

## Constitutional Developments in Burma and Malaysia

**David Steinberg:** I'd like to thank the Sasakawa Peace Foundation USA for all of their arrangements and for hosting this. It's a privilege to chair this forum. I think this is the first serious review of the Burmese constitution in Washington, and whatever we may think of it and however it was approved, it was "approved" in the May 2008 referendum. It's going to be important into the future, and it's best we understand the provisions and how it will impact that society. And also, externally, how other states and peoples will react to it. It has had a long gestation period as we know, so we'll try to turn the sixteen and some years into a couple of hours here today. Dr. Myint Zan?

**Myint Zan:** Thank you. I would like to thank the Sasakawa Peace Foundation USA for sponsoring this seminar, and also Professor Steinberg for his kind comments and my fellow panelists for coming.

### Drafting Processes

My focus will probably be more on Burmese developments, but I will include some things on Malaysia as well. What are the possible bases of comparison between these two countries? The commonalities in a very rough sense are that both Burma/Myanmar and Malaya/Malaysia were former British colonies that were "bequeathed" aspects of common law and very roughly the British Westminster system of governance at the time of the independence of each country.

So there are three Burmese constitutions and one, the only, Malaysian constitution. The Malaysian constitution is the 1957 Federal Constitution of Malaya, and the Burma constitutions are basically in the periods between 1947 to 1962: the 1947 Constitution; between 1974 and 1988: the 1974 One Party or Socialist Constitution; and the 2008 Constitution - I don't know whether it should be called the 2008 Constitution because the constitution has been adopted but it is not yet in force, as yet, strictly speaking.

I will now briefly compare the constitutional drafting processes. The Malayan Constitution of 1957 was drafted by the Reid Commission. If my understanding is correct, it was entirely composed of foreigners. In contrast, the 1947 Burmese Constitution was drafted by a 111-member Constituent Assembly consisting only of Burmese men. I think, gender in 1947, especially in Burma -- gender was not an issue, but of course, since the 1970s, 1980s, gender has become an issue, so they were all men, that is those who drafted the 1947 Burmese Constitution. And the lead drafters were also Burmese barristers. Among them was U Chan Htoon, who became Attorney General and also one of the judges of the Supreme Court of Burma. The drafting period of time was between June and September 1947. It was adopted on September 24, 1947 by the Constituent Assembly, it was a unanimous adoption.

The 1974 Constitution drafting process was from 25 September 1971, when the constitution drafting commission was

formed, and it was put to a referendum in the period of 15-31 December 1973.

I think most of you know that in 1962 there was a military takeover, and even though the Revolutionary Council never formally announced the abrogation, the abolition, or the suspension of the constitution, we can safely assume that the 1947 Constitution died sometime after March 1962. And definitely by March 1964 it was dead because on 23 March 1964, the Revolutionary Council announced the Law Protecting National Unity where all political parties were abolished. The 1947 Constitution embodied a multi-party system, so it was gone. The Supreme Court and the High Courts of Burma were abolished by the Revolutionary Council by decree on the 30<sup>th</sup> of March 1962 so these apex courts formed under the 1947 Constitution were gone also.

By the way, I am not affiliated with any opposition groups, nor any government groups. I speak independently as a scholar. I want to make that very clear.

So some opposition groups or some scholars want to maintain that the 1947 Constitution is still in force until it is formally abrogated. I edited an article in an academic journal where a writer claimed this, but I would say that is almost like saying that the Czarist constitution of 1917 was still valid in 1963.

Sri Lanka has had three constitutions but I don't think, even though I have not read them, I don't think the latter constitutions attack the earlier constitutions; but the preamble of the 1974 Burmese Constitution attacked or at least criticized the 1947 Constitution

by stating that "because of the weakness in the 1947 Constitution, the cause of socialism came under near eclipse", This is the only example that I know of where the latter constitution attacked the earlier constitution in the preamble.

The yet-to-be in force constitution's drafting period was, as Professor Steinberg mentioned, from June 1992 to the time the draft was completed in February 2008, then "adopted" in May 2008. That is nearly 16 years. On 23 June 1992, selected representatives from political parties were invited to meet with those from the government to talk about a convention, and the national convention started on 9 January 1993. The constitutional referendum was held and the Constitution was adopted in May 2008, so it's taken 16 years, roughly.

### **Core Provisions**

Now, a brief comparison of the core provisions. It has to be brief. I think I've already spent five minutes. The 1947 defunct Burmese Constitution, roughly speaking embodied a prime ministerial rather than a presidential system. In comparison, basically, the Malayan-Malaysian Constitution is a prime ministerial system and the Philippines Constitution is a presidential system because they do not have a prime minister. But even if one has a prime minister, the French Constitution probably can be described as a presidential constitution because the president has more power, roughly.

There are provisions regarding the separation of powers and the independence of the judiciary, a multi-party political system and a unitary system with a possible move towards a

federal system. The 1947 Constitution did give the right to, after a ten-year waiting period and fulfilling certain criteria, the Shan State only, I think, to secede. S-E-C-E-D-E - sorry to spell it out. I'm a law lecturer and many of my students cannot distinguish between C-E-D-E, cede, give up territory, and secede, S-E-C-E-D-E, secede, not to cede but to secede: that is to break away from a state to establish a new state (in rough terms). More than 10 years after the 1947 constitution, in 1962, there was a federal seminar on autonomy and the rest is history. The 1962 military coup took place, basically.

The Federal Constitution of Malaysia is, like the 1947 Burmese Constitution, partly based on the Westminster system, on a separation of powers, and there are current moves to restore the independence of the judiciary. The recent move is that about three weeks ago before I came here, the then Law Minister - I was very impressed when he visited our campus on 23 August. He was very outspoken and he was quite critical in a sense about his own government, and I was telling my colleagues and students that he won't last long in his post unless he makes a pretense, and he did not. He resigned. Recently there were a series of arrests, three persons were arrested under Malaysia's Internal Security Act. And he said that under the Internal Security Act this is not right, and he resigned. So I was right when I predicted that he won't last long; within three weeks he was out of the Malaysian government.

Okay, so there were moves under the current Badawi administration to restore the independence of the judiciary. I think most of you know about the 1988

judicial crisis in Malaysia. It happened the same day, on 8 August 1988, as the uprising in Burma started. On 8 August 1988, the Lord President of Malaysia was sacked, but I don't want to go into details because of the time factor.

So anyway, Malaysia is still a multi-party system, it's apparently a genuine multi-party system. I don't know whether it's "disciplined" or not because the Burmese constitution mentioned a "genuine and disciplined multi-party system." At least it's a quasi-genuine multi-party system because for the first time in Malaysia the government has lost its two-thirds majority. That was in the March 2008 elections. I was very surprised. I mentioned to my students that the prospect of the Barisan National government losing power in the elections on the 8<sup>th</sup> of March 2008 is slightly less than the prospect of the sun exploding on that day, but the sun almost exploded. The Barisan National lost in Peninsular Malaysia, and if it was not for the votes in Sabah and Sarawak they would not have won the election. If there was a proportional representation system in Malaysia - and there is not - the Government would have won only by a few seats. As it is, they have about a 28-seat majority in the Parliament, though they no longer have a two-thirds majority.

But anyway, the 1974 Burmese Constitution is a single party constitution. Article 11 states that "the Burma Socialist Programme Party is the single political party and it shall lead the state." In the 1974 Burmese Constitution, there is no separation as well as no independence of the judiciary. The members of the judiciary were members of the legislature. This is not

the case with the 1947 Constitution. This is also not the case in the 2008, the current constitution adopted, because this constitution mentioned that the judges of the Supreme Court must not be members of the legislature. But in the 1974 constitution it was that way.

Now, I said “praetorian system” because it requires 25 percent military participation in both houses of the legislature. The president is ensured to be a military man. It said that the president must have a military administrative and political outlook. I don’t know what it means by “outlook.” The late president Dr. Maung Maung, he served for six months or a year, I think, in the military when he was about 20, does he have a military outlook? I don’t know. I’m talking about Dr. Maung Maung, I’m not talking about - I won’t name names here because I know some people are here, so I’m not mentioning the unmentionable name. I’m talking about Dr. Maung Maung. Would he be considered a person who has a military outlook? I don’t know.

Also, the president can hand over power to the commander-in-chief in an emergency and after consulting with the National Defense and Security Council, six or seven of the members of them (out of eleven) are military men.

Both the 1947 and the 1974 constitutions came to an end as a result of military coups. Neither the 1962 takeover, nor the 1988 takeover was authorized by the constitutions in force at that time. But here, now, this is probably the first time a - almost a contradiction in terms! - constitutional military takeover is *a priori* (in advance) authorized. But it doesn’t matter whether it’s constitutional

or unconstitutional. I’m in agreement with the philosopher Michel Foucault and the jurist Hans Kelsen in that the one who has power also has “legality.” So basically, this is prior constitutional approval of a military takeover. I think you can nitpick about the exact terms and wording used in the Constitution, but basically the core provision amounts to that.

