Introduction

As stated in the Foreword, this Special Burma Edition of *Southern Cross Law Review* arose out of a one day conference called *Restoring the Rule of Law in Burma* that was jointly sponsored by the Southern Cross Law School and the Law Society of New South Wales.

Not all of the presentations and speeches that were made at the conference are reproduced here. And some of the contributions to this volume were not presented at the conference. A few were "solicited" by this editor or my co-editor Sam Garkawe. To be specific "'Revolutionary Legality': The Coup d'Etat of 1962 and the Burmese Military Regime" by Nang Mo Kham Hom was an honours thesis in law that was submitted to the Law Faculty of Northern Territory University and was not presented at the conference. "A Democracy's Rite of Passage: Confronting the Ghosts of its Past" by Mathew Deighton and Sam Garkawe was also not presented at the Conference and arose out of an article which Mathew Deighton initially wrote. The Case Note "The Unocal Case: Potential Liability of Multinational Companies for Investment Activities in Foreign Countries" by Theo Christmann is also based on an international law assignment at Deakin Law School in which this editor was the Unit Chair of the course. Adrian Lipscomb's review of the book *Burma/Myanmar: Strong Regime, Weak State* was not presented at the conference. In fact that book was a product of papers of another *Burma Update Conference* which was held in Canberra on 6th and 7th August 1999. The first day of the Canberra conference coincided with that of the *Restoring the Rule of Law in Burma Conference* that was held in Sydney. However the proceedings from the Canberra conference were published much earlier than its Sydney counterpart. Hence a few of the articles that were presented at the "parallel" conference were able to be reviewed in this Special Edition of *Southern Cross Law Review*.

I am the only "vernacularist" among the three editors (myself, Sam Garkawe, and Adrian Lipsomb) and all the contributors to this volume. As one who has done the major editing as well as providing information and documents for, correction of historical and substantive facts in some of the articles, and closely and at times fairly extensively correcting the style, grammar and expressions of a few of the papers as well I feel that a personal Introduction in the form of a brief comment on the substance of the papers and the Case Note is appropriate for this Special Edition.

The opening article entitled "The Just Rule of Law", by Adrian Lipscomb and Nicholas Cowdery, is based on remarks made by the latter at the conference and later substantially expanded upon by its joint-author. The essay is jurisprudential and reflective in nature and comprises mainly snippets of observation concerning English legal history, Australian pronouncements, as well as brief references to aspects of Islamic law and Buddhist political thought as gleaned from excerpts of Aung San Suu Kyi's writings. As befitting a Special Burma Edition, a point needs to be made that the broad concept of the just rule of law is not exclusively or even mainly Western though undoubtedly it has Western roots. An aspect of the article tries to illustrate that common, generic factors pertaining to the *just* rule of law can be found in varied cultures. Yet I am reminded of a saying which I have read but cannot 'source' which states in effect that the concept of the Rule of Law can, at times, be used to 'deceive not only those on the receiving but also on the giving end'. This comment was apparently made in relation to those States or systems of governance which can arguably be placed more or less in the "Rule of Law" rather than "Might is Right" "continuum" which the authors have described in the article. In this context it could be mentioned here that the Burmese government has used not only the phrase "law and order" (it need hardly be pointed out that until November 1997 the name of the ruling junta was the State *Law and Order* Restoration Council) but also the phrase "rule of law" in its commandments to the citizens to obey the laws and also the "Rule of Law". From their perspective, it seems that there is no need to 'restore' rule of law .It is already 'there' and its citizens should merely 'obey' its laws and 'rule of law'.

"No man should be a judge in his own cause"[1] says a well-known legal maxim. Hence I will refrain from commenting on

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[1] I have not used the word "[sic]" after the allegedly (to some) offensive word "man" since I am quoting from a centuries-old Latin maxim: *Nemo judex in causa sua.* At least in Burmese culture one of the most revered if only mythical judge in Burmese folklore is a woman: Princess Thudamasari, who was also designated as "Princess Learned in the Law" by a late Burmese scholar. See Maung Htin Aung, *Burmese Law Tales: The Legal Element in Burmese Folklore, OUP*, 1962, p. 22. See also Maung Htin Aung, "A Conversation with Princess-Learned-in-the-Law" which appeared in the 28 and 29 March 1974 issues of *The Working People's Daily*, Rangoon, Burma.
As for my reason to "demur" from using "[sic]" after the translated phrase "exploitation of man by man" which was a political jargon - indeed one of its slogans mainly used by the then Revolutionary Government of the Union of Burma in the 1960s and 1970s - see Myint Zan, "Of Consummation, Matrimonial Promises, Fault and Parallel Wives: The Role of Original Texts,

