conjunction with the background situation of a respective society, considering its national rights system and learning the norms of the international community.

2.1 Fair Trial From A Burmese Legal Perspective

2.1.1 Dhammathats or Customary Law: An Aspect of the Rule of Law Foundation

Customary law was the predominant force and written law-texts (known as Dhammathats) became a guide to the judicial system of ancient Burma. The Dhammathats were accepted as treatises of rules which were referred to whenever the disputes, relevant to persons and property, were settled in accordance with custom of

[1] Lawyers Committee for Human Rights, What is a Fair Trial: A Basic Guide to Legal Standards and Practice. New York, LCHR Featured Publication, p. 2.

Burmese society.[2] They are principle sources of Burmese customary law. The code of Manu was regarded the first Burmese Dhammathat.[3]

> "The emigrants from India, Hindu and Buddhist, who laid the foundations of a new world in the Tropical Far East, took with them their law-book, the Code of Manu. Everywhere through out this region Manu has left his mark: in Burma both among Mon and Burman, in Siam, Cambodia, Java and Bali."[4]

> Although the Hindu code of Manu was commonly accepted as the origin of Dhammathats, some historians observed that they diverged more and more from their source through the operation of Buddhist principles; U Chan Toon, who is the author of the first modern text-book on Burmese Law, commented that the influence of their progenitors has long ceased, and a new race with a distinct civilization has sprung up. Dr. Ba Han, formerly a Professor of Law at the University of Rangoon, pointed out that Dhammathats betrayed its Indian origin. Dr. Htin Aung, a famous legal scholar, found that Burmese law was native in origin and had little influence from Hindu law; Dr. Forchammer, a historian, concluded that Burmese law later broke off all connection with Hindu legal literature.[5]

> The Burmese legal history has passed through at least three great Ages, namely, the Age of the Dhammathats, the Age of British Colonialist laws and the contemporary period. Of these three the Age of Dhammathats is by far the longest, covering a vast era of at least eight centuries.[6]

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[2] Maung Maung, Dr., Law and Custom in Burma and the Burmese Family. The Hague, Maritinus Nihgoff, 1963, p. 7.
[3] Hla Aung., Professor of Law, University of Arts and Sciences, Rangoon. . The Burmese concept of law: The journal of the Burma research society. Published by the Burma Research Society. Volume LII, (December 1969) p. 29.
[4] Ibid.
[5] Ibid, pp. 31-33.
[6] Ibid, p. 28.

With regard to the emergence of Dhammathats, Dr. E Maung, the Honorable Mr. Justice, mentioned as follows:

> Burmese jurists in their writings have consistently referred to three ancient Dhammathats originating in Burma as being among the nine original Dhammathats on which they have built and from which they have developed their own Institutes. These Dhammathats were ascribed to the reigns of King Duttabaung, in about the second half of the 5th century B.C.; Atitya in about the last quarter of the 2nd century A.D.; and Pyumindi, in about the second half of the 3rd century A.D.

Dhammavilasa Dhammathat was supposed to be the oldest one in legal history of Burma, compiled in 1174 A.D. by a Mon Buddhist monk named Sariputta. Dhammathats reflect the customs and the rules of the then society, and when the reflections are cloudless, the customs and rules are accepted as having binding force.

> "In case of dispute they must, in accordance with the Dhammathats, enquire into the causes of the people and decide between them and for this purpose they are appointed to the Courts as Judges. If in a law suit or dispute any of our subjects apply to a Judge, the judge shall decide the matter with the Manu Dhammathat in his hands; if the required rule is not to be found therein, then let him take in hand the four volumes of the Manosara Shwemyin; and if he cannot find the point there, let him follow in his decisions the precedents of the decisions of Kaingza Manuraja in the reign of our royal ancestor. If the case be of a trivial nature and not of sufficient importance for judicial determination, although the complaint be laid by the parties in their ignorance or folly, he shall not inquire into or decide the case but should merely explain the matter and instruct them."[7]

[7] E Maung, Honorable Mr. Justice, The Expansion of Burmese Law. Rangoon: The Royal Printing Works, 1951. p.2.

Judgments must be rendered in line with Dhammathats; accordingly, justice is metered out by taking into account such variables as location of case, time that the event occurred, value and natural situation of property at issue, and one's own logic of judgement.[8] The Dhammathats were not the sole repository of Burmese customary law; the proper solution to the problem at hand could also be ascertained from previously decided cases and the prevailing customs and practices of Burma."[9] However, in search of a fair trial, the Burmese society highly regarded the Dhammathats. They were major instruments in resolving the disputes among the people. The Burmese kings considered themselves bound by the Dhammathats and they had no power to enact law. While the term "Rule of Law" was not explicitly used by the ancient society of Burma, an aspect of the "Rule of Law" foundation was implicitly exercised by traditional Burmese society.

2.1.2 The Judges Play a Neutral Role.

In the traditional society of Burma, the role of judges was highly respected. Wise people were appointed as judges, and were expected to exercise neutrality when administering justice. In this respect, the traditional Burmese legal system is rather similar to Britain's common law system.

According to Burmese mythology and legend, Maha Thamada was the first great king and appointed Manu, a young cow-herder whose judicial wisdom brought him fame. He rendered several wonderful judgments to settle disputes among the people and he was applauded by both humans and Nats (Angles).

> In one dispute Manu made a wrong decision. Two neighbors came to fighting over a cucumber fruit. The creeper grew in the garden of one and had spread into that of the other neighbor who plucked the fruit that the creeper bore on his side. The man in whose land the creeper had its roots claimed the fruit, but Manu, the wise one, decided that his claim must fail, and for once neither men nor Nats applauded the decision. Manu knew then that he had erred, and he thought again, and decided that the fruit came not from the creeper but from

[8] Aung Than Htun, U, Burmese law in four era. Rangoon: Published by Flying Pen Press, 1968. p. 47.
[9] Sir Arthur Page, C.J. Ma Hnin Zan vs. Ma Myaing, 13 Rangoon. p. 487;

its roots and must belong to him in whose land the roots drew their nourishment, even as man in the present existence drew strength and destiny from his deeds in the past in the cycle of existences. So judged Manu, and men and Nats who heard him applauded.

But Manu, having erred, feared to err again, and begged his King for permission to go on a long quest for truth, and his own emancipation. The King sadly granted the permission and Manu went away to search and wander. Manu was able to gradually shake himself free from the shackles that bound him to the earth, and in lifting joy he ascended and on the "boundary wall of the solar system" he found laws engraved in "letters as large as elephants, horses, buffaloes or oxen," and these laws he copied and gave to the Maha Thamada to serve as the guide of wise and good men in their decisions. These, the Laws of Manu, were thus received and handed down through the generations as guide to Kings and men, and those that studied them and lived by them found happiness.[10]

2.1.3 Impartiality : Avoiding Four Potential Ways of "Bias"

In Burma, King Anawrahta (1044-77) contributed to Buddhism. Pagan was the capital of King Anawrahta, known as land of pagodas or "Golden Land." Since that period, the customs based on Buddhism have transcended almost every cultural practice, from birth to death, of the majority of Burmans, including: Burman, Mon, Shan, Pa-oh and etc.. Buddhist people believe in Karma (that deeds in a previous existence determine one's present life) based on the "Theory of Cause and Effect" enlightened by Buddha. In many Buddhist teachings, King is highly regarded as a supreme human being, who enjoys luxuries in his present life for his good deeds and contributions in his previous existence. As such, the people generally hesitated to challenge the rule of their kings and instead paid very high respect to the kingly authority.

[10] Supra Note 2. pp. 1-2.

According to Prof. John F. Cady, Buddhism provided its devotees with uniform attitudes and social values and operated as a cohesive force uniting the territorial and national fragments of the Burma state.[11] The traditional notion regulated by the Burmese society is that the judges have to avoid four potential ways of "bias". The principle ways of avoiding these sources of bias stem from Buddhism and have been applicable in adjudicating criminal as well as civil cases at every level of the judicial process. The ascertainment of truth and impartial justice is seen to rely on the correct application of these principles.

In Burmese language, the four sources of bias are known as Sanda, Dawtha, Baya and Mawha. In simple terms, these may be translated as "subjectivity," "anger", "fear", and "delusion." The Buddhist principles for avoiding these sources of bias are thus: "don't be subjective" (i.e. adjudicate a case only on its facts, without favoring one more than another); "don't get angry" (i.e. remain calm and detached from the case); "don't feel fear" (i.e. remain courageous, do not be concerned with threats created by either party in a case, by administrative officials, or by the consequences of the case); and finally, "don't suffer from delusions" (i.e. keep a clear mind, concentrate on the case before you). Traditionally, Burmese society believes that justice can be achieved if the judges adjudicating the cases avoid the aforementioned four potential ways of "bias". In 1947, one source of bias out of the four was excluded from the Constitution of Burma. Mawha, or "delusion" was seen as impractical. The background notion was that it is impossible for all laymen, including judges, to avoid delusions in practice.

2.1.4 Judicial Processes

Systematic judicial processes were to some extent guaranteed in the Burmese judicial system: the areas of criminal and civil jurisdictions were discriminated; the persons, who would represent the complainant or the accused, were usually realized as those who would defend their respective adverse parties in the trial; they were allowed to practice in the courts; and in later periods of kingdom, they were known as lawyers; the presence of witnesses was systematically arranged in the

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[11] Cady, J. F. A history of modern Burma. Ithaca, New York: Cornell University Press, p. 8.

trials; witnesses' statements were thoroughly recorded and scrutinized well; recommendations were firmly made to adjudicate the cases mainly based on the accurate statements of the witnesses[12]; and appeal-able and non appeal-able cases were also categorized.

> "It may be asserted with assurance that under Burmese Kings, criminal and civil jurisdictions were distinct. Prevention and punishment of acts productive of gross disturbances of the peace to the detriment of public security were considered part of the administrative machinery of Government; hence, criminal justice was dispensed by administrative officials of the State. Civil justice, on the other hand, was administered by Judges appointed by or under the King and by arbitrators chosen by parties. Naturally, appeals lay in the last resort to the King; but from the decision of an arbitrator there was no appeal. Neither was there an appeal where the trial was by ordeal. Again, where the parties had signified acceptance of the Judge's decision by taking a pinch of pickled tea offered to them after announcement of judgment, the right of appeal was lost."[13]

2.1.5 Reference to Pyattons or Case-Books

Pyattons or case-books were well respected as guides in adjudicating the cases. Pyattons are significant judgments, including the techniques leading to the rulings, compiled by the judges in previous cases. They could not be regarded as judge-made laws because the judgeswere not required to fully comply with Pyattons in administration of justice. However the judges were persistently recommended to refer to Pyattons whenever they ruled disputed cases.

2.1.6 Post Trial: Appellate Court

Justice could be sought by both adverse parties for their grievances up to the highest level of court against a decision made in the lower courts by filing an appeal.

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[12] U Aung Than Htun Burmese Law in Four Era. Rangoon: Published by Flying Pen Press, (1968). p. 57.
[13] Supra Note 7. p. 13.

This trial procedure was prescribed mainly for serious cases that had not been resolved by arbitration, or that had not been compounded. This appellate jurisdiction was exercised by the Hluttaw in traditional Burmese society until Burma was occupied by the British.

The Hluttaw, an eighteenth-century Burman assembly of government officials presided over by the king, was a kind of regency council, responsible for deciding legislative, executive, and judicial matters of the state; ultimately subject to the king's discretion and approval. Firstly, in its origin, princely brothers constituted Hluttaw; however, eventually other eminent persons were also assigned to there.

> Decisions of the Hluttaw council were based on free discussion within the group and were arrived at by majority vote, but the entire council assumed collective responsibility for all important actions submitted for royal approval. The crown prince sometimes presided over the council's deliberations and when he did so occupied the royal dais provided in the chamber. The king himself could also preside if he chose, or the council could request the personal presence of the king at important sessions.[14]

> The whole Hluttaw also functioned as a court of law, hearing public petitions of grievance in the first instance, and also acting as the supreme arbiter for appeals from provincial courts in both civil and criminal cases. Individual Wungyis, the "great burden-bearers" who headed the central administration, and their assistants, were also competent to settle at their private residences judicial business of a nonpublic nature. In appealed criminal cases, the Hluttaw was empowered to punish an inept or corrupt judge whose decision it might see fit to reverse. Virtually all foreign visitors to the Burman capital in modern times reported that the Wungyis were men of intelligence and administrative competence.[15]

[14] Supra Note 11. p. 16.
[15] Supra Note 11. p. 17.

2.1.7 Jurisdiction, Public Trial, and Bench of Honour

In traditional Burmese judicial system, jurisdiction was divided among various levels of courts. All important criminal cases were adjudicated in a Myoyon, or "township court". Punishment was to be consistent with the crime committed by the perpetrator, and the trials were held publicly. A kind of visible status, or Bench of honour, was maintained at all times by the court, and was accomplished by wearing proper garments, equipping suitable Bench 'set-ups', and displaying various emblems of authority as symbols of the court's power.

The military, administrative and judicial power were jointly exercised by local royal authorities, Myowuns or city governors, as an extension of the arbitrary authority of the king and the Hluttaw. Jurisdiction was divided between the Myowuns and village headmen, based on the categories of criminal cases.

> The major officials at any given provincial capital collectively constituted the public court, or myoyon, which acted as a kind of local Hluttaw, exercising wide administrative and judicial authority. The myoyon, like the Hluttaw, transacted its business in public sessions, held five days in every seven, in a large open hall elevated three feet above the ground and fitted with benches around the edges for the use of spectators. A record was kept of the evidence before the court, but no lawyers were used. Persons who lacked occupational status or were otherwise suspected of evil designs could be required to give surety guarantees before the myoyon for their proper behavior. Minor policing functions were usually handled by the headman, but all important criminal cases, especially those involving men from different townships, had to be tried by the Myowun himself. Penalties usually took the form of fines remunerative to both Myowun and the court, or prisoners were placed in the stocks. The latter practice was partly dictated by security reasons, for the jails were notoriously insecure. Punishments imposed by the Myowuns could include death, enslavement, or mutilation. Incorrigible thieves unable to pay their fines were branded with gunpowder on their cheeks and tattooed on their breasts with symbols revealing to all their criminal status; some were deprived

of all civil rights and consigned to the degrading status of executioners. Torture could be applied both to the accused and to hesitant witnesses.[16]

2.2 Sociology, Law and Fair Trial

Sociology means, broadly, the study of society of which law is but a part.[17] The founder of sociology, in a sense, is Comte (1798-1857) and he defined it as the science of social order and progress. Under his formulation, sociology includes two compartments: social static and social dynamics; the former being the theory of social order and the latter the theory of social progress.[18]

2.2.1 Sociology and Law

Many considered sociology as the father of all social sciences. The subject matter of sociology is definitely wider in scope than all other social sciences. Because it covers each and every aspect of society, while other branches of social science cover only parts of the study of society. Therefore, sociology's influence on other social sciences cannot be ignored. Because sociology is the basis of all social sciences, it has got an intimate relationship with law as well. Law discusses the legal aspects of the society to preserve social order to enable social progress. So it is not possible for Law to bypass the influence of sociology. In fact the more the law is wedded to sociology, the more it becomes just.

Law is considered as an important branch of sociology. The state, one of the most important issues of study in law, emerged at a certain moment in the long process of evolution of the society. In fact the state was for a long time, considered as a social institution. The concept of state as a political institution emerged in a later period. So it can be said, first, that law was born out of the womb of sociology or society.

Second, most of the studies in law directly or indirectly refer to sociology because it is not possible to study legal problems in isolation. Right from the beginning of the study of the state by the classical scholars, down to the modern

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[16] Supra Note 11. p. 26.
[17] RWM DIAS (1985), Jurisprudence, New Delhi, Kailash Balani for Aditya Books (P) Limited, p. 420.
[18] Ibid

behavioral studies, law has sprung from society. Because all problems are primarily social, rather than legal issues such as communalism, secularism, national integration and etc. They have their roots deeply entrenched in society.

Third, modern behavioral scientists like David Easton think that any legal system depends very much on the 'social environment'. From social environment a legal system gets its inputs. Law gets its basic raw materials from society. As such, we must recognize sociology's influence on law. If sociology is the whole, law constitutes a part of it.

Sociology not only influences law, it also depends on law. The state, which is a political institution, is also effective machinery for social control as it maintains law and order in the society. A sociologist must be aware of the laws and regulations of the state, the nature and modes of functioning of the government etc. For such information he has to depend on law. Again, law also discusses other social organizations, problems and behaviors. Studies on different groups, socio-political movements and the political behavior of man have immensely benefited sociology. Such studies have infused dynamism in sociology. Moreover, ruling political ideas very often dominate social values and beliefs. The political ideas of great leaders had tremendous impact on their respective societies. They undoubtedly shaped the values and beliefs of respective societies to a great extent. So for a study of social values and beliefs, a sociologist needs the help of law because it studies intensely the ideas of different times.

So, law and sociology have an intimate relationship. They discuss different socio-political institutions, events and problems intensely. But in spite of the traditionally close relationship, law and sociology have been able to maintain their separate identities. We study these two subjects separately because there are lots of differences between them.

First, the subject matter sociology is rather broad and general in scope. It studies the society as a whole whereas law studies only the socio-political aspects of the society. In that sense law is a more specialized subject. Second, law studies some selected and organized institutions whereas sociology covers both organized and unorganized institutions of the society. In its studies of social institutions, it does not make any choicest selection. Third, though both law and sociology studies the

individual human being, their points of view are different. While law views man as a natural being, sociology considers and studies him as a social animal.

Fourth, sociology studies both the conscious and unconscious phenomena of the society, whereas law focuses only on the conscious phenomenon of the society. Finally, from the point of view of evolution, sociology is an older discipline than law. Society is prior to any political institution. The study of society (Sociology) is older than the study of law. For this reason, law is relatively more modern than sociology. So, in our conclusion, though it is considered that law and sociology to be more or less inseparable, these two are now-a-days studies as independent, autonomous disciplines. It is true that they share a great intimate relationship, yet they have quite a number of differences. So in the final analysis we can say that these two disciplines are complementary in spite of the fact that they are independent, separate and autonomous.

In this context, Fair Trial is a design of law, but fruit of sociology. One cannot be divorced from the other. The marriage of the two can result in the fertility of the society. Social mechanism of justice such as trial emerges from such an amalgamation. It prevents society from being dysfunctional. Concept promoted by Max Weber, one of the founding fathers of sociology, had a great influence on the development theory of change. Rational-legal authority was the upshot and social mechanism is closely linked to the concept of trial. Then, the fairness part of trial subsequently and inevitably developed. But for sociology decisions and conflict resolution would have been traditional and arbitrary. It helped to understand the inter actions of different institutions. Trial has therefore become an institution, therein lies the importance of making it fair. Theory of law was always about forms of normative regulation. Fair trial is a successful part of this normative regulation.

2.2.2 Harmony between 'Protection of Individual Rights' and ' Fostering the Welfare of a Society'

Trials are mainly governed by the existing laws of a state. A Fair Trial cannot be imagined if unjust laws prevail within that society. In every society, there is an essential connection between law and social environment. Many times, the social environment pressures the society to apply proper legal principles and enact necessary

laws in order to deal with the social issues encountered by its' people. On the other hand,, the prevailing laws in a society can seek to promote or downgrade the status of social environment. "In the nineteenth century the focus of attention began to swing away from individual rights towards social duties, and carried with it an emphasis on the function of law in communal existence."[18]

Jeremy Bentham (1748-1832) highlighted the problem of reconciling interests of the individual with those of community.[19] Ihering (1818-1892) also recommended a reconciliation between the individual and society; a kind of balancing act between various interests which he grouped into three categories: individual, state, and social. In this context, the selfish interest of the individual competes with certain values of larger social interest.[20] As such, the purpose of law is to maintain harmony between 'promotion of individual liberty' and 'fostering the welfare of a society'. Whenever laws damage harmony in a society, they can be branded as 'unjust laws'. If unjust laws prevail, trials cannot be fair. Only when there exist just laws can Fair Trials emerge, facilitating harmony of society for the long term.

2.3 Fair Trial from a Legal Theoretical Perspective

2.3.1 Law

"The most accepted definition of 'Law' is that it is a body of rules which is recognized by the courts of the country as 'law'. And the term law embraces all governmental machinery for carrying out governmental programs."[21] The realization of law is different from age to age.

> It may be said that the object and function of the law is to maintain an orderly state of society by compelling the individual in close association with other individuals to live in such a way that he pays some regard to the private wills and the pleasures of the others, and does not act as if his own

[18] Ibid, p. 420.
[19] Ibid, p. 427.
[20] Ibid. p. 424.
[21] D. R. Saxena Law, Justice and Social Change. New Delhi, India, Deep & Deep Publications, (1998) p.11.

> interests were everything and theirs nothing. Thus, in one direction the law deprives a man of his full freedom by limiting his powers – e.g. his power to assault and rob his neighbours – but in another direction it increases his freedom, for he will in his return be free from untrammelled assault and robbery of his neighbours.[22]

Natural law theories maintain that there is an essential connection between law and morality.[23] St. Augustine's famous natural law slogan is that "an unjust law is no law at all."[24] The natural law was viewed as establishing certain moral entitlements (e.g., the right to freedom) that all human beings supposedly have simply by virtue of being human.[25] Martin Luther King commented that any law that uplifts human personality is just and any law that degrades human personality is unjust.[26]

John Austin, a nineteenth-century English Philosopher of law, distinguished between analytical jurisprudence and normative jurisprudence. Accordingly, analytical jurisprudence is concerned with the logical analysis of the basic concepts that arise in law - e.g., duty, responsibility, excuse, negligence, and the concept of law itself; normative jurisprudence is concerned with the rational criticism and evaluation of legal practices.[27] Analytical jurisprudence focuses on moral reasoning that evaluates the justification for the entire practice of criminal punishment. Morality is more a matter of attitude that a person takes up to a problem than a matter of any intrinsic characteristics of the problem itself.[28]

2.3.2 Legal System

(a) Legislation

In order to evaluate a legal system and its' direct impacts on the status of a trial, it is prudent to examine the concepts of 'form of law' and 'content of law.' 'Form

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[22] U Ba Kyaing. Law, morality and justice: Law journal. Rangoon, Myanmar: Attorney General Office. Vol. 1, No. 2, (June, 1999). p. 149.
[23] Jeffrie G. Murphy and Jules L. Coleman Philosophy of Law: An introduction to Jurisprudence, Delhi, Oxford University Press, (1997), p. 11.
[24] Ibid. p. 11.
[25] Ibid. p. 15.
[26] Martin Luther King's Letter from Birmingham Jail (April 16, 1963)
[27] Supra Note 24. p. 1.
[28] Supra Note 24. p. 68.

of law', addresses the issue of who will make the laws and how. In British's common law system, the Parliament, formed by the elected representatives, stands as the highest legislative body and exercises parliamentary supremacy. For Britain, the 'Form of law' connotes that parliament enjoys absolute power to make all laws that will govern the country. Today, in regard to the formation of a legislative body such as parliament, one defining factor is that it be constituted only of elected representatives.

Furthermore, in order to arrive at just laws, the law making process, as a major part of legal system, is of paramount importance. In making laws, the process needs to be transparent so that the laws can reflect the will of the people. As such, law-makers must observe the values and aspirations of the people as a whole. It does not suffice to consider just their own constituency; rather, law-makers must recognize the collective set of aspirations and beliefs of all citizens in the country. For this purpose, the people must have access to all law making processes, including exercising the right to observation in parliament or congress through Media and other public relation channels. The legislative bodies in democratic countries usually invite NGOs, academics and other relevant persons and collect their suggestions and comments in order to produce laws that might reflect the will of the people. In this context, the potential participitation of all citizens through their representatives is also a major part of what should be classified under the heading "form of law."

"Content of law" is the end result achieved after a law making process has properly been implemented. The ability of a legislative body to determine the "content of law" depends upon the type of authority with which it is endowed; some legistative bodies reserve the right to enact any law if they are able to fulfilla required quorum, while others are more restricted. For example, in Britain's common law system, the parliament has full authority to enact any law that they wish. Contrary to this paradigm, in the American law making system, Congress is limited in the types laws they can create by the US Constitution. The first amendment of US Constitution provides that "Congress shall make no law --- abridging the freedom of expression --- ." The intention of this provision is to limit the power of Congress; in spite of being the highest law making body in the whole country, laws enacted by Congress cannot deprive individuals of their fundamental rights as set out by the US Constitution. The

scope of laws that legislative bodies are empowered to enact is directly relevant to what is meant by the "content of law."

In order to evaluate whether a particular law is 'just' or 'unjust', it is necessary to pay particular attention to both the "form of law" as well as the "content of law." Without the existence of 'just law' in a society, a Fair Trial cannot be expected.

(b) Legal Profession

In supporting the proper function of a legal system, the legal profession must be a noble one. To make this a reality, the profession must be both independent and strong. If, on the other hand, the legal profession is weak or not highly valued, then the functioning of the legal system will almost certainly be weak as well.

The fundamental essence of the legal profession is to provide legal assistance to both sides of every serious criminal case. Whenever the rights of weaker sectors of society are abused by governmental officials or other influential persons, the lawyers, as prosecution councils, have to be able to take effective legal action against those accused of the crime. In doing so lawyers may ask for remediation for any grievances suffered by the victim(s) at the hands of the perpetrator(s). In the case that effective assistance of competent prosecution councils is not available, the victims will not be able to seek justice; and as such, the legal system will be sacrificed. This is an important role of legal profession from the victim's perspective.

Similarly, another important role of the lawyer can be realized from the position of the 'suspected perpetrator'. For an uncountable number of reasons, an innocent person may wrongfully be indicted as a perpetrator. If this is indeed the case, the individual under suspicion will certainly require the assistance of legal councils so that the truth may be uncovered beyond the technical determination of guilt, and so that they can be discharged or acquitted by the court immediately. Seeking assistance of an advocator or a lawyer to defend oneself, if arrested or accused of wrongdoing, is everyone’s right. The United Nation's General Assembly passed resolution No.43/137 on December 9, 1988, to provide basic protection to those arrested, detained, or jailed. Paragraph 17 of this resolutions reads inter alias:

(1) (the accused) must have an access to lawyers. Soon after the arrest, the authority must inform this right to the accused.

(2) If the accused could not afford to hire a lawyer, the prosecutor or other responsible authorities must arrange to hire a lawyer for the accused.

The current Burmese law also clearly stipulates the right to hire a lawyer. Article 340(1) of Burmese Penal Code states that "Anyone being prosecuted at criminal court has the right to defend oneself with the help of a lawyer." Section 455(1) of the Burma Court Manual provides that "each accused, by personal right, has to defend oneself with the help of a lawyer."

For the reasons detailed above, it is self-evident that in a legal system, the role of advocates and lawyers as prosecution or defense councils, is of paramount importance. Such individuals should enjoy professional security, the ability to practice their profession independently, the freedom to exercise the right to form their own organizations in accordance with the law, and sufficient status to be regarded as dignified 'court officials' by judges, other judicial staff, and police. As such, the lawyers' profession needs to be respected as a noble profession by society as a whole.

(c) Legal Education

Citizens of all nations would benefit if they were to examine, study, and seek to understand what the law is and what the rule of law really dictates. Moreover, citizens need to think for themselves about whether they should strictly conform to unjust laws, orders, and decrees. To this end, legal education for the people plays a major role.

