

Challenges Facing “State” Building in Burma: Law and Legal Dimension

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Abstract

This paper explores evolutionary process of legal concept and theory in Burma. The purpose of this paper is to analyze the issues that Burma will face in legal transformation and building state in Burma. Since its independence, the post-colonial governments have failed to transform legal system in accordance with the social elements that govern daily lives of Burmese. The paper argues that there are two fundamental challenges Burmese society faces in legal transformation. The first challenge is the emergence of a new constitution that will serve as a framework of citizen-sovereign state. The second challenge resonates in the question of how Burmese society will achieve “rule of law” that will be congruent with institutional foundation of Burmese society.

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Introduction

This paper examines some important historical documents and books dating back to publications of the late 1700s mostly written about the accounts of the early Burmese society. Early westerners, who arrived in Burma as missionaries and later as merchants and diplomatic appointees especially by the British India government, have recorded their own account of Burma as they saw it. In addition, scholarly works written in the period after Burma’s independence in 1948 by the Burmese and western historians are also examined. The purpose of this paper is two fold: (1) to interpret and analyze the conceptual unfolding of law in the context of Burmese Dhammathats as well as the traditional social and cultural elements; and (2) to analyze the current state of challenges at the transition.

Nations at political transition, in a broader conceptual framework, face three areas of transformation: (1) economic transformation, (2) legal transformation, and (3) historical and traditional value transformation. Economic transformation is the condition at which transition from traditional economic activities to modern “growth” oriented economic activities takes place.¹ At this stage critical debate about the present and future economic goals of the nation need serious consideration. The issues such as conservation

¹ The growth of domestic industries and their capacity to transform into modern competitive industries is the main focus of economic transformation.

and utilization of natural resources, cultivation of human and social resources, and adaptation to modern technology are some of the fundamental issues that need to be addressed in economic transition. Legal transformation is related to how the economic system is transformed. Law and legal institutions play a critical role in carrying out and maintaining a viable and solid economic system. It is indispensable that nations at transition need to seriously consider the transformation of law and legal system to meet the short and long term social and economic goals. Historical and value transition is also another equally important area of transformations that transitional nations need to articulate and debate about. The ethnic identity, historical values of a segment or whole population, citizenship issues, property ownership, and traditional customs are some key elements that need to be incorporated into the debate about value transformation.

This paper will mainly cover the area of legal transformation in the case of Burma. I will also incorporate this analysis with the historical and value transformation. In so doing, the paper will be organized into the following subtitles:

- II. Early Development of Law in Traditional Burmese Society
- III. Burmese Social and Legal Theory
- IV. Law in the Era of British Burma (1885-1948)
- V. Burmese Law After Independence
- VI. Challenges in Transitions
- VII. Conclusion

Early Development of Law in Traditional Burmese Society

The early written works about Burmese history are U Kula Yarzawin (History of Kings written by U Kula) completed in 1721 and Mhannan Yarzawin (The Glass Palace History of Kings) written in 1829. The latter, being written by the assigned historical

commission of the King, became the national archive of Burmese history. Because the king-assigned historical commission to write Hmannan Yazawin, western scholars charged Hmannan Yazawin as a nationalistic interpretation of the history of Burma.² The scholars, who are critical of Hmannan Yazawin, base their interpretation of Burmese history on inscriptions dating back to the Pagan era (A.D 1044-1278), the first great kingdom of Burma. Before the Pagan period there were dynasties of different regions. King Anawratha united all of those existing dynasties and established the first Burmese kingdom at Pagan in 1044 and proclaimed Buddhism as the religion of his kingdom with the help of a famous Buddhist monk Shin Araharn (Harvey, 1967: 25-27).

The historians of Burmese history have different views about at what period Burma's different kingdom began to emerge and by whom. A renowned post-war Burmese historian U Htin Aung in his *Introduction to Burmese Law Tales* gives the account of where the Burmese people came from as follows:

There were humans in Burma at least some 5,000 years ago, but not much is known of those early humans. Later on some Indonesian tribes seem to have come from the West, settled for sometime in coastal regions, and then passed to the East. In the early centuries of the Christian era, the Mons entered Burma from the East, by way of the region now known as Thailand, and settled in the South, founding cities and kingdoms, which originally were part of the Great Mon-Khmer Empire of Southeast Asia. The Burmese and their allied tribes bound to them by blood and a common language, left their original homeland on the south-eastern slopes of the Tibetan Highlands, and migrated across the northern hills of Burma into the Irrawaddy.