### **Civil Rights and the Judiciary in Burma**

Now, I’d like to give an example to demonstrate the erosion of civil rights and the independence of the judiciary in the 1949 to 1995 period in Burma. The case that I am mentioning, very few Burmese lawyers would even have heard of this case. At least those under 40, or even much older, would probably not know about it. This is a case decided by the Supreme Court of Burma in the 1949 BLR. BLR means *Burma Law Reports*, the judgments of the Supreme Court, it is written in English<sup>1</sup> so you can follow it. What happened was that the Communist Party of Burma distributed leaflets denouncing U Nu, the Prime Minister. I’ll say it in Burmese: “*Phet Sit Lu That Thamar Thakin Nu Asoye ya,*” that is, “Fascist murderer Thakin Nu’s government.” These leaflets, distributed around 1948-1949, called the then prime minister of Burma a fascist murderer, and the leaflets’ distributors were arrested and charged under the Public Order Preservation Act. The Supreme Court released them saying that this is not a valid justification for preventive detention under the Public Order Preservation Act.

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<sup>1</sup> Ma Ahmar v Commissioner of Police and One, 1949 BLR (Burma Law Reports) SC (Supreme Court) 39.

I want to mention a bit more about U Nu. U Nu was called a fascist murderer in 1949, but in 1962 he wrote in his memoirs that when the military took over at 2 a.m. on the 2<sup>nd</sup> of March, he was arrested in his home, and after his arrest, the soldiers who arrested him talked into the walkie-talkie, “We have got the Maggot. We have got the Maggot.” Maggot was the codename for U Nu. So he wrote in his memoirs how he mused about going from prime minister to “maggot” in a moment. So he was called a fascist murderer in 1949, was called a maggot in 1962, and later on, he was called, in Burmese, *Pyipyaygyi U Nu* the “expatriate U Nu,” the “big fella who ran away from the people and the country.”

But anyway, he was detained, and was released on the 27<sup>th</sup> of October 1966, but later on - and I will jump ahead here - in 1995 when U Nu died, students who sang democracy songs in his honor at his funeral were arrested and jailed for five to ten years, and then the utterly subservient Supreme Court did not release them. You can see the irony: in 1948-1949 when those leaflets were released calling Thakin Nu a fascist murderer, those who distributed the leaflets were released, but in 1995, those who sang democracy songs in honor of U Nu at his funeral were put in jail for four to five years, and the Myanmar Supreme Court did not release them. They have been released by now because they have served their time, but you can see the difference.

### **Amendment Process**

Now, the next part is the amendment process. In the 1947 Burmese Constitution, there was only one major

amendment; there were a few minor ones, but the one major amendment is regarding religion: Buddhism being the state, or perhaps more appropriately, “official” religion, though I am not sure exactly what English term was used when the 1961 Constitutional amendment was made. I think it is something like “Buddhism is accorded special status as the religion worshipped by the majority.” At the time of the passing of the Constitutional amendment in 1961, Muslims and Christians, who constituted less than seven percent of Burma’s total population, insisted on their right not only to practice but also to preach their own religions. But with the 1962 military takeover, the 1947 constitution came to an end and this provision also became ineffective.

Now, Malaysia apparently has had over 100 amendments to the constitution since independence. The late Lord President, that means the chief justice - they used to call them Lord President - Tun Mohamad Suffian said in a conference - and I heard it with my own ears - that someone went to a bookshop to ask for a copy of the Malaysian Constitution, and the owner said, “we don’t sell periodicals,” because the constitution changes periodically. Imagine a former chief justice in Burma daring to talk publicly like that about the current constitution: “We don’t sell periodicals.”

But one major amendment in 1971, after the 13 May 1969 riots in Malaysia, was the prohibition of the raising of sensitive issues even in Parliament, which would include challenging the concept of *Ketuanan Melayu*. Some say the phrase means “Malay supremacy,” some say “Malay sovereignty,” “supremacy,”

“sovereignty,” “dominance,” I don’t know. This cannot be challenged.

One of the sensitive issues was that the Malay rulers, there are nine Malay rulers, they cannot be sued, they cannot be criminally prosecuted. But in 1993, after the Sultan of Johor assaulted a hockey coach, the Malaysian Parliament amended the constitution, partially removing the immunity of the sultans. Now, the sultans can be sued and prosecuted, but only after the written consent of the Attorney General and not in ordinary courts but in special courts.

Under the 1974 Burmese Constitution, basically, one-party rule can only be changed with 75 percent of the members of the *Pyithu Hluttaw* (the legislature) approving it and more than 50 percent of the electorate must also approve it in a referendum, but it was changed in 1988 without going through the process. The *Pyithu Hluttaw* on 11 September 1988 decided to hold multi-party elections within three months, but of course SLORC took power on 18 September so that didn’t happen. But when the *Pyithu Hluttaw* said that overcoming the constitution (in Burmese, *Achaygan Upadei Go Kyaw Lun Ywei*), we will hold elections within three months.

Now, amending the current constitution is even more difficult. Certain key principles require more than 75 percent, I think, of both houses of the legislature to approve of the changes and more than 50 percent of those eligible to vote - not who actually vote - those who are eligible to vote must approve of the changes in a referendum. So it is very, very difficult. I think it’s almost impossible to change unless a 1988-like situation arises, where the *Hluttaw*,

“overcoming the Constitution,” scheduled multiparty elections. That is, you cannot change the army’s leading role and many other basic principles, including the method of the selection of the president and the amendment process of the constitution itself. There will be a 25 percent military representation in the legislature, so it would be very difficult to change the constitution because they will not vote for any changes and because they are appointed by the commander-in-chief.

Very briefly, I think I have to summarize now, Islam is the religion of the federation of Malaya/Malaysia. There was no such provision in the Burmese constitution until the August 1961 constitutional amendment was made, which in any case died along with the 1947 constitution after the military takeover of 1962. There is a provision concerning religion in the current constitution and this is my translation: “The state recognizes that Buddhism is a religion which has the distinction and characteristic as a religion worshipped (or adhered to) by the large plurality of the population.” There are also four or five other religions named: Christianity, Islam, Hinduism and Animism. But Sikhism, Baha’i, and Judaism, are they not recognized? What is their status? There are Sikhs, Baha’i, and Jews in Burma, even though they are very small minorities.

The referendum. I think Professor Steinberg already mentioned the referendum. I don’t want to talk too much about it because it’s astonishing as regards the percentage of the people who “approved” the constitution in the referendum. As a comparison, in Venezuela in the 2007 referendum, the

government of Hugo Chavez lost. In Thailand in the 2007 referendum, the government got 57 percent approval; the government just barely won regarding the adoption of the 2007 Thai constitution. In Chile, the Pinochet government lost the referendum that was held in 1988. In all of the above instances, those who opposed the Constitutions were able to openly campaign against them.

### **Future Prospects of the Rule of Law**

Okay, I'm coming to the end of my presentation. The Malaysian government has lost the two-thirds majority and the power to change the constitution, but the constitution and its core provisions will remain.

Burmese military domination will continue in a "constitutional fashion." I don't think in the arc from Chile to Fiji to Pakistan to Argentina to Nigeria, where they've experienced military rule, I don't think there were such provisions in their constitutions that entrenched the military as much as the Burmese constitution does.

On the rule of law in Asia. What is Asia? "Asian values" - it's very difficult to talk about the rule of law in Asia. The rule of law comparatively, there are various definitions of the rule of law and the rule by law. But even among scholars, they say that the rule of law concept "deceives" those both on the giving end and the receiving end. So is it rule of law or rule by law in Burma and in Malaysia? In ASEAN we have former British colonies, there are four civil law countries, Thailand, Cambodia, Laos, Vietnam; Laos and Vietnam being one-party states; and a former Dutch colony,

Indonesia. And as far as the rule of law is concerned, I attended a constitutional seminar in March 2008 and I heard a Filipino academic saying that "the good kid on the block is Indonesia," and compared to ten years ago, I think it is "a good kid on the block."

But look at the rule of law comparison between the Democratic People's Republic of Korea and the Republic of Korea. They speak the same language - the same culture, look at them. I think the rule of law in the Republic of Korea, dare I say, but I won't name names, is better than in some ASEAN countries where the rule of law was bequeathed by the British. I'm not talking about Burma now, but I will not mention the name of the country because when I was in that country I was told that this is a very dangerous topic to discuss, the independence of the judiciary, so I won't mention the name.