2.3.3 Judiciary

In brief, the factors relevant to the formation, function and jurisdiction of various levels of courts, including those for appointment, dismissal and transfer of judges, can be identified as the judiciary.

(a) Independence of the Judiciary

Whenever violation of rights occur, the judiciary should be the most significant institution for any citizen to have recourse, rather than political parties and

other institutions of the state. Furthermore, for a victim, instead of resorting to a violent response, seeking a remedy by peaceful legal means through the judicial mechanism should also be encouraged. Within this context, for the benefit of a society, the role and function of a judiciary need to be scrutinized. The Right to Fair Trial can only be achieved in a judicial system where independent judiciary is exercised.

The essence of judicial independence and impartiality was formulated succinctly by Dr. L.M. Singhvi in his final report to the U.N. Sub-Commission in the following two paragraphs:[29]

> "Judges must be impartial and independent and free from any restrictions, inducements, pressures, threats or interference, direct or indirect, and they should have the qualities of conscientiousness, equipoise, courage, objectivity, understanding, humanity and learning, because those are the prerequisites of a fair trial and credible and reliable adjudication …"
>
> "The concept of impartiality is in a sense distinct from the concept of independence. Impartiality implies freedom from bias, prejudice and partisanship; it means not favouring one more than another: it connotes objectivity and an absence of affection or ill-will. To be partial as a judge is to hold the scales even and to adjudicate without fear or favour in order to do right…"

According to the aforementioned definition made by Dr. L.M. Singhvi, the concept of 'impartiality' is not new for Burma as that concept has already been reflected in the Burmese traditional legal text, which is a provision for the judges to avoid the four ways of "Bias" (Sanda, Dawtha, Baya, Mawha). Strict adherence to this traditional text already implies a compliance with the modern concept of 'impartiality' accepted by the international legal community.

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[29] Dato Param Cumaraswamy, Securing judicial independence – international and regional norms: Regional seminar on media and the role of an independent judiciary in a democracy, Bangkok,. 2.

While impartiality may be easily defined as above, the level of independence needed by the judiciary may appear quite arbitrary. According to Mr. Vichai Ariyanuntaka, Deputy Secretary General, Office of the Judicial Affairs, Ministry of Justice of Thailand, "independence from what?" has become a logical question. He highlighted independence from one's own weaknesses and independence from institutional conflicts or constitutional crisis as being the most critical components to the notion of independence of the judiciary.

(b)Judicial Tenure

> Obviously, complete judicial independence from the other two arms of government is not theoretically perfect given that most judicial appointments and all judicial funding comes from government sources. However, it must be understood that the key to judicial independence is in providing various constitutional and legislative safeguards and maintaining respect for long standing traditions for the appointment to the judiciary of persons of independence and integrity. Further protection can be ensured by upholding security of judicial tenure subject only to removal for proven misconduct or incapacity and by institutionalizing the processes upon which a contested removal from judicial office may occur. Without such safeguards, there can be no guarantees for an independent judiciary.[30]

(c) Binding Judicial Precedents

In the common law system, courts observe the doctrine of binding judicial precedents. In this sense, common law may also be seen as a judge-made law system.

> Only decisions of the High Court and above are quotable as 'law'. With regard to the binding force of decisions, the rule is that higher courts binds lower courts; courts of co-ordinate authority do not bind each other. The High Court does not bind itself. Where two High Court decisions are in

[30] Burma Lawyers' Council. Legal issues on Burma journal. Bangkok, Thailand: BLC Publication. Vol. 2, (June 1998). p. 39.

> conflict, the judge in a third case should follow the later decision, unless he is convinced that the judge in later decision was wrong in not following the earlier case.[31]

In contrast, for civil law systems, the responsibility of the court is simply to apply the law; here, cases are solely to be adjudicated in accordance with statute laws. Courts in this case are not required to follow the decisions rendered in higher courts. Civil law judges are influenced by Rousseau's theory that the State is the source of all rights under the social contract, while English common law judges favour Hobbes's theory that the individual agrees to forfeit to the State only certain rights.

In civil law systems, the court plays a proactive role in investigating cases in search of justice. In common law systems, judges have to adjudicate cases mainly based on the oral and documentary evidence submitted before the court.

2.3.4 The Rule of Law

In primitive times, before the rule of law was adopted, in connection with tribal or religious customs, law reflected the personal desires of societal leaders and was dispensed accordingly. When people are governed by a rule of law, they are afforded greater protections from the abuse of power. Rule of law safeguards a countries' people from atrocious acts exercised by bad leaders. Oppositely, countries ruled by dictators or military dictatorships pursuant to self-claimed 'law and order' are subject to individual or group desires. In actuality, however, these self-proclaimed desires are not consistent with principles of the "Rule of Law." Rule of law represents balance and harmony, unity and equality before the law rather than disharmony, distinction and privilege. Rule of law embodies humility; it places no human being or person as supreme.

> The Conference on Security and Cooperation in Europe (CSCE) was attended by all European countries, Canada and the United States in Copenhagen (1990) and Moscow (1991). The countries participating adopted a list of principles and key components that were seen as

[31] Supra Note 17. p.127

fundamental to the 'Rule of Law' foundation, and can be summarized as follows:

- all persons are equal before the law and are entitled without any discrimination to the equal protection of the law;
- free and democratic elections;
- a representative form of government in which the executive is accountable to the elected legislature or the electorate;
- the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law;
- a clear separation between the state and political parties;
- military forces and the police are to be under the control of, and accountable to, civil authorities;
- human rights and fundamental freedoms are to be guaranteed by law;
- free access to the legislation adopted at the end of public procedure;
- everyone is to have an effective means to appeal against administrative decisions;
- the independence of judges and the impartial operation of the public judiciary service;
- protection of the independence of the legal profession;
- clear definition of powers in relation to prosecution in criminal procedure;
- any person arrested or detained on a criminal charge will have the right to be brought promptly before the judge or other officer authorized by law to decide the lawfulness of his arrest or detention;
- the entitlement of everyone to a fair and public trial;
- the right of everyone to defend himself in court in person or through prompt legal assistance, to be given free if he does not have sufficient means to pay for legal assistance;

- no one is to be charged with, tried or convicted of any criminal offense unless the offense is provided for by law which defines the elements of the offense with clarity and precision;
- everyone is to be presumed innocent until proven guilty according to law;

In addition to agreeing on the preceding principles and components of the 'Rule of Law,' the participating states reaffirmed that their domestic legislation will comply with international laws in the field of human rights, including guarantees for the freedom of information and communication, travel, thought, conscience and religion, right of peaceful assembly and demonstrations, associations, private property, etc.

2.3.5 Equality Before the Law

In the Common Law system, the principle of equality before the law is a fundamental characteristic and undisputed factor of the Rule of Law. "The Rule of Law involved the supremacy of regular law as opposed to arbitrary power and equality before the law".[32]

The concept of equality before the law can become a reality in a nation "where the law is king." This idea was elaborated on by A.V. Dicey, in his 1885 "Introduction to the Law of the Constitution." His thesis is summarized as follows:

> The "Rule of Law" in England meant that ordinary courts determined every man's legal rights and liabilities; that executive officers had less arbitrary power and more limited discretion than in other European countries; and that government officials could be brought to court for wrongdoing even when crimes are committed under the cloak of official authority.

There is a Burmese saying that "Nothing Is Received In Spite Of Giving." If there are no supporting elements for equality towards economically disadvantaged people, politically powerless citizens, and socially marginalized individuals, "Equality

[32] Clayton, R., & Tomlinson, H. Fair Trial rights. UK: Oxford University Press, 2001. p. 6.

before the law" only functions as a "Gift" on paper, achieving nothing in practice. This must change. "The poor and the illiterate should be able to approach the courts and their ignorance and poverty should not be an impediment in the way of their obtaining justice from the courts."[33] Only then, will fair trials exist.

2.3.6 Substantive and Procedural Justice

From a legal-theoretical perspective, justice can generally be categorized as either substantive or procedural. Substantive justice refers to the principle of the Rule of Law which maintains that the person who commits a crime should be punished. Procedural justice, on the other hand, connotes the duty of the legal system to exercise complete and fair procedures in taking legal action for victims and perpetrator alike, and in all three stages of trial: pre-trial, trial and post trial.

In terms of substantive justice, the societal values informing the proper punishment for different crimes have changed from one age to another. At the time of King Hamurabi who reigned over the state of Babilonia (1792-1157 BC),[34] it was thought that the punishment for a particular crime should be equal and opposite to the symbolic nature of the criminal act. For instance, a thief who stole the property of another had one of his or her hands cut off; a perpetrator who destroyed the eye of another had one of his or her own eyes removed; and a murderer would be sentenced to death. In criminal proceedings of that time, the society in question accepted these revengeful punishments as justice. Currently, in seeking justice, the particular societal values influencing punishment have changed. An emerging trend in criminal proceedings is not to render the death penalty even to a cruel criminal in spite of the fact that he or she may be a serial killer. The major concern is that an innocent person may be convicted due to procedural weaknesses in the way criminals are prosecuted. With this in mind, over 50 countries have already done away with capital punishment.

The International Tribunals established by the Security Council of the UN never exercise the death penalty. The top leaders of the Hutus majority people's government in Rwanda, who were accountable for the mass killings against the Tusi

[33] Report of the legal aid committee. Government of Gujarat, India, 1971. para 1. 08, p. 5.
[34] Burma Lawyers' Council. The rule of law. Bangkok, Thailand: BLC Training Curriculum Publication, (1999). p. 13.

minority people, numbering about 800,000, in 1994, were not rendered the death penalty. The perpetrators who seriously violated human rights by killing people and committing other serious crimes were provided amnesty in South Africa in order to protect more human rights violations in the future.

In seeking substantive justice, the expected end result has changed in the international community; it is now concentrated more on the benefit of the whole society in the long term, instead of demanding revengeful punishments immediately in every individual case. As such, substantive justice needs to be considered in consonance with the practice of procedural justice.

The issue is that procedural justice needs to be exercised in support of seeking substantive justice. However, the ends that are desired as the culmination of substantive justice should not come about at the expense of sacrificing procedural justice. Legal systems need to maintain a constant level of procedural justice if they are to function properly. Attorney Bo Li from the New York law firm of Davis Polk & Wardwell, concluded that in a system emphasizing procedural justice, arbitrary government power will be checked, liberty will be protected, and substantive justice will be preserved in the long term. He commented as follows:[35]

> First, the legal system must have a complete set of decisional and procedural rules that are fair. Second, the fair rules of decision and procedure must also be pre-fixed and pre-announced. Third, these decisional and procedural rules must be transparently applied. Fourth, these decisional and procedural rules must be consistently applied. When these four conditions are satisfied, western judges and lawyers will say that they have achieved a certain kind of justice, which is called formal or procedural justice.
>
> More specifically, formal or procedural justice has at least three values. First, without fair and just procedure, there is no guarantee that the end result will be just (that is, substantive justice cannot be guaranteed). As

[35] Attorney Bo Li , What is Rule of Law, New York, New York Law Firm of Davis Polk & Wardwell, (2002). p. 3-5.

such, procedural justice is seen as a necessary condition for substantive justice. This is why the western legal tradition places a much higher value on formal or procedural justice than its East Asian counterpart, which puts emphasis on substantive justice. In fact, some western legal scholars regard procedural justice as the only workable method for reaching substantive justice, and to these scholars procedural justice should be the only concern of the players within the formally rational legal system.

2.3.7 The Separation of Powers

A large majority of the modern international community of states have endorsed the principle of 'separation of powers.' Originally advocated by Montesquieu, the renowned French political philosopher, this principle entails separation of the Executive, Legislative, and Judicial branches of government. Of paramount importance is the separation and independence of the judiciary from the legislative and executive branches. This is realized as “the separation of powers” and is the foundation of judicial independence. The countries that accept the doctrine of separation of powers usually guarantee it in their State Constitutions and establish the Judiciary as an independent institution. "The criminal justice system of each society is primarily based on the ideals envisaged by the constitution, and progresses with the spirit of it." [36]

Under a constitution where there is a separation of powers it is obvious that a judicial organ is the best institution to decide disputes on constitutional law. Whereas the legislative and the executive organs which have a strong position, would most likely decide in their own favour, the judiciary is not under any policital pressure and is accustomed to settling conflicts. The judiciary is the weakest of the state organs. The judiciary does not have financial or executive competences of its own. But the judiciary has the authority of law, the ability to consider arguments carefully and the necessary independence from political

[36] Institute for Legal Research and Resources, ILRR. Analysis and reform of the criminal justice system in Nepal. Center for Legal Research and Resource Development, (n.d.). p. 31.

considerations. Furthermore it is the task of judicial organs to interpret the law, and the constitution is the basic law of a state.[37]

Article (16) of the French Declaration of the Rights of Man and of the Citizen (1789) boldly declared that "any society in which rights are not guaranteed, or in which the separation of powers is not defined, has no constitution."

In the eighteenth century, enlightened opinion was that the separation of powers was essential to limit the powers of the government and to prevent tyranny. Separation of powers and other forms of checks and balances in the conduct of government continue to be recognized as essentials of constitutional government in some countries, particularly those with presidential systems of government, e.g., the United States and France.[38]

2.4 Fair Trial from the Perspective of International Human Rights Laws

Concern over "the fair trial" has in recent years moved beyond the realm of intellectual legal-theoretical debate. Societies are now required to view "the fair trial" as somewhat obligatory, given that several international human rights laws have recognized "the right to a fair trial" for every person.[39] While the proposal that "the trial should be fair" may be morally interesting and valuable in its own right, without accompanying obligation it is weak, ineffective, and not binding. Morality on its own cannot be forced.

After societies have recognized "the right to a fair trial" as pertaining to international and domestic human rights laws, people can start to hold the view that " to enjoy a fair trial is my right." Under law, the "right to a fair trial" becomes strong, binding and effective; a matter of force. The states cannot ignore it. To this end, societies need to promote their own national laws to be consistent with the major

[37] Umbach Dieter, Prof. Dr., Recent trends in international comparative law: A paper presented at regional Symposium on ' Law, Justice and Open Society in ASEAN', 06-09 October 1997. (n.d.) . p. 5.
[38] Henkin, L., Prof. Elements of constitutionalism. Columbia University, New York: Center for the Study of Human Rights, (Nov. 1992). p. 2.
[39] Article (10) of the Universal Declaration of Human Rights, Article (14) of the International Covenant on Civil and Political Rights and Article (6) of the European Convention on Human Rights

provisions of international human rights law concerning the principle of the fair trial. Furthermore, in application, it is necessary to realize the full scope and objective of "the fair trial."

> The fairness of the legal process has a particular significance in criminal cases but 'fair trial rights' must also be applied in other proceedings which deal with disputes between citizen and state. The protection of procedural due process is not, in itself, sufficient to protect against human rights abuses but it is a foundation stone for 'substantive protection' against state power. The protection of human rights therefore begins but does not end with fair trial rights.[40]

From a human rights perspective, the criterions for whether a trial is fair or not are as follows:

(a) Right of Access to the Court and the Right to be Tried

Every citizen should have the right to exercise a private prosecution in the court for his or her grievances. This is often not an absolute right. For example, English law confers a number of immunities from suit on public authorities and private individuals under six headings.[41] These are crown immunity, parliamentary immunity, judicial immunity, proceeding immunity, negligence immunity and statutory immunity.

Clause 39 of the Magna Carta of 1215, states that "No free man shall be taken and imprisoned of any tenement or of his liberties or free customs…except by lawful judgment of his peers or by the law of the land." Thus, a suspected perpetrator can only be punished after legal action has been taken against them by a competent court. Without being tried, no one should be punished.

[40] Supra Note 33, p. 2.
[41] Ibid p. 13.

(b) Procedural Rights

Almost everywhere, 'written' constitutions govern, and fair procedure has been constitutionalized. The United States' Constitution, for example, sets out specific procedural rights especially for those charged with criminal offence.[42]

> There is no established list of the elements of procedural fairness but they include the following: prior notice of the case, adequate time to prepare, disclosure of the material on which the decision is to be based, a hearing, legal representation, calling and cross-examination of witnesses, consideration of evidence and submissions. Procedural fairness may also entail an obligation to give reasons for the decision.[43]

(c) Equality Before the Courts and Tribunal.[44]

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) guarantees that in a trial the complainant and defendant shall be granted the same level of procedural equality. However, the UN Human Rights Committee (HRC) conceded that 'Article 14 of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of results or absence of error on the part of the competent tribunal.'[45] The committee is of the view that there have been violations of article 14, paragraph 1, due to inequality of arms between parties.[46]

(d) Pubic Trial

The publicity of hearings is an important safeguard in the interest of individual rights and of society at large. The UN Human Rights Committee (HRC) deliberates:[47]

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[42] Janis, M., Kay, R., Bradley, A., European Human Rights Law: Text and Materials. UK: Oxford University Press, Oxford, p. 375.
[43] Supra Note 33. p. 32.
[44] Article (7) of UDHR and (14) of ICCPR.
[45] McGoldrick, D., The Human Rights Committee, Oxford, Clarendon Press, (1996). p. 418.
[46] Ibid
[47] Supra Note 46, p. 403.

> A hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgment must, with strictly defined exceptions, be made public.

The importance of public trial is highlighted in the Article (14) (1) and accordingly the press and public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interests of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

> Moral grounds for the exclusion of the public are usually asserted in cases involving sexual offences. The term "public order" in this specific context has been interpreted to relate primarily to order within the courtroom, while reasons of national security may be advanced so as to preserve military secrets. The private lives of the parties has been interpreted to denote family, parental and other relations, such as guardianship, which could be prejudicial in public proceedings. Lastly, the public may be barred from a trial in the interests of justice, but only in special circumstances and to the extent strictly necessary in the opinion of the court.[48]

The court has the inherent power to exclude the public in cases where a public hearing would defeat the ends of justice. The right to a public hearing can thus be negated under the following circumstances:[49]

- the case involves the maintenance and upbringing of minors;
- where the preservation of secret technical processes or other commercial confidences is at issue;

[48] Supra Note 33, p. 10.
[49] Supra Note 33, p. 36.

- where there is a legitimate possibility of resultant disorder;
- a witness refuses to testify publicly.
- when public hearing might deter future prosecution.

(e) To Examine, or Have Examined, the Witness

HRC stated that article 14(3)(e) of ICCPR was designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.[50]

(f) Preparation of Defense

In regards to the preparation of the defense, it is provided in Article 14(3)(b) of ICCPR that the accused should enjoy enough time to prepare an adequate defense for his or her case. HRC commented that three days of notice before the beginning of a hearing is simply not enough.[51] It also expressed the view that article 14(3) (b) is violated when individuals are unable either to choose their own counsel or communicate with appointed counsel.[52] Moreover, the committee stated that the term 'facilities' mentioned in the phrase – 'To have facilities for the preparation of his defense' – must include access to documents and other evidence which the accused requires to prepare his or her case.

(g) To Be Tried Without Undue Delay

HRC has noted that the requirement to bring every arrested or detained person 'promptly' before a judicial authority means that delays, if any, in the production of detainees before the courts shall not exceed "a few days." The Committee has also emphasized that "pre-trial detention" should be an exception and as short as possible.

[50] Supra Note 46, p. 408.
[51] Supra Note 46, p. 403.
[52] Supra Note 46. p. 403.

(h) Double Jeopardy

If a person is tried again for an offence for which he has already been finally convicted or acquitted, it can be construed as double jeopardy and as such Article 14(7) is violated.

> With reference to a case in Uruguay, the HRC stated that the Supreme Military Tribunal had sentenced C to twelve years of imprisonment and in addition to one to three years of 'security measures' basically for the same offences with aggravating circumstances. In reply it was alleged that the imposition of precautionary measures was illegal and that such measures merely served the purpose of preventing any proceedings aimed at obtaining release on parole.[53]

(i) To Be Tried in Regular Courts

All cases are to be tried in regular courts, which are established by law in a formal judicial system. Regular courts should exercise normal court procedures, regardless of the situation on whether a state of emergency has been declared. The formation and existence of special courts that are not established in accordance with the constitution of a state are to be prohibited.

(j) Presumption of Innocence

The criminal justice system inherited from the British is based on the premise that the prosecution is responsible for proving the guilt of the accused beyond any reasonable doubt. No burden of proof is placed on the accused to prove his innocence.[54] If the prosecution is unable to demonstrate beyond a reasonable doubt that the accused person is guilty, the accused is entitled to the benefit of the doubt and cannot be convicted. Under this scenario, the accused is to be discharged or acquitted. As of now, no legal challenge has been made in Burma with regard to the law on 'Burden of Proof' or the legal principle of 'the Presumption of Innocence'.

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[53] Supra Note 46, p. 436.
[54] Section 101 of Evidence Act: Maung Kyi Maung Vs The union of Burma (1968 Burma rulings; Special Criminal Appeal Court 6).

The 'Presumption of Innocence' provided for in international human rights law[55] is a principle on how to deal with a suspect who is being taken into custody by the police or by prosecuting officers at pre-trial and trial stages. From the point of view of national law, another established principle that the Burmese legal community has already accepted is that "it is better that several guilty persons escape than one innocent person suffer."[56] This maxim clearly delineates the manner in which courts should deal with an accused person when he or she is charged with a criminal offense. By shifting the burden of proof in this direction, innocent persons are afforded some measure protection from being wrongly convicted. Thus, justice is sought for the suspect as well as the complainant.

In order to realize the 'Presumption of Innocence' principle in a proceeding, the court has to come across oral and documentary evidence alike to make a reference as conclusive proof in all hearing processes of a trial. In so doing, first, the status of a witness needs to be assessed on whether he or she, himself or herself, directly experienced the facts in issue or not, and his or her statement is relevant to the disputed issue or not. In addition, it requires to scrutinize all documentary evidence presented either by prosecution or defense site on whether they are relevant to the disputed issue or not, and if there is relevancy, they are primary or secondary evidence. To this end, the court will have to apply the Evidence Act, an existing law in Burma, strictly and effectively.

(k) Due Process of Law

"Due process of law", or the right of access to the court in order to have disputes settled in accordance with the law, is deeply rooted in the common law system, and was originally enshrined in clause 39 of the Magna Carta (1215)[57] This maxim remains a key component of the right to a fair trial: "The Privy Council of the UK said that the phrase 'due process of law' invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilized nations."[58]

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[55] Article 14(2) of International Covenant on Civil and Political Rights.
[56] U Phoe Thar. (n.d.). Commentary of evidence act. (3rd ed.). Gondoo Press, p. 269.
[57] Supra Note 33
[58] Ibid.

Due process of law implies the right of the persons thereby affected to be present and to give testimony before the court or tribunal. Furthermore, the defendant should enjoy the right of providing proof of his or her innocence. Any question of fact or law against the affected person must be conclusive as to whether he or she is liable for the alleged criminal action. Only then, can it be presumed that due process of law has been applied.

From the perspective of national law, due process of law needs to be considered with the application of relevant procedural laws – for instances, the Code of Criminal Procedure and Court Manual for the processes of hearing in the trial, Police Manual for the processes of investigation under the police, Jail Manual for the processes of administration in the jail. There may have some provisions, necessary to be revised and amended in those laws, but major parts are still applicable.

When "Due Process of Law" is exercised within the context of equality before the law, the "Fair Trial" is supposed to be achieved; however, if it is denied, the existence of a "Fair Trial" cannot be conceptualized. Achieving substantive justice by exercising due process of law has become an accepted norm of the international community.

SUMMARY

The Dhammathats or Burmese customary law can be realized as an aspect of the rule of law foundation in spite of the fact that they do not manifestly connote the principle on equality before the law. Accordingly, the judges played a neutral role. Trials were usually held in public. Jurisdiction was divided among various levels of the court. The presence of witnesses was systematically arranged in the trials and witnesses' statements were thoroughly recorded and scrutinized well. A kind of visible status, or Bench of honour, was maintained at all times by the court. The king did not interfere in the disputes arisen among the common people themselves and the courts were competent to exercise their jurisdiction. Then, avoiding four potential ways of "Bias", whenever the judges adjudicated the cases with reference to those Dhammathats or Pyattons, Fair Trial largely existed in ancient time. However, if the king or the kingly authorities suspected a person as a rebel, that might stand against royal rule, he or she would be executed even without a trial. In such instances, trials were not relevant to the kings but for the common people; the king and the kingly authorities were above the law; and, it was against the principle of the Rule of Law. As such, since that time, issues on the Rule of Law has been in existence in connection with the trial.

Once the Rule of Law is fundamentally deprived, the status of other relevant factors on trial is diminished. The Rule of Law can be realized as the foundation for justice and it also underpins a Fair Trial to emerge. Despite the fact that the Rule of Law can be elaborated widely from various perspectives, one of the undisputed factors is that "every person is equal before the law". The exercises of the Rule of Law will not become effective in the event that the state constitution, that is regarded as the supreme law of the land, does not exist, or it is not formulated in line with the principles of the Rule of Law.

Furthermore, unless just laws do not prevail in a society, Fair Trial cannot even be dreamed. In the case of Burma, for hundreds of years, the Dhammthats, Burmese legal texts, have been regarded as just laws. They originated from the common people as they were mainly written by the Buddhist monks, scholars, and judges. Some substantive and procedural laws, such as Penal Code, Evidence Act and

Code of Criminal Procedures, still being applied in the trials in Burma, have been accepted as just laws. The British Parliament constituted by the elected representatives enacted them. Following the independence of Burma, the new Parliament formed by the elected representatives could also produce a large number of just laws. It may not be true that all laws enacted by the elected representatives are just. However, with reference to the experience of Burma, it can be realized that the laws originated from the common people, reflected the will of the people and enacted by the elected representatives are, more or less, just. This is in terms of 'form of law'.

In respect of 'content of law', those aforementioned laws are also regarded as just laws given that they reconciled interests of individuals with those of community; preserve social harmony; and also promote social solidarity. In addition to those characteristics, in modern times, the national laws can be scrutinized on whether they are in line with the international human rights laws or not. Only when they do not stand against the human rights concept and the principles of international human rights laws, they can be accepted as 'just laws'.

Under the British common law system, the accused enjoy 'the benefit of doubt'. In line with this concept, unless the prosecution site could prove that the accused commit the alleged crime beyond a reasonable doubt, he or she has to be discharged or acquitted. 'The benefit of doubt' concept originated from the principle of 'presumption of innocence' that has been adopted by the Article 14 of the ICCPR. These concept and principle facilitate a Fair Trial to emerge.

Out of the four potential ways of "Bias" in Burmese traditional terms, one of which is **Baya.** It means 'don't feel fear' (i.e. remain courageous, do not be concerned with threats created by either party in a case, or by administrative officials). It encourages the formation and function of an impartial trial. And, it also paves the way to the independence of judiciary. In modern time, the independence of judiciary can become a reality only when judiciary, as an institution, is mainly separated from the executive.

In history of Burma, when the security of judicial tenure was guaranteed, Fair Trial largely existed. In this regard, the regulations on selection, appointment, dismissal and transfer of judges require to foster the security of judicial tenure. Judges should be accountable only to the constitution and laws. Instead, if the judges have to

pay highly regards to the state policy, or be subservient to the ruling political party or executives, Fair Trial will be fading out. In accordance with the British common law system, the courts observe the doctrine of binding judicial precedents. Sometimes, it is branded as judge-made law system. It is still in dispute as to whether that system facilitates a Fair Trial.