One of the pioneer works of Burmese history, on which many western historians of Burmese history relied upon in studying Burmese history, is a book entitled *A Description of Burmese Empire* written in 1833 by an Italian missionary leader Reverend Father Sangermano who arrived in Burma in 1782. Sangermano in the chapter on *Origin*

² See Maung Htin Aung (1970) *Burmese History Before 1287: A Defense of the Chronicles*

of the Burmese Nation and Monarchy observed that it was impossible to trace back the origin of Burmese nation and people due to the lack of historical account of the people who lived before the establishment of dynasties (Sangermano, 1833: 38). Sangermano obviously failed to cite U Kula Yarzawin, which is the account of Burmese history written in 1721.

The Emergence of the First Kingdom and Legal Development

Before King Anawratha concurred different dynasties of Burma to establish the first Kingdom of Pagan in A.D. 1044, Burma passed through eras of dynasties for thousands of years. Pagan is also known as the “Kingdom of Temple Builders” for its great number of temples built during the Pagan era. After Anawratha had established Pagan’s power, his grandson King Alaungsithu in A.D. 1112-1165, began the formalization of legal system based on customary law (Htin Aung, 1962: 9). However, while legal disputes were decided according to native customary law, it was also in accordance with the spirit of Buddhist ethics. When Alaungsithu died, his decisions were collected as a work called *Alaungsithu’s Pyat-hton* (or *Alaungsithu’s Judgment*), which served as a code of precedent for later generations up until the nineteenth century (Htin Aung, 1962: 9).

In the year A.D. 1173, Narapatisithu, grandson of Alaungsithu, became the king of Pagan. Like all kings of Pagan he was a great patron of Buddhism. The king wanted a young monk, named Shin Ananda who was then educated in India, to be the Royal Tutor. The king gave a great feast in honor of the monk and offered him the title of *Dhammavilasa*, meaning ‘great scholar of Buddhist scriptures.’ Shin Dhammavilasa³

³ “Shin” is title to address monk.

became famous all over the region as a teacher of other monks. He later wrote a treatise on law, which became to be known as *Dhammavilasa Dhammathat*, which is one of highly regarded nine institutions of law out of thirty-six Dhammathats in Burma (Appendix A). The Dhammavilasa Dhammathat is the oldest surviving Burmese law book today, although it is not a pioneer work among thirty-six Dhammathats (E Maung, 1951: 6).

Burmese legal scholars have followed the Dhammathats and attempted to trace the legal development of Burma beginning from the first Manu Dhammathat written at the time when this world emerged according to Burmese mythical tales and stories (Analysis in Section B). The earliest written work by western scholars about the sources of Burmese law and legal concept was the Jardine Prize essay entitled *On the Sources and Development of Burmese Law from the Era of the First Introduction of the Indian Law to the Time of the British Occupation of Pegu* by learned British scholar Dr. Emanuel Forchammer. It was published in 1884, two years before British invaded the last Kingdom of Burma. Dr. Forchammer in his essay observed:

The development of law in Burma has not been a steady devolution. Every great Burmese or Talaing Monarch endeavored to preserve existing laws and to enact and enforce new ones suitable to the customs and usages of the people for whom they were intended. But subsequent weak rulers, or a change of dynasty, reduced the body of law promulgated by predecessors or members of subverted dynasties to a dead letter; it was set aside and then forgotten [p. 91].

The scholars including Burmese legal historian and judges rejected Dr. Forchammer's observation. Former Justice U E. Maung of Burma in his series of lectures given at Cornell University and published in 1951 stated that Burmese law in its descent to the later part of the 19th Century had no breaks and catastrophes. He argued that:

Dynasties passed away to be succeeded by other dynasties; kings waged war with supplanted other kings; rebellion on many occasions reared its head and pretenders had come to the rule; but there never was a revolution in the growth of Burmese law. (E Mayng, 1951: 1).