Compare Dr. Maung Maung, in his book, *Burma in the Family of Nations*, first published in 1956. In some of the books, on the opening page dated 27 June 1956, this statement by Dr. Maung Maung appears. It's not in all of the books, but in some of the books there is a statement by Dr. Maung Maung, a *stelling* [proposition] of his thesis. At point 6, Dr. Maung Maung wrote: "The British brought the rule of law to Burma and it is good." I don't know whether it is good or bad. Later, he said this (the British bringing the rule of law) is bad! Everything is bad. After 1962, he said everything the British did was bad, but in 1956 he was praising the British to high heaven.

Hence the rule of law in Asia is open to generalities. But now, I would end with

hope, I would end with a cliché. The cliché is from Professor Julius Stone, another international lawyer. He is very pro-Israeli and I don't agree with him, but anyway I will mention him. He has a book called, *Of Law and Nations: Between Power Politics and Human Hopes*. I am by nature a pessimist, and I have never (disappointingly) been disappointed in my pessimism as far as Burmese political developments are concerned, never. I wish I were wrong. Just as the law of nations is juxtaposed between power politics and human hopes, the rule of law within nations, especially in Asia and Southeast Asia, will always be at the interface of human hopes and power politics. Thank you.

**Dominic Nardi:** Well, this is a bit odd because we're primarily talking about the 2008 Burmese Constitution and this constitution is not even in force yet. It's been adopted through the referendum, but it is not in force. So there are two ways to understand the constitution. First, you can call up your favorite Burmese astrologers and see what they have to say, or second, you can use comparative constitutional law and see what other countries have done and then try to see whether Burma might follow a similar pattern.

### **Amending the New Constitution**

The first thing I want to talk about is this whole amendment issue. This has received a lot of attention in the Burmese press and there has been a lot of debate on how bad it is. Many people think it's a horrible provision. I personally don't think it's going to matter as much as many in the opposition believe it will.

First of all, if you have 75 percent of the parliament and you just need one extra vote, chances are you're going to have enough political power to do other things. I don't think the central question is whether anybody will get to that 75 percent or not. For example, there are provisions in the constitution which let the speaker of both houses of the parliament and the president appoint judges to the constitutional tribunal. This constitutional tribunal interprets the constitution. If you can't amend the constitution, then another way of changing constitutional interpretation to fit your needs is to appoint judges more favorable to you to the court, which is something you can do without having more than 75 percent of the parliament.

And so that's one issue and that's exactly what we do today, and that's exactly what our presidential candidates talk about, when John McCain says he wants a judge that will interpret the law and not make it, or Obama says he wants judges who will empathize with marginalized groups. They're talking about appointing judges to change the constitutional interpretation without going through the amendment process, because I frankly think, in America, we've got a much more difficult amendment process. We have to get two-thirds of Congress plus three-quarters of the states. If you think it's hard to get 270 electoral votes in an election, for a constitutional amendment you have to get red states and blue states together on a very, very difficult proposed constitutional amendment. So it's sometimes through constitutional interpretation that you can get around some of those institutional barriers.

And actually there's a very good example of this where there was a constitution of a very prominent state that had no amendment provision and the government of this country realized the constitution was not working, so even though this constitution had no provision for amendments, they simply called another national convention and wrote another constitution. That's the Constitution of the United States, and it replaced the Articles of Confederation. So such things can happen. Constitutions can change even with difficult amendment provisions so that's one thing I wanted to mention. The restrictive amendment provision in the Burmese Constitution might not be the huge impediment that some believe.

### **Constitutional Court**

The second thing I wanted to talk about is something that most of you probably have not even heard about, even if you've followed Burma very closely; the fact that this constitution has a constitutional court or a constitutional tribunal. It's received very little attention and it seems like a very odd institution to place in this constitution. In the U.S. and in many other countries, we tend to think of constitutional courts as guardians of human rights or protecting the weak from government, and in some sense it's true, although if you go back to say, 200 years ago, to the founding of our nation, the Supreme Court was very often seen as a restraint on majority rule, a restraint on democracy. Thomas Jefferson would not have seen the Supreme Court as a rights-enhancing institution. It actually inhibited them. Much of the court during this time was comprised of federalists, from members of the other party, so it inhibited his policy goals.

So, what is this constitutional court doing in Burma? I suggest that it has three main functions or it will have three main functions once it's operating. First, constitutional courts can help administer the law. Burma has a lot of law from the British colonial era, a lot of it is outdated, probably conflicts with what is currently on the books, as well as situations that have changed. Also it's going to be very difficult with the new constitution for the central government to oversee government officials at the state level, the regional level, lower levels. Constitutional courts can help oversee the law and how those other government agents act by having people at lower levels bring lawsuits to the constitutional court or other government officials bringing lawsuits to the constitutional court. The court can then interpret the law and that precedent will be binding upon all the other courts and in all of the other government agencies in the system.

So for example, in the U.S. we do this very frequently with environmental law. We allow environmental organizations to bring lawsuits against a government official or state government if they violate, say, the Endangered Species Act, and that way the government does not have to spend the resources to enforce the Endangered Species Act at every single level; it lets the general public do so. That's one way the court might work. This also happens in China with the Administrative Litigation Law, where China allows - as you probably know, Beijing has a lot of trouble controlling provincial governments, so China allows citizens to bring suits in courts for violations of administrative procedure or property rights, and those individuals do the job of the Beijing

central government in enforcing the law on lower governments. So that's one function this constitutional tribunal might have. And it helps that the constitutional tribunal members are appointed every five years, so they will be responsive to the political demands of the parliament and of the president.

Another function will probably be in the case that there's a dispute between different branches of government, say the legislature or the executive, or between the state government and the central government, the constitutional court can mediate those disputes. This happened in the 1960s with President Charles de Gaulle and the French Republic. De Gaulle had essentially given himself new law-making powers as president and did not want the chamber of deputies, part of their parliament, to interfere or infringe on his powers, so he set up a *conseil constitutionnel* basically to monitor the legislature; to make sure that it stayed on its side of the law-making fence and president De Gaulle retained his powers.

I foresee something similar happening in Burma with this constitutional court where if there is a dispute over constitutional interpretation between a state *hluttaw* or legislature and the central government, then the central government or the state government can file a complaint in the constitutional court and then they'll have a body to adjudicate it, and since the constitutional court members are appointed by the central government, very often, I predict, the court will rule in the central government's favor. So it's a way of mediating these disputes.

A third possibility for this court is what in comparative constitutional law we call an elite insurance mechanism or insurance theory, where if, for whatever reason, the political situation changes dramatically in Burma and we see the opposition take over one or both houses of the legislature or even the entire government, the constitutional court ensures that minorities will have some protection of the law. In transition from less liberal forms of government to more liberal forms of government, we often see these countries establish courts so that the elites that are leaving power feel that they have some protection from prosecution. This happened in South Africa where, during the negotiations from apartheid to democracy, the whites and the Zulu minorities needed some sort of insurance that their rights wouldn't just be trampled on, that this wouldn't become a black African majority dictatorship. A strong constitutional court was one of the mechanisms to assure minorities in the system that their rights would be respected. So, if the current holders of power ever feel that their political situation has changed, the court could be one means of protecting their interests even after they're out of power.

So just a couple of things to watch out for in the next few years when constitutional law develops a bit more. And just as a final thought, if anybody here is thinking about or knows people practicing law in Burma, I think they should definitely start looking at constitutional law; there aren't many constitutional lawyers now because there hasn't been a constitution, but with all these ambiguities in the current constitution, it should be a hot practice. Thank you.

**Pek Koon Heng:** Thank you. I'd like to begin with some general comments about Dr. Myint Zan's observations on constitutional developments in both countries, which I enjoyed, and then focus on six specific points pertaining to Malaysia which he raised.

Malaysia and Burma began their existence as independent states with constitutions based on the British parliamentary model. However, unlike the direction taken by Burma where the military has taken over the country, in Malaysia, the democratic ideals and institutional arrangements for multi-ethnic accommodation in the 1957 Constitution have, I believe, largely survived, despite two periods of democratic rollbacks.

The first was in the wake of the 1969 riots when, as Dr. Myint Zan pointed out, civil liberties and freedom of expression were severely curtailed. The second was during the 21 year-long strongman rule of Mahathir when legislative powers, judicial independence, rule of law and executive accountability and transparency were sharply eroded.

As Dr. Myint Zan observed, the original draft of the constitution was drawn by non-Malaysians in the Reid Commission. But importantly, it was significantly modified because it was not acceptable to the Malays and UMNO, which then as now constituted the power center in the country. The Reid proposals gave far more rights to non-Malays than were acceptable to UMNO. The final document guaranteed Malay special rights, recognized Islam as a state religion, and made Malay the sole national language. In return, non-Malays

received citizenship based on right of birth.