my own article "Judicial Independence in Burma: Constitutional History, Actual Practice and Future Prospects" except to say that I have presented, in historical perspective, the concept of judicial independence as embodied under the two defunct Constitutions of 1947 and 1974 as well as during the period of March 1962 to March 1974 when the country was without a formal constitution. Aspects of the actual practice. regarding judicial independence especially since 1948 is also stated in the article. As far as the future is concerned, some of the proposed constitutional provisions that can be discerned in the *Basic Principles as Agreed to by the National Convention till March 1996* (which I have referred to as the "National Convention Draft Constitution") is also discussed. I believe that some of the factual information that is provided in my article is presented for the first time in the English language.

"'Revolutionary Legality': The Coup d'Etat of 1962 and the Burmese Military Regime" by Nang Mo Kham Hom is a substantial article with strong comparative law elements and is fascinating to read. I would demur though from the author's conclusion or statement that the 1947 Burmese Constitution is still valid. It is true that there was no official statement, military decree or judicial pronouncement during the period of the Revolutionary Council of 1962 to 1974 - where Burma was without an effective Constitution - that the 1947 Charter has been abrogated. Yet the 1974 Constitution factually and all but legally "overrode" or superseded that of the 1947 Constitution. This does not mean that in the "misty" and contingent future, a (future) Burmese government cannot "restore" (even then perhaps with major amendments) the 1947 Constitution. Moreover, it needs to be commented here that the 1962 military coup that brought the Revolutionary Council to power was more sweeping, more complete, more effective and more "total", so to speak, than any of the military takeovers or "revolutionary regimes" that are discussed in the article. For example in footnote 4 of the article, the author briefly discusses the October 1999 military coup in Pakistan and the decision of the Supreme Court of Pakistan regarding the legality of the military government of General Pervez Mushraf. In the 1999 Pakistani coup even though the elected government of Prime Minister Nawaz Shariff was overthrown the country's President, and its Supreme Court remains "intact". Indeed the deposed (later convicted and exiled) Prime Minister Nawaz Shariff's Pakistan Muslim League was able to file petitions to the Pakistani

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Interpretation, Ideology and Policy in Pre-and Post- 1962 Burmese Case Law" (2000) 14 (1) *Columbia Journal of Asian Law* 153 at pp. 180-1, footnote 105.

Supreme Court. In the case of the March 1962 Burmese military coup not only the Prime Minister as the Head of the Government but also the President as Head of the State and the Chief Justice of the Supreme Court (known officially then as "Chief Justice of the Union") were removed from their positions and detained for a period of over four to about six years. The Parliament was abolished within a week of the coup by military decree. The two apex courts, the Supreme and High Courts were also abolished within four weeks of the takeover by another decree of the Burma's ruling Revolutionary Council. Additionally, there never was any challenge to the legality of the regime or of its laws, whether in domestic or international fora. That obviously was not the situation in the cases discussed in the article. In all the cases, there were challenges against the laws issued by the new revolutionary regimes. The validity of the laws issued by the "revolutionary regimes" in such countries as Pakistan, Grenada, Rhodesia and Lesotho were the subject of litigation in domestic courts or non-domestic courts such as those of the Privy Council. Notably, all the countries in which the cases arose were Commonwealth countries with a common law background. Burma never was a member of the British Commonwealth and at least in terms of public laws or concepts of constitutionalism it has moved as far away from its "common law legacy" (which it inherited or adopted at the time of independence in 1948) as any other former British colony.

The two essays that followed Nang Mo Kham Hom's also deal at least in part with contingent future events which may or may not materalise. Venkat Iyer's "Federalism and the Protection of Minority Rights: Some Lessons for a New Democratic Burma" is a thoughtful, scholarly piece which is helpful if and when a "new democratic Burma" emerges. But as the Boy Scouts motto says: "Be Prepared". The fact that (in this editor's opinion) prospects for the emergence of a "new democratic Burma" in the near future are extremely remote does not necessarily mean that the issues raised in the paper are not worth canvassing or that the lessons from other countries which have made the transition should not be reviewed.