U E. Maung's views contend that Burmese law has existed without much break and changes but steadily resonated in the sources – Dhammathats. This view was supported by the Letters Patent of the appointment of judges in the last days of Burmese monarchs in 1885 as recited below:

In case of dispute they must, in accordance with all thirty-six Dhammathats, enquire into the causes of the people and decide between them and for this purpose they are appointed to the Courts as judges. In a lawsuit or dispute any of our subjects apply to a Judge, the Judge shall decide the matter with the Manu Dhammathat in hand first. If the required rule is not to be found therein, follow all other Dhammathats.

Therefore, the development of Burmese law is rooted in all Dhammathats written by different legal scholars appointed by different kings throughout eras of Burmese kings. These Dhammathats were restored one dynasty after another and observed by one king after another. By this observance, the kings gained people's support and respects throughout Burmese history.

Burmese Social and Legal Theory

One of the key institutional foundations of Burmese society is development of law and legal concept developed in parallel with the emergence of kingdoms discussed in previous section. The development of legal theory in Burma has to be understood in the context of social meaning of rules and norms which are heavily drawn from the Buddhist concept of law and orders of life. Therefore, Dhammathats written by Buddhist scholars are major sources or roots of Burmese legal theory.

Legal Theory

Among the Burmese Dhammathats, the Manu Dhammathats is the first of 36 Dhammathats. Throughout Burmese history, the Dhammathats are the fundamental sources of laws. In the introduction of Manu Dhammathat, the foundation of the source of law in Burma is written:

When this universe had reached the period of firmly established continuancy, the original inhabitants of this world conjointly entreated the great king Mahasammata to become their ruler. King Mahasammata governed the world with righteousness. Now the king had a wise nobleman called Manu, who was well versed in the law. This nobleman called Manu, desiring the good of all human beings, and being also opportuned by King Mahasammata, rose into the expanse of heaven, and having arrived at the boundary wall of the world, he there saw the natural law, Dhammathat, he committed them to memory and having returned, communicated the same to the King Mahasammata, stating eighteen branches of law.

The sources of Burmese law, therefore, can be inferred as natural law. “Burmese laws on the whole seem wise, and evidently are calculated to advance the interests of justice and morality” (Vincent Jr., 1874: 16). The value of justice or truth is seriously upheld in Burmese culture. The worst insult that one could do to oneself and society is giving lies or making false statements to harm others. This is reinforced by the belief in the concept of *Karma*. To be able to capture the mentality of the Burmese in regard to law and justice, I present the oath of witness used in court during the Ava⁴ dynasty in 1782 (cited in Vincent Jr., 1874: 18) as follows:

“I will speak the truth. If I speak not the truth, may it be through the influences of the laws of demerit – passion, anger, folly, pride, false opinion, immodesty, hard-heartedness, and skepticism – so that when I and my relations are on land, land animals – as tigers, elephants, buffaloes, poisonous serpents, scorpions, and etc –

⁴ Ava dynasty is one of the early dynasties that started establishing relationships with India and Italy in the further west. During this period, Italian Reverend Father Sangermano visited and established a missionary in Burma in 1782, who later wrote one of the earliest works by western scholars entitled “A Description of Burmese Empire” printed in 1833.

shall seize, crush, and bite us, so that we shall certainly die. Let calamities occasioned by fire, water, rulers, thieves and enemies oppress and destroy us, till we perish and come to utter destruction. Let us be subject to all the calamities that are within the body, and all that are without body. May I be seized with madness, dumbness, blindness, deafness, leprosy, and hydrophobia. May we be struck with thunderbolts and lightning, and come to sudden death. In the midst of not speaking truth may I be taken with vomiting clotted black blood, and suddenly die before assembled people. When I am going by water may the water nats⁵ assault me, the boat be upset and then property lost; and may alligators, porpoises, sharks, and other sea monsters seize and crush me to death; and when I dies and change worlds may I not arrive among human or nats, but suffer unmixed punishment and regret, in the utmost wretchedness, among the four states of punishment, Hell, Prita, Beasts, Athurakai.’