### **Key Features of the Malaysian Constitution**

Now, the first of the six key features that I'd like to highlight is the role of the Malay rulers. First, the nine sultans are the symbol of Malay political supremacy, protectors of Islam and guardians of Malay special rights. The constitution provides for a unique constitutional monarchy with a rotating head of state. The supreme ruler changes every five years when a new incumbent is selected from one of the nine sultans.

Second, it has a working federalism with elected state officials, and elected state governments and chief ministers in each of the 13 states. In the 11 west Malaysian states, a wide consensus exists regarding division of powers between the federal and state levels. There has been electoral transfer of power at the state level from time to time. For example, in the March 2008 elections, opposition parties organized under the People's Alliance won in five states, the largest number to date. But the People's Alliance remains in the opposition at the federal level.

State-federal relations are more contentious between Kuala Lumpur and the East Malaysian states of Sabah and Sarawak. When the two states joined Malaysia in 1963, the constitution was amended for their incorporation. They were granted much wider autonomy over matters relating to immigration, finance, education, culture and religion. Today, although many East Malaysians complain that they have not gotten the

full measure of autonomy promised, there is little talk of secession.

The third point regards the judiciary. The judiciary has, I believe, been highly respected over the years especially from 1957 to 1969. Although its independence was sharply curtailed and its reputation badly tarnished under Mahathir, the setbacks have not been irretrievable. Although judges were removed, the Lord President sacked, and justice bought, as evidenced by the Lingam tape scandal, fortunately, we are now seeing a restoration of judicial integrity under Prime Minister Dato' Badawi. However, it might take another generation for that integrity to be fully restored. I would argue that the Malaysian court system is more respected than that in any other country in Southeast Asia, perhaps other than Singapore.

The fourth point pertains to the role of Islam and Sharia law. Malaysia has a two-tier legal system, a secular court system that dispenses British-style civil and criminal law to the population at large, and a system of Islamic courts that applies Sharia law to Muslims in matters pertaining to family law, but not criminal, *Hudud* law. PAS (Parti Islam) would like to implement the latter as well but has not been able to do so. A notable development in recent years is growing fears, especially among non-Muslims, that Islamic justice is applied in an increasingly large arena of public life.

The fifth point is the role of the military. Unlike Burma, Thailand, and Indonesia, there have been no constitutional appointments of military personnel to executive or legislative positions. No

active duty officer in Malaysia has ever had a cabinet position or served in the Senate. This is even true in times of severe social turmoil such as the May 1969 riots. After assisting the police in quelling the riots, the military promptly retired to the barracks.

The final point pertains to the curtailment of civil liberties. Dr. Myint Zan says a hundred amendments have been made to the Malaysian constitution. Other constitutional scholars, including Shad Faruqi, claim there have been at least 650 amendments, including those made to the Internal Security Act, the Sedition Act, and the Official Secrets Act. Those amendments represent the biggest departure from democratic norms. However, the application of these acts is nonetheless subject to procedural restrictions. At present, detainees apprehended under the ISA cannot be held indefinitely and incognito. They have to be charged in court and their families be informed of their whereabouts in a timely fashion. It is not a Guantanamo situation where a person can disappear from sight indefinitely. Human rights groups, such as SUARAM (Malaysian People's Voice) are vociferously critical of the ISA. The Malaysian Bar Council wants its repeal; even the government-appointed Human Rights Commission has asked for substantial liberalization of the ISA.

In conclusion, I will say that despite its shortcomings, the constitution is still highly regarded by Malaysians: by Muslims and non-Muslims, Malays and non-Malays. Non-Malays and non-Muslims see it as guaranteeing their civil liberties and religious freedom. It is their bulwark against the promulgation of a Malaysian Islamic state. Muslims and

Malays for their part see it as guaranteeing their special rights and political supremacy, and legitimizing their status as first among equals in Malaysia.

Malaysians today are transfixed today by the political drama in which Anwar Ibrahim and the coalition of parties he leads may be able to assume power. If that scenario does peacefully play out and produce the country's first full scale transfer of power, the Malaysian constitution will have lived up to the democratic ideals and aspirations of its citizens.

### **Constitutionalism in the Two Countries**

**Brian Joseph:** Thank you very much. When I was invited to speak, as I looked at the title, I wasn't exactly sure what the connection was between constitutionalism in Malaysia and constitutionalism and Burma, and if you listened to all of the presenters today, perhaps you are joining me in trying to tie these two subjects together.

As we just heard, the way constitutionalism has developed in Malaysia would give one hope in a more normal democratic society or a politically evolving society that these types of things can be worked out through a constitutional order that provides - and I think your point was fundamental to understanding Burma - among other things, the protection of minority rights. That all of the different parties in Malaysia have bought into and accepted the constitutional framework as protecting their rights within the Malaysian Federation is a good example.

In Burma, as I was listening to this discussion, I kept going back to this question: are we trying to put lipstick on a pig? Is there anything at all to this constitution drafting process, to the constitution at all that warrants our attention, our serious consideration? Are we simply looking at a process in a constitution that does absolutely nothing to advance democratic rights, the rule of law, or any of the other things which we have seen so clearly in the case of Malaysia, where there has been an entrenchment and development of the constitutional system, the judiciary, the development of political parties, independent political space? It has all taken place within the confines of a constitutional structure that has allowed for, in my opinion, two things: one is the protection of minority rights, and again, this is fundamental to Burma, we haven't heard about this at all, in how the new draft constitution of Burma deals with it; and the second thing is for the development of the rule of law. I know much less about Malaysia but from what I understand, as you were saying, for the lawyers, the legal professions, the judiciary is a respected institution in the country.

### **Power to Dismiss the Government**

So let me just turn to Burma a little bit and look at both the historical developments and the sort of effort on Dominic's part to dress up or look for the bright spots in this constitution. And my first point is it strikes me that the constitution drafting effort in Burma and the draft constitution itself offer us virtually nothing to which we can grab or hold. It's a constitution that may have some provisions which provide for protections, legislative action, a whole

range of things, but it has a fundamental principle, which we've seen in Pakistan for example, or a fundamental piece of the constitution which undermines its essential characteristics: the ability to dismiss the government. As long as the president has the ability to dismiss the government and hand over power to an individual, all the other protections serve no purpose because whoever's governing or whatever the opposition can do, once they overstep their bounds, the government is simply dismissed. And so whatever government is in power is constantly watching over its back to see how far it can be pushed before it gets toppled. To me that's a fundamental question.

The second thing is this: I've heard some people say if you look at Burma today, the opposition has zero percent of power. In the future they could have up to 75 percent of power. But if you look at the constitution and its provisions, in a sense, they will never have any of the power. They have a figment of power, they have a seat at the table, but there's no way inside that constitution or in the power structures of Burma that provide for the development of opposition political space.

Which gets me to the other point. It strikes me that what we're really talking about is the division of power and the distribution of power and the relationship among disparate, distinct peoples in a country. And in Burma, you have a fundamental problem to grapple with within constitutional matters, and that's the question of the ethnic nationalities. It's a multi-ethnic country. There are a number of efforts afoot to draft federal constitutions for Burma, draft state constitutions, most of

which are done by the democratic opposition forces, and one of the most perplexing problems is how you grapple with center-peripheral power arrangements. Where does the power reside? How much power resides in the ethnic states versus the Burman majority? And these are the questions in my opinion, more so than almost any of the other ones, which will present the most fundamental challenges in developing the rule of law, democracy, or constitutionalism in Burma. It's not the question of the appointment of seats - although that in my opinion negates all of the other components of this constitution - but they don't even begin to grapple with the fundamental questions of the country.

The second thing is we haven't really talked much about what we learned from this last referendum exercise, which took place in May, in which this new constitution was approved. And the challenge there again is how do you introduce a referendum that pretends to provide for some constitutional protection, some evolution of democratic space, that had its origins in a process that had no opportunity for inclusion, no ability for people to participate in the discussion themselves, and which when the constitution was put to a vote, was stolen in one of the more grotesque fashions that we've seen in a very, very long period of time.

So in a sense, the origins and the history that you point to, if one sees to the historical development of constitutions in Burma, looks at this 14-year constitution drafting process, it's very, very hard for me to see how there's any bright spots in this constitution drafting process. I hope to be proven wrong and

perhaps the 2010 elections which this constitution says will happen will lead to political space and the emergence of new political actors, but I'm not sure how the constitution actually provides for that in the process of drafting the constitution.

### **Role of the Military**

The other last point, let me make very quickly, is the question of the role of the military. I think it's interesting if you look at most of Burma's neighbors, and Malaysia is a great example and India is the other one - which of the countries in the region have had militaries which have continued to come back to power and what is the relationship between the emergence of military governments in both the Indian subcontinent and in Southeast Asia and the development of a constitution? I'm not a constitutional expert but I thought it was very interesting that you attributed the lack of the military as a political force in Malaysia largely to constitutional designs. If you look at the most troubled countries in the region from Thailand to Bangladesh to Pakistan, it's precisely the military which cripples the development of constitutionalism and democracy in those countries and it's precisely that aspect of the Burmese constitution which, in my opinion, undermines any hope we should place in it in developing a better system of government for Burma. There is a huge amount to be discussed here about which part of this has to do with the constitution and which part has to do with power sharing, but I would just put out on the table that I really do think, in a sense, when we're talking about Burma, that we have to recognize the reality of Burma and not what we wish it was.

