Two Divergent Burmese Rulings on Criminal Defendants' Confessions: An 'Ideological Analysis'

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This article mainly discusses two different decisions given by two different Burmese courts on the subject of the admissibility and use of criminal defendants' confessions.

This discussion is intended not merely to describe and compare the two decisions but to highlight the possible ideological influences that might have impacted on the second decision which was given after the military coup of 1962. The military coup of 1962 overthrew the democratically elected government of the late Prime Minister U Nu. The coup not only brought significant and extensive changes in Burmese governmental structures but also resulted in changes to legal institutions and thinking. How the post-1962 Burmese political and legal ideology might have affected the Burmese courts' decisions on the subject of confessions in the post-1962 era will be the main focus of this article.

In order to give a perspective on the post-1962 changes that took place in the structure and orientation of the Burmese judiciary, a historical summary is required.

A Brief 'Legal History'

Some parts of Burma were under British colonial rule for over a century[1] British law - substantive and procedural - as well as British legal thinking did have an influence on the development of Burmese law.

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1 The British fought three wars with the Burmese in the 19th century and won all three of them. After the First Anglo-Burmese war of 1824 to 1826, the Burmese King signed a treaty which ceded parts of Southern and Western Burma to the British. After the Second Anglo-Burmese war of 1852 Rangoon and other parts of Lower Burma came under British control. And after the Third Anglo-Burmese war of November 1885, the whole country was annexed into the British-Indian Empire on 1 January 1886.

Therefore it would be appropriate to say that Burma was at least during colonial times and even after independence - as far as aspects of its legal system and some of the laws were concerned - a 'common law country'.[2]

Consequently during the colonial era and to a large extent in post-independent times as well, case law and the doctrine of precedent played an important role in developing and refining legal doctrines in various areas. A decision handed down by a British judge during the colonial era would theoretically 'bind' or could at least be cited or referred to as precedent in Burmese courts, provided of course that precedent or ruling has not been explicitly overruled in a later case or overridden by subsequent legislation.[3]

2 'Common law' is used here to denote the legal system (and not 'case law'), especially in contrast to civil or continental systems. As to this author's general classification of post-1962 Burmese law (in a sentence) as a mixture of 'customary law, common law, socialist law and/or martial law' see Myint Zan, 'Law and Legal Culture, Constitutions and Constitutionalism in Burma' in Alice Tay (ed), *East Asia: Nation-Building, Human Rights, Trade* (1999), 200-01 fn 73.

3 Court decisions of the British era were compiled in various law reports. The earliest law reports of court decisions, all of them written in English, were the *Selected Judgements of Lower Burma* (1872-92) and the last series of law reports before independence were published as *Rangoon Law Reports* (1937-1947). (For a compilation of the lists of the law Reports from 1872 to 1947 see Maung Maung, *Law and Custom in Burma and the Burmese Family* (1963) 146).

With independence in 1948, the judgments of the Supreme and High Courts of Burma (the two apex courts under the 1947 Constitution of the Union of Burma) were compiled in a series called *Burma Law Reports*. From 1948 to 1962 most of the rulings given by the Supreme and High Courts of Burma were written in English. However even in 1948, the year of Burmese independence, about 10% of the rulings were written in Burmese. After 1962 the rulings of the Chief Court (later renamed Supreme Court) were increasingly written in Burmese. The last year in which a few (roughly less than 10% of the judgments contained in the annual law reports) of the Chief Court were written in English was 1968. From 1969 onwards all of the judgments of the highest court of the land be they formally named Chief Court (1962-70), Supreme Court (1971-73), Central Court of Justice (1974-88) and Supreme Court (1988 to present) were all written in Burmese.

It should be briefly mentioned that in the early to mid-1970s, around the time o the introduction of the 'People's Judicial System' there was considerable de emphasis on case law or reliance on precedents. Dr Maung Maung then Judicia Minister wrote in 1973 that foreign rulings should not be quoted at all and ever previous rulings by Burmese courts should be cited and referred to with caution since the social and historical circumstances of each case varies'. See Myint Zan above n 2, 235-36.

The *1998 Myanmar Law Reports*, (in Burmese), a selective compilation of th decisions of the current Supreme Court of Myanmar (as it is officially named during the year 1998 contains the compilation of judgments of 18 civil cases an 42 criminal cases. All of the rulings were written in Burmese. But pre–1948 ruling

As stated earlier, there was a major political change on 2 March 1962 when the Burmese Army took over power from the democratically elected government of the late Prime Minister U Nu. A 17 member Revolutionary Council to rule the country was formed.[4] Parliament was abolished on 8 March 1962 by a decree of the Revolutionary Council.[5] On 30 March 1962 the Supreme and High Courts of Burma, the two apex courts under the 1947 Constitution, were also abolished by a decree of the Revolutionary Council.[6] In their place a new court called 'Chief Court' was established.[7]