“If I speak the truth, may I and my relations, through the influence of the ten laws of merit, and on amount of the efficacy of truth, be freed from all calamities within and without the body, and may evils which have not yet come be warded far away. May the thunderbolts and lightning, the nat of waters, and all sea animals love me, that I may be safe from them. May my prosperity increase like the rising sun and the waxing moon; and may the seven possessions, the seven laws, and the seven merits of the virtuous be permanent in my person; and when I change worlds (life after death) may I not go the four states of punishment, but attain the happiness of men and nats, and realize merit, reward, and perfect calm.

This oath of witness illustrates how Burmese are serious about upholding the truth in order to help the machinery of justice at the court. In addition, the oath conveys the social philosophy of Burmese people being rooted in the concept of Karma – such as wishing to gain good things as a result of good deed of telling the truth and willing to accept the bad that comes as a result of ones’ lie or bad acts. I shall extend the discussion about Burmese belief in the concept of Karma in the following paragraphs.

The Concept of Karma

In Burma, it is fair to state that the society is imbued with Buddha’s teaching. “The one single factor which has had the most influence on the Burmese culture and civilization is Theravada Buddhism,” (Aung San Suu Kyi, 1991: 66). Buddhism teaches

⁵ Nat(s) is the term refers to the goddesses or spirits of different kinds. Some people still believe in different Nat in Burma today.

that the sole “God” of an individual is the individual itself and therefore, an individual is responsible for his or her actions, which are finally judged by the Karma of the individual. The similar concept of Karma is found in Isaac Newton’s *Third Principle of Force* which states that when object A hits object B with certain force, object B would respond with the same amount of force that comes from object A. Therefore, all good and bad actions of individuals would result in their respective ways according to Buddha’s principle of Karma.

One of the weak points that the concept of Karma plays in the Burmese mind, however, is that the people in Burma tend to leave those evil doers, such as the military generals in Burma, alone under the judgment of their own Karma, believing that one day in the line of their Karma, justice will be served for those evil doers. At the same time, Burmese people tend to believe that the suffering under the military government is somewhat in accordance with the Karma of the sufferers. Therefore, the Burmese are tolerant in reacting to or correcting the military generals’ wrong doings. This is true even if their family members are jailed and tortured. However, the majority of the Burmese have expressed their desire through demonstrations in 1988 and the well-known election held on May 27, 1990 in which the democratic opposition party, the National League for Democracy (NLD), won 82% of the parliamentary seats. The Karma of people’s acts has yet to become true.

Government and Governed

The Buddhist view of kingship (government) does not invest the ruler with the divine right to govern the realm as he pleases, which is in contrast with the Chinese view

of the legitimacy of government based on the “Mandate of Heaven.” The king or government is expected to observe the Ten Duties of King or Government, the Seven Safeguards against Decline, and the Four Assistances to the People, and to be guided by numerous other codes of conducts stated in Buddha’s teaching. During the people’s movements in 1988, a number of speakers including a famous Burmese scholar, astrologer and novelist Min Thin Kha widely quoted the Ten Duties of Government in his public speeches. The Nobel Peace laureate and the opposition leader Daw Aung San Suu Kyi also discussed the importance and relevance of the Ten Duties of Government to democracy in her *Freedom from Fear* (1991). Since the Ten Duties of Government or King are well-known and mainly used as the parameters to judge their government by Burmese people, it is necessary to discuss how the concept of the Ten Duties of Government work in the context of modern politics and legal system.

The Ten Duties of Government are: charity (*dana* in Parli), morality (*sila*), self-sacrifice (*paricagga*), integrity (*ajjava*), kindness (*maddava*), austerity (*tapa*), patience (*akkodha*), nonviolence (*avihamsa*), forbearance (*khanti*), and non-opposition to the will of the people (*avirodha*). The first duty of *charity (dana)* demands that a ruler should contribute generously toward the welfare of the people, and makes the implicit assumption that a government should have the competence to provide adequately for its citizens. In the context of modern politics, the *dana* means that one of the prime duties of the people’s government would be to ensure the economic security of the people, such as creating jobs and eliminating unemployment.