So when you're talking about the historical development, constitutionalism, political parties, President Dr. Maung Maung, constitutional courts, we take it with a grain of salt that these things are really not what they sound like they are. These aren't constitutional courts that have any comparison to any other country that we can point to, this is how it works and this is how it may work in Burma. Burma has proven the exception, not the rule, in Southeast Asia.

So I think the challenges for us to think about is how do you move Burma from where we are today closer towards where Malaysia might have been in 1957 as it tried to craft a constitution that allowed for it to develop politically, economically, socially, over the past 50 years, instead of entrenching a civilianized or constitutionalized military rule? Because my fear is that's exactly what's happening in Burma today. Thank you.

**Steinberg:** Let me take the liberty of the chair and just make a couple of quick comments before I open it to the floor.

There are two things in the constitution that nobody mentioned so far. One, there is a get-out-of-jail-free pass for everybody in the administration. There is a provision in the constitution that says nobody can be tried for any crimes committed previously, under the previous government. So basically, it is a free pass for anyone, I think, at this stage, from the previous government.

Second, there is something that is positive in there and that is there will be no more demonetizations. That is very important; that they put that in the

constitution means they learned at least one thing, and that is important because it has devastated the country in the past.

On the question of the military and the British tradition and so forth, the question that I always try and get answered is why, with both of the militaries coming out of the British colonial tradition, did India never have a coup and Pakistan have four coups? I don't know the answer to the question but I'll throw it out there.

And the last thing is maybe a bit of cynicism, but constitutions have a whole bunch of functions. They can be ideals, they can be actualities, they can be hopes, they can be window dressing, they can be internal propaganda, they can be external propaganda, or some of the above all at the same time. And we have to distinguish what this is in terms of future distribution of power and I would say that it does enfeeble the military for the indefinite future in that country. I think that was what was intended, I think that has been intended since 1988 and the coup of September 18. Now we'll throw this open to the floor.

## Q&A

### Polish Comparison

**Questioner:** I was wondering if any of the panelists have looked at the situation in Poland especially in 1989 where you had a similar situation in which the ruling party reserved certain seats for itself in the initial elections and then the opposition completely overwhelmed expectations, swept into the seats that they were able to sweep into and in a relatively short time, transformed the

country. And whether that is something that anybody looks at in the region on either side of the political divide.

**Steinberg:** Anyone care to deal with that? Maybe we're on unknown territory here.

**Myint Zan:** I'm ignorant about the Polish situation. I know a little bit about Solidarity, but I think both the Polish comparison and if I may say so, Dominic's U.S. comparison is, I would say, farfetched. The difference is not only historical but it is also epochal. The U.S. constitution was in 18<sup>th</sup> Century America and we had a feudal system at that time in Burma. With Poland also, I think the situation is different. I don't know what percentage was allotted in Poland, but 25 percent to the military in Burma, I think it would be very difficult to get more than - I mean, the government has learned lessons, the unexpected NLD landslide. They would not allow this to happen again, they would not allow this. So I do not think we can expect a Polish miracle in that regard.

## Religion

A Justice of the High Court of Australia, Michael Kirby, wrote that Malaysia has been lucky in comparison with other countries in terms of constitutionalism in Southeast Asia, and this is the point made by Dr. Pek Koon Heng as well. I would like to mention, to be fair, and I say it with a little bit of trepidation, the role of Islam in the Malaysian Federal Constitution and in Malaysia. I think the role of Islam was not initially stated in the Reid Commission's draft, but Justice Hamid from the Pakistani Supreme Court said, "No, no, no, this must be

there.” In fact, the Malay sultans were not eager to put that in because they are the protectors of religion and they thought that would take power from them. But that was only the role of Islam as an official religion and mainly for ceremonial purposes. Now it has become a hot political issue because in 1957, Islam as a political force was not as strong as now in that regard. And in Burma, a Christian has been President of Burma. Mahn Win Maung was a Karen Christian. With Christians being only four percent or five percent of the population. It is unthinkable in the Malaysian context in the next 50 to 100 years for a non-Muslim -

**Steinberg:** Didn't he have to say he was a Buddhist and not a Christian?

**Myint Zan:** Someone said that but I'm skeptical of that. But anyway, it is unthinkable in the Malaysian context that a non-Muslim could become the head of state in Malaysia in the next fifty to hundred years, whereas in Burma with 85% being Buddhists, a Christian was President of Burma from 1957 to 1962.

Secondly, the power of the Sharia courts in Malaysia. After praising Malaysia I would say a little bit about the power of Sharia courts. They've taken bodies and said, "He died a Muslim so we're not giving back the body," and it is unthinkable in the Burmese context of the *Winiseya Khoneyone*, the Buddhist monks tribunal, which can loosely be described as "Buddhist ecclesiastical courts," to say that the dead person was a Buddhist and not a Muslim so we will bury him or her according to Buddhist rites and we will not transfer the body - if a Muslim died, right? So this is one thing which jars me. I'm going back to

Malaysia so I don't know whether - I hope I will not be in any jeopardy for mentioning that.

Very briefly, the ability to dismiss the government that Mr. Joseph mentioned. I think this is also - I know the comparison is apples and oranges, but the Australian Governor-General also has the "reserve powers" to dismiss the government. I have had to explain it twice to my American colleagues how the Australian Governor-General has the power to dismiss the government under the Australian Constitution. It only happened once, even though they've had their constitution for more than 100 years. It happened in 1975, the Australian Governor-General dismissed the elected government.

Briefly on Dr. Pek Koon Heng's lack of the military as a political force in Malaysia. I had a private conversation with one of my former students from Malaysia, a military man, he told me in 1993 that if the opposition takes power, "We have been taught about military coups in our military training and we will take power." I don't know. This may or may not be true. But he told me that. I don't know which parties he meant by "the opposition," or if he meant a coalition of opposition parties.

And thank you, Professor Steinberg for mentioning the "free pass." General Pinochet also, initially successfully, created a free pass, but it did not succeed as much as it was initially planned to. History is unlikely to repeat itself in Burma.

## Malaysian Power Struggle

**Heng:** I want to respond to the question on Poland by referring to the ongoing power struggle in Malaysia. While a change of government in Poland transformed the country, it will be different in Malaysia. The power struggle in Malaysia is essentially the outcome of a fragmentation of Malay political elites who share similar ideological beliefs. Anwar and other leaders of Parti Keadilan had defected from UMNO. Also, for a period of time last summer, leaders from UMNO and PAS explored the possibility of working more closely to preserve Malay unity. That is why I'm pretty optimistic there will be a peaceful transfer of power should the opposition win the next parliamentary election. UMNO, Keadilan and PAS are not ideologically antagonistic parties that are unable to work with one another within the existing constitutional framework.

Anwar left UMNO in 1998. Since his release from prison and election to parliament in 2008, he has promised to clean up the government. His political views are shared by many in UMNO. At the same time, Chinese and Indian leaders are represented in the government coalition - in the MCA and MIC - and in the opposition in the DAP. Thus, if the opposition wins the next election, I don't anticipate a transfer of power that will translate into fundamental changes in either domestic or foreign policies.

Generational change in Malaysia greatly facilitated the opposition's electoral victories in March 2008. Anwar Ibrahim successfully tapped into the widespread dissatisfaction of younger voters over

government corruption and lack of transparency. At the same time, the New Economic Policy has bred a self-confident Malay middle class, many of whom realize that special rights have made them and Malaysia less competitive. The impact of globalization and the on-going U.S.-Malaysia free trade negotiations have also brought greater awareness that Malays have to compete on a more level playing ground in order for Malaysia to retain its competitive edge in the region. Anwar, as well as UMNO leaders, have been telling Malays: "You've got to really stand on your own now." Today, Malays appear more willing to accept an amendment of the NEP that would see special rights given out on the basis of economic need, not race. As far as the Chinese are concerned, they have long sought an end to the NEP. Therefore, Anwar's election pledge to end the NEP has found support from both Malay and non-Malay voters.

With regard to the question of how the Malaysian military would react to a change in government, when I was at the Malaysian Armed Forces Staff College with some students from American University in July 2008, a senior officer told us: "If Anwar and the opposition comes to power, it's fine. It's the same people, basically." Senior military officers were comfortable with Anwar when he was deputy prime minister. They don't see him as an enemy of the ruling regime.