Venkat Iyer's paper partly overlaps with that of Graeme Wiffen's "Drafting a Constitution for Burma: A Comparison of the Government's and an Expatriate Opposition Group's Proposals", for both papers discuss certain provisions of the "draft constitutions" mainly drawn up by the exiled or expatriate National Council for the Union of Burma (NCUB) in comparison with the government's (for want of a better word) "proposals". It needs to be reiterated that neither the

government's "draft" of Basic Principles nor the (external) opposition's "draft constitution" are the Basic Law or in force in Burma yet. And given the reality "on the ground" it would appear that it would be the government's rather than the opposition's draft that could perhaps materialise as the future Constitution of Burma. The (external) opposition's *(Future) Constitution of the Federal Union of Burma* actually becoming *the* Constitution is considerably less than that of the government's proposed but only partially completed (as of the time of writing in February 2001) provisions being transformed into the actual Basic Law. Foreign experts obviously have a major role in drawing up the NCUB's draft constitution and perhaps the draft was originally written in English. The government's draft on the other hand was written in Burmese and the *Basic Principles and Detailed Basic Principles laid down by the National Convention's Plenary Sessions Up to 30 March 1996* is, a "translated document" as stated in the article. This editor is not aware that there is, in print, a Burmese language version (perhaps translated from the "original" English version) of the NCUB draft or for that matter whether the NCUB draft has been translated (from English) into any of the other ethnic languages of Burma. Graeme Wiffen states in footnote 72 of the article that in his personal conversations with members of the NCUB drafting Committee they mentioned or referred to the "English" version. Hence one assumes that there would be a Burmese version, or versions in other ethnic languages, of the NCUB draft. In this regard Venkat Iyer's reminder in his article about "the risks of heeding the glib, off-the-peg advice that some of the more ideologically fanatic foreign 'experts' whose enthusiasm for politically correct solutions [which] far exceeds their knowledge of local cultures and conditions" should be kept in mind when drafting a future Charter for the country.[2]

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[2] It is not meant here that because a country's constitution is drawn up by foreign experts it is always, usually or sometimes "defective" or undesirable or that all foreign experts lack "knowledge of local cultures and conditions". The Federal Constitution of Malaysia for example was drafted around 1957 by the Reid Commission which consisted entirely of foreigners and the Malaysian constitution has lasted for more than forty years. In contrast, Burma's 1947 Constitution was drafted by a 111 member Constitution drafting Commission all of which were Burmese nationals though undoubtedly some important members of the Commission were British-trained Burmese barristers. The fact that the 1947 Constitution was mainly drawn up by "elitist barristers" itself was later used during the 1970s and 1980s and even now as one ground of criticism pointing to the "weak points" of the 1947 Constitution. Unlike the 1947 Constitution, the "draft" constitution of the NCUB apparently has more "foreign participation" though some infelicitous and ungrammatical English

Unlike the two preceding essays, which deals with the "future", Robyn Layton's "Forced Labour In Burma: A Summary of the ILO Commission's Report and Subsequent Developments" brings the reader back to the present in all its stark and intricate realities. For those who do not have access to the massive and detailed ILO Commission's Report of more than 300 pages the article provides a succinct and revealing description of the findings of the Commission and also a summary of events (till June 2000) subsequent to the Commission's Report.

Mathew Deighton's and Sam Garkawe's "A Democracy's Rite of Passage: Confronting the Ghost of its Past" brings us back to the future and for that matter the "mistiest" of the future on the issue of what should be done to those who have committed past "atrocities" if and when the military regime collapses and a new democratic government emerges. The contents are "academic" in more ways than one, and the likelihood of such "scenarios" or "rites" occurring in the Burmese context are so remote that one can perhaps be allowed to be flippant enough to quote from a Burmese song which was popular in the early 1970s. The relevant phrase from the song reads in translation: "When a rock is thrown against a [flying] aeroplane it would hit ... Ocean Liners will dock at the railway station..." To that phrase, if I correctly recall the song, was added the phrase "far, far away..." in English. Nevertheless an academic journal should contain articles which are "academic" in other meanings too. The value of this article is in its comparative treatment of other repressive regimes which had been overthrown or fully or partially "eased from power" and the nuances that pertain to confronting the "ghosts of the past" when a new relatively democratic government emerges. The analogy with other "collapsed" regimes however, as the authors implicitly acknowledge, is (at least) "stretched" since the fundamental fact of the current regime's continued viability for perhaps a long time is not seriously doubted even by the most fervent "optimists".

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expressions that are in the document (1997, Manerplaw) that I have, makes me wonder about the level and extent of that "foreign participation" in the "process". That there is "foreign participation", even if in a leading role in the drafting process, does not automatically qualify the document to fall into the category of suspect classification (to borrow an American constitutional expression) but Venkat Iyer's reminder can and should serve occasionally as a stimulus for thought.