The second duty of government, morality (*sila* in Parli) is based on the observance of the Five Precepts of Buddha’s teaching, which entail refraining from

destruction of life, theft, adultery, falsehood, and indulgence in intoxicants. The Burmese believe that the ruler must bear a high moral character to win the respect and trust of the people, thus the ruler is in a position to ensure their happiness and prosperity, and to provide a proper example as a role model of their society. When the king or the government does not observe the *dhamma* (the rule of morality or ethic), state functionaries become corrupt, and when state functionaries are corrupt the people are subjected to suffering.

Self-sacrifice (or *paricagga*) is the third duty of government. The *paricagga* is sometime translated as generosity and sometimes as self-sacrifice. The former would overlap with the meaning of the first duty, *dana*, so the latter, meaning self-sacrifice as the ultimate generosity which gives up all for the good sake of the people, would appear the more appropriate interpretation. The concept of selfless public service is sometimes illustrated by the stories of the hermit Sumedha who took the vows of Buddhahood. In so doing he “who could have realized the supreme liberation of *nirvana* in a single life time committed himself to countless incarnations that he might help other beings free themselves from suffering” (cited by Aung San Suu Kyi 1991: 171).

The fourth duty of government is to observe integrity or *ajjava*, which implies incorruptibility in the discharge of public duties as well as honesty and sincerity in personal relations. Burmese believe that those who govern should be wholly bound by the truth in thought, word, and deed. According to the fourth duty, to deceive or to mislead the people in any way would be an occupational failing as well as a moral offense. The ruler, therefore, has to observe the truth which is “as an arrow, intrinsically straight, without warp or distortion, when one word is spoken, it does not err into two,” as

Buddha has compared the meaning of truth to a straight arrow (Aung San Suu Kyi, 1991: 172).

The fifth duty of government is to practice Kindness (*maddava*). A ruler has to bear courage to feel concern for the people's welfare. With this courage the ruler has mind and heart to take care of public services. To care is to take responsibility and to dare to act in accordance with the dictum that the ruler is the strength of the needy and helpless. Not just "a few good men" but many good men are needed in the government of the people in order to observe the fifth duty of government.

The sixth duty austerity (*tapa*) implies that a ruler must adopt simple habits, develop self-control, and practice spiritual discipline. This duty prevents rulers from abusing public properties and taxpayers' money.

The seventh, eighth, and the ninth duties, patience (*akkodha*), nonviolence (*avihamsa*), and tolerance (*khanti*) are similar and are related in most of the interpretations in Burmese culture. Rulers must not allow personal feelings of enmity and ill will to erupt into destructive anger and violence. It is incumbent on a ruler to cultivate true tolerance, which serves him/her to deal wisely and generously with the shortcomings and provocation of even those enemies he could crush with impunity. Violence is inhumane and absolutely contrary to the Buddha's teachings. A good ruler relinquishes ill will and anger with loving kindness, wickedness with virtue, parsimony with liberality, and falsehood with truth. These are all relevant to the seventh, eighth, and ninth duties of rulers.

The most significant duty among the Ten Duties of Government is the tenth duty, which states that the ruler must not oppose the will of the people. The *avirodha* meaning

non-opposition to the will of the people is the Buddhist endorsement of democracy. This was supported by numerous stories of the kings during the Buddha's time in the ancient world. For instance, Pawridasa, a monarch who acquired an appetite for human flesh and adopted a habit of eating it, was forced into exile because he would not heed the people's demand that he should abandon his cannibalistic habits. Another different kind of ruler was the Buddha's penultimate incarnation on earth, the pious King Vessantara. He was also sent to exile when, in the course of his striving for perfection of liberality, he gave away the white elephant of state without the consent of the people. The true meaning of the tenth duty, non-opposition to the will of people, is a reminder that the legitimacy of government is founded on the consent of the people who have the power to withdraw their mandate at any time if they lose confidence in the ability or creditability of the ruler to serve their best interest.

The Ten Duties of Government or King in the tradition of Buddha's teachings greatly influence Burmese people's mind. The concept of these duties is not very different from the concept of representative democracy that is currently practiced in the world's democratic countries. Why could the current military regime exist in a Burmese society in which the concept of the Ten Duties of Government is widely accepted? To understand the answer for this question, one must first understand the concept of Karma and how it plays out in Burmese social life, as discussed earlier.