**Myint Zan:** I think my former student was thinking mainly about the DAP, I suppose.

## Implementation of the Constitution

**Questioner:** Any guesses as to when the 2008 constitution will come into force and how it will come into force?

**Myint Zan:** I think the constitution mentioned that it will come into force around the time the new *Hluttaw* is convened. On the first day the *Hluttaw* is convened, after the elections. I may be subject to correction, but sometime after the scheduled elections.

**Joseph:** May I answer? I think you're making a big assumption which is that the constitution will ever come into effect, and I say that not - I mean, half in jest. Perhaps you're right, after the election the government may begin to work under some sort of new constitutional arrangement, but I think it would really - we should wait a little while to see if they actually change how they govern, how politics are done, the role of the courts and everything else to see if the constitution has any bearing on how the country is governed. If you look now, the constitutional provisions, the law as it exists in Burma today and how the country is actually governed and run, they have very little to do with each other. So when this constitution takes effect, legally and reality might be two very different things.

**Same Questioner:** I could follow up on that by recalling the comment that David Steinberg made about demonetization, because it seems to me that if you look at this country and its history in how it's operated, I'm not convinced that this new constitution would actually prevent the regime from demonetizing the currency if it decided to demonetize the currency.

## The Military in Burma

**Questioner:** Dr. Myint Zan, I would like to ask you your view on the role of the military in Myanmar, not in the legal context that you discussed that but in the political realities of Myanmar's history. You know it's not only the junta, but many prominent Southeast Asian and other leaders, people like Ali Alatas, have argued that they were left by the British with a whole host of ethnic and drug armies and so forth, most of which were controlled by the outside, from London, from Washington, at one time from China and so forth, and that it was only through this recent military period that they were able to pacify that and to unify the country and to begin to actually make a basis for developing the infrastructure, the connections into other countries, which was absolutely impossible during the era of general disunion. So in that context, the sort of Indonesian model of a military role, at least for the foreseeable future, can be argued for and I'd like to know what your view is of that.

**Myint Zan:** Yes, thank you. Much has been said about military rule as the savior of the nation, I would partially agree with that in that there have been attempts and the military has saved the country in some sense, but I think compare it - you mentioned Indonesia, I don't know whether Indonesia has 25 percent military rule -

**Steinberg:** It has changed now, but they did.

**Myint Zan:** A full 25 percent?

**Steinberg:** That's the model.

**Myint Zan:** Okay, that's the model. But it has changed quite significantly in that regard. I am not enough of a political scientist to know what role the Indonesian - to make a comparison between the Indonesian army and the Burmese army so I cannot answer that but I can only answer that yes, I do acknowledge the military's role in part of nation building but I think it has been, if I may say so, somewhat overstated.

Very briefly, there's a Burmese short story where one man went to town and bought a pair of glasses for his friend. And the man was always mentioning the favor that he did, "I bought you those glasses, I bought you those glasses," and he took so much advantage of that, finally his friend said, okay, and he took out the glasses and crushed them so that he would no longer owe him his gratitude. This was written by a Burmese writer; I read the English translation. So we are forever in debt to the glorious *tatmadaw*, but not to the extent stated. I will have to revert back to the legal issue: Apart from Indonesia, I am not aware of any other country having such a praetorian system. Even Indonesia no longer has the full-fledged praetorian system of previous years.

**Steinberg:** There's one thing. I may be the oldest person in this room, so I'd like to go back in history a bit for a moment. If you go back to the literature of the 1950s and 1960s, a lot of the social scientists, political scientists, talked about the efficacy of military rule because they were forward-looking, rational, they weren't corrupt like the civilians were, and this was a big thing. And actually during the caretaker government in Burma from 1958 to 1960, Burma was a model. It's difficult

to believe now but it is true, if you go back to that time.

Now things have changed. And of course, part of our interest in the military rule in that period was that these people are anti-communist and we're in the middle of the Cold War. So it was very convenient for us, let us say, to take this kind of view. But the military then was very authoritarian. I knew these guys and I used to deal with the mayor of Rangoon all the time, and they were tough but they did do some very practical things, I mean, it was like Mussolini, the trains ran on time, that kind of situation.

### **Separation of Powers and Accusation Against Anwar**

**Questioner:** Dr. Myint Zan, you mentioned the separation of powers in the 2008 constitution, giving the example of the judiciary. But if the top judicial officials are appointed by the chief executive, can you call it a separation? And how about the MPs, the legislature, 25 percent will be the military-nominated MPs. So technically, what can you call it?

I have another question for Dr. Heng. This is about sodomy because I would like to know about that accusation against Anwar Ibrahim. Is that politically motivated? Also, is sodomy illegal only for Muslims or for non-Muslims as well?

**Myint Zan:** Thank you. Twenty five percent, I already mentioned my views. I think the appointments are at the discretion of the executive, so probably Montesquieu would not have envisioned this, I suppose, because the idea of separation of powers goes back probably

to Montesquieu, the French philosopher, so I don't think Montesquieu would see this provision as in accordance with the separation of powers concept.

I think this is an improvement, on paper, to the 1974 Constitution, but the 1974 Constitution did not say anything about the qualifications of the judges. Among the Council of People's Justices first formed in March 1974, there were five and only one of them had a law qualification.

In a sense, you are right. The government appoints the judges of the Supreme Court but they say that the *Hluttaw* must approve them. They said that unlike the American Supreme Court appointments where the Senate can reject the President's nomination of a Supreme Court Justice, the *Hluttaw* would have to give reasons why they reject the candidate, and unless they can clearly show that the candidate the future Burmese president appoints does not meet the qualifications - I don't know what they meant by qualifications - then the *Hluttaw* has no right to reject them.

So the 2008 Constitution, as far as judicial appointments are concerned, it's between the 1947 and 1974 constitutions. In the 1947 constitution, the president appoints and the *Hluttaw* must approve, but the *Hluttaw* can reject. There were competent judges, U Myint Thein, U Bo Gyi, U Chan Tun, they were competent judges with integrity. In that sense the current constitution is somewhat of an improvement to the 1974 Constitution, on paper.

**Heng:** Sodomy? As you know, Anwar was charged with sodomy by the government in 1998, and that charge was

thrown out because the government botched the case. It was so badly handled that the government had no case at the end of the day. Anwar was tried and imprisoned for six years on corruption charges. The sodomy charge was dropped but it was brought up again, this time by a young political aide. Polls show that 60-65 percent of Malaysians do not believe the latest charge. Some Malaysians also wonder if Anwar's detractors in UMNO had any role behind the second charge. If so, they question whether the government could be so foolish as to do the same thing twice. However, it has not hurt Anwar politically. He won his parliamentary seat, vacated for him by his wife, in a by-election with a large majority.

**Nardi:** I just wanted to mention a few things about the separation of powers. First of all, and we do have to stress, we are dealing with an illiberal constitution, and I think sometimes we tend to equate the rule of law with liberal democracy and they're not always the same. China has a constitution, I think they're increasingly sticking to the constitution, but there isn't a separation of powers as we think of it in the U.S. Judges are actually graded as to whether they're competent or not competent and their bonuses and their salaries can be docked if they're shown to be incompetent, and they are graded by the legislature at each level.

Just one thing I want to mention is that there's a pretty wide variety in the world as to how separation of powers issues are dealt with and they're not all mechanisms that violate what we might think of as the rule of law. They violate the norms of liberal democracy, so I guess, in short, if we are putting lipstick

on a pig, it's a black, ugly color of lipstick on this pig.

Second of all, there are a couple of interesting things in this Burmese constitution that haven't been mentioned widely. For example, the president, when he's choosing the nominees for the Supreme Court, is supposed to consult with the chief justice of the Supreme Court, which raises another separation of powers issue. Consult isn't defined; does that mean the president has to listen to the chief justice or just get his opinion? Is he bound by the opinion? This was something that the drafters of the 1947 Constitution had considered, had rejected, and if I remember correctly, Dr. Maung Maung actually criticized the rejection saying that the chief justice should have some role in this.

There's another separation of powers issue, and one question that I think we'll have to see is who gets appointed as the chief justice. How close is that person to the military or if he has a history in politics, how close has he been? For example, the current chief justice, Aung Toe, was basically promoted from being a registrar in the court to chief justice. It's a pretty big promotion. He's also been chairing the national convention. So he's already a political elite and has close connections, so there are those issues too that we might see arising.

**Myint Zan:** U Aung Toe is the longest serving chief justice in Burma's post-independence history. He was appointed around 29 September 1988, so 20 years. Maung Maung was chief justice for six years, and U Aung Pe was the chairman of the Council of People's Justices for seven years. So he's the longest serving chief justice; he's 83. So he's well past

retirement age but keeps being renewed and renewed and renewed.