Although it cannot be realized that all trials held in public are fair, it is commonly true that the Fair Trials are usually held in public in ancient time of Burma, or under the rule of British colonialist or after independence. Public trial has also become an accepted international norm. Although public trial is held, trial may not be fair in the event that the court is not the one established by law in a formal judicial system. The establishment and function of the Special Criminal Courts, under any circumstances including the state of emergency, should be prohibited.

Even in the later periods of Burmese kingdoms, the role of lawyers were properly recognized so that trial can be fair. The proper judicial processes were, more or less, exercised in a Burmese traditional judicial system. The extension of similar practices are currently recognized by the international community as due process of law. The statements of the independent witnesses were properly recorded in traditional system. In this regard, the Evidence Act, enacted by the England Parliament under the British common law system has been a new development for traditional judicial system of Burma. The statements of the witnesses, not recorded in line with the provisions of the Evidence Act, will not certainly facilitate a trial to be fair.

In modern time, the legal analysts have started to consider to expand the scope of a trial. It covers three stages – pre-trial, trial, and post trial. Once the victims or the suspected accused could not enjoy their respective rights at pre-trial stage, trial would not be fair. Because either side of contra parties in the case may suffer a lack of preparation to face each other thereby depriving equal arms principle in the trial. Furthermore, In the event that an aggrieved party cannot retrieve his or her remedy at post trial stage, the trial might not be fair.

CHAPTER III
CURRENT SITUATION ON ADMINISTRATION OF JUSTICE IN BURMA

In this chapter, the case studies that will introduce the current situation on administration of justice in Burma, will mainly be mentioned. Furthermore, a brief analysis on each case will also be made.

Case Studies

3.1 Torture Under Investigation

3.1.1 Torture of Police

A female traveler was hit by a stone on Friday, August 30, 2002, at about 10:30 a.m. when the Myitkyina to Mandalay Express train Number 56 arrived at Nan-si-aung station, Indaw township, upper Burma. She got off when the train arrived at Mawloo, being a resident of this town, and she went to the hospital for medical attention. The police at Mauloo asked Nan-si-aung-pe-gon police to investigate the matter and apprehend the culprit.[1]

Without proper investigation at about 12 noon, the police arrested 8th standard students Maung Than Thiha and Maung Thein Thiha, 14 year old twin sons of U Win Naing and Daw Than Myint who were returning from school. They were taken to the Nan-si-aung-pe-gon Police Station. The younger brother was then allowed to return home while the elder brother was kept in custody. The mother, Daw Than Myint was summoned to the Police Station but was not allowed in. The doors

[1] NCGUB <burma@cscoms.com>. Student died because of police torture. NCGUB. (22 Dec 2002).

and screens were all closed while they interrogated the boy in the room. At about 5 p.m. the boy was taken to the Police Station at Mauloo where he was further interrogated. He was released at about 7 p.m. The next day (31-8-02) at about 9.00 a.m. when the police came to arrest the boy again, the class teacher testified and provided proof that he was in the classroom at the time of the alleged commission of the offense. Consequently, they did not proceed with the case against him. The boy had not been normal ever since the 7 hours of torture and investigation by the police at both stations. According to his mother, he had been suffering from emotional shock and swelling of the mouth and could not eat solid food. His mother also reported that the son spoke about the torture he suffered. He was forced to stand on his toes for about one hour with jagged stones under his feet, then for another two hours he was made to stand on broken and sharp edged bricks. He also was slapped and punched on the face and ears.[2]

Maung Than Thiha never recovered from the trauma. His condition deteriorated slowly but his parents being ignorant and afraid did not seek medical attention in time. On 17-9-02, when his condition was serious, and he was being taken from Mauloo hospital to Katha hospital, he expired on the way. His death was the result of the trauma caused by torture at Nan-si-aung-pe-gon and Mauloo Police Stations.[3]

3.1.2 Torture of the Military Intelligence

Ko Zar Ni (aka) Maung Maung Nyunt son of U Saw Lwin, born in 1963, has been living room No. 1, flat No. 98, Midon Street, Thuwunna township, Rangoon. Ko Zar Ni was of the activist who participated in 1988 democratic uprising. Five days after the military coup took place on September 18, 1988, Ko Zar Ni was detained alleging him of motivating the workers not to obey the order of the military junta to return to their work. Then, he was sent to 'Yae-Kyi-Aing' – Burmese term means as 'A Pond Wih Cleansed Water' – which is one of the notorious secret investigation centre, located at the Min-ga-la-don township in Rangoon. There, he was routinely tortured

[2] Ibid.
[3] Ibid.

physically as well as mentally. First, before being asked anything, he was kicked, hit and slapped him cruelly all over the body by the group of men, with truncheon and jungle boots. Later, he was kept in poor sanitary condition. Then, he was forced to stretch out his leg, and a piece of rounded wood was rolled over his shins. Sometimes, he was hung by his feet and not allowed to sleep. The worst form of physical torture was electric shock. The military intelligence men placed electrode on his sexual organ, then they switched on the current. As a result, he lost consciousness.

On 23 January 1989, Ko Zar Ni was sent to Insein prison, where he faced an unfair trial. The military regime always opens a special court for political detainees at the entrance of the Insein prison and "At the trial Ko Zar Ni was not able to stand and walk because of being tortured" said the eye witness, Ma Khin San New. After being convicted, Ko Zar Ni was sent to the Insein prison hospital. When he was hospitalized, he could hardly manage to take care of himself such as taking showers, changing clothes, and having meals difficult due to torture. A few days later, he suffered from paralysis, because of shortage of medicine and specialists in the prison hospital.

Despite suffering from paralysis, he was moved to Tharrawaddy prison. His health became so poor that he could not bear the hard situation of that prison. Then, he was sent to Tharrawaddy hospital. When the military regime found that his health was not getting better anymore, finally he was released in 1992.

After release, he was taken to a Hospital for Disabled Persons. While he was there, Mrs. Sadako Ogata, a representative of the Human Rights Commission of the United Nation, came to Burma to inspect the situation of human rights and demanded the ruling military junta to let her meet Ko Zar Ni. However, during that time, he was forced to discharge from hospital with fake medical report by the head of the medical officers. Ms. Ogata did not get an opportunity to meet with Ko Zar Ni.

Next year, Mrs. Ogata came to Burma again with the similar purpose. This time also, Ko Zar Ni, was very unlucky again. As soon as Mrs. Ogata got to Burma,

Major Ngwe Soe and the military intelligence came to Ko Zar Ni's house and detained him again although he could not move his body. He was detained for six days during Mrs. Ogata's visit.

Now due to his terrible health situation, he has to lie down on bed all the time. As Ko Zar Ni has become a disabled person, he faces many difficulties for his survival. The worst thing is that as his parents are getting older and older, they are no longer able to help him. At present, he feels himself that he is a worthless person and there is no hope for the future.[4]

The aforementioned cases glimpse the situation of the two suspects seriously tortured by police and military intelligent people while they were investigated. Torture is against the principle of international human rights law.[5] The investigation officers also violate the principle on 'presumption of innocence' provided for in the Article 14 of International Covenant on Civil and Political Rights. In the event that these situations are not considered as a part of the pre-trial stage, Fair Trial can never be realized.

3.2 The Trial of 18 Foreigners

(The following paragraphs are excerpts from an article written by one of the 18 foreigners who experienced the trial in Burma.)

The eighteen, 6 Americans, 3 Thais, 3 Indonesians, 3 Malaysians, 2 Philipinoes and 1 Australian were convicted of "undermining the security of the union" and sentenced to five years imprisonment. ----------.

They were detained, without any formal arrest, by Burmese authorities on 9th August 1998 in Rangoon, Burma's Capital City. Twelve of the Eighteen while distributing business card sized "Goodwill Messages" and the remaining 6 members at the airport while attempting to return to Bangkok. Without any formal or informal

[4] Source from Assistance Association for Political Prisoners (Burma).
[5] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

charges or explanation for their detention, the Eighteen were held for five days under varying conditions. ----------

Finally, on the 6th day, without prior notice, the trial began. Without notice of the proposed charges, or the evidence to be presented by the prosecutor, the Eighteen were unaware of the case they would be required to answer. Despite a prison guard's earlier remark "don't get a lawyer – will slow down the process – we have hundreds of witnesses", they were never given the opportunity of requesting legal assistance. The suddenness of the trial ensured they were unable even to prepare their own defence.

The prosecutor announced, at Insein Special Division Court, that Joel Greer and 17 others were charged under section 5(j) of the Emergency Provisions Act 1950. ----------
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The State's case, as presented to the court, totalled 6 witnesses – 3 police or security officers, 2 hotel staff and 1 local SPDC official. The SPDC official testified that a Goodwill Message was handed to him by one of the Eighteen. Twelve of the Eighteen were witnessed handing out similar messages. A total of about 8,000 Goodwill Messages were distributed across Rangoon. The hotel staff, who searched the rooms and luggage of the Eighteen, claimed that a letter on NLD letterhead was found in one of the rooms (a claim denied by the Eighteen.)

Following the testimony of each witness the Eighteen were given the opportunity to question the witness. "Please read the message", the court was asked. It was read aloud:

"Goodwill message – We are your friends from around the world. We have not forgotten you. We support your hopes for human rights and democracy. 8888 – Don't forget – Don't give up."

The judge also read the documents attached to the prosecutor's charge sheet. These documents were never disclosed to the accused or formally admitted as evidence. However, it is known they included a copy of the State run newspaper, "The New Light of Myanmar". This newspaper detailed the government's accusations against the Eighteen and displayed photographs of evidence not presented to court – such as the hollow-soled shoes allegedly used by the Eighteen to smuggle the Goodwill Messages into Burma. The judge took interest in The New Light of Myanmar and spent some time scrutinizing its contents during the trial. To the Eighteen it appeared that the New Light of Myanmar was one of the judge's primary source of information about the case.

The Eighteen were sentenced to "five years imprisonment to be served at Insein Prison."

This time the "stage" was cleared and "Act two", as one of the Eighteen described the scene, commenced. A new bench was set up now draped in white. Three new officials sat at the bench. One of the officials stood and announced that the Eighteen were to be pardoned. However, if the Eighteen were arrested a second time, the original sentence would be added to the new sentence. Each person was then asked to sign a statement in Burmese, without translation, and flown out of Rangoon the next day.

In 8 hours the Eighteen were charged, tried, convicted and pardoned. Their experience provides a frightening example of the legal system faced by the people of Burma, whose trials are not scrutinized by foreign embassies and media.[6]

Distribution of Goodwill message is not a criminal offense. It is simply an exercise of the freedom of expression.[7] The suspects did not have enough time and facilities to prepare for defense at the pre-trial stage. Other than pieces of paper mentioned 'Goodwill message', documentary evidence mainly submitted by prosecution was "The New Light of Myanmar", a government's newspaper. According to the Evidence Act, it is not a primary document by which the accused could be rendered punishment. This is in respect of documentary evidence.

There totaled 6 prosecution witnesses – 3 police or security officers, 2 hotel staff and 1 local SPDC official. The hotel staff stated that a letter on NLD letter head was found in one of the rooms but it was denied by the Eighteen. Oral statements of the witnesses were also not sufficient proof to render penalty as they mentioned merely about the distribution of Goodwill message by the Eighteen foreigners. This is in respect of oral evidence.

Then, the Eighteen were charged under section 5 (j) of the Emergency Provisions Act 1950. It provides as follows:

If anything is done intentionally to cause aberrance of the moral or conduct of the public or of a section of the public in a manner which is likely to impair the security or restoration of law and order of the Union or if any act which is likely to cause the same is done.

In accordance with the law, the prosecution has to prove the motive of the accused that the Eighteen did have intention to commit such a criminal offense. However, in this regard, no prosecution witness provided a supporting statement on that. Maximum penalty for EPA is seven years imprisonment. The Code of Criminal

[6] Greer, V. J., et al. The trial of 18 foreigners, mentioned in legal issues on Burma journal. Mentioned in Legal Issues on Burma Journal, Bangkok, Burma Lawyers' Council. Vol. 3, (May 1999). pp. 42-44.
[7] Article 19 of the Universal Declaration of Human Rights.

Procedure provides that for any offense punishable for a term not exceeding six months, the accused shall be tried by applying procedure for the trial of Summon-cases. And, for any offense punishable for a term exceeding six months, the accused shall be tried by applying procedure for the trial of Warrant-cases.

In terms of hearing processes, Summon-cases and Warrant-cases are quite different. The trial procedures for Warrant-cases are more detailed and well-regulated. As the accused can be rendered higher punishment up to death penalty under Warrant trial, the law provides more opportunities to the accused for defense. For an offense taken into action under EPA Section 5(j), the accused shall be tried by applying detailed procedures for the trial of Warrant-cases. However, unfortunately, the authorities violated the law and completed all trial processes within eight hours. The Eighteen received very few opportunities provided for in the Code of Criminal Procedure. As a result, it seriously damaged the rights of the accused, in respect of procedural due process. In spite of lack of either documentary or oral evidence, the accused were rendered five years imprisonment. It was totally an unfair trial.

3.3 Myo Myint Nyein and 21 Prisoners' Case in Insein Prison

3.3.1 Significance of the Case

The ruling military junta detained 22 persons, Myo Myint Nyein, a journalist and others, in Insein Prison for alleged political offences. For their attempts to maintain contact with the outside world, the political prisoners were tried again in 1996 by the Rangoon Divisional Court under the 1950 Emergency Provision Act and sentenced to a further seven years incarceration. An examination of this true case will serve to expose the true nature of the numerous politically-motivated criminal cases taking place inside Burma.

The political prisoners attempted to send information about the desperate situation in Insein prison to General Secretary of the United Nations. According to judgment of the Rangoon Divisional Court, that act provided a compelling reason to impose a long prison sentence. The case was tried in Insein prison. The judgment, dated March 28, 1996, was signed by Kyaw Htun, Deputy Divisional Judge of the Rangoon District Court (Northern District Court). That document details the evidence

and testimonies presented at the trial and the judge's reasons for finding all 22 prisoners guilty.

According to the accepted procedures, as stated in the Evidence Act and the Court Manual, the judgment of the court is a public document and people concerned in the case should have the right to access that judgment. The junta's obstruction, however, has acted to make it extremely difficult for ordinary folk to get any concrete information about cases tried in Insein prison. In spite of SLORC's interference, information about this trial was secretly smuggled out of the prison. This is the first time since 1988 that detailed information about the unjust trials in Insein prison could be collected.

While the 1996 case was being tried, one of the prisoners, U Hla Than, passed away in the prison. U Hla Than, a lawyer, won the seat of Coco Islands for National League for Democracy led by Daw Aung San Suu Kyi in the 1990 May elections. He was arrested by the military junta for attempting to form a provisional government and was sentenced to 25 years imprisonment. Without adequate medical attention, his health deteriorated in Insein prison and tuberculosis weakened his condition. Only when the situation became hopeless did the prison authorities allow him to be sent to Rangoon General Hospital where he died on August 2, 1996. Another of the prisoners, U Win Tin, is a prominent journalist in Burma and is secretary of the Central Executive Committee of the National League for Democracy.

3.3.2 Charge

The prisoners were charged on March 20 1996 under Section 5 (E) of the 1950 Emergency Provision Act which states: If anything is done intentionally to spread false news knowing it to be false or having reason to believe that it is false or if any act which is likely to cause the same is done. The alleged punishable action was that the accused prisoners engaged in:

Writing and distributing seditious literature and drawing cartoons and illustrations aimed at discrediting the State despite knowledge and proof that information contained in these documents was false ...

3.3.3 Allegations Based on the Information of Police Lieutenant U Khin Htay

First Allegation

That in 1996 Myo Myint Nyein and accomplices secretly wrote the "New Blood Wave Magazine" which contained news items critical of the State, in commemoration of the founding of Rangoon University, and that they distributed the document in Insein prison.

Second Allegation:

That the prisoners wrote a paper entitled "The Presentation of the Prisoners of Conscience Unjustly Detained in Insein Prison and Request and Demand on Human Rights and Politics in Burma" addressed to the Secretary-General of the United Nations.

Third Allegation:

That the prisoners brought radios secretly into the prison, and acted to re-disseminate information, despite knowledge that it was false. That they compiled news records and distributed them.

Statements made by the plaintiff's witnesses:

To support the allegations of the plaintiff, the following statements were made by the plaintiffs' witnesses upon Myo Myint Nyein.

(a) Myo Myint Nyein smuggled Time and Newsweek magazines into the prison by unlawful means and distributed them for other prisoners to read.

(b) Myo Myint Nyein took responsibility for the layout of the magazine which contained seditious literature against the State, and which was written in commemoration of the Diamond Jubilee of the founding of Rangoon University.

(c) Nyunt Zaw, Kyi Pe Kyaw, Zaw Min, Phyo Min Thein and Myo Myint Nyein discussed collecting information on events within the prison and presenting this information, along with their demands, to the Secretary-General of the United Nations.

(d) Myo Myint Nyein held discussions with Phyo Min Thein and Kyaw Min Yu about a conference to be held in Vienna, Austria [UN Human Rights Conference]. As a result, Phyo Min Thein wrote a paper in English on a short-sleeved prison shirt and smuggled it out of the prison.

(e) Myo Myint Nyein wrote "New Year Greetings for Aung San Suu Kyi from her Colleagues" on a white cloth and asked 107 prisoners to sign their names on it.

(f) Myo Myint Nyein collected news from visitors during prison visits and distributed this information in a news bulletin every Sunday.

(g) U Hla Than received from Myo Myint Nyein the pieces of thin Ajinomoto plastic bag on which U Win Tin had written a letter to the United Nations. U Hla Than concealed this letter in the handle of the plastic basket he had made.

3.3.4 Legal Analysis

The prisoners lost their access to legal defense. The Court relied heavily in its judgement on the statement provided only by the police lieutenant, U Khin Htay. According to Article 162 of the Code of Criminal Procedure, however, the statement of the police alone cannot be considered by the court as evidence to convict the accused. The other statements which the court referred to in their judgment were those made by prison officers. They could only testify how and where they made a search of the prison cells, which materials were confiscated, and from whom. They were unable to testify that how the prisoners committed a crime. To the contrary, the legal search made by junta's authorities was not in line with the section 103 (1) of the Code of Criminal Procedure.

a. There was no attending witness while the searches were made.

b. The occupiers of the place searched were not permitted to attend during the search: the search was made only after the prisoners were taken outside their cells. Moreover, the court accepted, considered and admitted the statements of the prison officers as evidence. This action was wrong in law.[8]

[8] 1941 Rangoon ruling. n.p. p. 552; All India Report. A.I.R., 1946, p. 16.

Time and Newsweek magazines are hardly illegal documents. They are freely available for everybody to purchase and enjoy reading outside the prison. Taking the magazines into the prison is not a criminal offence. According to accepted international practice as well as that specified in the "Jail Manual", still in-force inside Burma, it is the right of the prisoners to enjoy such privileges. The action of taking such magazines into the prison, does not violate the provision of Section 5(E) of the Emergency Provision Act.

Myo Myint Nyein stated that he wrote a paper on the "rights and grievances of the prisoners" to be presented to the United Nations through the International Committee of the Red Cross (ICRC) during their proposed visit to the prison. Because the ruling junta rejected the request of the ICRC to visit Insein prison, Myo Myint Nyein's intended action was frustrated. Consequently, along with other prisoners, he determined to attempt to present information directly to the United Nations.

It could be argued that had the SLORC permitted representatives of the United Nations or the ICRC to visit the prison and to interview the prisoners, the desperate action of seeking secretly to take the papers outside the prison would not have been necessary. Although such an action by Myo Myint Nyein and other prisoners may have violated the discipline imposed in the prison, it could hardly on that basis have warranted such a severe and unmeasured punishment from the authorities.

The criminal law contains various rules which are meant to guide those determining whether any given conduct by a person is, or is not, a crime. The most fundamental of these rules is the general principle that a crime is constituted by:

(a) certain conduct by an accused person

(b) which causes a proscribed effect (such as death); and

(c) which is done with a guilty mind - with intention, recklessness or negligence.

This principle is derived from the ancient maxim actus non facit reum nisi mens sit rea.

The crime alleged against the prisoners is that of "Writing and distributing seditious literature and drawing cartoons and illustrations aimed at discrediting the

State despite knowledge and proof that information contained in these documents was false".

Section 101 of the Evidence Act provides, "Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person." Accordingly, the burden of proof that the information contained in these documents was false, lies with the plaintiff. The documents submitted by the plaintiff as evidence were:

1. A magazine in commemoration of the Diamond Jubilee of the founding of Rangoon University,
2. The testimonials of prisoners of conscience from Insein Prison who have been unjustly imprisoned; demands and requests regarding human rights violations in Burma,
3. New Year Greetings for Daw Aung San Suu Kyi from her colleagues,
4. The news bulletin in 1994 and 1995,
5. A paper to present to Professor Yozo Yokota, former UN Special Reporter on Burma,
6. The New Blood Wave Magazine.

The plaintiff was bound to prove that, with reference to the specific paragraphs or sentences, the information contained in the foregoing documents was false. In the judgement, the court was entirely unable to identify the false information. Myo Nyint Nyein and the other prisoners in this case testified that they wrote the documents mentioned above except the last one, "The New Blood Wave Magazine". The information contained in those documents before the court was unchallenged. That is why, with the charge of the violating section 5 (E) of the 1950 Emergency Provision Act, the court could not properly move to punish the prisoners.

In page No (7) of the original judgment, it was stated that a "New Blood Wave Magazine" was found between the lake and the barrack of the jail staff. However, anybody, including the prison authorities, could have left any material there. It was altogether obvious from the evidence, that the "New Blood Wave Magazine" was not found in the possession of the prisoners.

Myo Myint Nyein testified that he saw the magazine only in the court and he had never seen it before. Win Thein also made a statement that it was known that the chief prison officer, U San Ya, found the "New Blood Wave Magazine": that it was not taken from his possession and he was not involved with the magazine. No evidence to connect him with the publication was found in his room.

Aung Myo Tint also attested that, after being tortured, a book was shown to him and he was asked whether he wrote it or not. He denied it. Htay Win Aung also denied that hand writing in the magazine was his writing. Kyaw Min Yu also stated that he saw the magazine only in this court. U Win Tin also denied that he wrote anything in the magazine. Zaw Myint Maung testified that he had never heard about the existence of the New Blood Wave Magazine and had not seen it before he caught sight of it in the court, although in the magazine his name was mentioned as the author of some of the poems and articles. The magazine was supposed to have fabricated by the investigators themselves.

If the prison authorities asserted that the prisoners offended against prison regulations, they should have acted under the provisions of the "Jail Manual", a regulation still in force for the administration of prisons in Burma. It appears, however, that the military junta is not keen to advertise the existence to prisoners of the provisions contained in the Manual which are more liberal than their practices. The junta is knowingly suppressing implementation of the regulations contained in the "Jail Manual" and substituting oppression of political prisoners by harsh and illegal practices which deny basic human rights in the prison.

According to the provisions of the "Standard Minimum Rules for the Treatment of Prisoners", adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, contact with the outside world is a right of prisoners. Section 39 provided as follows:

"Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits;

Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorised or controlled by the administration."

Despite those internationally-recognised provisions, the 22 innocent political prisoners remained incarcerated in Insein prison in Burma, convicted of the alleged "crime" of attempting to contact the outside world. The action which the prison authorities took against the prisoners was untenable. The actions of the prisoners were not crimes against either the 1950 Emergency Provision Act or any other criminal law. However, Myo Myint Nyein and 21 prisoners were sentenced to seven years imprisonment.

Summary

For case studies, altogether four cases were introduced. The first two highlight the importance of pre-trial stages. Out of the two victims, one died of torture and another becomes disable while being investigated at pre-trial stages. The objective of a 'Trial' is to seek justice for the victims. In both case studies, it is obvious that the two victims lost justice as they did not enjoy the right to a Fair Trial due to demerits of substantive as well as procedural laws with the background social environment where 'fear' is prevailing. In the first case, immediately after the victim was arrested, his mother got access to the police station. Nevertheless, she was not courageous enough to challenge the action of the police investigation officer, by asking the assistance of legal council or other local authorities. Furthermore, as she was a poor parent, she could not afford to bribe the police to release her son. Then she lost him. In the second case, immediately after the victim was detained, nobody followed up the case, communicate with him, and provide necessary legal and other assistance effectively. The relatives and friends of the victim themselves were scared of being taken into action by the ruling junta given that the case was politically motivated one.

These two cases can also be analysed from legal perspective. In accordance with the existing laws, the scope of a trial does not cover the pre-trial stages given that the court does not have any authority to provide protection of sufferings of the victims at pre-trial stages. There are no trial procedures to deal with the issues, arisen immediately after a person has been arrested as suspect. In Burma, the law has as yet manifestly provided that a person can ask the assistance of legal council immediately after he or she is detained. Furthermore, there exist many laws legalizing the arbitrary detentions and allowing the authorities to detain the suspects without being tried.

In spite of the fact that one was dead and another has become disable, there has been no remedy for suffering of two victims. That was for two reasons. One was that relatives and friends of the victims were not brave enough to file a criminal lawsuit against the responsible authorities who tortured victims. Although they filed a lawsuit, they might not win the case as the ruling junta would certainly protect their lackeys. Another was that, in line with the effective laws of Burma, without referring

to the previous judgment of the court in a criminal case, nobody can file a civil suit for damages. As such, with reference to these two cases, it can be realized that the right to a Fair Trial was deprived by the authorities at two stages – pre-trial and post trial processes.

Eighteen foreigners case reflects the weaknesses of hearing processes in the trial as well as post trial stages. The exercise of fundamental rights of every individual, in terms of freedom of expression, was criminalized. From the moment of arrest to the period that those Eighteen were released, procedural due process was totally denied. They were detained without any formal arrest[9] and also released contrary to the procedure on appeal, reference and revision.[10] The right to get the legal assistance was also rejected. The prosecution could not prove the guilt of the Eighteen beyond reasonable doubt. In admitting the evidence, the court did not properly apply the existing law, Evidence Act. In addition, the court did not provide enough time to the Eighteen in order to prove their innocence including summoning defense witnesses. Justice system becomes a mockery as the accused were rendered five years imprisonment, after being tried within eight hours, and they were also released by the same court, that rendered punishment, without applying the appeal procedures in an appellate court.

Myo Myint Nyein and 21 prisoners lacked preparation for defense at pre-trial stage as their case commenced at the prison while they were serving their detention period for previous alleged political offenses. Then, the case was tried inside the walls of Insein prison, devoid of public scrutiny. It is more than that of the exclusion of public from trial. Due to the attendance of trial held in prison, fear permeated not only the witnesses and the accused but also the judges. As such, the judge had to render severe penalty unavoidably over the accused in that case. Denial of public hearing has become a common practice for all politically motivated cases in Burma.