The social and legal theory discussed above still play important role in the daily lives of Burmese belief and practices. However, they are difficult to spell out in legal terms or to be incorporated into rule of law system. The challenge lies before the new

generation of governments and citizens in Burma is to find a way to address these elements into the political and legal system.

Law in the Era of British Burma (1886-1948)

Although Burma as a whole was eventually colonized in A.D 1885, some Burmese legal scholars argue that the influence of British over the administration of Burma began in 1824 at the end of the first Anglo-Burmese war (Maung Maung, 1963: 20). Beginning from the first Anglo-Burmese war, there were three stages in which the British came into Burma and influenced the administration of Burmese kingdoms. The first stage took place in 1824 when the British took the lower maritime areas as a result of Yandabo⁶ ceasefire treaty of the first Anglo-Burmese war. The second stage took place in 1852 when territory further north was seized and “Lower Burma” became “British Burma.” The third stage occurred in 1885 when Upper Burma was annexed and the entire country was consolidated as a province of the British India Empire (Maung Maung, 1962: 20).

The British first arranged the administrative system in which local customary law and traditional practices were allowed to exist parallel with the British administration. The British rules immediately encompassed city administration at Mandalay where the Palace of last king of Burma was located. However, the Burmese society was not entirely shattered by the changes that took place at Mandalay. The Burmese society in rural areas, during the British rules, revolved around the family and the village. These social units survived almost at the outside of the British administration that is active at

⁶ The name of the Village where the ceasefire treaty was signed after the first Anglo-Burmese war.

the capital and cities where most commercial activities took place. Hugh Tinker (1961) observed that Burmese people in rural villages “were very conscious of their relationship as ‘sons of the village,’ their law was the law of custom and tradition, there were no great social differences, all bore their share in manning the village defenses and in repairing the village wells or roads; it was a democratic little world ... and much of the tradition of past times remain alive today, village democracy, patriotism, and proud memories of independence back to the dawn of the Burmese race.”⁷ Some of these patterns of livelihoods in rural Burma are mostly retained intact by the teaching of elders and monks and it is still practiced in Burma today.

When the British established civil service and the hierarchy of courts under the Village Act in 1886, the role of the village headman and the elders, who used to be the traditional “judges” for rural problems and quarrels, was eliminated and replaced by the appointed judges by the British. Under the traditional system of law and justice, the aim of the village headman and elders was to keep social harmony and peace. The job of keeping social harmony and peace was not just a noble one but it also has economic incentives for the elders who wanted “to wax fat they must keep as many villagers as possible, and to do this they must keep the peace and reduce quarrelsome litigation to a minimum. For this reason it will be found that in awarding punishment for an offence the elders rarely inflict the maximum penalty applicable. Because they have to live with both parties to the case their main objective is restoration of harmony, granting of just sufficient economic balm to assuage the wounded without permanently antagonizing the

⁷ See Hugh Tinker, “A Short Survey of Burmese History,” *The Guardian*, English language monthly magazine, Rangoon, December, 1961.

wonder.”⁸ With the change in the village and agricultural land system, the role of the headman was reduced to collector of revenue and upholders of the Village Act. The British system emphasized the self-policing functions of the village, and neglected its role as social system.

The Burma Reforms Committee organized by the British India in 1922 noted that, “the Burmese people feel that there is too much of logic and too much of hair-splitting in the system of British law, and too many loop-holes and too many occasions for the benefit of the doubt. Therefore, the justice is not served and so the lawless people, offenders, and the clever-people enjoy the advantage of rule of law system under the British rules.”⁹ This report precisely reflects the social theory of Burmese society in which the Buddhist teaching of the “medium way” of judging at things and viewing at their live and existence. Therefore, the British system of rule of law faced passive resistance throughout rural Burma by not following British rules.

Burmese Law after Independence

After Burma gained independence from Britain on January 4, 1948, it established a parliamentary democratic system in which the rule of law became an important parameter for keeping the system working. The first Burmese Prime Minister U Nu speaking to the whole nation on March 12, 1948 said, “The first essential condition for making democracy secure in our lives is to base all our activities firmly on the rule of law.” With this ideology, the post-colonial government introduced the “rule of law” system by explicitly copying almost all rules of the governing system from the British.