### **Central-Local Government Relations**

**Questioner:** Dr. Myint Zan, aside from the question of secession, have you any thoughts on how the 2008 praetorian constitution defines the relationship between the national government - the *Hluttaw*, and state, regional, and self-administered-zone legislatures? And how is that different from previous constitutions?

**Myint Zan:** Yes. I will confess that I have not studied this particular subtopic very thoroughly but I think in a very generic sense my view is that both the 1947, 1974, and the current constitution can be considered more on the unitary side rather than the federal side, even though the provisions concerning the autonomous regions in the current constitution were absent in the previous constitutions. Both in the 1947 and in the 1974 constitutions, there is no separate *Hluttaw* for each division and state. So in that sense, I think, it would be an improvement on paper again from both the 1947 and 1974 constitutions. I don't think I can say expertly beyond that.

**Steinberg:** I think what you will find is when there is criticism and the new constitution comes into effect, they will say, look, we have given more autonomy to local people than ever before since Burmese independence, so what are you complaining about anyway?

**Same Questioner:** Except the military component's even larger in the self-administered zones, it's one-third, not one-fourth.

**Steinberg:** One of the things that we can think about which will be, I think, quite normal, is of the 75 percent elected to the national *Hluttaw*, there'll be a lot of retired military because they are better educated, they have prestige, they have local power, and even in a free election, I would expect a great many of them to get positions. So it may increase the power of the military even beyond what the constitution dictates.

**Nardi:** I was going to mention one other thing about this relationship between the central and local governments. As I was trying to explain, where I think the constitutional tribunal could be a bit of an end-run around local autonomy or the local autonomy as it's worded in the constitution, because most of the main officers in the central government can submit cases to the constitutional court, they control the appointment mechanisms to the constitutional court. So this could essentially be a way for the central government to have a constitutional court interpret laws in its favor and perhaps creatively interpret limits on local autonomies. It might be another issue that local autonomy faces.

### Judicial Review

**Steinberg:** I'd like to ask a question about this because, as I remember the 1947 Constitution, the government can bring to the court the question of whether a law was legal at the beginning. It didn't have to wait for somebody to bring the case up as you do in the United States. Is that a good thing or a bad thing? Or is our system deficient?

**Nardi:** I think it's a way for - it really depends and I think one of the things

that's interesting in this constitution is that ten percent of either house of the legislature can bring an abstract review case like that directly to the Constitutional Tribunal and that could give minorities in the legislature quite a bit of power if they have some reason to believe that the court will interpret the case favorably. But the problem is these justices are not appointed for life, they don't have security of tenure, so in this case I think it's going to be more a mechanism of elite control, not a mechanism for protecting minority rights.

### Political Influence

**Steinberg:** In the civilian period, how free of political influence were the courts? We know there were good people, but...

**Myint Zan:** I think they were pretty free, comparatively, because the government lost cases. In a 1952 case called *Akham vs. U Shwe Phone* in the 1954 *Burma Law Reports* (Supreme Court) page 222, it was held by the Supreme Court that the president's action was *ultra vires* of the 1947 constitution and Maung Maung praised that ruling in his book *Burma in the Family of Nations*. What the President did in that case was that instead of inserting a new provision in the Bureau of Special Investigation Act, which he is empowered to do so under the Act, he delegated authority to the BSI (Bureau of Special Investigation) to insert any provision the BSI wants. The Supreme Court said that this is in violation of the principle of *delegatus non potest delegare*, a delegate cannot delegate further. Thus the President had not properly exercised his power and his

action was *ultra vires* (“beyond what is allowed in the Bureau of Special Investigation Act.”) So in that sense that is very impressive, illustrating the independence of the judiciary at that time.

But if I can tell an anecdote, one of my friends, he is a son of U Kyaw Myint. U Kyaw Myint resigned from the Supreme Court in 1950 after U Nu pressured him regarding a political detainee, but U Kyaw Myint, instead of following U Nu’s pressure, resigned from the Supreme Court. So there were attempts at political influence, but U Nu did not jail any of the Supreme Court judges. But when General Ne Win took power, the longest serving person in detention was not U Nu, the prime minister, not Mahn Win Maung the president. U Nu was released within 4 years and eight months after his arrest. President Mahn Win Maung spent five-and-a-half years in detention. But U Myint Thein, the chief justice, was detained for just two days short of six years when he was released at the end of February 1968.<sup>2</sup> I heard, and the son of U Kyaw Myint told me, that General Ne Win later on, long after U Myint Thein’s release, invited him to a dinner,<sup>3</sup> and tried to explain or

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<sup>2</sup> News items of U Myint Thein’s (1900-1994) and other prominent political detainees’ release from protective custody can be read in the 1 March 1968 edition of *The [Rangoon] Guardian* and *The Working People’s Daily*.

<sup>3</sup> I recall that around 1980 I heard about the dinner given to U Myint Thein and others. Subsequently I purchased this news item from *The New York Times* entitled “Burmese Delighted by an Exile’s Imminent Return” by Henry Kamm in the July 16, 1980 edition. It reported on the imminent return after more than 11 years in exile of former Prime Minister U Nu, whom General Ne Win had overthrown in the 1962 coup. On paragraph 16 of the news item it was stated that “[o]n July 3 [1980] the President

apologize to U Myint Thein but U Myint Thein said, “*Bogyoke* [General], don’t say anything, you don’t need to explain.” So in that sense, I am not saying that as far as the independence of the judiciary was concerned the civilian period was a golden age - in a sense it was a golden age, but now we are worse than bronze. It is rusty iron, I think, regarding the independence of judiciary.

**Steinberg:** One of the questions that is always raised in our disputes about political affairs in Burma is, is the period of civilian rule a model for the future or is it not? And of course, there are two sides and people will argue about this. So in the question of law, you’re saying it certainly was a better situation.

**Myint Zan:** Absolutely.

**Steinberg:** One of the things that one hears about in Burma these days is that it is not a question of rule by law, it’s a rule by policy, and policy trumps law because policy is what the government wants done. And of course, what is legal under law may not be according to policy and policy may change and what is done today may be illegal in the future. So there is that kind of insecurity on the part of people, and it also relates to questions of foreign investment, for example. Even if there were no sanctions, would you invest in a system where this was so obscure, unclear, there

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[U Ne Win] invited three distinguished judges whom he had also removed from the highest posts, to dinner and friendly reminiscences.” It is quite likely that one among the “distinguished judges” whom Ne Win had also removed would include U Myint Thein and perhaps Ne Win’s attempt to explain U Myint Thein’s detention - which according to a nephew of U Myint Thein the former Chief Justice “preempted” - took place during the course of the dinner.

was no separation of powers, there is no independent adjudicatory body that deals with disputes and so forth.

### **Constitutional Restrictions on Political Participation**

**Joseph:** On this new constitution, which was drafted and voted on by an overwhelming number of wonderful Burmese citizens, they thought they were voting - 90-something percent of the people with 90-plus percent turnout - for a constitution with two clauses: one is the president of the Union himself, no women obviously, parents, spouse, children, their spouses shall not owe allegiance to any foreign power, shall not be subject to any foreign power, et cetera. The next one was the eligibility requirements for members of parliament, which limits those persons punished for the commission of an offense that makes him or her lose qualifications, which is a sweeping prohibition, and it keeps going on. And this one, there's also an exclusion for any person who obtains and makes use of, or member of any organization that obtains or makes use of money, land, housing, building, vehicles, properties, et cetera, directly or indirectly from a foreign country's government or religious organization or other organizations, or people who have received financial support from any government. In a sense, it excludes everybody except the military from that 75 percent of the seats that are contestable.

For the president, it also forbids anyone who is married to a foreigner, which is to exclude Aung San Suu Kyi. For the members of parliament, it excludes everybody else who's participated in a leadership role in the democratic

opposition in the past 20 years. So, you can read it however you want but that is such a sweeping exclusionary clause that in a sense it allows people, it allows the government, the military, to limit who participates in the political contest.

**Steinberg:** Any Burmese person had better be careful, you'd better not get a grant from the Ford Foundation or get a scholarship from an American University.

**Joseph:** Or drive an American car.

### **Economic Aspects**

**Questioner:** I was at the 8<sup>th</sup> International Burma Studies Conference in DeKalb this last weekend, and there was a discussion of the constitution. I just thought it might be worthwhile to point out that one of the takeaways I had from that discussion - interesting points, I thought - was that there seems to be nothing in the constitution, this new constitution, that would interfere with the government's ability to implement sound macroeconomic policies, sound economic policies, and, in a sense, I thought that was sort of surprising. I would have expected a constitution that was much more anti-market or restricted the powers of the government in the economic field much more.