Myo Myint Nyein case can be analyzed from other perspectives of a Fair Trial. As the judges were not only appointed but also closely instructed by the junta, independent judiciary was denied. The prisoners were charged of the action that did

[9] Article 46 to 67 of the Code of Criminal Procedure.
[10] Article 404 to 442 of the Code of Criminal Procedure.

not constitute any offense. All the prosecution witnesses were junta's officials. Documentary evidence against the prisoners was supposed to have been fabricated. The assistance of the legal council for the defense was denied. Some prisoners were tortured and forced to give the false statements. With reference to this case, it is evident that the impartial tribunal did not exist as the court could not challenge the pressure of the junta's authorities to try the case in the prison, denying the rights of the accused to have the public trial in accordance with the law.

The court did also not scrutinize the validity of the evidence submitted by the prosecution. During the trial processes, circumstances enjoyed by prosecution and defense were not equal: while prosecution comprising investigation officers and prison authorities was strong, the defense site was too weak as they could not even communicate with outside world, get the assistance of legal council, and submit the defense witnesses. They were also denied the procedural due process. Myo Myint Nyein and 21 prisoners case is a sufficient evident that the right to a Fair Trial was denied by the authorities at two stages – pre-trial and trial processes.

CHAPTER IV
THE STATUS OF A CRIMINAL TRIAL SYSTEM IN BURMA

4.1 System of Justice at Post-Colonial Time and Fair Trial

The nation building for new Burma immediately before and after the independence took place in legal order based on the rule of law foundation**:** on September 24, 1947, the new Constitution of the Union of Burma, was approved by a formal constituent assembly; this constitution coupled with the Burma Independence Act of 1947 established Burma's independence; effectuating independence on January 4, 1948. The constitution became the supreme law of the land. Accordingly, all citizens were equal before the law, irrespective of birth, religion, sex or race. Parliament, the law making body of Burma, was the most honorable venue for the whole country. In line with the 1947 Constitution, an independent judicial system was created,[1] the judges were subject only to the constitution and laws,[2] the right to constitutional remedies could be exercised by citizen,[3] and Supreme Court was conferred power to issue directions in the nature of Habeas Corpus, mandamus, prohibition, quo warranto and certiorari.

Habeas Corpus is a court order, known as a writ in legal terms, to release a prisoner being held in custody. According to this principle, a person could come forward before the Supreme Court and apply for Habeas Corpus by executive or administrative order for a family member or friend under illegal detention.[4] After this

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[1] Chapter 8 of the 1947 Constitution of the Union of Burma.
[2] Article 141 of the 1947 Constitution of the Union of Burma.
[3] Article (25)(2) of the 1947 Constitution of the Union of Burma.
[4] Explained by U Ba Gyan., Former Judicial Minister after independence of Burma. Constituent Assembly (Parliament) Record; September 2, 1948.

application, the Supreme Court would issue Habeas Corpus directing the arresting officials to bring the detained suspect before the court to examine the legality of the executive order. If the detention was illegal, the arresting officials had to release the detained suspects right away as per the direction of Habeas Corpus. At that time, many communists, Karens and other political leaders were detained by the democratic regime for preventive action; but to the credit of Supreme Court, most were released.

The judiciary provided protection for citizens by quashing orders issued by the Government whenever such orders conflicted with the Constitution. The Supreme Court applied this procedure effectively, thereby facilitating the emergence of a Fair Trial in Burma between 1948 and 1962.

Following independence, the British judicial system pattern continued. The main difference was the establishment of the Supreme Court as the highest court of the land and the Court of final appeals. The striking feature of the system was that it was vested with powers to enforce constitutionally guaranteed fundamental rights of the citizens. The Supreme Court, thus, largely prompted fair trials and promotion of societal status.

Between 1948-1962, the Supreme Court played a significant role in protecting the fundamental rights of the people enshrined in the constitution. There was a High Court at Rangoon, and a bench of the High Court at Mandalay, which heard all civil and criminal district court appeals.

4.2 Selection of Judges: A Major Supporting Factor for the Emergence of a Fair Trial

Prior to independence, judge selection was a controversial issue faced by draftors of the Constitution for a new democratic Burma. Firstly, the draft was drawn up on May 20, 1947 by a 111-member committee of the AFPFL Convention. This committee approved the draft on May 23, and dissolved the Convention that same day. The draft constitution, under the title of 'Union Judiciary,' set forth the following:

> "The judges of the Supreme Courts are to be elected by the Union Assembly in joint sitting."
>
> In this regard, Justice U Ba Oo commented, "In a democratic country, the

> judges should be independent, honest, and competent. If they are to be elected, they will never be independent, and if they are appointed for only a short period at a time, some may find it hard to keep to a straight path. As in a democratic country the sovereign power resides in the people, the appointment of judges should be traceable to the people. Therefore, I should like to suggest that the Prime Minister as the Head of the Government, in consultation with the Chief Justice, choose the candidates and submit their names to Parliament for approval. If they are approved, then they will be appointed by the President. This amounts to election of the judges by the people through their representatives in Parliament. In order to ensure the honest and efficient discharge of duties by the judges, the appointment should be made pensionable. And in order to deal with refractory and dishonest judges, a penal provision should be made."[5]

Later on, the proposed 'elected system' was rejected. The Chief Justice of the Union, Supreme Court and High Court Judges were appointed by the President with the approval of both Chamber of the Parliament in joint sitting.[6] All judges then were nationalities of Burma, recruited through the competitive judicial service system.

4.3 Judges' Subservience only to the Constitution and the Laws : Another Supporting Factor for the Emergence of a Fair Trial

Every person appointed as a judge of the Supreme Court and of the High Court shall subscribe to the following declaration as oath: [7]

> I, --------, do solemnly and sincerely promise and declare that I will duly and faithfully to the best of my knowledge and ability execute the office of the Chief Justice without fear or favour; affection or ill-will towards any man, and that I will uphold the **Constitution and the laws**.

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[5] Ba U, Dr. My Burma. New York: Taplinger Publishing, (1958). p. 198.
[6] Article 140 of the 1947 Constitution of the Union of Burma.
[7] Article 139(1) of the 1947 Constitution of the Union of Burma.

Requiring Supreme Court judges to pledge to such an oath expressed the great honor of the court and the reaffirmed the societal import and role of judge as guardian of the constitution. Adherance to the oath, in essence, epitomized the social and judicial background of the country, a striking factor for the emergence of a Fair Trial. Including the oath in the constitution was critical to the administration of justice, as judges could be impeached by Parliament if they violated the oath.[8]

The declaration of oath was a two-part promise. The first part involves judges' application of morality to legal matters. In this context, the term "without fear" expresses the courage required by judges to administer justice without paying attention to potential threats made by: parties, executives or government officials. The term "without favor, affection or ill-will" references protection of the impartiality of a trial. That underlying morality based concept came from Burmese judiciary tradition.

The second part of the promise is relevant to the Constitution and Laws of the State. Judges pledge to giv5e their word of honor to uphold the Constitution and the laws. This idea stems from Rule of Law principles exercised by democratic countries with common law traditions. In such countries, the Constitution serves as a sacred bible to be observed, protected, and complied with by Supreme and High Court Judges.

4.4 Independence from Executive: Essential for a Fair Trial

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 awarded U Ba Oo the title "Sir" due to his good service in judiciary. The superficial giving of this title was an attempt by the British to restrain rebellious farmers, led by Saya San, struggling against British rule during 1930-1931.[9] For this reason, some political leaders objected to the proposed appointment of U Ba Oo as Chief Justice of the newly established democratic state.

[8] Article (143) of the 1947 Constitution of the Union of Burma.
[9] Ba-maw Tin Aung, History of Burma in colonial era. Rangoon, Myanmar: Published by Pyi-thu-ah-lin Printing Press. (July 1964). p. 369.

Nevertheless, U Nu, U Ba Swe and U Kyaw Nyein, the then most influential political leaders, strongly supported U Ba Oo, 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.[10] Unfortunately, this consideration never materialized since the application of 1974 constitution, as the military junta has completely controlled the judiciary, using it as a strong pillar in support of their political power.

U Ba Oo became President of the Union in 1952, and retired in 1956. Thereafter, the country was forced to find another leader to replace U Ba Oo. 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 lied in fear of creating misconstrued 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.[11]

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 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.

[10] Interview with Mr. B.K. Sen.
[11] Ibid.

4.5 Security of Judicial Tenure : A Foundation for Fair Trial

Following the independence of Burma, in appointment of all Supreme Court and High Court judges, it required to get the approval of both Chambers of the Parliament in joint sittings. The whole process to appoint judges were transparent. There, the nominated candidate's background, his or her commitment to justice, legal qualification, prominence in legal field, and other relevant factors were scrutinized by the members of Parliament. Only then, the judges were appointed.

According to Article (143) of the 1947 Constitution, tenure for Supreme and High Court Judges was secured as follows:

"A judge of the Supreme Court or of the High Court shall not be removed from office except for proved misbehavior or incapacity."

In one of the two Chambers of Parliament, a proposal to impeach a Judge on any of the aforementioned grounds must first be initiated by resolution in which at least one-fourth of Chamber membership must sign, and then a majority of the Chamber must adopt.[12] When the charge relates to a Supreme Court judge it shall be investigated by a Special Tribunal consisting of the President, or a person appointed by him, the Speaker of the Chamber of Nationalities, and the Speaker of the Chamber of Deputies.[13] The Judge who is charged has the right to appear and defend himself. The Special Tribunal, after investigation, submits its report to the Chamber and proffers the charge to be considered, by both Chambers of Parliament in joint sitting. In the event that the proffered charge has been proven, the President shall, by sealed order, immediately remove the judge from office.[14]

Such an accurate and systematic procedure for judicial impeachment facilitated tenure security for judges. As such, the judges could, to a large extent, administer justice through fair trials without pressure from outside the court.

[12] Article 143 (4) of the 1947 Constitution of the Union of Burma.
[13] Article 143 (6) of the 1947 Constitution of the Union of Burma.
[14] Article 143 (8) of the 1947 Constitution of the Union of Burma.

4.6 Fair Trials After Independence

Unfortunately, immediately after the independence, Burma was plagued by communist and ethnic 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. Lines of communication from Rangoon to local areas were severely strained. The international community started to refer to the ruling democratic regime as "Rangoon Government;" implying that, during that short period, law and order was compromised. Residual lawlessness permeated many parts of the country following the war. Generally, however, even within this unstable time, the rule of law was not absolutely damaged. The central government eventually was able to reoccupy the whole country of Burma; re-establish its authority; and restore the Rule of Law once again. 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.[15]
>
> 'Our Courts have always acted freely,' said U Nu as President of the AFPFL at the League's third congress, on January 29, 1958. '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

[15] Maung Maung Dr., Burma's Constitution; The Hague: Martinus Nihjoff, 1959. p. 154.

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."[16]

In spite of some improper practices by the governmental authorities, the principle on equality before the law then was commonly exercised among the people under the supervision of independent judiciary. Furthermore, the judiciary was also effective at protecting individuals' rights and fundamental freedoms in the aftermath of the independence of Burma. At that time, fair trials largely existed in Burma.

The then existence of Fair Trial can be realized with the backgound of independence of judiciary and other factors – supremacy of constitution, prevailing of, more or less, just laws enacted by parliament comprised of elected representatives, the judges' subservience only to the constitution and the law, security of judicial tenure for the judges, impartiality of trial avoiding three potential ways of "Bias", the observance of procedural due process, holding of public trials, the existence of independent and noble legal profession and lawyers' associations such as dignified Bar Council, the courts' practice of the doctrine of binding judicial precedents, largly guaranteeing of the principle on equality before the law within the framework of the rule of law.

Furthermore, At that time relatively strong civil society organizations also existed in Burma. British colonial rule permitted independent Burmese organizations, and in the post-independence period, a rich civil society continued to develop in the cities and some towns, though not in the country side.[17] Until a few years after independence, the ruling political party, Anti-fascist People's Freedom League (AFPFL) was united, strong and could to a larger extent lead the society relatively developed one. The leaders of AFPFL many times expressed their appreciation on the role of independent judiciary and supported its function.

Media then was free, lively and also responsible. It served as a watch-dog of a society, by monitoring not only the operation of government institutions but also the function of various levels of judiciary. In terms of religious groups, Buddhist

[16] Ibid p. 156-7.
[17] International Crisis Group, Myanmar : The Role of Civil Society, Asia Report; Bangkok: Brussels., (2001), p. 3.

community was also strong. Many times, the reverend Buddhist monks could influence government officials and majority of people in search of justice for the society. Rangoon University was established in accordance with the University of Rangoon Act (1924). It was well respected by the contemporary universities in the Southeast Asia Region; Department of Law, there, was famous; the practical court practices and famous rulings of Supreme Court were the areas where the law professors, students, and other scholars learnt, many well-known lawyers and legal academics could be produced; and, the successive democratic regimes had to collect and obey the suggestion of legal communities and academics. Those background sociological environment could impacted over the whole justice system that hugely lowered the corrupt practices within the judiciary, and finally led to the existence of a Fair Trial.

In return, the then many existing laws and major parts of legal and judicial system, to a larger extent, supported the harmony of society. It could hugely protect the fundamental freedoms of individual on one hand and foster the welfare of the society on the other. For instance, the Supreme Court could exercise its judicial review power and supervised illegal and unjust actions of government by issuing directions in the nature of Habeas Corpus, Mandamus, Prohibition, Quo warranto and Certiorari to respective government officials. Supreme Court summoned the disputed cases being tried in its lower courts, in line with the power of Certiorari, and adjudicated them. SC asked the questions to the government officials, in line with the power of Quo warranto, as to whether an event was truly taking place or not. SC prohibited the action of government officials, in line with the power of Prohibition, if they did something wrong against the existing law. SC provided directions to the government officials in line with the power of 'Mandamus' if they did not perform something in spite of the provisions in law to do so. The government had to fully comply with the directions of Supreme Court. In so doing, Supreme Court could preserve "social solidarity". At that time, the status of the trials were reasonably high.

However, the foundation for justice system was threatened after ten years in 1958, the time that the military rule was legalized by the then parliament with the suggestion of the Attorney General of the country. As a result, the military gained confidence in public administration; and in 1962, it staged a military coup reasoning

that the safeguard of the union be protected from the danger of ethnic's 'secessionist movement.' From then on, the status of the trials were gradually lowered.

4.7 1974 Constitution and Trials

In the aftermath of the 1962 military coup, the regime drafted a Constitution for the formation of a one-party state, which fully guaranteed the perpetuation of the military dictatorship. A sham referendum was held on the draft constitution in 1973 and the people were forced to support it. What followed was a general election and the installation of so-called civilian government dominated by military and ex-military officers. The military junta ruled for the next fourteen years under false legitimacy.

Under the 1974 Constitution, the military junta exercised its centralization through the Council of State in which the majority of its members were the Military Generals who wore civilian clothes. Central and Local Organs of State Power - Council of Ministers, Council of People's Judges, Council of People's Attorney, and Council of People's Inspectors - had to function under the direction and supervision of the Council of State[18] thereby denying the independent role of the judiciary. In accordance with the Constitution, the Council of State was conferred the power to abrogate the decisions and orders of the Central and Local Organs of State Power[19] in a way that the Council of State impliedly exercised the power of Judicial Review. During the period of 1974-1988, Council of People's Judges, which was supposed to assume the Supreme Court, never stood as an independent institution to check the function of government and its authorities as to whether they performed their duties in accordance with the law. Furthermore, they could not protect the fundamental rights of citizen within the judicial system as its power on Habeas Corpus and other writs had already been withdrawn in that 1974 Constitution. Instead, the Council of People's Judges, as a political instrument, had to serve the authoritarian regime under the strict judicial principle such as, inter alia, to protect and safeguard the Socialist system, enshrined in the Constitution.[20]

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[18] Article 79 of the 1974 Constitution.
[19] Article 73(m) of the 1974 Constitution.
[20] Article 101(a) of the 1974 Constitution.

4.8 Ethnic Cease-Fire : Negatively Impacted over the Criminal Justice System

Burma's borders with Thailand, India, China and Bangladesh are all material to the context in which the ethnic armed organizations operate.

Following the September 18, 1988 coup, SLORC used the power of their army to stabilize urban areas in which democratic uprisings most frequently occurred. It was not possible for the military junta to suppress urban opposition and rural armed resistance simultaneously, so the junta withdrew many battalions from these areas and instead focus energy on the northeastern part of Shan State. It was there where they battled "Wa" ethnic troops under the control of the Communist Party of Burma (CPB). During that time, the several thousand students and people participating in the democratic uprising in urban areas, convened in southeastern sections of Burma to join ethnic armed resistance organizations. There, they formed the Democratic Alliance of Burma (DAB) and prepared for armed struggle against the junta. In the face of the challenging political and military scenario, the junta was forced to find a strategy to prolong their power at the expense of damaging the Rule of Law.

In mid-1989, the military junta initiated a policy of ethnic cease-fire. This occurred first in the north-eastern part of Burma, which had previously been controlled by the CPB. In 1989, the Wa ethnic people revolted in the north-eastern part of Shan State where the CPB held a liberated area. They expelled the CPB leaders to China; formed the United Wa State Party (UWSP) in 1989, and became the largest ethnic armed opposition force in Burma.

Previously, China had supported the CPB in establishing its liberated area. In spite of this, China refused to supply Wa troops following the coup, abandoned the CPB,and shifted its policy in favor of collaboration with the Burmese military junta.[21] China established a direct government to government relationship with the military junta in Burma; promoted its cross-border trade with Burma; and sold ammunitions. There is an impression that Chinese motives may be more economic rather than political. China put much pressure on the Wa, including severing communication with them, resulting in a supply crisis within the UWSP.

[21]Interview with a central committee member of the CPB in 1989..

The military junta manipulated this situation by persuading UWSP leaders to enter into a cease-fire agreement without requiring laying down their own arms. Many carrots were dangled, including the guarantee of the creation of "Wa" state, with regional development projects to be carried out therein. China also pressured the Wa community to accept the cease-fire agreement in return for access to territory across the frontier. In addition, the military junta provided three opportunities to the Wa, enjoyed by no other ethnic armed organization since independence. They were:

(i) Recognition of the existence of the United Wa State Party (UWSP);

(ii) Permission for the establishment and control of the UWSA; and

(iii)Acknowledgement of the designated territory controlled by the UWSP and UWSA.

Following this, the UWSP entered cease-fire agreements with the junta. As a result, some armed ethnic organizations, fighting against the junta, such as the Pa-oh National Organization (PNO), the Palaung State Liberation Front (PSLF) and the Shan State Progress Party (SSPP), all based in Shan state, followed suit of the UWSP and entered the ceasefire with the junta respectively in 1989-90. This was also the case for the organizations whose operations were mainly based in southern Shan State, during 1994-95: Kachin Independence Organization (KIO), Karenni Nationalities Peoples' Liberation Front (KNPLF), Kayan New Land Party (KNLP), and Shan Nationalities Peoples' Liberation Organization (SNPLO). Against the backdrop of the China- Burma border, fighting almost ceased in both the Shan State and Kachin State.

Until 1985-86, the Government of Thailand pursued a buffer zone policy at the border. Thai involvement was perceived and portrayed as a protected war zone border area for which the Thai Government took implicit responsibility for defending the military camps established by ethnic groups. But, Thai policy soon changed, instead treating the area as an economic zone. Under that new policy, cross-border security reverted to the Thai military, and ethnic armed organizations based in the border area were pressured to enter cease-fire agreements. As a result, the Mon based New Mon State Party (NMSP), and the Karenni based Karenni National Progressive Party (KNPP) also entered the cease-fire agreements in June 1995. KNPP resumed fighting, however, after three-month cease-fire period.

The military junta has created a political process of cease-fire in search of legitimacy to rule the country. Whenever an ethnic armed group entered the cease-fire, a ceremony entitled, "So and so organization has returned to the legal fold" was usually held. In all those events, the term "Return to the Legal Fold" was repeatedly propagated by the regime so that the process impliedly legitimized the rule of the junta, that came into power by military coup. This was also the process to legalize the existence of ethnic armed organizations and their administrative mechanisms including the judiciary in their designated local areas of Burma.

Currently in Burma, unequal political development cannot equalize the various judicial status of ethnic local areas in the whole country. In those ethnic armed organizations' designated areas, judiciaries are also not independent but subservient to political initiative; criminal justice systems are being exercised unevenly depending on their political status, in terms of cease-fire and non cease-fire; criminal trial procedures are being exercised uncommonly; uncountable numbers of crimes, involved by the ethnic cease-fire organizations, that have been making money with narcotic drug trade, are intentionally ignored; no action was taken against the people who cooperate with the ethnic cease-fire organizations but the people who contacted the ethnic armed organizations that have not yet entered the cease-fire were tried on charge of unlawful association act. As such, those situations have negatively impacted over the criminal justice system particularly in the non-Burman ethnic areas.

4.9 Unlawful Association Act and the Status of Trial

Ironically, the junta's cease-fire policy is contrary to existing laws in Burma. The Unlawful Association Act[22], still current law, authorizes the government to ban the existence of political parties and ethnic organizations. Dr. Venkat Iyer comments on this contradiction:

> The Unlawful Associations Act falls short of international human rights standards. By conferring wide and untrammeled powers on the executive to declare any association unlawful, it subjects the rights and freedoms of

[22] 1908 Unlawful Association Act, Burma Code.

> Burma's peoples to greater restrictions than is strictly necessary to meet the requirements of morality, public order and the general welfare. The Act's incompatibility with international standards is underlined by the arbitrary, indiscriminate and heavy-handed manner in which it has been applied in practice, usually to suppress peaceful dissent.[23]

Furthermore, the military junta's order No. 3/89, declares that the four minority armed groups: Kachin Independence Organization (KIO), Karen National Union (KNU), New Mon State Party (NMSP), and Karenni National Progressive Party (KNPP), are unlawful associations. Without repealing Order No. 3/89 and the Unlawful Association Act, the military junta illegally established cease-fires with the KIO, NMSP and the KNPP; acknowledged their associations and publicly allowed their movements. By persuading these armed organizations to declare that they have returned to the legal field, the military junta sought endorsement of its activities and legitimization of its rule. Propaganda was produced and disseminated by the junta in cease-fire ceremonies with other armed ethnic groups. Their materials declared that all 15 armed national minority groups have fully understood the well-intentioned SLORC/SPDC, and have thus abandoned their armed struggle, to return to legal legitimacy. The action of the junta with regard to the cease-fire arrangement opposes the Rule of Law. It has negatively impacted the social life of the people as well.

Actually, the military junta itself did not legally assume power. From a legal perspective, it is not de-jure but de-facto government, as it controls the country in practice. Previously, hundreds of people were charged with the 1908 Unlawful Association Act and placed in prison for several years for allegedly contacting organizations the government deemed unlawful associations. Now, without cancellation of that declaration, the government deals with these organizations in the same way as the people did before. Nobody challenges the action of the military junta as government, as to the legality of their actions. Without cancelling the names of the organizations from the unlawful associations list or repealing the Unlawful Association Act, the military junta allows ceasefire groups to exist, open their offices,

[23] Venkat Iyer, Dr., Burma: Beyond the Law; Published by Article 19. p. 6.

and enables members to freely move about the entire country. These actions are against the Rule of Law.

For several years now, the military junta has failed to cancel the list of unlawful associations. They also failed to repeal the Unlawful Association Act as they could manipulate law as an instrument to prolong power. So long as that law exists, the military can, take whatever action on the members of the cease-fire groups whenever they wish. Currently, despite the fact that the cease-fire groups are unlawful associations, people can contact the organizations without concern for the junta taking legal action. Under the same law and order, the Karen National Union (KNU) remains on the list of unlawful associations. However, the people who contact the KNU have been subject to serious legal action by the junta. The difference lies in the status of ceasefire and non-ceasefire, in terms of politics, not law. From this perspective, the junta's dealings with the people is against the Rule of Law as it is discriminatory to the people as to whether they are in support of their policy or not.

Political debate is criminalized by the junta; yet another violation of the Rule of Law. Observation of the case of Dr. Min Soe Linn and two others, inter alia, can be useful in this context: Dr. Min Soe Lin was the May 1990 elected representative from Ye Township No. (1) and Dr. Min Kyi Win be from Mudon Township; another victim was Nai Ngwe Thein who was not an elected representative but a well-known political leader within the Mon nationality society.

Each of these individuals allegedly wrote problematic letters to the New Mon State Party, a ceasefire ethnic organizations, which purportedly caused misunderstanding between the junta and the organization. Each was sentenced to 7 years rigorous imprisonment pursuant to the 1950 Emergency Provision Act. The following paragraphs, extracted from a Supreme Court judgement, explain the reason for punishment. The third page of the letter is an excerpt written by Dr. Min Soe Linn to New Mon State Party; it reads:

(1) Declaration of the New Mon State Party after the ceasefire agreement with the SLORC is politically appreciable and it appeased the whole Mon people.

(2) The stand of the New Mon State Party, over the past three years, gradually lowered rather than the previous position that the NMSP adhered to. The whole Mon people have concern on that.

(3) In struggling for democracy and equality, firstly the NMSP dealt with the SPDC in the central level; but later, it had to reduce to district level. The principle of the equality is:

(1) equality in politics;
(2) equality in economy;
(3) equality in administration;
(4) equality in judiciary;

(however, contrary to these principles,…)

(1-1) the political activities are prohibited;
(1-2) economic enterprises could be performed only with the appeasement of the military government;
(1-3) there is no authority to do administration.;
(1-4) similarly, judiciary is also under the control of the military government.

In order to reform these factors

(1) Once the struggle for equality and self-determination does not continue, it will only strengthen the prolonging of the military government; and, it will also weaken the movement for equality and democratic cause.

(2) After scrutinizing the events mentioned above, the NMSP better attempts to work for the strengthening of equality and democracy. Should this responsibility cannot be carried out, there will have a black spot in history for the NMSP, as a political party.

It is evident that the letter, written by victims, is only a political critique on the New Mon State Party, expressing the victim's political opinion; not constituting any criminal offence. However, with reference to this letter, the victims were rendered 7 years rigorous imprisonment. Unfortunately, the victims in that case are only few of the myriad examples of individuals suffering from unjust imprisonment while there are other oppressive acts in a country where the Rule of Law does not prevail.

In conclusion, the cease-fire designed by the SPDC military junta failed to resolve short and long term self-determination and equality issues facing ethnic nationals. Paradoxically, this policy, in violation of the Rule of Law principle, has created new and deepened pre-existing divisions both within ethnic communities and in relation to other communities. Furthermore, due to lack of the Rule of Law, suspects charged with violating the Unlawful Associations Act and Emergency Provisions Act are faced with tainted and unfair trials.

4.10 Seeking Procedural Fairness

(a) Direction of the Nature of a Habeas Corpus

The court should emphasis the fundamental importance of the guarantees for securing the rights of individuals to be free from arbitrary detention at the hands of the law enforcement authorities. To this end, section 90 of the Criminal Procedure Code of Thailand provides as follows:

When it is alleged that a person has been kept in custody or detained contrary to law, or imprisoned contrary to the judgment of the Court, the following persons apply by motion to the Court for his release:

(1) the aggrieved person;

(2) his spouse, relative or any interested person;

(3) the Public Prosecutor;

(4) the governor of the gaol or the chief gaoler.

On receipt of such application, the Court shall summon the official or person who caused such custody, detention or imprisonment, and the person kept in custody, detained or imprisoned, to appear together. If satisfied that the keeping in custody or detention is contrary to law or the imprisonment is contrary to the judgment, the Court shall order the release of such person.