⁸ See H. N. C. Stevenson, *The Central Chin Tribes*, Bombay, 1943.

⁹ See Burma Reforms Committee, *Record of Evidence*, II, p. 73, Rangoon 1922.

A Burmese legal scholar, Furnivall in his book *Colonial Policy and Practice*, pointed out that “judicial interpretation in British Burma was to favor private interest over social welfare. This was a heritage from the British legal system, which had been transplanted in Burma by judges and lawyers. But judicial traditions that fortified the national solidarity of England furthered the disintegration of social order in Burma.” The reason why the British rule of law system failed to keep social order in Burma is because, as pointed out earlier, it deviates from the social elements and tradition of rural communities.

A similar sentiment was expressed in a note of dissent, which a Burmese political leader wrote for the report on reorganization of the administration in 1949:

It has been found that the introduction of the rule of law, which is alien to Burmese tradition, has led to the disintegration of Burmese social life. Any unalloyed continuance of the rule of law will further disintegrate Burmese social life. Hence any measure to reintegrate Burmese social life will have to depend more on social sanction than on the rule of law. I do not recommend that the rule of law should be dispensed with. But the rule of law should be adjusted in such a way that it should leave the largest possible scope to the play of social sanction.¹⁰

The post-colonial Burma’s parliamentary system, based on rule of law, lasted about twelve years from 1948 to 1962. In 1962, Burma fell into the hands of the Burmese army led by General Ne Win. General Ne Win created a political system called “Burmese Way to Socialism” and implemented new “rule by law” system to replace “rule of law” system. In new “rule by law” system under the socialist ideology, law is made by the authoritarian power. Meanwhile, General Ne Win sorted out social norms and traditional practices outside of political boundary in which rule by law is practiced.

¹⁰ See *The First Interim Report*, Administration Reorganization Committee, Rangoon 1949. Bo Khin Gale’s note of dissent.

Therefore, social norms and traditional practices are left to be dealt by village headmen and abbots of Buddhist monasteries throughout country. This dual system “rule by law” and rule of the “social and traditional practices” exists today. This, from the legal scholars’ point of view, is a challenge for the next coming generation of governments and citizens in Burma. The fundamental question is how can a newly emerged government in Burma integrate social norms and traditional practices into “rule of law” system?

Challenges at the Transition

Burma now is in the throes of transition to modernization and change. The quest for this modernization and change began in 1988 after the student-led popular uprising challenged the “Burmese Way to Socialism” under General Ne Win’s government. On August 8, 1988, people throughout Burma marched on the streets of cities and town demanding a more liberalized political system. The people’s movement was ceased by the military coup on September 18, 1988. The military government known as State Peace and Development Council (SPDC) promised to transform the country to a “modern and developed” nation. In 1990, it held democratic election. The National League for Democracy (NLD) led by Daw Aung Suu Kyi won the election. The military government refused to transfer the power to the elected government on a ground that the emergence of a new constitution was priority before the transfer of power could take place. Accordingly, the SPDC has single-handedly convened the National Convention that is charged to draft a new constitution.

Burma at present is somewhat in a period of “constitutional moment.” The military regime in Rangoon has been convening the National Convention since 1992 to

write the constitution while the opposition party, National League for Democracy, has its own version of the constitution. In addition, two constitutions still exist in Burma to be sorted out their relevancy today from the Burma's historical complex. The first is 1947 constitution nullified by the 1962 military coup and the second is 1974 constitution ended by the 1988 military coup respectively. Therefore, there are at least two challenges at the frontier of legal transformation in Burma.

First is the challenge for the emergence of a constitution. What kind of constitution should be implemented to meet the desire of the population – a constitutional democratic system of governing system? General public and majority of politicians in Burma view the constitution as a foundation for a political transformation rather than a foundation for a legal system. Legal system and political system are, by nature, different. Legal system clearly outline a set of rules or a serve as social contract that society as a whole view as parameters of civic behaviors whereas political system functions based on the level of civic education and the scale of economy. Therefore, political transformation cannot be set out or controlled by a constitution. However, these two systems are dependent upon each other in coevolution. The progress or change of one can have significant impact on the other. While the constitution necessarily need to address issues associated with political transformation, the overemphasis on the constitution as fundamental foundation of political system and its transformation can impede the natural process and evolution of political lives of citizens and society as a whole.