Mathew Deighton's and Sam Garkawe's article looks into the issue of taking into account those responsible for "past" atrocities in the (hoped for) future. On a much smaller scale, current attempts to hold those multinational corporations, who have "cooperated" with the current Burmese government, have hit a "snag" as stated in the postscript of Theo Christmann's case note "The Unocal Case: Potential Liability of Multinational Companies for Investment Activities in Foreign Countries". Judge Richard Lew has dismissed the plaintiff's claim to hold Unocal accountable mainly under the United States *Alien Tort Claims Act* (ATCA). However the Case Note was written and submitted before Judge Lew's decision in August 2000. The case note deals with the previous decision of Judge Paez's (which was, in a sense, reversed by Judge Lew). The criticisms that were made against Judge Paez's decision in the Case Note are quite comprehensive although also quite conservative. The cautious approach of Theo Christman's contention is illustrated by his comment that "[t]he ruling of Judge Paez goes well beyond the already liberal and extensive interpretation of ATCA in *Kadic v Karadzic* regarding state action" One would suppose that when the rulings in *Kadic v Karadzic*[3] and *Filartigia v Pena-Irala*[4] were delivered in 1995 and 1980 respectively there might have been murmurs that the rulings in those cases were, in Theo Christmann's words, "truly novel" (in its not so positive sense) and went "beyond the holdings of current case law". Yet international law progresses and new, innovative case laws are always treated with scepticism in some quarters.[5] Judge Lew's decision is now being appealed by the plaintiff's lawyers to the United States Ninth Circuit Court of Appeals. At the time of writing, it is not known whether the Court of Appeals would even consent to hear the case. The author wrote that the Unocal litigation (as decided by Judge Paez) should make

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[3] 70 F 3d 232 (2nd Circ. 1995), (1995) 34 *International Legal Materials* p. 1592.
[4] (1980) 630 F2d 876.
[5] For example in the first Pinochet case delivered by a judicial committee of the House of Lords on 25 November 1998 (*Pinochet I*) (a decision subsequently vacated by another judicial committee of the House of Lords on grounds that Lord Hoffman's participation in the first judicial panel is "tainted with the apperance of bias") Lord Slynn, one of the two dissenters cited a 150 year old English case *The Duke of Brunswick* v *The King of Hanover* to express his view that international law has not changed from its absolute position of giving full immunity to a former Head of State, even for heinous crimes, if they were done within the "governmental function". In a comment on this observation, I wrote that "If Slynn meant that there is no judicial precedent in British law holding that a former Head of State does not have immunity for heinous crimes, he was correct. But as they say there is always a first time". (Myint Zan, "Landmark Ruling in London", The Japan *Times*, December 6, 1978, p.21)

investment companies "more cautious about entering agreements with governments of host states that have a poor human rights record and that they [should] not turn a blind eye to human rights abuses in developing countries". That statement, it must be repeated, was written before Judge Lew's decision. "Globalization" is a very powerful phenomenon. The cautious approach of the author, when juxtaposed with the above statement might prove to be optimistic especially if the attempts to hold multinational corporations legally accountable vis-à-vis the Unocal case in United States courts prove to be elusive.

As stated earlier Adrian Lipscomb's book review considers some of the papers that were presented at a "parallel" conference that was held on the same day as the *Restoring the Rule of Law in Burma* Conference After considerable efforts of the editors and some delay "the conference papers" (plus additional essays) have now been published in this special edition of *Southern Cross Law Review.* One of the disadvantages of such a late publication is that some of the contributions such as the Unocal Case Note become "outdated" since new developments have taken place. Still, one possible advantage may be that the delayed publication has facilitated the review of papers that were presented at another conference dealing with Burma issues.

Finally, a few general observations regarding this Special Issue. As far as the use of Burma or Myanmar is concerned we have adopted whatever name or terminology the authors have used in their contributions In the substantive text Robyn Layton uses "Myanmar" - for that was the official name used by the ILO Commission Report of which she is a member - but in the title of the article "Burma" is used. We have retained both terms as submitted.

The usual (and recommended) word limit for articles does not apply to this Special Issue. Obviously there are divergences in the length - and substance - of the articles. The "sources" from which they originate are also different. Due to their prominent station in public life, some of the contributors were coaxed - and indeed assisted - to expand the almost off-the-cuff remarks they made at the conference into academic papers for this issue. Others were more substantial and solid academic articles originally written for separate projects and therefore they are longer than the usual word limit.

I would like to thank my colleagues Sam and Adrian for the confidence they repose in me by "assigning" me the major editing work, in all of its aspects, of all the articles, case note and book review and for asking me to write the Introduction.

Myint Zan
Co-Editor