The aforementioned provision in Thailand, authorized the courts to release the persons who are detained contrarily to law, is similar to the law in Burma under the provision on Direction of the Nature of a Habeas Corpus. The Thai law stipulates rather details on who can apply for, under which condition and how the process be

proceed. What is different is on which court will exercise such power. In Thailand, it is realized that the power is conferred on all courts regardless of hierarchy while, in Burma, it is only the power of High Court.

In Burma, such a provision is stipulated in the Article 491 of the Code of Criminal Procedure of , under the title 'Direction of the Nature of a Habeas Corpus' is as follows:

> The High Court may, whenever it thinks fit, direct
> (a) ----------
> (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;
> (c) ----------
> (d) ----------
> (e) ----------

Following the independence of Burma, the Supreme Court, as the apex court of the country, could exercise the power on Habeas Corpus in accordance with the 1947 constitution. At that time, the Supreme Court could provide protection effectively for the liberty of all individuals who were detained by the state authorities and it could even challenge the legality of detention orders.

In the aftermath of cancellation of 1947 constitution by military coup in 1962, that power was withdrawn from the Supreme Court. Since that time, in spite of the fact that the similar provision on Habeas Corpus still exists in the Code of Criminal Procedures, the military junta never encouraged and authorized the courts to exercise that power. The judicial branch of the executive did not provide any 'court instruction' for the application of Habeas Corpus. Furthermore, in this regard, no court ruling could be found.

Contrary to this, the detention period, provided for in 1975 State Protection Act that authorizes the executive to detain a suspect, has been expanded in 1995. Previously, the executive could detain a suspect for the period up to three years. However, currently in Burma, a person can be put in jail, without being tried, for the period up to five years. For that arbitrary detention action of the ruling military junta,

the courts are keeping silent and the provision on the Habeas Corpus provided for in the Code of Criminal Procedure has remained unapplied. As such, it is evident that since 1962 the military junta has exercised more rigid centralization that impacted over the status of a trial. The power of the court, that could protect the liberty of individual citizen, through the trial procedures, has been minimized.

Anyway, the provision on Habeas Corpus enshrined in the Code of Criminal Procedure is an encouraging factor for the people who would like to protect individual liberty and security of a person. That provision needs to be revised; and in respect of this, the power of a court be expanded. The law should detail on who can apply to the court for the release of detainee and how the court will proceed the process to scrutinize the authorization of detention. Furthermore, the power should not be conferred only on the High Court. Instead, an ordinary court, that is competent, should have power to release the detainees whom is illegally detained and also to scrutinize the legality of detention order.

(b) Bail

The Underlying Principles

The procedure on 'bail' is to set free or liberate a person, after being arrested as a suspect of crime, on security being given of his appearance.[24] The underlying principle of granting bail is not to punish any suspect before the court adjudicates on the case. This is also to exercise the "presumption of innocence principle" in practice within the framework of trial procedures.

The grant of bail is a rule and refusal is an exception. The basic rule may be put as "bail" not "jail" except where there are circumstances suggestive of fleeing from justice or thwarting the cause of justice or creating other troubles in the shape of repeating the offence or intimidating witnesses and the like.[25] Regarding bail, broad

[24] A.N. Saha, Commentary on the Code of Criminal Procedure, New Delhi, Orient Publishing Company, 2001 p. 1504.
[25] Ibid.

principles are as follows:[26]

(1) Bail is a matter of right if the offence is bailable.
(2) Bail is a matter of discretion if the offence is not bailable.
(3) Bail should not be granted by the Magistrate if the offence is punishable with death or imprisonment for life. But if the accused is a woman or a minor under the age of 16 years or a sick or infirm person, the Magistrate has a discretion to grant bail.
(4) The Court of session and the High Court have a wider discretion in granting bail even in respect of offences punishable with death or imprisonment for life.

The matter on bail is to be taken into account whenever a person is detained by the state authorities. Following the independence of Burma, the Supreme Court did have power to release a person detained unconditionally if he or she is arrested by the state authorities without legality of detention order, considering on the application for writs of habeas corpus. At that time, the principle on "the presumption of innocence" could be safeguarded well. However, in the aftermath of the 1962 military coup, the Supreme Courts power on habeas corpus was withdrawn. Since that time on, in spite of effective provisions on bail in the Code of Criminal Procedures, in the event that a person is detained by the state authorities on charge of 1975 State Protection Act, he or she will not be granted bail as the court does not have any power to release a person on bail, regardless of whether offense is bailable or not. The categorization of "bailable or non-bailable offense" will be relevant only when a person is taken into legal action on charge of an offense mainly under the Penal Code.

Categorization of "bailable" or "non-bailable offense" is of paramount importance in granting bail. For the offenses, punishable with death, transportation or imprisonment for seven years or upwards, under other special laws except 1975 State Protection Act, are presumed as "non-bailable". For other offenses, punishable with imprisonment for three years and upwards, but less than seven years, are regarded as

[26] Ibid.

"bailable" except in cases under the Arms Act, section 19. For remaining offenses, punishable with imprisonment for one year and upwards, but less than three years, are regarded as bailable.

Bailable Cases

In bailable cases, the detainee is entitled to bail as of right. He or she shall be released on bail. The Code of Criminal Procedure should manifestly mention that the police officer or the Magistrate cannot refuse the bail and impose any condition in granting bail. Bail should be cancelled only on the condition that a person released on bail:

- does not appear on the court adjournment date fixed; or
- creates hindrance in the progress or a case by intimidating, bribing or tampering with the prosecution witnesses; or
- attempts to abscond.

Non-Bailable Cases

In non-bailable cases, the detainee is not entitled to bail as of right. When any person accused of any non-bailable offence is detained without warrant by an officer in-charge of a police station or is brought before a court, he may be released on bail.[27] But he may not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or with transportation for life.[28] The words "reasonable grounds for believing" mean such grounds as are based on reasonable logic and not bereft of all reasons.[29] The grounds should be such as may lead to conclusion to believe that the accused is guilty of such an offence.[30]

[27] Article 497 (1) of the Code of Criminal Procedure.
[28] Ibid.
[29] Supra Note 24
[30] Ibid.

Repeated Crimes

Article 437 of the Code of Criminal Procedure of India stipulates further that such person shall not be so released if he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence.

This provision can be realized that the persons who usually commit repeated crimes are to be dealt with serious actions and bail should not be granted for them. The essence of that provision needs to be taken into account.

Opinion of Public Prosecutor for Provisional Release

Section 109 of the Criminal Procedure Code of Thailand provides that if there is the request of provisional release, the Court must ask the inquiry official, public prosecutor or prosecutor whether he shall have any objection thereto or not. In Burma, the Court usually asks the opinion of the public prosecutor whether bail should be granted for the suspects accused of non-bailable offence. However, should the similar provision is included additionally, there might have presumption that the Court cannot grant bail so long as the public prosecutor raises an objection. If it is the case, the discretionary power will not lie with the Court but the public prosecutor. The role of the public prosecutor will be greater than the Court.

Police Power to Release on Bail

From a reading of Article 497 of the Code of Criminal Procedure of Burma, it is realized that an officer-in-charge of a police station may also release persons on bail. In granting bail, the power of police needs to be scrutinized; and further, be minimized.

> Police power of arrest and detention, their discretion as to investigation, to allow for visits/phone calls by/to suspects, etc, to release on police bail results in a situation where corruption has become rampant. Money can result in persons being released and investigations discontinued. For example in Malaysia prisons, it is reported, that a hand-phone call cost

about 300 RM (80 US$), a packet of cigarettes 50 RM (13 US$), a drink RM 50 (13 US$). There have also been cases of families of suspects in remand receiving phone calls asking for RM 10,000 (2665 US$) and above to ensure that the suspect be released/ not charged. In some countries considerable amounts of money are paid to the police.[31]

Time Limit for Trial and Release on Bail

In order to achieve a Fair Trial, unfavorable arbitrary detention is to be avoided. Once a suspect is detained for non-bailable offence, he shall not be released on bail and detention will continue until the final judgment is rendered by the Court. The suspect might be acquitted after the whole case had been heard by a Magistrate. However, the judicial proceeding might be a protracted one and many times it take a year long period due to court adjournment under various reasons. In this account, the Court needs to take into account justice for detainees and he may be released on bail although he is charged with the non-bailable offence. This notion has not yet been reflected in the Code of Criminal Procedure of Burma but it has been the case in India. The Section 437 (6) of the Code of Criminal Procedure of India enshrines as follows:

> If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, he released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

Release of Accused on Personal Bond

For uncountable times, the accused cannot provide enough monetary sureties to be released on bail as he or she is a poor person. In administration of justice,

[31] Decline of Fair Trial in Asia, Papers from an Asian Seminar on Fair Trial, Organized by Asian Human Rights Commission & Danish Centre for Human Rights, 7-12 November 1999, Hong Kong, Published by Asia Human Rights Commission, 2000: p. 18.

poverty should not be a reason to continue detaining a person as it is against the principle of equality before the law.

To resolve this, the law should create an opportunity for the poor to release on bail only with the personal surety made by two honorable friends of the accused. Otherwise, the accused should be released on his own personal bond if the Court is satisfied that the accused has his roots in the community and is not likely to abscond. To determine this, the Court should take into account the following factors concerning the accused:[32]

(1) The length of his residence in the community,
(2) His employment status, history and his financial conditions,
(3) his family ties and relationship,
(4) his reputation character and monetary relationship,
(5) his prior criminal record including any record or prior release on recognizance or on bail,
(6) the identity of responsible members of the community who would vouch for its reliability,
(7) the nature of the offences shared and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non-appearance, and
(8) any other factors indicating the ties of the accused to the community or bearing on the risk of willful failure to appear.

(c) De novo Trial or Re-trial

Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction, and is succeeded by another Magistrate who has and who exercises such jurisdiction, or whenever a case is transferred from one Magistrate to another, the succeeding

[32] Supra Note 24, p. 1522.

Magistrate may re-summon the witnesses and recommence the inquiry or trial.[33] In the inception of the trial, the succeeding Magistrate has to explain to the accused on his or her right to apply for de novo trial.[34] In the event that, de novo trial is held, the prosecution witnesses as well as the accused shall be re-examined and charge shall be reframed.[35] These are the essential provisions relevant to de novo trial.

Pursuant to those aforementioned provisions, the succeeding Magistrate shall have the power to decide whether de novo trial will be held or not. He can order to hold de novo trial on his own discretion or on the application of accused. Furthermore, He can adjudicate the case on the evidence recorded by his or her predecessor, or partly recorded by his or her predecessor and partly recorded by himself or herself. Otherwise, he can also reject the application of the accused to hold the de novo trial.[36] As such, it is evident that the succeeding Magistrate enjoys enormous power on de novo trial.

In administration of justice, the rights of the accused should be protected. However, too much power should not be conferred on Magistrate. The accused do not enjoy any power to transfer the Magistrate from one area to another. Nor do the accused have any authority to transfer the case from one court to another. These events usually take place under the instruction of the judicial authorities. In the case of Burma, whenever the military authorities are unhappy with a Magistrate, at any time he or she will be transferred to another areas or many times even dismissed. In the event that the succeeding Magistrate re-summons the witnesses and recommences the trial on his own discretion, all the precious records, the statement of witnesses and other documentary evidence, which might support the defense of the accused, will be gone. It will substantially deny the principle of a Fair Trial. In this account, with regard to the de novo trial, it should be the right of an accused but not the discretion of the Magistrate. The accused should decide on whether previous proceeding be continued or de novo trial be held. The accused should enjoy the right of de novo trial

[33] Section 350 of the Code of Criminal Procedure and Article 498 of the Court Manual.
[34] Article 498 of the Court Manual.
[35] Article 499 of the Court Manual.
[36] Article 76 of the People's Judges Act.

that cannot be denied by any Magistrate.

(d) The Prohibition on Double Jeopardy

The intention of the prohibition on double jeopardy is to prevent a person from being tried and punished for the same crime twice. The Article (403) of the Code of Criminal Procedure provides that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence. This provision is quite clear and no procedural issue has arisen in this regard.

However, the issue that might be relevant to the concept of the prohibition on double jeopardy has appeared in Burma. The case is that the international community has created much pressure on the ruling junta to release the political prisoners; then, the junta released some number of convicted political prisoners on the condition that they made personal bonds. There, they had to guarantee that they will no longer continue their political activities against the ruling government and that they agree to serve the remaining penalty from the previous case and also the new penalty from future case consecutively in the event that they break this bond after their release. The objective of the junta is to put continuous pressure on the political activists so that they no longer dare continue any political activity, by taking advantage of the weakness of criminal trial procedures provided for in the Code of Criminal Procedure (CRPC). In order to implement this action, the junta applied Article 401 (1) of the CRPC. It provides as follows:

> When any person has been sentenced to punishment for an offence, the President of the Union may at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

According to that provision, the executive, as President, is above the judiciary and accordingly the executive can suspend or remit the punishment already

rendered by the court. This provision needs to be revised in a future democratic society of Burma as it will strengthen the power of executive while reducing the status of the courts.

Furthermore, in the aforementioned provision, the term "the President may suspend the execution of his sentence" blurs. It does not manifestly mention on whether the beginning of execution can be suspended; or, for a convicted person who has been serving penalty for some period in the prison, his or her penalty can be suspended; or both.

According to Dr. A. N. Saha, who wrote the commentary on the Code of Criminal Procedure of India, it can be realized as follows:

> Suspension of sentence means only postponing the execution of the sentence. The period of sentence is not affected at all. The date of beginning of the execution is only postponed for a period. Suspension means that the sentence has not been enforced. It is only in abeyance at the pleasure of the person who is authorized to suspend the sentence.
>
> ---- an appellate Court may suspend the sentence during the pendency of the appeal. In that section even the trial Court can suspend the execution of sentence for a period sufficient to enable the convicted person to file an appeal.

Contrary to the essence of that commentary, the military junta in Burma is exercising the relevant criminal procedure, Article 401(1) of the CRPC, differently in order to prolong their power. In a case study, the political prisoners, who had already served five years prison term out of ten, were released on their own personal bonds guaranteeing that they agree to serve the remaining five years prison term if they break their promise not to continue similar political activity after their release.

Pursuant to the original provision of Article 401 of the CRPC, suspension of penalty might be beneficial for the convicted criminals who practice good conduct while serving prison terms and they be released on their own personal bond. However, for the convicted political prisoners, this procedure can be applied by the authoritarian regime to control the activists not to continue their political activities

permanently after their release. They will live in constant fear for being arrested and put them in jail again. As such, this criminal procedure needs to be reviewed in line with the norms of the prohibition on double jeopardy.

4.11 The Existence of Just Law or Unjust Law Influences the Status of a Trial

Following the independence of Burma, parliament, formed by the elected representatives, was the highest law making body. At that time, law making processes were transparent. The people could personally observe the debates of their elected representatives in the parliament. All Media could publicize and analyse them. Independent Associations could express their opinions, if necessary, on every Bill. Members of Parliament had to discuss the comments of people mentioned through the various public communication channels, mainly Media, in drafting their Bills. This is in terms of 'form of law'.

1947 Constitution was approved fifteen months before the Universal Declaration of Human Rights was adopted. There, under the title of "Fundamental Freedoms" mentioned in Chapter Two, detailed provisions on 'Rights of Equality', 'Rights of Freedom', 'Rights Relating to Religion', 'Cultural and Educational Rights', 'Economic Rights', 'Rights in Relation to Criminal Law', 'Rights to Constitutional Remedies' were enshrined. At that time, in a Parliament Session, U Ba Jan, Judicial Minister, explained to other members of Parliament that there were only very few constitutions in the whole world, in which "Fundamental Freedoms" were provided as similar as the ones in Burma's 1947 Constitution. Then, he had to answer the questions raised by MPs, with reference to those provisions; and, they all discussed Bills on whether they were contrary to the essence of "Fundamental Freedoms" of individual citizen, constitutionally guaranteed, or not. This is in respect of 'content of law'.

With these background Scenario, more or less, just laws could be produced by the society resulting in the existence of Fair Trial largely, in spite of the fact that all trials might not be fair even at that time.

However, following the 1962 military coup, the atmosphere of the society changed. The military leaders forcefully advocated the so-called "Burma Socialist" ideology; and highlighted the discrimination between the exploiting class and

exploited class. They propagated that the aim of the country must be to go forward for the establishment of 'Socialist' society where 'exploiting class' be eliminated and the benefit of 'exploited class', as 'working people', be safeguarded.

When the military coup occurred, the people had no other alternative except to accept it as they were pointed at gun. However, because there was an important sociological factor, the people did not strongly resist the military coup. At that time, the majority of people in Burma were boring the democratic leadership and functions of political parties that terribly conflicted each other after the collapse of AFPFL, a powerful leading party, before and after the independence, on one hand. On the other hand, the military could to a larger extent convince the people on their justification of coup, that was to safeguard the union not to collapse. As such, the people did not strongly object that the military took a leading role in politics, after coup.

Another important factor was that the military could to some extent persuade the people to accept 'The Burmese Way to Socialism', as a leading ideology of the state, by pointing out that the political leaders, who led the country before 1962, ignored 'socialism', a noble political objective, established by the founding fathers of the country, after independence. 'The Burmese Way to Socialism' was interpreted by the military, as a positive development of socialism. It was elaborated as the amalgamation between the fundamentals of 'Buddhism' and 'Marxism' and it would be applied in consistence with the tradition, custom, and geographical particularities of the Burmese society. That propaganda attracted the proper attention of a majority of Burmese Buddhist people, that constituted 80% of the population, and even Buddhist monks, who were interested in social development. Socialism then was a prevailing ideology in the country, influencing over the social environment; and in practice, a strong state, that was actual objective of the military, could be established by manipulating that opportunity.

With that background social environment, no challenge was made by the society on the proposed norm that the content of laws, the operation of legal system and the function of judiciary must facilitate 'socialism,' protect the 'working people,' and eliminate the 'exploiting class'. That concept was reflected in the effective laws of those days.

For instance, in 1964, the military provided an "Act for Fundamental Rights and Responsibility of People's Workers". Chapter 7 provided for 'Punishment'. Accordingly, if the person who violated the law was 'an employee', the punishment was 'dismissal from work' or 'fine amounting to half of his or her ordinary salary.' However, if the person who violated the law was 'an employer', the punishment would be two years imprisonment for him or her. As such, it can be realized that the then law itself violated the "equality" principle.

In 1965, the military enacted "Act Authorized to Protect the Socialist Economy". Accordingly, the Section 4 of Chapter 2 provided as follows:

> The government is authorized to deal whatsoever goods relevant to Economy by (a) nationalizing (b) temporarily confiscating and managing (c) providing supervision on utilizing, storing, trading, transferring, and transporting (d) regulating over utilization, store, trade, transfer, and transport.

The punishment for violation of this law was from three years imprisonment to death penalty.

Bean is one of the staple diets in many countries of Asia. In Buddhist scriptures, even Buddha recognized the profession of 'Bean' trade as a clean and ordinary business. When the price of green bean or green gram – Mat Pe in Burmese - was high in foreign trade, the military government regulated that the trade of green bean by ordinary citizen be prohibited, with reference to 1965 Act Authorized to Protect the Socialist Economy. In so doing, a clean profession was criminalized; many bean traders were tried and rendered several years imprisonment, as penalty. The essence of a Fair Trial was absolutely damaged.

It occurred because the 'content of law' itself was abusive and unjust. In such cases, as substantive justice had been denied even before the commencement of a trial, seeking procedural justice was not beneficial. Even though "due process of law" was exercised, justice, as an end result of the trial, would not be achieved. So long as such an unjust laws exist in the society, trials will always be unfair and justice will not be sought.

With that background social environment, the 1974 Constitution was adopted and accordingly, the Burma Socialist Program Party was recognized as the sole party that would lead the country. However, after twelve years of military coup, the people suspected the "Burmese Way to Socialism"; the armed struggle of the non-Burman ethnic people to achieve 'self-determination' was gaining momentum in mountainous areas of Burma; the underground movement of the Communist Party of Burma (CPB) increased; and, big mass demonstrations, such as 'Workers Strike' and 'Students' Demonstration', occurred in 1974 and 1975 respectively. As such, the ruling junta required to enact a law, that could be applied as an instrument, in crashing down the democratic opposition movement. In this context, 1975 State Protect Act was produced within the framework of the 1974 Constitution. Since then on, it has been the most oppressive law not only in Burma but also in the whole Asia as it authorizes the government to detain a citizen up to three years period (later, extended to five years), as 'preventive detention', without being tried. The existence of 1975 State Protect Act and other similar oppressive Special Laws fundamentally deprive all peoples' rights of a Fair Trial in Burma.

Currently, 'unjust laws' could be produced by the military junta as there is no law making body, comprised of elected representatives of the people; law making process are not transparent; there is no independent Media through which the people can express their opinion on the Bills or Laws; there exists no independent organization that can publicly criticize the validity of laws; with these background, all laws are enacted in the secret elite meetings of the ruling junta; and as such, it is against the principle of 'form of law'.

National solidarity issue has been highlighted much more than necessity and 'public order' has been the major concern articulated by the ruling junta since 1988. "Fundamental freedoms of citizen" has never been a subject addressed by the ruling junta whenever they make a law. That is why, the contents of the majority of laws enacted by the ruling junta do not facilitate the harmony in the society. The junta forces the people only to obey the laws. The people were never allowed to scrutinize the contents of laws. As a result, the majority of people presume that law is an instrument only to strengthen the rule of junta under the slogan of 'public order' but not to protect their fundamental rights. Due to the existence of 'unjust laws', judiciary

cannot protect fundamental rights of poeple; fair trial does not exist; and, harmony of society has collapsed.

4.12 Social Environment Creates the Trial Fair or Unfair.

Following the independence of Burma, various sectors of society could maintain its stability. The democratic government then functioned rather well and could foster the economic development. Under a free market economy, private enterprises were successful. Burma's currency could be circulated in the international monetary system as the country could reserve its tons of gold in the world bank. Civil service was relatively competent and well paid. Corruption within the civil service was relatively lowered. As tons of rice could be exported to foreign countries yearly, a large portion of farmers, that constitutes 70% of population, were prosperous. As private enterprises were booming, the life of workers working in the private factories were, more or less, stable. Social equilibrium within the middle class people such as the university lecturers, school teachers, newspaper editors and correspondences, civil service, business persons, lawyers, judges and etc. could be maintained. The majority of citizen lived securely with the knowledge that if their fundamental rights were violated, they could get the protection of law, effective assistance of legal system, and fair adjudication of courts. Generally, society, as a whole, then was moving forward to "social solidarity".

At that time, the court practices were closely observed and learnt by the law school of Rangoon University; and as vice versa, the comments of legal academics were well regarded by the Supreme Courts. The lawyers could maintain their professional status if they were expertises in law. As the judges received higher remuneration than other civil service, they could maintain their status, in terms of living, without taking bribe. The corruption within the whole judicial system was also rare. With that sociological background, the impartiality of tribunal could be preserved; the cases were adjudicated mainly based on the laws; and as such, fair trial largely existed.

At present, social environment has adversely changed. Due to the poor management of the military junta, economy abruptly lowered: the prices of goods are sky-rocketing while the salaries of civil service are relatively quite low; while very

few number of narcotic drug dealers, the cronies of the ruling junta and high ranking SPDC officials make a huge amount of money, a great majority of people, regardless of those from middle class or farmers or workers, live in poverty. In this context, social equilibrium has utterly collapsed. As a result, the civil service, police, army, immigration, and all local and higher leveled administrative authorities corrupt hugely.

This current social environment impacts over the whole justice system. Due to low wages for workers inside Burma, hundreds of thousands of people leave their mother land and work in foreign countries; to make this a reality, they have to pay at least over 100,000 Kyats bribe money in return for an official travel document such as passport. The ordinary people, who cannot cover the cost of such an expensive travel documents, usually pass the border; enter the neighboring countries including Thailand; work there; after collecting some money, they enter Burma illegally by paying bribe to Burmese Immigration officials and local administrative authorities so that they cannot be taken into legal action. For those thousands of people, the whole processes are illegal from beginning to end. In the beginning, they break the law as the existing law prohibits the citizen to get outside the country without official permission. In the end, they break the law again as they re-enter the country by bribing the authorities. But the justice system is keeping silent under the influence of corrupt social environment.

Previously, the mockery on justice system was that "if you have more money, you will win the case." Currently people are making a joke that the previous saying is no longer true; they said it has already been changed; that is, "if you have less money, you will lose the case." If a person wants to communicate his or her family member, whom is detained in the police station as a suspected accused, or release him or her on bail, or even bring him or her before the court in time, the police must be bribed. The police community has collapsed due to terrible corruption.

Very few lawyers achieve success in legal field only on the condition that they have particular expertise in law. However, many lawyers win the case and earn a lot of money because they can make closed friends with judges and SPDC officials by using the resources of their clients. A large number of lawyers, who want to promote legal profession to be a noble one and who are not cronies with the administrative

authorities, rarely win the case, and live in poverty. The lawyers were charged with Contempt of Court Act and rendered punishment for their alleged improper attitude against the judges. Some dozens of lawyers' licenses have been withdrawn on charge of their involvement in democratic opposition. There is no lawyers' association that can protect the professional security of lawyers. As such, lawyers' community, that was usually a strong pillar of legal and judicial system, has broken apart.

The bench clerk will leave the case file behind if he or she is not bribed. The judgment of the court or the statement of the witnesses are regarded as public document in law. But now, only when the court officials are bribed, the certified copies of these documents are easily available. Given that all the judges, regardless of whether Supreme Court judges or their subordinates, receive not more than 25 US$, as monthly salaries, they have to live like a pauper if they don't corrupt. General Khin Nyunt, Secretary (1) of the ruling junta, publicly blamed the judges and other judicial staff for their alleged corruption.[37] Some judges, who granted bail to the accused in the case where the government was complainant, were dismissed. The judges who do not comply with the strict instructions of the junta are subject to dismissal or transfer.

Supreme Court is the apex court of the country. Supreme Court judges were highly regarded by the whole society in Burma up till 1962. The similar situation usually takes place in all democratic countries. According to 1947 Constitution of Burma, appointment and dismissal of Supreme Court judges were enshrined in details paying high regards. Accordingly, it was evident that security of judicial tenure was guaranteed; and the judges could function the administration of justice independently without worrying the interference of executive or ruling government at that time.

Following the military coup in 1988, there has been no constitution in Burma. That is why, the security of judicial tenure cannot be guaranteed in accordance with the constitution. Then, the two judicial laws were enacted by the junta; one was in 1988 and another was in 2000. Furthermore, the amendment of 2000 Judicial Law was also made by junta on February 2, 2003. In all these judicial laws, there have been no provisions on appointment and dismissal of Supreme Court judges.