Therefore, the challenge in constitutional thinking for the emergence of a new constitution is not to confuse with Burma's need for political transformation because the

emergence of a new constitution does not necessarily guarantee political transformation to occur. For the constitution to set parameters for civic behaviors, it is important in Burmese context that the rule of law framed by the constitution does not deviate from the traditional and social elements of the people. The challenge, therefore, for the constitutional framers is to sort out current social and traditional values that dominate the daily life of people in Burma and to incorporate them into the constitution. If a newly emerged constitution is closer to the traditional social elements of livelihoods of different communities of Burma, it may support and lead the political transformation to occur in Burma.

The second challenge is to introduce the rule of law system in Burma so as to plug Burmese social and economic system into the global economy while it encompasses traditional values and wisdoms. The system of rule of law is important to maintain political and economic stability as well as to foster economic and social progress. Burma had a short history of parliamentary democratic system from 1948 to 1962, in which the rule of law system began to emerge. However, the system failed due to the lack of political will and the failure of the then legal system to frame rule of law in accordance with social elements of the society. The difficulty was encountered, however, in discovering what the Burmese social elements and customary laws were (Maung Maung, 1963: 27). The new government in the future has to deal with this difficulty. One way in dealing with dealing with this difficulty is to decentralize or federalized¹¹ legal and

¹¹ The term “federal” here means a power and authority sharing system between the union government and state, division, and local governments. In the military regime’s view, the term “federal” is misunderstood as “disintegrated” while in practices in other federal republics in the world, it means opposite. This notion of interpretation of language “federal” is perhaps the most important “trap” in reconciliation of views in Burmese politics between the regime and other parties.

political systems with polycentric orders by giving more authority to local governments and communities.

Conclusion

The history of legal development in Burma discussed in preceding paragraphs indicates that Burma today is a society where modernization and traditional social elements are about to collide in every aspect of transformations. The legal transformation and historical and traditional value transformation are likely to be shadowed by the economic transformation. This could lead to incomplete or partial political transformation. Three areas of transformations that should occur simultaneously to achieve comprehensive political transformation that is mainly desired by various groups other than the military regime are not the subjects of the ongoing National Convention.

Therefore, the hindrance for the political transformation exists when all parties or groups in Burma view the National Convention as the hallmark of political transformation in Burma while it should be viewed as just one area of comprehensive political transformation. If the ongoing National Convention is viewed as the hallmark of political transformation, then the constitution that is produced by this National Convention will unlikely match social and traditional elements of livelihoods of various communities of Burma. The emerging governments have to balance the transformation of three areas – economic, legal, and historical and traditional value – so as to establish a viable and sustainable social and economic development that facilitate the evolution of not only law but also social and traditional livelihoods of various communities.

Appendix A: Nine Institutions of Burmese Dhammathats

Name of Dhammathat	Date	Reign of the King	Remarks
Manu	A.D. 540-560	First Pagan	The introduction states that it was presented to King Mahathamada by the Rishi Manu.
Dhammavilasa	A.D. 1200	Fifth Pagan	The introduction states that it was abridged edition of Manu Dhammathat by Shinn Dhamavilasa.
Wagaru	A.D. 1270	Martaban	This Dhammathat at the introduction states that it was rooted in Manu Dhammathat written at the instance of Wagaru, King of Mataban.
Pasadha	A.D. 1468	Taungoo	This Dhammathat has been considered to be high authority in Burmese law
Manusara	A.D. 1549	Pegu	Twelve legal scholars in 1549 composed this Dhammathat under King Sinbyumyashin
Dhammathat Kyaw	A.D. 1581	Taungoo	This Dhammathat, according to its preface, is combination and analysis of previous Dhammathats
Pyanchi	A.D. 1614	Taungoo	This Dhammathat was written by an individual named Maung Pe Thi.
Myingun	A.D. 1650	Konebaung	It is named after the town where the Dhammathat was written.

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 2. Justice E. Maung, *The Expansion of Burmese Law*

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