**Nardi:** On economic provisions in the constitution, they can be kind of tricky. First of all, they may not even be enforceable - even though it's in the constitution it might not even be directly enforceable either in court or as policy. In a lot of countries, the parliament actually has to pass a law to allow people to sue under that provision. And so I know, for example, in the

Philippines they have a great provision banning monopolies, that would make great competition policy, but if you go to the Supreme Court, they kind of say that the constitutional spirit suggests that the government should be anti-monopoly but you can't bring a lawsuit against the monopoly just under that provision. There needs to be another law. So there might be layers of law in between that will make that situation murkier.

**Same Questioner:** Or layers of policies.

### **Political Change?**

**Joseph:** In a sense, what this all gets back to in my opinion is how does the international community engage in the political process inside Burma now? Whether we think it's an exercise that's going to lead somewhere or not, the regime has clearly embarked on the seven-step roadmap to some sort of reform in the country. They've done the first few, the national convention took 14 years, the referendum flowed much more quickly after that. We now have elections scheduled for 2010. There may or may not be opportunities that present themselves.

But my reading of Burma in a sense is, "past is prologue," and if you don't understand how you got here, how these decisions are made, who's been drafting these constitutions, what the impetus has been behind certain provisions in them, it's very difficult to step back and analyze it as a document in itself that has any value outside of the political context of Burma. Because the provisions in the constitution itself undermine any of the constitutional standards that we would - international standards we would apply to a reasonable constitution today

including all of the restrictions on who can participate in the elections, who can run for president, the role of the military, the ability to dismiss the government without cause. All of these types of things, in a sense, just puts you back where you are today with the rule by a certain group of military generals who are introducing a new system or at least a superficial cover over a system which guarantees their ultimate hold on power.

I do think there's a political process underway inside Burma, they're likely to hold elections in 2010. The things to look at are not the technical details of how the constitution is actually structured, but whether people are able to organize, whether there's any freedom of association, mobility, speech, that political parties are allowed to organize and mobilize, and if not, you simply have an empty exercise of political progress that's not based on any real change in the country.

**Heng:** The point I'd like to leave you with is that the democratic institutions put in place by the 1957 constitution have largely survived the onslaught by Mahathir. The country's lawyers, constitutional scholars, civil rights activists and opposition leaders have pushed back, demonstrated, and spoken out. Many of them have been detained under the ISA. It is due to their persistent championing of civil liberties and freedoms granted to all Malaysians under the constitution that we're now seeing a restoration of those guarantees that were eroded during the Mahathir administration.

## The Role of Islam

The most controversial issue today for non-Muslims is the role of Islam. They regard the constitution as their only bulwark against Islamization and the introduction of Islamic features into their lives. Anwar Ibrahim has done a great service for the time being by bringing PAS into his coalition. PAS has dropped its Islamic state agenda at the national level for the time being. So it's no longer pushing for a Malaysian Islamic state. However, it will carry on its Islamic agenda at the state level, especially in Kelantan, its stronghold.

The concern for non-Malays is whether the constitution is going to be more Islamic in character or whether it will retain its secular features. I would also point out that the term "secular" is becoming tainted in Malaysia. More and more Malay politicians and Muslim constitutional scholars regard a "secular" constitution as going against Islamic principles of governance.

So this is the question that I think will frame the next constitutional debate in Malaysia: What Islamic features will be introduced into, and maybe replace, the "secular" guarantees non-Muslims have enjoyed in the country since independence in 1957?

## Freedoms in Malaysia

**Myint Zan:** Thank you. First a few thoughts on Malaysia and probably later on, Burma. Dr. Heng mentioned Dr. Mahathir a few times, and I've only had one chance to meet and talk with him briefly. I was sitting side by side with him at one of the seminars held in Putrajaya about one-and-a-half years ago

and the very first questioner who challenged Dr. Mahathir was his own daughter. I don't know whether it was a show or not, and Dr. Mahathir came back and said, "I don't agree with you." Then the question that I asked Dr. Mahathir was about the freedom of the press.

Also, I asked a question about the independence of the judiciary in a session where Mahathir was not present. I asked the chair of that session to compare the independence of the judiciary in terms of the four prime ministers of Malaysia. The chair minister, A. Kadir Jasin, was previously the editor of *The New Straits Times*, a government newspaper, and like General Ne Win, boasted or wrote at least once in a newspaper column that he doesn't have a university degree. General Ne Win boasted in his speech on 6 November 1981 - you can check in the collection of General Ne Win's speeches - in his last speech as both president and party chairman he said "*Nauk Hmar Bar Amee Hma Ma Par Boo*," that means "I don't have a tail behind my back" and A. Kadir Jasin has also boasted or wrote that he could not get into Penang University. But anyway, he refused to take my invitation to compare the independence of the judiciary under the four prime ministers.

As regards Dr. Mahathir's statement about the press during his time, I said, "Sir, I cannot read the Malay press or the Chinese press or the Tamil press, but as far as the English-language press is concerned, I have contributed both to *The New Straits Times* and *The Jakarta Post*, and even under Suharto, *The Jakarta Post* was criticizing Suharto, but *The New Straits Times* and *The Star*

were very mild.” And he said, “Of course I disagree with that.” So briefly on Mahathir.

I don’t know whether or when the change will come, I don’t know. Anwar Ibrahim said that on 16 September 2008, there will be a new government. He held a press conference on that day, when he did not become Prime Minister, and he expressed his fears about whether there would be a suspension the constitution or a declaration of emergency. So far this has not happened as yet.

Even if Anwar Ibrahim became prime minister, the role of Islam, the Malay privileges, would not be changed. I don’t know whether there would be liberalization, I don’t even know whether Anwar would abolish the ISA (Internal Security Act) if he became prime minister.

But I will state that recently there were demonstrations against the Bar Council holding the meeting on conversion to Islam and its legal consequences. Among others, Anwar supporters, people both from the PKR and UMNO barged into the Bar Council meeting discussing the freedom of religion issue and the conversion issue and ordered them to disband the meeting, “Out, out, out, out” and the Bar Council seminar had to be disbanded. Basically, the police would have arrested the demonstrators if they were, say, anti-government demonstrations, but the police here facilitated the demonstrators entering into the Bar Council meeting.

## **The Burmese Constitutions and the Future**

Now, coming back to Burma, first on scholarship. There have been three constitutions, and I think it facilitates political analysis, but I don’t think it facilitates legal or scholarly analysis of them.

One of my colleagues when I was studying in Australia wrote his Master’s thesis on the separation of powers concept in the Sri Lankan constitutions, the presidential constitution and the prime ministerial constitution, and he had case laws to cite and discuss in his thesis. In the case of Burma, the only case law regarding the constitutions is the 1947 Constitution where in a few cases in the 1950s and before 1962 the High Court and Supreme Court ruled on constitutional issues and these cases can be seen in the *Burma Law Reports*. There is no case law regarding the 1974 Constitution.

So it doesn’t give rise to any scholarly analysis, but having said that, these two Constitutions are so radically different, I can hardly believe that the 1947 and 1974 constitutions were from the same country. I don’t think Thailand’s 16 constitutions have that much divergence or Sri Lanka’s three constitutions have as much divergence between them as the Burmese ones have in that regard.

I would say, don’t hope for 2010. I mean, the 1990 election was a surprise, but the surprise will not be repeated. History does not repeat itself most of the time and the only thing - I know it’s a cliché - the only thing I can end with is hope. We still have hope, but we should work on it.

I don't know, the Burmese people are in a predicament. In Burmese there is a saying, "*Hsoke Lei Soo Sar Lei Yoo Shu Lai Moo.*" There is a certain fruit, whatever one does with it one will be harmed. If one holds that fruit, the thorns can pierce one's fingers. If one sniffs the fruit, it could cause nausea or headaches. And if one eats the fruit, one could go mad. So the Burmese predicament is great, and the Burmese people don't know how to get out of this rigmarole, but there is always hope. Thank you.

### **South Korean Comparison**

**Steinberg:** There are a couple of things here. I think we probably all agree that the military certainly has no intention of diversifying its power sources, and that will continue. One other thing I might mention is on the constitutional tribunal, South Korea had a constitutional court, and for 15 years, no case was ever brought under the authoritarian government. Since then, of course, it has found against the government on a number of occasions.

But I think also, one other fact is we look at the constitutions, they all have talked about minority culture, protecting culture, and so forth, but they've never, of course, done it. And these are all subject to public morality, stability, and so forth. They are not unencumbered rights as our Bill of Rights is, and I should say the new constitution of Korea from 1987 also has those rights.

But essentially we see a continuation, I think, of military rule by other means under the new constitution. We hope that there might be some break in the system where you even find people within the military trying to change the operation of

the constitution, or let's say the operation of power under the constitution, but I think that right now that is a very unlikely possibility. I think Myint Zan is optimistic, he has hope, but...

**Myint Zan:** I have to end with a cliché.

**Steinberg:** Well, the diplomats say, "we are cautiously optimistic," and I guess I say I'm cautiously pessimistic about the situation. Thank you to the panel, and thank you for coming.