[37] Burma Rulings (1993)

All appointments and dismissal were made only at the whim of ruling junta freely without publicizing any ground, consulting with the legal community, and receiving any suggestion from elected representatives. Then, out of six Supreme Court judges, five were forced to resign in 1998 and replaced with new five judges. Then, on July 1999, another six judges were added[38] and then total number of Supreme Court judges was eleven. Since then on, no news was officially released by the junta that any one or more of Supreme Court judges were dismissed or forced to resign repeatedly. After that, in February 2003, more five judges were appointed and as such total number of Supreme Court judges is currently 16. It is against the existing Judicial Law 2000; because, total number of Supreme Court judges to be appointed in total is twelve. Nobody knows that, out of 16, four Supreme Court judges had already been dismissed before the appointment of new five judges in February 2003 or they will be dismissed or forced to resign soon. All the processes for appointment and dismissal of Supreme Court are done at the whim of junta. The term “judicial tenure” is mockery for the current judiciary in Burma. Furthermore, there is no judges' association to protect the security of judicial tenure.

Supreme Court, itself, has become a "Giant" with no teeth. SC is keeping silent on the issue of 'validity of law' enacted by the junta as it does not have power on judicial review. It usually ignores the abusive action of executive, in various levels of junta's administration, as its power on writs, that is to issue directions in the nature of Habeas Corpus, mandamus, prohibition, quo warranto and certiorari, has already been withdrawn. As the Supreme Court cannot protect the fundamental freedoms of citizen, safeguard the genuine principles of the rule of law, and produce landmark rulings, the law schools have nothing to learn from the current court practices. The legal academics do not express their interest in functioning of Supreme Court. As vice versa, the Supreme Court itself and its subordinate courts usually hesitate to pay proper regards to the comments sometimes made by legal academics and prominent lawyers; as such, the role of legal academics and lawyers have terribly lowered in administration of justice. Harmony between "Bar and Bench", and between "Bench and Legal Community" has already disappeared.

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[38] SPDC Order No 3/99 issued on July 8, 1999.

For all those accounts, the whole justice system has been ramshackle. People live in constant fear as they have knowledge that although government officials violate their fundamental rights, they will not get the protection of law, the assistance of legal system, and fair adjudication of courts. This situation has been taking place in Burma for some decades.

With that sociological landscape, the judiciary cannot maintain the impartiality of tribunals. The judges adjudicate the cases mainly under the instructions of ruling military authorities or other persons who can influence the trials in one way or another. As such, the Fair Trial rarely exists now.

CHAPTER V
THE FACTORS THAT OBSTRUCT A FAIR TRIAL IN BURMA

5.1 Social Environment where 'Fear' Is Prevailing

During the 1988 popular democratic uprising, the military junta massacred thousands of people on the streets. Hundreds of political prisoners are still languishing in the prisons. The activists who struggled for democracy were rendered long term imprisonment, 42 years for students and 57 years for political dissidents at maximum. Uncountable number of democracy activists were tortured; some were executed; due to unfavorable situation in the prisons, many passed away; many got mad; and, some become disables, while being detained.

The junta establishes intelligent mechanism widely. A huge amount of the state budget is spent to pay the informers who collect information about the activities of democracy activists and other dissidents. The 'ears' of the ruling junta are everywhere – at the coffee shops, university campuses, markets, public meetings, factories, governments offices, schools, restaurants, prisons and courts. As a recent evident, Mr. Pinheiro, UN Special Reporter, uncovered that a listening device was secretly equipped at the table where he was doing interview with the political prisoners in the prison, in March 2003. In all politically motivated cases, military intelligent people usually sit in the trial, and monitor the court processes, actions of judges, lawyers and other judicial staff openly. They usually take the stock witnesses from the detention centers and put them in the trials. Many times, they send judgments, already written prematurely, to the judges only to read. They even intercept the private meetings held between the defense lawyers and their accused. By holding trials in the campus of the prisons, they impliedly threaten all relevant persons in a proceeding.

Due to underpinning of such a social environment, feeling of 'fear' is prevailing in the mentality of all common people including judges, lawyers, witnesses and judicial staff and as such Fair Trial rarely exists.

5.2 Corrupt Society

Corruption is seriously taking place in the whole country. Government officials may not be happy to do something for the common people, if they do not receive any grease. To obtain business licenses, the business men have to bribe the authorities. To achieve employment opportunities at the government departments, the candidates have to bribe the respective officials. Similarly, for transfer, promotion and pension matters of all civil services, the higher senior officials must be paid off.

The farmers can pay cash, as corrupt money, to the in-charge of government 'Paddy Purchasing Centre' instead of providing paddy quota, as tax levied by the ruling junta on farmers. After receiving bribes, the in-charges of PPC substitute the amount of that paddy quota with other paddy, that they have stolen, when other farmers officially sell their paddy at the PPC, by taking a little bit more amount of paddy from every basket.

People comment that, in the government hospitals, not all but many doctors and nurses may even hurt the patients being treated if they do not receive any pay-off. In spite of limited hours for the guests to meet the patients in government hospitals, security guards will open hospital gates at any time, if they are bribed. Only when the students take tuition classes, opened by their school teachers at over time, they may pass the examinations. Because they have to pay a large amount of money to their school teachers, as tuition fees. Furthermore, the students can also buy the examination questions from their teachers. In a nutshell, Burma has become a totally corrupted society.

Previously, the farmers living in the villages usually shared their vegetables and other eatables within their village community, free of charge. Currently, they have to sell everything they produce in their farms with money, even among their neighboring farmers.

While a great majority of common people lives in terrible poverty, the families of the army generals and the cronies of the ruling junta – particularly their relatives and associates, who receive business licenses, and their collaborators, who do narcotic drug trafficking – make a huge amount of regular income.

As such, social equilibrium no longer exists in the society. Social harmony has been ruined. And, social solidarity has collapsed. Economic survival is the first

priority for every individual. To this end, everyone has to earn money by any mean– whether be it legal or illegal. Common practices of corruption largely impact over the whole judicial system, particularly in all investigation processes, performed by the police, and in all trial processes, administered by the courts.

5.3 Unjust Laws

Following the 1962 military coup in Burma, the military regime provided a number of unjust laws that were not in line with the principles of 'form of law' and 'content of law', and also contrary to fundamentals of human rights and the essence of international human rights laws. For instances, 1962 Printers and Publishers Registration Act deprives the right of freedom of expression. The penalty is three years imprisonment. Then it was extended to seven years at maximum in 1989. The 1964 and 1965 Acts for Protection of Socialist Economy violate the right to work and to free choice of employment. The penalty is minimum ten years imprisonment to maximum capital punishment. The 1964 Act for Protection of National Solidarity cancelled the right to freedom of associations. The penalty is five years imprisonment at maximum. The 1975 State Protection Act authorizes the executive to detain a person up to five years term, without being tried. It violates the right to freedom from arbitrary detention.

1933 'The Children (Pledging of Labour) Act prohibited the child labor. The military junta cancelled that act and replaced it with the 1993 Child Law. Accordingly, the child is permitted to work in accordance with law and on his own volition. It is against the essence of Convention on the Rights of Child.

The military regime let the 1908 Unlawful Associations Act, one of the unjust laws enacted by the British colonialist, continue to exist. Because by applying this law the regime can prohibit the functions of independent organizations. It has not yet cancelled 1950 Emergency Provision Act, one of the unjust laws provided for by the democratic regime to crash down the rebellion after independence.

Whenever the government authorities indict a suspected accused on charge of unjust laws, Fair Trial cannot be realized in spite of the fact that judicial processes may be in consistence with the procedural due process. The prevailing of unjust laws is one of the major factors to obstruct Fair Trial.

5.4 Strong State Concept

Before the second world war, the struggle of various ethnic nationalities in Burma for independence gained momentum; and in 1941, the "Thirty Comrades," a historically well-known group of Burmese patriot youths led by Aung San, first General of Burma's Army and national hero, went to Hinan Island in Japan to learn military tactics and strategy from Japanese military leaders. These leaders practiced Fascist politics to ward off British colonialists. Since that time, the "Seeds" of militarism, rooted in the "Thirty Comrades," reemerged whenever the members of the "Thirty Comrades" played a role in politics; leading to an exercise of rigid centralization.

> In Japan with the 'thirty comrades' Aung San has been asked by the Japanese to prepare a plan for Burma's future, and he had written: 'What we want is a strong state administration as exemplified in Germany and Italy. There shall be only one nation, one state, one party, one leader. There should be no parliamentary opposition, no nonsense of individualism.[1]

Socialism and communism were popular political ideologies among past leaders struggling against British colonial rule in Burma, for example, General Aung San, the 1939 general secretary of the Communist Party of Burma (CPB). Thakhin Than Tun and Thakhin Soe, famous leaders for Burman independence, were also the leaders of CPB. The role and influence of communist leaders and communism can be realized in Burma's struggle for independence.

Strong state concepts also originated from socialism and communism in the sense that, the government hugely exercises rigid centralization and strictly limits individual rights. Following the Second World War, capitalism retreated and socialist ideologies and practices became powerful.[2]

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[1] Aung San. Blue print for Burma. A copy of the paper was preserved by Mamoru Sugii of the Minami Kikan and presented to the Defence Services Historical Research Institute (March 1957): Guradian magazine.

[2] Ba Maw Tin Aung. History of Burma at colonial era. Rangoon, Mynamar: People's Light Printing Press, (July 1964). p. 322.

In 1947, one year before the independence of Burma, the political leaders of the country prepared a new constitution and approved it by a Constituent Assembly on September 24th of the same year. The Constituent Assembly became a temporary Parliament with Sao Shwe Theik as the President. In his explanatory speech on governmental policy, Sao Shwe Theik stated the following:

> Our primary objective is to establish a Socialist State, in which the operation of the country is to be done by the people, after abolishing the capitalism.[3]

Because many leaders and people appreciated socialism at that time, socialist principles were reflected in that constitution.[4]

Before and after World War II, most political leaders of Burma supported the concept of socialism as an ideology that might effectively promote the well-being of the people. Based on that concept, they favoured a strong state in which the central government would wield a significant proportion of the power in terms of administration, distribution of resources, policy development and implementation, and general development of the country as a whole. Opposition leaders preferred democracy as a form of representative government, based on majority rule, in which minority rights would be a natural outgrowth of guaranteed individual rights. Different types of leaders both realized that the state is the key mechanism through which national development can occur.

On the basis of that school of thought, a state federal in theory and unitary in practice, as U Chan Htoon mentioned, was created in accordance with the 1947 constitution. Centralisation became the mainstay of state policy, subject to the reservation of certain individual rights. As a result, during the period between 1948 and 1962, in spite of increased economic development, particularly in densely populated lowland areas, the country was confronted with issues involving ethnic nationalism and collective rights of the people.

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[3] Constituent assembly: Parliamentary record. Vol. 4, Meeting No. 2.
[4] Maung Maung, Dr., former Chief Justice of Supreme Court and President of the Socialist Republic of Union of Burma. Political Path of Burma and General Ne Win. (March 27, 1969). p. 297.

As students of Japanese Fascist Generals during the Second World War, the military leaders' backgrounds were amenable to a rigid and centralized state. Their rise to power is indicative of a firm commitment to centralized power and systematic neglect of individual, human and minority rights. This approach has been thinly veiled as an attempt to ensure and promote stability, solidarity and sovereignty of the union.[5] Such policies have continued to teach the populace that federalist concepts would lead to the collapse of the union. In accordance with this ideology, stability, solidarity and sovereignty was to be protected at the expense of sacrificing people's individual liberties and rights. In the aftermath of 1962 military coup, the first act the military regime undertook was to abolish the writ provision. From then on, individual liberties and rights were no longer protected, and the surfacing of Fair Trials were greatly suppressed.

5.5 Damage of Justice System

When there was a split among the ruling party, the Anti-Fascist People's Freedom League (AFPFL), in 1958 General Ne Win, as military Chief of Staff, assumed power as the leader of caretaker government. It has still been controversial on how the army actually got into power at that time: whether U Nu, the then Prime Minister of Burma, transferred his power to General Ne Win as a result of pressure from the army, or the army assumed power under the sincere request of the Prime Minister. Until U Nu passed away, he refused to disclose the truth.[6] It was only when his autobiography was issued, Saturday's Son, that U Nu mentioned the military coup incident as "society was suppressed in 1958 when the first military coup d'etat occurred."[7]

The application of the constitution and parliamentary procedures within the context of the Rule of Law legalized the transfer of power to General Ne Win. On October 31, 1958, General Ne Win became the new Prime Minister and delivered a speech to the Chamber of Deputies in Parliament. In this speech he expressed his

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[5] The three causes of the state: to maintain the union, to establish solidarity and to protect sovereignty, the political slogans orchestrated by the ruling military junta.

[6] Prof. Joseph Silverstein interviewed U Nu when U Nu visited his home in Princeton, New Jersey, U.S.A. (n.d.). n.p.

[7] Bharatiya Vidya Bhavan. U Nu: Saturday's son. (1976). p. 24.

appreciation of Parliament and democratic practices as well. Paradoxically, he emphatically expressed his high regard of the constitution, which he would later abrogate in 1962. His original speech, inter alia, was as follows:

> "Mr. Speaker, Sir, I wish deeply that all Members of Parliament would hold as much belief in the Constitution and in democracy as I do. I wish deeply that all Members of Parliament would defend the Constitution and democracy as I would. I wish deeply that all Members of Parliament would sacrifice their lives to defend the Constitution as I would do in my capacity as Prime Minister, as a citizen, and as a soldier."

After the expiration of his six month term as the Prime Minister of Caretaker government, the parliament was faced with the challenging legal issue as to whether the continuation of General Ne Win's position as Prime Minister would be consistent with the constitution. In response to this dilemma, U Chan Htoon, Attorney General, provided legal advice in favor of General Ne Win's continuation of power.

In legitimizing General Ne Win's continuation of power as the Prime Minister of Caretaker Government after expiry of 6 months, U Chan Htoon might presume that caretaker arrangement was provisional and was intended as a temporary measure. In this vein, mentioning that the transitory period would be prolonged beyond 18 months from the date of coming into operation of the Constitution, U Chan Htoon mainly quoted Article 231(3) of the 1947 Constitution. It reads:

> "Such persons as shall have been elected in this behalf by the Constituent Assembly shall be the prime minister and other members of the Provisional Union Government, until the President duly elected under Chapter V has appointed other persons in accordance with the provisions of section 56."

With regard to the advice given by Late U Chan Htoon, Mr. B.K. Sen, a legal analyst and senior advocate in Burma since that crucial event took place, has offered a different legal opinion.

There is much confusion surrounding how the word "provisional" crept into U Chan Htoon's description of the government, as it does not appear anywhere in other provisions of 1947 Constitution except under Chapter 14 entitled "Provisions on Transitional Period". Mr. B.K. Sen mainly commented that the reference to Provisional Government in 231(3) should be read in the context of a Constituent Assembly. However, it was not the Constituent Assembly that elected the Prime Minister, rather, it was the 1954 General election, which elected U NU. The Provisional Government is the outgrowth of the Constituent Assembly. The caretaker was created by the already-elected government. As such, the provision in Article 231 (3) is not relevant to the issue as to whether General Ne Win could continue assuming the power as the Prime Minister after the expiration of six months term.

The legal advice made by U Chan Htoon should be based on the interpretation given to Article 116. It reads "A member of the government who for any period of six consecutive months is not a member of the parliament shall at the expiration of that period cease to be a member of the government."

Article 116 is clear. "shall cease" means that there cannot be continuation, otherwise there would be circumvention of the law. If extension is permissible, it can go on for the full 4 year term, thereby defeating the law. The implication is also serious, as it would mean that a person in power without mandate could operate to the prejudice of citizens. In fact, if the principle extended to many individuals, then the entire democratic process could be subverted.

A similar problem arose in India. Article 75(5) of the Indian Constitution reads "a minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a minister "by virtue of this provision." Pandit Pant, who was not a member of parliament, was appointed minister for the union and, subsequently secured the seat in the upper house, by election, illustrating the fact that there are no bars to the appointment of a person as Minister from outside the legislature. However, this individual cannot continue as minister for more than six months unless they secure a seat in either house of parliament. There has been number of judicial decisions on this point in India's law court.

According to the analysis of Mr. B.K. Sen, the Attorney General of the country legalized the process of General Ne Win's continuation in power, which is actually contrary to the essence of the constitution and democratic principle; and as such, the foundation for the justice system was irreparably damaged.

5.6 The Existence of Special Criminal Court

Following the 1962 military coup, rigid centralization was exercised by the military junta and the legal and judicial system were negatively affected over the past forty years period. Following the military coup, 1962 Special Criminal Court Act was provided for by the junta as the Revolutionary Council. Accordingly, the Revolutionary Council could establish the special criminal courts for any part of the country; the SCCs were authorized some special power such as sentencing capital punishment, speeding up the hearing processes, and denial of summoning witnesses.[8] To control the trial processes, the positions of Special Law Officers to be appointed by the Revolutionary Council, a characteristic that was absent in the previous judicial system, were invented.[9] In practice, the Special Law Officers then were the army personnel appointed by the junta. As such, in those Special Criminal Courts, judiciary was directly controlled by the executive through the Special Law Officers. That was one of the major factors that obstructed the essence of a Fair Trial in Burma.

The 1962 Special Criminal Court Act mainly abrogated the fundamental principles of the Law of Evidence provided for in the Evidence Act, [10] a major procedural law still effective in Burma, being applied in every trial. Article 101 of the Evidence Act enshrines as follows:

> Whoever desires any Court to give judgment as to any legal right of liability, dependent on the existence of facts he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

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[8] Section (4) and (6) of the 1962 Special Criminal Court Act.
[9] Section (8) of the 1962 Special Criminal Court Act.
[10] Chapter (7) of Evidence Act, "Of the Burden of Proof". Union of Myanmar, p. 454.

Pursuant to that provision, the accepted principle is that the burden of proof lies on the person who seeks judgment from the Court, complaining that the other party (or the accused) should be punished for a crime. The Article (12) of 1962 Special Criminal Court Act reversed that principle: it said, inter alia, that if a person, who is arrested with arms and ammunitions in fighting against the rebellious forces, is indicted, that person shall be liable to prove that he or she is not a member of an unlawful association, participating with the motive to commit high treason. The law said if that person is unable to prove so, it shall presume that he or she will be a member of unlawful association participating with the motive to commit high treason. As such, the law created the unjust trials in which the prosecution, usually representing the government, does not have major liability to prove that the accused commits such a crime while the defense, mostly the ordinary people, is mainly liable to prove their innocence. It is evident that political objective of the military junta to crush the armed rebellious forces negatively aided by the legal and judicial procedure which denies the "Fair Trial".

5.7 Denial of Peaceful Legal Means

Following the 1962 military coup, the notion of individual liberty was seriously damaged and acquisition of political power became the primary goal for both the ruling military regime and the revolutionary groups. The ruling junta was determined to continue their reign by staving off threats of the insurgent forces in the jungle and demonstrators on the streets.

Due to human rights violations committed by the troops of the military junta in local ethnic mountainous areas, non-Burman ethnic people were forced to believe that only when they are holding their weapons would their rights be protected. In this context, the number of ethnic armed resistance organizations increased. The military junta also hugely extended its army to retain their political power. Knowingly or unknowingly, both the ruling military regime and many resistance forces have exercised the teaching of Mao-tse-tung, the most famous political philosopher of China, that the power originates from the barrel of the guns. Taking arms has become part of the culture. The elite leaders of many armed resistance organizations have expressed their intention to reform laws only after they have achieved political power.

The question of who is going to make the law has remained unanswered; the principle underlying the Rule of Law unexplored. The ruling regime or the resistance forces never discussed the issue on the rule of law during the armed conflict. After several decades, unavoidably, many ethnic people, naturally sincere and gentle, have taken arms to defend their rights instead of promoting them through peaceful, legal means.

5.8 Lack of the Rule of Law Foundation

In 1973, a national referendum was held to approve the 1974 BSPP draft of the constitution. There were then two kinds of ballot boxes in voting centers: white boxes contained votes supporting the proposed constitution or candidate; black boxes contained votes in opposition. In every polling station, polling booths functioned as voting areas in which the two types of ballot boxes were kept. The objective of these booths was to prevent others from seeing someone casting his or her ballot.

However, before that national referendum, the BSPP authorities provided training on how to manipulate votes to the local BSPP members, supporters and teachers responsible for administering polling stations. Trainees were clearly instructed on how to arrange polling booths: white ballot boxes were to be kept in the area close to the entrance; while black ballot boxes were to be placed in a remote corner of the polling booth. Curtains used to cover the small polling booths were to be very thin so that outsiders could see voters' movements inside. Polling station administrators were required to help the elderly by assisting them to the polling booths, opening curtains for them and motioning to cast their vote in the white ballot boxes. Ballot boxes were required to be three layers of wooden sheets; and only one out of four corners of the black ballot boxes was to be hammered. This lack of security allowed polling station administrators to easily open black ballot boxes by twisting the wooden sheet at the bottom. According to voting rules, the polling station administrators were the sole persons able to enter the polling booths and check the ballot boxes as to whether or not they were in order.

Under that well designed ploy, ballots cast into black boxes were routinely slipped into white ballot boxes by polling station administers. After ballots were

counted, a large number of the polling stations announced that a hundred percent of the qualified voters voted in support of the new constitution.

Thereafter, the BSPP declared that the new constitution was approved by 92% of people. The constitution that went into effect on January 3, 1974, was mocked by grassroots supporters, perceived by the people as a piece of paper to which they had no connection, one which did not reflect their will, or protect their rights. As such, in terms of 1974 constitution, the 'validity' was in dispute; the 'supremacy' could not effectively be exercised; and 'legitimacy' was also challenged. Since that time, a genuine rule of law foundation was formally deprived; and, it has been one of the major factors that obstructed the existence of a Fair Trial.

5.9 Lack of Constitution

Following the 1988 coup, the military junta, declared that a multi-party democratic general election would be held and power would be transferred to the elected people. Accordingly, in September, 1988, the Multi-party General Election Commission was formed and the Political Parties Registration Act was enacted. On May 31, 1989, the "People's Assembly Election Law" was promulgated by the SPDC.

Then, the political parties and the people participated in the election with the knowledge that the winning party in the election shall form a civilian government by convening the People's Assembly.

After the election, National League for Democracy (NLD), the election winning party, waited for SLORC's offer to convene a People's Assembly, to no avail. The NLD attempted to convene their own People's Assembly for the purpose of forming a civilian government which would temporarily approve the 1947 constitution. To accomplish this, the NLD scheduled a meeting at Gandhi Hall in Rangoon on July 28-29, 1990. When the military junta obtained information about this meeting on July 27, 1990, they immediately promulgated Declaration No. 1/90 on the same day, to prohibit the actions of the NLD.

Declaration No. 1/90 states inter alia:

Article (20): "The representatives elected by the people are those who have the responsibility to draw up the constitution of the future democratic State."

Declaration No. 1/90 served as strong evidence that the military junta renewed its old promises to avoid the transfer of power by providing a retroactive law.

Even if a reference to Declaration No. 1/90 is made, it is quite clear that the authority to draw up a constitution has been conferred only to elected representatives. In spite of that, when the elected representatives from the NLD made a resolution to draw up a constitution, the military junta immediately promulgated Order No. 5/96 in June, 1996 to prevent it.

Article 3(d) of Order No. 5/96 that no individual or organization shall carry out the functions of the National Convention on drafting and disseminating the Constitution of the State without lawful authorization.

Article 4 provided that whoever violates any prohibition contained in section 3 shall, upon conviction, be punished with imprisonment for a minimum term of 5 years, and a maximum term of (20) years, and may also be subject to fines.

Declaration No. 1/90 and Order No. 5/96 are existing laws inside Burma. However, they completely conflict with one other. According to the Declaration No 1/90, elected representatives have the authority and responsibility to draw up the constitution. In that Declaration, SLORC never mentioned the National Convention.

According to the Order No. 5/96, only the National Convention has the authority and responsibility to draw up the constitution. In that Order, SLORC didn't confer the authority to the elected representatives to draw up the constitution. After the withdrawal of 80 NLD elected representatives from SLORC's National Convention in November 1995, only 19 of 702 elected representatives remain on the National Convention delegation list. Among the 485 elected representatives, a significant majority are outside the National Convention. It is thus easy to infer that the authority to draw up the constitution lies with a great majority of elected representatives outside the National Convention. Declaration 1/90 acknowledges that the military junta does not have the authority to draw up a constitution. Nevertheless, Order 5/96 authorized the military to so, while the majority of elected representatives were prohibited from drawing up a new constitution.

Due to the withdrawal of the 80 NLD elected representatives from the National Convention, the constitution making process, initiated by the junta, has been suspended since 1993 as of now. In spite of the fact that the representatives elected in

1990 May election themselves has a legitimate authority to draw up a new constitution, it has as yet become a reality because of the embarrassment made by the ruling junta. In brief, constitution making process for Burma is not in progress. Without the constitution, the junta is ruling the country. Constitution is realized as the supreme law of the land. It is also a semi-legal document that protects the rights of people and limit the authority of the executive. In spite of that, Burma is still lacking the constitutional underpinning.

The absence of a constitution in Burma for over a decade has created a major barrier for the emergence of the Fair Trial, as SC and HC judges have no law by which they can be guided. Furthermore, because the legislature is not comprised of elected people, military dictators enact laws based only on personal desire. As such, once the Supreme Court or High Court judges take an oath to uphold the law, they are in effect promising to administer and effectuate military desires. Thus, an independent judiciary, a major characteristic for the emergence of fair trial, has been omitted from Burma's legislative agenda. That is one of the important factors that obstructs the Fair Trial.

5.10 Socialist Way of Judicial System

Following the military coup in 1962, the 1947 constitution was suspended. The post-independence judicial system continued, however, for some years, in which legally qualified judges continued to hold their positions and judicial structure remained more or less the same, although the Supreme Court was re-designated as **'The Chief Court of Burma**.' With the exception of Habeus corpus, the CC exercised the remaining powers of the Supreme Court. Later, Dr. Maung Maung, an academic hand-picked by the military, was appointed as Chief Justice, stripping eminent High Court judges of their power; replacing them with a new batch of legally qualified, military backed judges. At this time, lawyers were permitted freedom of association, while the Chief Court created Special Crimes Courts to adjudicate cases

of insurrection, crimes against public safety, economic crimes and other serious offenses.[11]

In 1974 constitution, the Burma Socialist Program Party (BSPP) introduced a single-party system, [12] and established a State Council[13] under which all Central and Local Organs of State Power, including the judiciary, were placed.[14] These acts obliterated the separation of power principle and the remaining facet of a just judiciary. The 1974 constitution, upon which the judicial structure was founded, was autocratic and arbitrary; and largely affected trials negatively.

At this juncture, four objectives of the Socialist Judicial System were laid down;[15] Retired Brigadiers were made judges of the apex court; and, re-designated as the new Supreme Court at that time. Fundamental changes were made under the People's Judicial System to implement the principle that "justice for the people must be sought by the people themselves." Dr. Maung Maung, who founded the PJS, was appointed as Chief Justice of Supreme Court, and later became President of the Union of Burma in 1988.

Dr. Maung Maung attempted to justify the validity of the Peoples' Judicial System by referencing feudalist era experiences in Burma. These references are elaborated upon in the following explanation:

> In Ancient Era, laws and culture were able to solve the problem of human society gently. Workers, farmers, gardeners, and prudent monks could render fair judgments. In spite of the fact that it was under the rule of King in feudalist era, the people could administer their justice themselves, manage their own affairs, and it strongly rooted in the society. The further the village is from the capital and the more the king is separated from his people, the

[11] Silverstein, J. Burma: Military Rule and the Politics of Stagnation. Ithaca: Cornell University Press, (1977). p. 95.
[12] Article 11 of the 1974 Constitution of the Socialist Republic of the Union of Burma.
[13] Chapter (5) of the 1974 constitution.
[14] Article (79) of the 1974 constitution.
[15] Party Affairs Bulletin No 5; The judiciary and the responsibilities of the lawyers. Rangoo: Burma Socialist Programme Party Headquarters, (May 1970). p. 54.

> people would get organized by themselves and would also manage their local problems by resorting to their own ways as well as their own culture.[16]

Some historians articulate a different analysis from Dr. Maung Maung regarding people's participation in administering justice in feudalist areas:

> When, Hluttaw, an Assembly of government officials, was ably manned and was supported by the king in exercising its best judgment, the system worked with considerable effectiveness. But, even under optimum circumstances, poor communications between the capital and outlying areas left open the possibility of considerable abuse of authority on the part of provincial governors (Myowuns) (All judicial and administrative actions by the **yon** – court or office – were subject to the review of the Myowun.) and the parasitic overlords called myosas. Complaints against such abuses usually got sidetracked en route to the capital.[17]

Similar denials of Fair Trial practices could be seen in both the feudalist and BSPP era as victims lacked state institutional mechanisms through which they could take action against judges or administrative authorities abusing their power or acting corruptly. Fair Trial practices were denied because the judiciary was not separated from the executive and the judiciary did not have power to review functions of the executive.

The BSPP established the new Peoples' Judicial System on August 7, 1972[18] with the concept that "The loyalty of the courts remains in working peoples but not in

[16] U Aung Than Htun, Burmese judicial system in four eras; Rangoon, Myanmar: Flying Pen Press.
[17] Cady, J.F., A History of Modern Burma. New York, Ithaca: Cornell University Press, 1965 p. 21.
[18] U Thein Hlaing,, & Daw Khin Hla Han, Dr., The Changes of Political System in Burma ,Rangoon University Area, Myanmar: Printed by U Tha Yin, Manager University Press. Third Part, (1962-74). p. 55.

the side of capitalists; the laws must benefit the working people but not exploited classes."[19]

"The Working Peoples" was a very popular term to describe workers and farmers in the BSPP era between 1963 and 1988. The above statement indicates that the court would take sides with these working people to stand against capitalists and through the courts the ruling military junta could accomplish their political objectives.

It was also understood that the courts would decide cases to protect "The Working Peoples" but not to seek justice for individual victims. Courts were also responsible for deciding whether a person or a group of persons were "Capitalists or Exploited Classes." In practice, whenever the ruling military junta branded a person or a group of persons as "Capitalists or Exploited Classes" the courts were forced to convict.

Out of the four principles laid down by the BSPP to establish a new Burman judicial system, the one that "Big case must become small and small cases must fade out" has remained highly controversial in the context of justice.

The notion of the aforementioned provision was quite vague; and justice was never sought. Is it sensible to make a big case small? Some commentators have shed positive light on this principle, noting the fundamental concepts of the provision are minimizing litigation and resolving issues among the people peacefully. Criminal offense cases come into existence only when there is a perpetrator and a victim. Thus, the principle should not be to try to make the case small or disappear, but to consider how to deal with both perpetrator and victim from the aspect of justice, primarily retributive justice.

Once the principle of The Rule of Law is observed in a society, the perpetrator who commits a crime must be tried by an impartial trial and convicted in accordance with the law. In other words, he should not enjoy impunity; and he should not be pardoned.

Furthermore, once a perpetrator commits a murder, a court must examine him irrespective of whether his actions constitute Murder or Culpable Homicide as prescribed by the Penal Code, as respective punishments for each differ. Punishment

[19] Ibid, p. 59.

should be rendered consistent with the seriousness of the crime the perpetrator committed.

The perpetrator must be tried by a court to determine whether his actions rise to the level of Murder. If they do, the perpetrator's actions cannot be considered the same as Culpable Homicide as prescribed by the Penal Code, as the provisions in the Penal Code for Murder and Culpable Homicide differ in terms of punishment. This should be a fundamental principle for a society seeking justice; even in spite of the fact that there can be exceptions to this rule. For example, even though the perpetrator committed a serious crime, less punishment can be rendered to the perpetrator for circumstances in which the perpetrator commits the crime for the first time or has been living in the society honestly throughout his whole life prior to the incident in question.

The more serious issue is how to safeguard society from repeated criminal action rather than making a big case small or incorporating a perpetrator back into society. The notion of 'making a big case small' can include many practical factors such as: providing full-impunity to the perpetrator, without investigation or prosecution; or providing semi-impunity to the serious crime doer, in the sense that he be rendered less punishment. Full-impunity or semi-impunity will not prevent society from suffering repeated criminal action again; as such, it is the duty of society to punish the perpetrator who commits a crime in accordance with the general principle that **every criminal should not escape criminal accountability**. Taking effective legal action towards the perpetrator is one thing, allowing him to be incorporated into society is yet another. The former is of greater importance to safeguard the security of all individuals and promote the welfare of an entire society. The latter can be done after the perpetrator has already been convicted. However, vice versa should not take place.

Article 11 of the 1974 Constitution provides "The BSPP is the sole political party and it shall lead the state." This really was the case. Hierarchically, in every township, the most powerful organ was the Township Party Unit; the second was the Township People's Council; and, the least powerful were the Township Judges. The chairman of the Township Judges Committee had to pay respect to the Chairman of

the Township Peoples' Council and even more obedience to the Chairman of the Township Party Unit.

During the BSPP era, the judiciary was under the control of the BSPP. Since that time, the phrase "independence of the judiciary," was no longer used in society. Instead, another phrase became popular in court judgment terminology: "Notwithstanding anything provided in the law, ---------- ." This phrase embodied the sentiment that the court would adjudicate a dispute at it's own discretion, in spite of the fact that it might be contrary to the law. In fact, courts were forced to ignore legal provisions to comply with BSPP instructions.

A great majority of the people's judges had no legal education. For the most part, they attended one month legal training sessions provided by the BSPP. Whenever there was a legal council argument with reference to any provision of the law, the judge would respond to it: "Not necessary to elaborate upon the laws much. We know the laws as we have already attended the legal training for one month." The judges thought that law was very boring to study in depth, they thought that one month's training was ample training to administer justice. They were proud of being busy with BSPP party affairs outside the court, instead of studying laws, regulations and rulings for respective cases. Party policy, guidelines and instructions were much more important for the judges than legal provisions. They hated lawyers who often spoke of or referenced laws.

5.11 Lack of Independence of Judiciary

Shortly after taking power in September 1988, the military regime decreed Judicial Law No. 2/88, which established a Supreme Court and provided for the creation of civilian courts at the trial level. The Judicial Law stated: "Judicial proceedings shall be independent and in accordance with the law," and, "shall contribute to the restoration of peace, tranquility, and law and order."

In reality, however, there is only the pretence of judicial independence. All courts are subservient to the directions of the military regime and there is no protection for a judge in terms of tenure or other provisions regarding dismissal from office. Judges are under clear instructions to take the lead from military authorities in the discharge of their functions.

The New Light of Myanmar on 21 December 1999, in a report entitled "Passing fair judgments speedily in accord with law essential for firmness of judicial system," described the 15th "work coordination meeting" of Supreme Court Justices and State/Division Judges. In his address, the Chief Justice said "judges should work in line with the guidance given by the Chairman of the State Peace and Development Council; and they should work collectively for the success of their task."

The military junta appoints Judges of the Supreme Court. The Supreme Court selects judges for the lower courts, but requires military junta approval. Any provision regarding the security of judicial tenure, or judges' protection from arbitrary removal is not prescribed in Judiciary Law, thus leaving such issues to be determined by military leaders.

The 'Qualification' or 'Responsibility' of judges was defined by Lieutenant General Khin Nyunt, Secretary (1) of the ruling military junta, State Peace and Development Council (SPDC). It was clearly publicized on the initial page of the 1993 Burma Rulings.[20]

> "Judge profession cannot be done by everybody, but by the persons who have morality, noble precepts and mindfulness. According to the teaching mentioned in "Noble Practices of Kings" the five ingredients of judges, which are worthy to be observed and applied not only by judges but by other staffs relevant to judiciary, are as follows:[21]
>
> 1.he who keeps noble precepts;
>
> 2.he who seeks and promotes the truth;
>
> 3.he who is competent;
>
> 4.he who speaks lovely; and,
>
> 5.he who knows 'win' and 'lose."

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[20] Burma ruling , Published with the permission of Supreme Court by Myawaddi Press in January 1995. Extract from a speech delivered by Lieutenant General Khin Nyunt, Secretary (1) of the State Peace and Development Council, at the work consultative meeting of law officers and Supreme Court, Province Court, and District Court Judges, held in the Conference room of the Nursing University on July 29, 1993. (1993).

[21] Excerpt from a speech delivered by Lieutenant General Khin Nyunt, Secretary (1) of the ruling military junta, State Peace and Development Council, to the judges from Supreme Court, Provincial and Divisional Courts, District Courts, and Law Officers at their Work Consultation meeting held on July 29, 1993.

Those characteristics of judges, provided for in ancient feudalist era, now highlighted by the military junta and well regarded by the currently established Supreme Court as Biblical teachings, sound superficially attractive; but are actually vague in the context of the current social and political scenario.

1. He who keeps noble precepts

The junta did not clearly elaborate "The noble precepts" but strongly reminded judges, as servicemen of the state, to deeply absorb Six Commandments for Loyalty. They are as follows:

(1) be loyal to the state;
(2) safeguard the union;
(3) unite the various nationalities;
(4) protect sovereignty;
(5) stay away from political parties; and,
(6) comply with the orders provided by the State.

These axioms were supposed to have been regarded as noble precepts in spite of being "politically motivated" guidelines. Furthermore, they are also irrelevant to the judiciary and legal aspects.

2. He who seeks and promotes the truth

If judges do not have power over the stability of their tenure or the administration of their duties, they will not be able to protect or seek the truth. The military junta exercises sole discretion over legislative, judicial and executive state powers. The independence of the judiciary to procure justice no longer exists. The judiciary has been under absolute control of the military junta. The Judiciary Law[22] does not enshrine any provision for security of tenure of judges or protection from arbitrary removal, thus leaving such issues in the hands of the military government.[23]

To cite a recent example of this, without providing any explanation, the military junta dismissed five High Court judges in 1998, except Chief Justice U Aung

[22] Law No 2/88 provided by the state law and order restoration council.
[23] Attacks on Justice: The arassment and persecution of judges and lawyers. Geneva: Published by Center for the Independence of Judges and Lawyers. (June 1999).

Toe, and assigned five new military hand picked judges to the vacant posts. Whenever he provided guidelines for his lower-level Supreme Court Justices, Provincial and Divisional Courts, or District Courts, U Aung Toe was forced to cite uncountable speeches delivered by Lieutenant General Khin Nyunt, Secretary (1) of the State Peace and Development Council (SPDC). These speeches inevitably pressured judges to obey government orders and policy.[24] In light of this pressure, judges hesitate to protect and seek the truth, particularly in cases filed by the ruling executive against political opposition. Since 1988 to date, there have been no accused discharged or acquitted after being charged with alleged involvement in political activities.[25] Without guaranteeing the security of judicial tenure, the emergence of a Fair Trial to seek and promote truth might be only a dream.

3. He who is competent

Currently, a great majority of judges in Burma may be incompetent, not because of personal weakness, but because most of them were trained in a poor legal educational system. This system failed to train judges in essential curricular areas, and did not place emphasis on principles regarding: Rule of Law, Independence of Judiciary, Separation of State Power, Bills of Rights, and Judicial Review, etc.. The term "Judicial Review" was only applied relatively recently[26] and in many systems, notably the United States of America, it refers to the power of a supreme court under a supreme written constitution to review all types of legislation and other governmen-

[24] Speech delivered by U Aung Toe, Chief Justice, at the 6 Months Work Consultation Meeting among the judges from Supreme Court, Provincial and Divisional Courts, and District Courts; mentioned in 1993 Burma Rulings Book.
[25] Burma Lawyers' Council. Address to the International Bar Association, 1997, New Delhi. Reproduced in Legal Issues on Burma journal. Vol. 2, (June 1998). p. 4.
[26] It was used by Prof. J.D.B. Mitchell in his Constitutional Law (1st ed., W. Green, Edinburgh, 1964); but in Bennet Miller, Administrative and Local Government Law (1961), the reference is to "judicial control".

tal acts for consistency with the constitution.[27] Almost all judges, except U Aung Toe and some judges from the Supreme Court, have rarely been allowed to participate in regional or international legal seminars or to make observational trips to democratic countries in which the judiciary plays a significant role. Furthermore, the Supreme Court, with reference to the competency of judges, cannot now be expected to be a reliable state institution, given that the important jurisdictions, such as writs, have already been withdrawn from them. If judges and courts are incompetent, Fair Trials will never exist.

4. He who speaks lovely

In Burma, "Speaking Lovely" is indicative of when someone expresses sentiment only in conformity to the ruling junta. As such, judges are deprived, by law, of the freedom to express themselves.[28] In spite of the fact that five other Supreme Court judges were forced to resign, U Aung Toe has remained in his Chief Justice position. He speaks "Lovely" about the ruling military junta, providing guidelines to his inferiors consistent with government orders.[29] "Speaking Lovely" can have various meanings, contingent upon the context; as such, the term is extremely vague. "Speaking Lovely" should not be a designated qualification for judges, judicial officers or staff working in the judicial system. This is yet another example of how the emergence of a Fair Trial is hindered.

5. He who knows 'win' and 'lose.'

This precept might be the most important for the corrupted judge. The Burmese saying, "Those who have money will win cases" has and continues to plague judges' integrity.[30] Until judges' qualifications are defined by "he who knows the laws provided by legitimate parliament, and he who observes the supremacy of constitution, which guarantees popular sovereignty," there will be no Fair Trial.

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[27] Judicial Review by the RT Hon. The Lord Clyde and Denis J.Edwards. Edinburgh, W. Green: Published by Scottish Universities Law Institute. (2000).
[28] 1950 Emergency Provision Act; 1975 State Protection Act; 1962 Printing and Press Act.
[29] Speech delivered by U Aung Toe, Chief Justice. (n.d.). Burma Rulings, 1993. n.p.
[30] Supra Note 33.

Moreover, so long as judges only know money and the might of the military administration of "justice," the Fair Trial will never become a reality.

Out of the five principles, two and three are feasible. However, they are inapplicable to this current political, social and administrative scenario. Principles one, four and five, which originated from feudalist concepts, do not adhere to international human rights norms. In brief, the ruling junta could not establish a set of comprehensive principles for an independent judiciary to lay down a foundation for the emergence of a Fair Trial.

U Aung Toe, as Chief Justice, repeatedly urged his inferior judges and other judicial staff to observe the guidance provided by the military junta in administration of justice. In line with this, Supreme Court led by U Aung Toe, never scrutinized the function of executive on whether their action are consistent with the effective laws in Burma. On the contrary, the Supreme Court has also been keeping silent on the issue, raised by U Tin Oo, chairman of the Central Legal Committee of the National League for Democracy, that there has not been a single case where a political prisoner has been acquitted or given a lesser sentence by higher courts. In this context, judiciary currently in Burma, which is supposed to be a reliable institution for the people, has remained incompetent, compliant and subservient.

5.12 Deprivation of Victims' Rights

In seeking justice, the perpetrator must be prosecuted and convicted; consistent with the Rule of Law principle. Weakness of prosecution under the 'benefit of the doubt' principle should not always be a strong reason to release the perpetrator all the time; and, if it is the case, Fair Trial will never become a reality for the victims.

In order to make the prosecutors' case strong, the scope should be broadened beyond the scope of the complainant to encompass the whole process, from the filing of a complaint by the victim in the police station. Many times, complaints made by victims were not properly and systematically recorded; sometimes, records were falsely made contrary to complaints; and usually, certified copies of the records were not available for the victims. The weaknesses of the prosecution can be attributed to these preventable and unfavorable situations for the victims, so that victims are not denied Fair Trials.

> Gender and ethnic factors can sometimes vitiate understanding of the recording and investigation officers. The victim will be the one who gets punished for the mistakes of recording and investigating officers.[31]

From a victims perspective, refusal to record complaints;[32] denying information relating to all actions taken by investigation officers;[33] delaying transmission of complaints; enabling time for culprits to escape;[34] destroying evidence; and failing to provide alternative places or state institutions for making complaints against the police, prosecution and other state officers, when they fail to take action on the complaint, or fail to proceed with the prosecution effectively,[35] are some barriers which hinder the emergence of a Fair Trial.

5.13 Replacement of Military Intelligence in the Position of Police and Lack of Neutrality of Police

In Burma, the law generally provides **who** can detain **whom** in which circumstances; [36] accordingly, in criminal cases, arresting officers must be **police**. However, on countless occassions, arresting officers wear civilian dress; concealing their identity from the arrested person.[37] These military intelligence people usually replace the position of police officers; execute police officers duties to arrest; and commit various forms of serious torture. Police generally dare not commit such atrocious acts, for example, drop water over the center of an individuals' head continuously day and night while the military intelligence people do.[38] Replacement of military intelligence in the position of police to arrest the civilian people is an important factor that hinders the emergence of a Fair Trial.

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[31] Statement of the Asian Seminar on Fair Trial; held at Kwoloon, Hongkong on 7-12 November, 1999.
[32] Ibid Rights of Victims of Crime 5.1.3.
[33] Ibid Rights of Victims of Crime 5.1.6.
[34] Ibid Rights of Victims of Crime 5.1.5.
[35] Ibid Rights of Victims of Crime 5.1.4. & 5.1.8.
[36] Article 54 of Code of Criminal Procedure.
[37] Interview with U Htein Lin, writer, living in Suwunna Quarter, Thingangyun Township, Rangoon Division; on November 28, 2001.
[38] Interview with U Paing (aka) U Aye Thet, student at the time of arrest, living in Minglataung Nyunt township, Rangoon, who was arrested two times, on November 1988 and November 18, 1989; Interview was made on November 29, 2001.

Police should not be biased towards any ruling political party in a democratic society; neutrality of police must be exercised; and police should be accountable only to the law. However, currently in Burma, the whole police institution has been dominated by ex-army and army personnel in its leading role. There has been no neutrality of police as they are totally subservient to the military. Police dare not take action against the military personnel who commit crime over civilian people. Lack of exercise on “neutrality of police’ is also an important factor that obstructs a proper function of criminal justice system.

5.14 Existence of Secret Detention Centers

Placement of suspects in any kind of secret detention center such as solitary, incommunicado, or other similar form of detention inaccessible to the public is a denial of Fair Trial.

Military Intelligence officials in Burma commonly place detainees in secret detention centers, such as buildings in local Military Intelligence Regiment units. Placing and investigating suspects or detainees in secret detention centers enables authorities to mentally and physically torture; and increases the availability of stock witnesses. Stock witnesses are the individuals who are detained and forced to be witnesses against suspects for cases fabricated by the administrative officials or the executive. This force is exerted through threats that stock persons will be listed as accused if they do not do comply with officials' instruction. In a democratic society, secret detention centers should not exist.

The Human Rights Committee found that incommunicado detention may violate Article of the ICCPR which prohibits torture, inhuman, cruel and degrading treatment. Principle 19 of the Body of Principles states that a "detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations." At a minimum, the right to communicate with the 'outside world' includes the right to communicate with a detainee's family, a lawyer and a doctor.

5.15 Arbitrary Detention: Lack of Preparation for Defense

From a Fair Trial perspective, the protection of human rights for a victim needs to be taken into account not only at the trial or hearing stages, but also throughout pre-trial and post trial events. After being arrested, the detainee is not allowed to communicate with the outside world or seek the assistance of legal council. In the event that he suffers from mental or physical torture during the pre-trial stage detention period, he will not be able to defend his case effectively and efficiently, yet again, denying the reality of a Fair Trial.

Detention should be made pursuant to due process of law and national laws guaranteeing absolute rights of detainees. In terms of the current and future society of Burma, it is worthy to consider how international human rights law concepts can be incorporated into national laws. Furthermore, once procedural legal vacuums are created, society must find means with which to fill them with new provisions based on justice.

Detention can be simply defined as: a person restricted to a confined area of a lockup or detention center in which freedom of movement is deprived. As soon as this situation takes place for any individual, the concept of a 'Fair Trial' must be applied.

In every society, detention is a necessary measure to take effective criminal action against the perpetrator of a crime. This measure is intended to protect further crimes and other human rights violations from being repeated. Whenever justice is sought for victims whose rights are violated by a perpetrator's criminal offense, detention is a beginning step in furtherance of prosecution and hearing at a formal trial. In theory, by so doing, impunity for perpetrators is supposed to be denied, and ends of justice for victims are supposed to be promoted. The question remains: How can arbitrary detention[39] against innocent victims be avoided? Arbitrary detention leave detainees vulnerable to torture and inhuman treatment at the hands of law enforcement authorities,[40] setting the stage for a denial of a fair trial.

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[39] Article (9) of UDHR and ICCPR.

[40] Gutter, P., & Sen B.K. Burma's state protection law: An analysis of the broadest law in the world. Published in Bangkok by the Burma Lawyers' Council, (December 2001). p. 44.

On countless occasions, innocent people are detained as suspects; and human rights violations inevitably take place, particularly for the powerless and poor people in society. There is a Burmese saying that "The ugly person will be regarded as witch and the poor person will be suspected as thief." Unlawful, unjust and arbitrary detention usually occurs in every society, particularly in undemocratic societies, and it is of paramount importance to find an effective procedure to avoid this dilemma. Aiming to harness political opposition, the ruling military junta in Burma has been detaining people arbitrarily, as common practice, for several decades, resulting in serious damage to the social, political, and economic life of individuals.

5.16 Preventive Detention

The law does not provide a clear definition of the term 'State Prisoner' but it can be realized that a State Prisoner is one who is arbitrarily placed under personal restraint at the discretion of the government. Although the government deems their action sufficient to be placed under such restraint for a certain period,[41] such action is insufficient to institute judicial proceedings with the government. This law was promulgated by the British government in 1875. Pursuant to this colonial law, the government can detain any person 'for good and sufficient reason,' whereby if government suspects that a person might threaten the stability of their administration, his freedom of movement can be deprived at any time; and he can be placed under detention as a preventive measure. That law was effective in Burma for over one hundred years, but was abolished in 1992 by the ruling military junta (SPDC) with the Law No 1/1992 entitled "Law to Repeal the Laws."

It is assumed that two reasons prompted the military junta's repeal of that law.

The first reason is that they already promulgated similar law to place political oppositions under detention: 1975 Law to Safeguard the State from the Dangers of Destructive Elements (known as **1975 State Protection Act**). The law allows the government to impose side-ranging restrictions on individuals: anyone suspected of having committed, or who is committing, or who is about to commit any act which

[41] Article (1) and (2) of The State Prisoners Regulation, enacted on September 16, 1875.

endangers the sovereignty and security of the state or public peace and tranquility, can be ordered by the Council of Ministers to be imprisoned for up to five years without trial.

The second reason is that the former law, 1875 State Prisoners Regulation, sets forth detainee's rights which the military junta no longer wished to allow. Surprisingly, exactly 100 years transpired in between the enactment of the two laws. Thus, an analysis is useful insofar as which law is more abusive from the perspective of promotion and protection of human rights.

A comparison of those two laws reveals that both are completely arbitrary laws insofar as they authorize executives and governmental authorities to whimsically detain suspects, as a form of preventive detention, without well-founded grounds upon which they could initiate a judicial proceeding.

With regard to a detainee or a suspect, the internationally accepted fundamental principle regarding criminals is the right to be presumed innocent until proved guilty in accordance with the law.[42] The national principle in Burma, inherited from common law tradition, bestows that it is better that several guilty persons escape than one innocent person suffer.[43] Governmental practices stand in stark contrast to those principles; and as such, they are unacceptable in terms of international and national human rights law standards.

Nevertheless, former law had a justice seeking provision, to some extent, with proper governmental procedures to be applied in reviewing detention and allowing the detainee to address his own suffering to the government. In this regard, Article 1 of the 1875 State Prisoners Regulation states the following:

> whereas the ends of justice require that, when it may be determined that any person shall be placed under personal restraint otherwise than in pursuance of some judicial proceeding, the grounds of such determination should from time to time come under revision, and the person affected thereby should at all times be allowed freely to bring to the notice of the President of the Union all

[42] Article (14)(2) of ICCPR.
[43] U Phoe Thar. (Third Publication), Commentary of evidence act. Rangoon; Gondoo Press, p. 269.

circumstances relating either to the supposed grounds of such determination, or to the manner in which it may be executed.

Similar provision is made in the 1975 State Protection Law with respect to the first relevant part of the article regarding 'revision' or 'review.'[44] Unfortunately, the 1975 State Protection Law refuses to speak about the essence of the law mentioned in Article (1) 1875 State Prisoners Regulation, as well, which is the portion that is directly relevant to the rights of a detainee.

Furthermore, despite the fact that the 1875 State Prisoners Regulation was enacted during the colonial period, the provisions set out in the fourth paragraph of Article (1) and Article (4) were significant insofar as they facilitated health conditions of detainees from humanistic perspective. These protectionist provisions were totally omitted from the 1975 State Protection Act:

"and where as the ends of justice also require that due attention be paid to the health of every State prisoner confined under this Regulation, and that suitable provision be made for his support according to his rank in life and to his own wants and those of his family;

When any State prisoner is placed in custody, the President of the Union will instruct a Judge or some other public officer, not being the person in whose custody the prisoner is placed, to visit the prisoner at stated periods and to submit a report to the President of the Union regarding the health and treatment of the prisoner."

Unfortunately, similar provisions were lacking in the 1975 State Protection Act which resulted in the death of innocent detainees.

Admittedly the Law refers to detention of a person without trial in circumstances that there is no sufficient evidence to make a legal charge or

[44] Article 16 of 1975 State Protection Law.

secure conviction by legal proof, but may still be sufficient to justify detention in the interests of national security. It is left to the understanding of the arresting authority to determine what **sufficient** means. The absurdity of the Law becomes clear in its implementation. Detention is supposed to be for a maximum period of 3 years. After that, this is extended for another 2 years. This was amended to 5. It goes on and on. Regarding the revoked right of judicial appeal, in practice this means that detention is now a continued process for any number of years until death. Detention under the State Protection Law is an inverted death sentence without charges and without trial. For instance, Si Thu Ye Naing and Aung Kyaw Moe were both detained in Tharawaddy Prison under the State Protection Law. Both of them died while under detention.[45]

5.17 Lack of Information on Reason for Arrest

In Burma, the law[46] conflicts with international human rights law insofar as "Anyone who is arrested shall be informed at the time of his arrest, of the reason for his arrest…"[47] In spite of the fact that national law provides that arrests can be made without a warrant issued by a Magistrate in certain circumstances,[48] law cannot be scrutinized when a detainee is not formally notified, at the moment of arrest, of the reason for arrest.

The United Nations General Assembly adopted the Universal Declaration of Human Rights on December 10, 1948. India and Burma were under the rule of the British during colonial times and two similar common law systems emerged. The Code of Criminal Procedure was applied in both countries, and continues in Burma today, silencing detainees on the right to be informed of the reason for arrest. However, the India constitution, which came into effect on January 26, 1950, reflects

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[45] Gutter, P., and Sen, B.K., Burma's State Protection Law; Bangkok, Burma Lawyers' Council, December 2001. p. 38-39.
[46] Chapter 5 of the Code of Criminal Procedure. Union of Myanmar. "Of Arrest, Escape and Retaking"
[47] Principle 10; Basic Principles for the Treatment of Prisoners; Adopted and Proclaimed by General assembly resolution 45/111. Similar provision is also enshrined in Article 5(3) of the Federal Constitution of Malaysia.
[48] Article 54 of the Code of Criminal Procedure.

many provisions enshrined in the Universal Declaration of Human Rights;[49] and, as such, the constitution of India provides for a detainee on the right to be informed of the reason for arrest. This was not the case for the Constitution of the Union of Burma approved on September 24, 1947 (the 1947 Constitution). Moreover, this provision also remained absent in the Constitution of the Socialist Republic of the Union of Burma, effective in 1974 (known as 1974 Constitution).

The Article 50 of the Code of Criminal Procedure of India manifestly stipulates the right to be informed of the reason for arrest and of right to bail. Under this section a police officer or any person without warrant is bound to tell him the full particulars of the offence for which he is arrested or any other ground for his arrest.[50] Similarly, if the arrest is for a bailable offence the person effecting the arrest shall inform the person arrested that he is entitled to bail and that he should manage for bail.[51] However, the Code of Criminal Procedure of Burma is keeping silent in these matters and it certainly damages the principles of Fair Trial.

5.18 Denial of Legal Assistance

The right of the accused to defend himself in person or through legal assistance is manifestly enshrined in the international human rights law.[52] Among many rule of law foundations, hiring an advocator or a lawyer to defend oneself, if arrested or accused of wrongdoing, is everyone's right. The United Nation's General Assembly passed a resolution No.43/137) on December 9, 1988, to provide basic protection to those arrested, detained, or jailed. Paragraph 17 of this resolutions reads inter alias:

(1) (the accused) must have an access to lawyers. Soon after the arrest, the authority must inform this right to the accused.

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[49] Alexander, P.J. Dr., Former Director General of Police, Kerala State, India and Director, Institute of Management in Government. (n.d.). Fair trial: The Indian situation. Kerala, India.
[50] A.N. Saha, The Code of Criminal procedure, 1973. New Delhi, India: Orient Publishing Company, (Reprint 2001). p. 141.
[51] Ibid.
[52] Article 14(d) of the International Covenant on Civil and Political Rights.

(2) If the accused could not afford to hire a lawyer, the prosecutor or other responsible authorities must arrange to hire a lawyer for the accused.

The question of whether a detainee should enjoy the right to remain silent at the time of arrest must be observed in Burma for a Fair Trial to emerge. The concept of this right is already enshrined in the constitutions of other countries[53] and protects a detainee from making pre-mature statements at the time of arrest, prior to consulting with his or her lawyer, which might be later submitted in court as evidence.

> Principle 5 of the Basic Principles on Lawyers and Principle 17 of the Body of Principles specifically provide that when a person is arrested, charged or detained, he or she must be promptly informed of the right to legal assistance of his or her choice. Article 7 of the Basic Principles on Lawyers requires governments to ensure that all persons arrested or detained should have access to a lawyer within 48 hours from arrest or detention. An individual's right to choose counsel thus begins to run when a suspect or accused is first taken into custody, regardless of whether he or she is formally charged at the moment. Furthermore, if the accused cannot afford his or her own counsel, the relevant authorities must provide a lawyer free of charge if the interests of justice so require.[54]

The current Burmese law also stipulated clearly about the right to hire a lawyer. Article 340(1) of the Code Criminal Procedures stated that "Any person accused of an offence before a criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader." The similar provision is mentioned in Section 455(1) of Burma Manual "each accused, by personal right, has the right to defend oneself with the assistance of a lawyer." Section 455(2) of the same Manual provides "no lawyer will be allowed to

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[53] Article 3 Section 12(1) of the Philippines Constitution.
[54] Lawyers Committee for Human Rights, What is a Fair Trial: A Basic Guide to Legal Standards and Practice. New York, LCHR Featured Publication. p. 6.

practice in any criminal court unless he or she is authorized with an attorney power formally signed by his or her client."

Pursuant to those aforementioned provisions in Burma, it is evident that the right to get the assistance of a lawyer can be exercised by a citizen only when relevant case is filed in the court. Accordingly, the lawyer does not play any official role in the police station where his or her client, as suspect, is detained; and as such, the lawyer cannot provide a formal assistance to detained person in this stage. There had been a refusal to allow the accused any access to a lawyer during the whole period of detention by the police.[55] Human rights violation usually occurs in the police station or in other secret detention centers while a suspect is detained and put him or her under investigation. Actually, a detained person should have the right to get the assistance of a lawyer immediately after he or she is arrested and the law needs to be revised in line with this.

Currently, in Burma, lawyers defending political activists have become subject to persecution and any lawyer who engages in any form of opposition to the government risks disbarment. 55 lawyers were taken into action on charges of Emergency Provision Act and Penal Code Section 122 High Treason. Their lawyer licenses were withdrawn. Two lawyers died in the prison. The lawyers have to provide effective legal protection to their vulnerable clients in the course of the investigation processes or judicial proceedings. However, unfortunately, so long as the lawyers themselves are not secure to do their legal profession, fair trial will never exist.

In spite of the fact that the law[56] permits un-convicted criminal prisoners facing trial to see their duly qualified legal advisers, there have been no provisions in the constitution or effective laws in Burma that prescribe the right to have legal representation to detainees at the moment of arrest. In practice, a lawyer can visit detained clients during the investigation stage. However, it is only for the purpose of receiving instructions and obtaining signatures for attorney power. The lawyer has no

[55] Kolb R. The jurisprudence of the European court of human rights on detention and fair trial in criminal matters. Geneva, (1999-2000). p. 356.
[56] Article 40 of 1894 Prisons Act.

authority to protect the rights of a suspected accused detained and being investigated in spite of the fact that an attorney is permitted to officially defend client rights in court. This is a legal vacuum which must be filled with new procedures in order to promote Fair Trial practices in Burma.

5.19 Remand Versus Time Limit for Criminal Investigation

In cognizable cases, the police can arrest a suspected person without warrant up to twenty-four hours.[57] Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours, and there are grounds for believing that the accusation is well-founded, the officer in-charge of the police station or the police making the investigation, shall forthwith forward the accused to the nearest Magistrate,[58] seek the authorization from him for continued detention of the accused in such custody as such Magistrate thinks fit.[59]

Article 344 of the Code stipulates that if, in the event of a witnesses' absence or for any other reasonable cause, it becomes necessary or advisable to postpone or adjourn an inquiry or trial, the court may by warrant remand authorization of the investigating officer to continue detention of a suspected person for a certain term. In this regard, Section (167) (2) of the Code of Criminal Procedure mentioned, inter alia, as follows:

> …. but the detention of such person shall not exceed in the whole 30 days where a person is accused of an offense punishable with rigorous imprisonment for a term of not less than seven years, and where a person is accused of an offense punishable with rigorous imprisonment for a term of less than seven years, the detention such person shall not exceed fifteen days in the whole.

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[57] Article 61 of the Code of Criminal Procedure.
[58] Section 167 Subsection (1) of the Code of Criminal Procedure.
[59] Section 167 Subsection (2) of the Code of Criminal Procedure.

Presently, in Burma, the law does not clearly provide a time limit for the whole process of criminal police investigations; and many times, the police place suspected persons under detention for over six months, sometimes longer, with the pretext that they are seeking further and better evidence to compile an investigation. Such actions of investigative officers, authorized by the court, render a presumption of guilt over the suspects; and often times force suspects to plead guilty. In India, similar provisions have already been promoted; and, accordingly, courts have given bail to the accused in the event that the police fail to file a complete and formal case in the court after the 90 day detention period of the accused has expired.[60]

In order to avoid suffering of victims associated with detention without well-founded grounds consistent with remand proceedings, time limits for criminal investigation are necessary. Furthermore, during the remand detention period, police should comply with strict procedures whereby copies of entries of the investigation diary are made. The Criminal Procedure Code needs to stipulate that the investigation diary must contain detailed daily entries containing among other things, the time at which the investigation began and ended, the places visited by the investigator; and a statement of the circumstances ascertained through the investigation.[61]

5.20 Denial of Public Hearing

In regard to the place of inquiry or trial, Chapter 15 of the Code of Criminal Procedure provides, inter alia, "every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed." However, the law does not prohibit the existence of a trial held where the public cannot have easy access. In Burma, under the rule of the military regime, a large number of trials were held in the campus of prison or jail where the public hesitates to visit. Contrary to this practice, the general principle, subject to rare exceptions, is that the court must sit in public.

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[60] Supra Note 50.

[61] Hector, C., Human Rights Advocate, Malaysia. Administrative detention in Malaysia- A brief overview. A paper submitted in Asian Seminar on Fair Trial; held in Hong Kong on 7-12 November 1999.

> Open justice promotes the rule of law. Citizens of all ranks in a democracy must be subject to transparent legal restraint, especially those holding judicial or executive offices. Publicity whether in the courts, the press or both, is a powerful deterrent to abuse of power and improper behaviour.[62]

> In Rv Legal Aid Board, ex p Kaim Todner (a firm) Lord Woolf MR gave four reasons for the principle of open justice: it deters inappropriate behaviour on the part of the court, it maintains public confidence in the administration of justice and enables the public to know that justice is being administered fairly, it may result in new evidence becoming available, and it makes uninformed and inaccurate comment about court proceedings less likely.[63]

The right to a public trial was not provided for in 1947 Constitution. However, at the time after the independence of Burma, the trials were never held in the campus of prisons where the ordinary people and the Media cannot have easy access to there. The public hearing was stipulated in the 1974 Constitution enacted by the military junta. In spite of that, politics oriented cases has usually been tried in the campus of the prison.

In such proceedings, the courts do not provide advanced notice to the family members of the accused mentioning time and venue of the public hearing available. Adequate facilities for attendance even by those family members have been denied. The right to a public hearing is of paramount importance. The public, including the press, may be excluded from all or part of a trial for the reasons specified in Article 14(1), but such an exclusion must be based on a decision of the court rendered in keeping with the respective rules of procedure.[64]

As the public trials are denied, the legal community cannot observe the status of trials from the perspective of due process of law; the people do not believe in the administration of justice; and fair trial will never exist.

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[62] Clayton, R., & Tomlinson, H. Fair Trial Rights. UK: Oxford University Press, 2001. p. 35.
[63] Ibid.
[64] Ibid

Summary

(5.1) and (5.2) introduced current status of society with its background social environment. They are important factors that influence a trial to be fair or unfair.

The existence of a Fair Trial cannot be considered with reference only to laws within the campus of a court. As a wider perspective, it is worthy to observe the status of a society that underpins the judicial system, courts and trials. So long as 'fear' terribly prevails in the whole society, prosecution lawyers may hesitate to point out the substantive and procedural weaknesses of both parties in the proceedings; defense lawyers may not provide strong arguments, challenging the unlawful dealings of authorities publicly; the witnesses may not provide their statements only in the true nature of case; and finally, judges may not be courageous enough to adjudicate the cases independently. These situations will certainly lead the trial unfair.

There is a Burmese saying that man may not keep noble precepts, if his or her stomach is not full. Currently in Burma, except elite class facilitated by the ruling junta, a great majority of the common people live in hunger. It is assured that the official salaries of police and judicial officials are not enough even to survive in the event that they are not corrupted. If police is not bribed, he may hesitate to bring the accused from police detention cell, at one corner of the court, to the trial, at another corner in the same campus. If the bench clerk is not bribed, he may delay to issue the 'bail order' already granted by the court. If government prosecution council is not bribed, he or she may object all questions raised by independent prosecution lawyer, hired by complainant and officially attached to the Government Prosecution Officer (GPO) to support him or her. If the Court Police Officer (CPO) is bribed, the defense lawyer may be able to get the 'police paper,' where the statements before the police were recorded, and which is not available defense lawyer officially in accordance with the law. If the judge is not bribed, the end result cannot be expected positively. It is obvious that corruption is terribly damaging the whole justice system of Burma, resulting in the existence of unfair trials largely.

Another important factors are relevant to ideology that create judicial principles – whether be socialist way of judicial system or system to safeguard the union or protect sovereignty – to be applied in practice. Ideologies usually lead

societies. In one way or another, the leaders of Burma absorbed the 'strong state' concept in history. The more the leaders want to establish the country as a 'strong state', the more 'rigid centralization' they have to exercise. If it is the case, the fundamental freedoms of individual citizen must be diminished; the exercise of people's rights to a Fair Trial must be minimized; and judiciary must be placed under a certain control. These matters are discussed in (5.4) (5.10) and (5.11).

The foundation for justice system and the Rule of Law are also important factors. In Burma, the foundation for the justice system was irreparably damaged given that the military's continuation in power was legalized.(5.5) As 1974 Constitution was produced through a sham national referendum, a genuine rule of law foundation was deprived.(5.8) Given that Burma has lacked a constitutional underpinning since 1988 military coup, rule of law foundation has totally been denied. (5.9) These are also major factors that obstruct Fair Trial.

In spite of the fact that constitution exists as the rule of law foundation, if unjust laws prevail in a society, Fair Trial may not become a reality. (5.3)

Military intelligent persons replaced the police as arresting officers.(5.13) Immediately after arrest, they did not inform the detainees on reason for arrest. (5.17) Uncountable number of times legal assistance was denied.(5.18) During the investigation processes following the arrest, the detainees were placed in secret detention centers.(5.14) There has been no accurate time limit for criminal investigation. (5.19) After completion of investigation process, the accused were tried in Special Criminal Court or similar tribunals.(5.6) Many times, they were denied public trials. (5.20) Those factors also deny Fair Trial.

CHAPTER VI
CONCLUSION AND RECOMMENDATIONS

Since the era of Kingdom, Burma has exercised a part of the Rule of Law. The qualified judges that played a neutral role in adjudicating the cases emerged. Avoiding four potential ways of 'Bias' has become a powerful guideline for the successive judges and as of now the modern society cannot argue negatively against the 'validity' of that guideline. The traditional courts referred to *Pyattons* or case-Books. It was proper practice of the ancient courts although it might not be as similar as the exercise of contemporary courts in common law countries to set binding judicial precedents. Even in ancient times, judicial processes were properly practiced and that may be considered as a part of procedural due process of law. In a nutshell, modern Burma has inherited many positive judicial texts from its ancient society. Those documents might be an underpinning for a Fair Trial to emerge.

Furthermore, Burma acquired the common law system from British, major parts of which have benefited previous and current legal systems, existing as substantive as well as adjective laws and judiciaries since independence. Many legal academics commented that Burma's legal and judicial system was relatively stronger than its neighboring countries in South East Asia. There exist a lot of just laws such as Penal Code, The Code of Criminal Procedure and Evidence Act, in practice in the whole country. It was also well-known that Burma's legal community was competent previously. Today, there are still a large number of proficient lawyers, judges and judicial staff who are qualified to function a judicial system that will facilitate the emergence of a Fair Trial.

In spite of those aforementioned positive antecedents, one of the major issues that hinders the emergence of a Fair Trial currently in Burma is 'feeling of fear' prevailing among all people, regardless of whether they are judges, lawyers, judicial staff, witnesses, complainant, defendant or other laymen. As a consequence, the families or relatives of victims dare not file lawsuits against the governmental authorities who commit human rights abuses. The families or relatives of the accused

dare not challenge the illegal measures of the arresting or investigation officer or prosecution counsel or judicial staff or judges or other local authorities. Many times, the lawyers who are mainly responsible to protect the rights of their clients – complainants or defendants – hesitate to courageously make cross-examinations against the prosecution or defense witnesses or provide powerful arguments pointing out the malfunction of current judicial system, judicial proceedings or other judicial practices. Often, the judges themselves dare not adjudicate the cases justly and independently. Out of four potential ways of 'Bias', 'Baya' – feeling of 'fear' – has become the most challenging factor, not only for the judges but also for respected people in judicial processes, that is too strenuous to be sidestepped. In addition, when the corrupt practices negatively influence the function of judiciary, the whole justice system has been rendered dubious. As such, the possibility of exercising the Right to a Fair Trial has been fading out. And, currently in Burma, Fair Trial rarely exists.

In order to overcome this situation, only one solution might not be enough. It may require to consider wider scope. In general, we should examine the social landscape in Burma. To this end, awareness raising on the concept of a Fair Trial among the public may be of paramount importance. A state constitution that guarantees the rule of law should come into existence. Pressure should be created to cancel unjust laws and confer the power to issue directions in the nature of Habeas Corpus, Mandamus, Prohibition, Quo warranto, and Certiorari to Supreme Court. The governmental institutions such as a human rights commission, constitutional courts, ombudsman, and other independent institutions need to emerge in society. Independent media should emerge and be proactive. Independent bar associations should be reactivated. The previous Bar Council Act should be restored. Harmony between 'Bar and Bench' and between 'Bench and Legal Community' needs to be maintained. Relations with international and regional legal, human rights and academic communities should be promoted. In so doing, the interference of the executive in the judiciary shall gradually be minimized. Finally, feeling of 'fear' in the mentality of people might disappear in the long run. Confidence and aspiration of people to apply the legal and judicial system in general and trial in particular, as a peaceful means to resolving the conflicts within their own local community may be a major encouraging factor to facilitate a Fair Trial to emerge. For this purpose, further

recommendations will be made as follows:

1. Creation of a Proper Social Environment

A proper social environment is one in which people sympathize, respect and appreciate each other; tend to solve their conflicts peacefully and, promote their individual benefit in consonance with the well-being of their society. This can become a reality only when social equilibrium exists in every sector of a society. To this end, all exercises of discrimination must be minimized; social harmony must be maintained; and, social order with high regards to human dignity must be preserved. Only then, can a proper social environment be created and that can underpin a Fair Trial.

2. Legal Education and Court Practices

Legal education cannot be considered in isolation from social environment. The trials are a part of a social mechanism that deals the social issues on a daily basis. As such, legal education requires a proper reference to the court practices and drawbacks of existing trial procedures should be observed. And on the other hand, the courts need to heed the positive and negative criticism made by legal scholars as a part of legal education. The two processes will support each other resulting in smooth function of a Fair Trial.

3. Constitution

Such a constitution – that guarantees the equality before the law, formulates the judiciary as a separate entity from the executive and the legislature, prescribes the formation and functions of independent associations including lawyers and judges' organizations, and the protection of the judges for their judicial tenure and professional security – should be in existence.

4. Prevailing of Just Laws

Whenever a law is to be enacted, with reference to human rights concepts and international human rights laws, 'a form of law' and 'content of law' need to be addressed in order to produce just laws.

5. Procedural Due Process

Procedural justice should be applied as a 'means' to achieve the substantive justice. As such, procedural due processes, that do not facilitate seeking substantive justice, need to be revised.

6. The Scope of a Trial

For the cognizable cases, the scope of a trial should commence as soon as the police officer, who arrests a suspect or who is making investigation, produces the accused in court and seeks the authorization of remand for continued detention. For non-cognizable cases, it should commence immediately after his or her direct complaint has been filed in the court.

7. Protection of Rights of a 'Detainee'

All arbitrary arrest, including preventive detention, against a person should be prohibited. Once an unlawful detention takes place, the spouse, relative or any interested person of a detainee should have the right to apply for a direction in the nature of a Habeas Corpus in a competent court, not necessarily to be Supreme Court.

In the event that police fail to file a complete and formal case after the 90 days detention period in total for an offense punishable with rigorous imprisonment for a term not less than seven years, the detainee should be discharged and the case should be dismissed. A similar procedure should be exercised after 45 days detention period for an offense punishable with imprisonment for a term less than seven years. Furthermore, during the remand detention period, police should comply with strict procedures whereby copies of entries of the investigation diary are made. The CRPC may be required to mention that the investigation diary must contain detailed daily entries such as the time at which the investigation began and ended, the places visited by the investigator, and a statement of the circumstances ascertained through the investigation.[1]

[1] Hector, C., Human Rights Advocate, Malaysia. Administrative detention in Malaysia- A brief overview. A paper submitted in Asian Seminar on Fair Trial; held in Hong Kong on 7-12 November 1999.

A detainee shall not be placed in any secret detention centre or under solitary confinement. No physical or mental torture against him or her be practiced while being detained. Every detainee shall enjoy the status enshrined in the international human rights law.[2]

8. Protection of Rights of a Victim

The existence of the organizations that provide assistance to the victims should be facilitated. Particularly, if the victim is female, more attention should be provided. Complaints made by the victims should be properly, and systematically recorded. The certified copies of such records should be available. The victim should have the right to ask information on the action taken by the investigating officer to realize the progress of investigation. Alternative spaces or state institutions for making further complaints against the police, prosecution and other officers should be created when they fail to take action on the complaint or fail to proceed the prosecution effectively.

9. Denial of Special Criminal Courts

Under any circumstances – whether be it in a state of emergency or not – a suspected accused should be tried merely in the ordinary courts established in accordance with the law. The existence of Special Criminal Courts or similar tribunals outside a formal judicial mechanism should be denied.

10. Public Trial

Subject to limited exceptions aforementioned in Chapter (2), to hold public trials for all criminal proceedings should be a fundamental principle.

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[2] Standard Minimum Rules for Treatment of Prisoners, Adopted by the first UN Congress on the Prevention of Crime and the Treatment of Offenders; 31 July 1957 and 13 May 1977.

11. Judicial Tenure

Judges shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office;[3] a charge or complaint made against a judge shall be processed expeditiously and fairly under an appropriate procedure;[4] and, judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.[5]

12. Impartiality

(a) The judges should fully comply with the principles of the Rule of Law, State Constitution and other laws, but not men – whether they be governmental authorities or other influential people. In this regard, the spirit of independent judiciary enumerated in Burma's 1947 constitution be revived.

(b) In the event that there is close link between the judge and one of the contra parties in the case, he or she should not be a judge to adjudicate that case.

(c) In the event of having financial interest of a judge in the case, he should be disqualified, unless the interest is disclosed and no objection is made by both parties.

13. Legal Aid

legal aid is the sine qua-non for people so that justice can be sought by the vulnerable sector of the society. Awareness that we have the backing of lawyers in legal aid programs strongly encourages people to attempt to enforce their inalienable rights. Legal aid should be regarded as an instrument for achieving equality before the law. It also facilitates un-equals to be equalized while they are passing through the judicial process.

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[3] Article (12) of Basic Principles on the Independence of the Judiciary; Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[4] Ibid Article (17)

[5] Ibid Article (18)

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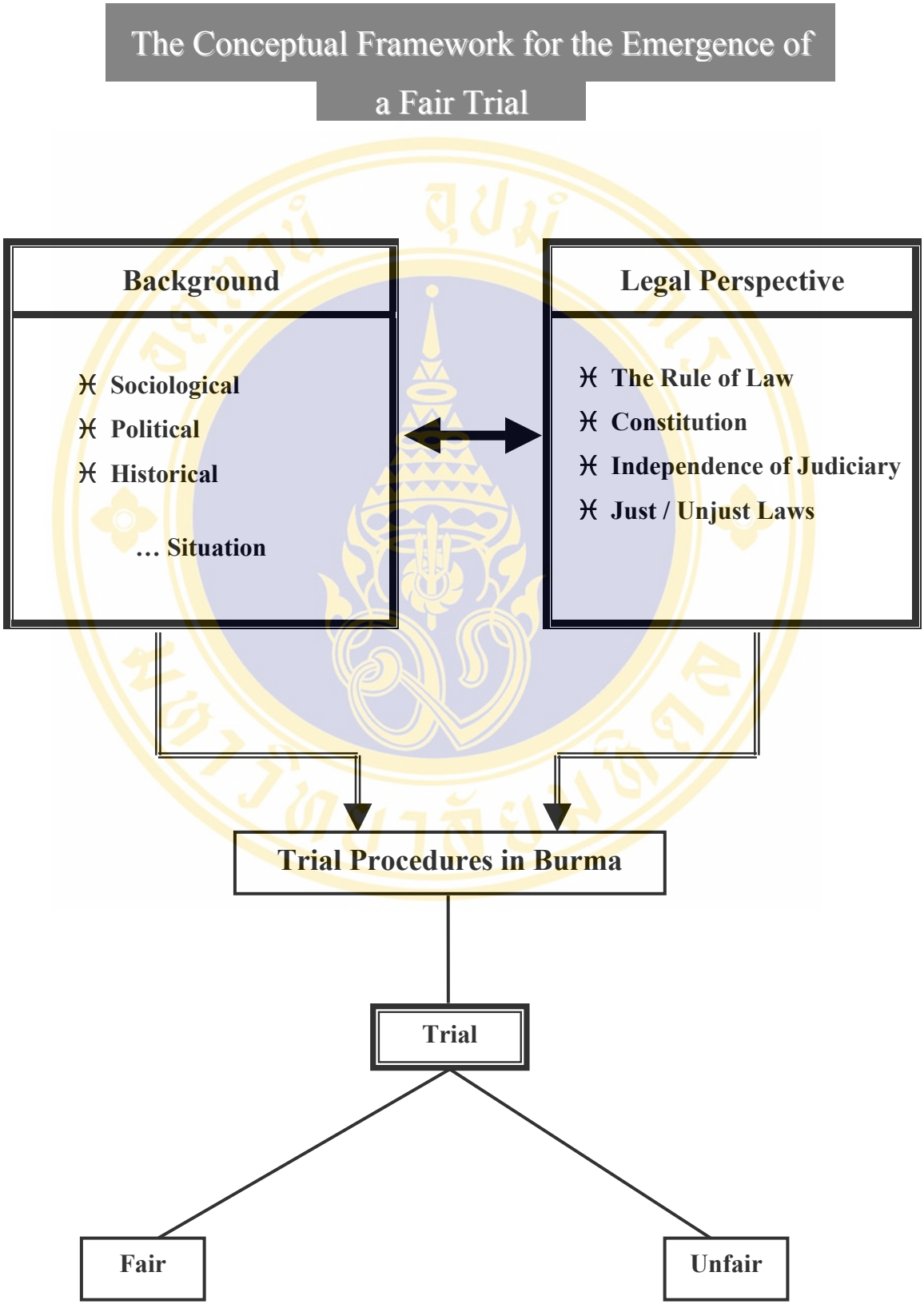
APPENDIX



BIOGRAPHY

NAME	Mr.Aung Htoo (aka) Mr.Khin Maung Aye
DATE OF BIRTH	23th April 1950
INSTITUTION ATTENDED	Rangoon Arts and Science University (Burma) Bachelor of Arts (B.A) (1968-72) Registered Law (R.L) (1983-85) Mahidol University (Thailand) Master of Arts in Human Rights (1999-2003)
PROFESSIONAL EXPERIENCE	Attorneyfrom 1977 to 1988 General Secretary of the Burma Lawyers' Council from 1994 till 2003
GRANT FOR STUDY AND RESEARCH	Norwegian Burma Council
HOME ADDRESS	201/5 Soi Sripanit, Ban Htone Htaung Maesod, Tak 63110 Thailand 66-55-542 163 Mobile: 66-1- 487 0262 E.mail :aunghtoo@access.inet.co.th