There are many books, articles, papers and other documents that discussed the political consequences of the 1962 military takeover in Burma. However academic articles that discuss the legal consequences as well as the changes in the legal arena, legal thinking and orientation of the post-1962 era in Burma are relatively few.[8] In the

of what could called 'Anglo-Burmese courts' (appellate court rulings during their British colonial era) were cited with approval in a few decisions of the civil cases of the current Myanmar Supreme Court during 1998. For example, a ruling given by an Anglo- Burmese court regarding succession (to family property) of Burmese Buddhists during the year 1897- 1901 was cited with approval in the year 1998 (at page 232, of *1998 Myanmar Supreme Court Reports*). Similarly rulings from the Privy Council from the year 1924, the High Court of Judicature at Rangoon in 1943 was also cited with approval (at pp 232-33 in the 1998 *Myanmar Supreme Court Reports*). In pages 234 to 235 of the 1998 *Myanmar Supreme Court Reports* reference was also made to five other rulings of the Anglo- Burmese courts of the 1920s, 1930s and 1940s. In a single instance (among all the sixty plus civil and criminal cases decided and compiled in the published law report by the current Myanmar Supreme Court in 1998) a sentence from a 1938 (pre-independence era) written in English (about the nature of obiter dicta) was reproduced in English and cited (at page 246 of *1998 Myanmar Supreme Court Reports*).

4 See the news item 'Army Takes Over Power, President, Chief Justice of Union, Prime Minister, Cabinet Ministers, Federal Leaders Detained for Security; Revolutionary Council Formed' in 3 March 1962 issue of *The Guardian* (Rangoon) newspaper. See also *The Nation* (Rangoon) of the same date for news item concerning the military takeover.

5 See 9 March 1962 issues of *The Guardian* (Rangoon) and *The Nation* (Rangoon) concerning news item of the abolition of Parliament.

6 See 31 March 1962 issues of *The Guardian* (Rangoon) and *The Nation* (Rangoon) newspapers.

7 The English nomenclature of the Chief Court was changed back to 'Supreme Court' in the early 1970s but for the sake of consistency and in order not to confuse with the pre-1962 Supreme Court when reference is made to the highest court of the post-1962 era (till 1974) the term 'Chief Court' will be used.

8 The author has tried to fill this lacuna. See Myint Zan above n 2, 214-81. See also Andrew Huxley, 'Fifty Years of Burmese Law: E Maung and Maung Maung' (1996-1997) *Law Asia* 9. For a correction of one -among a few others- factual errors, and expressions of the author's philosophical disagreement with some of Huxley's views see Myint Zan, 'Comments on Fifty Years of Burmese Law: E Maung and Maung Maung' (1999) *In Camera* (Deakin University Law Student

post-1962 era some laws became vehicles to implement the new government's radical and socialist developmental plans. Some of the laws that were promulgated during the post-1962 era began to embody and reflect its 'socialist ideology'.[9] Courts also began increasingly to become instruments and implementers of the executive government's policy and ideology.[10]

The Two Rulings Concerning the Admissibility and Use of Criminal Defendant's Confessions

The two cases that are discussed in this article dealing with the admissibility and use of criminal defendants' confessions were given in post-independence times. The 'delineation' in terms of 'era', was that one ruling was given pre-1962 and the other post-1962. They differed radically from each other even though the latter ruling did not specifically overrule or state that it superseded the earlier ruling.

Magazine) 39-40. For a 'conversational' discussion of some post-1962 legal developments see Maung Htin Aung, 'A Conversation with Princess-Learned-in-the-Law, Part I', *The Working People's Daily* (Rangoon), 28 March 1974, 2, Maung Htin Aung, 'A Conversation with Princess-Learned-in-the-Law, Part II', *The Working People's Daily* (Rangoon), 29 March 1974, 2. A rejoinder to (Dr) Maung Htin Aung's Article was written by Dr Htin Aung's elder brother U Myint Thein, the third Chief Justice of independent Burma. See MMT, 'Comments on Dr Htin Aung's Dialogue with the Princess' which appeared in three parts in 24, 25 and 26 April 1974 issues of *The Working People's Daily* (Rangoon). In the 1990s a book by Alex Christie and Suzanne Smith, *Foreign Direct Investment in Myanmar*, (1997) describes in detail almost exclusively the commercial and foreign investment laws except in a sub-section entitled 'Legal System' 5-6.

9 In the first twelve years of its existence, the Revolutionary Council issued its news laws through decrees by announcing them on radio and publishing them in newspapers often with the statement that 'This Order shall come into effect immediately'. One example of a law that is reflective of its 'ideology' is the banning of all political parties except the ruling Burma Socialist Programme Party. See the promulgation of the *Law Protecting National Unity* in 24 March 1964 issues of *The Guardian* (Rangoon) and *The Working People's Daily* (Rangoon). This law was repealed by a decree of the State Law and Order Restoration Council ('SLORC') on 18 September 1988: the day it assumed power. See 19 September 1988 issue of *The Working People's Daily* (Rangoon).

10 For example in the early years of its assumption of power, the Revolutionary Council established the Special Criminal Courts Appeal Court, a court presided over by three judges where at least one member of the court was a member of the Revolutionary Council. In the post-independence and pre-1962 era such instances whereby members of the 'legislature' (since the Revolutionary Council promulgates laws through its decrees) has not occurred before. The fact that it was done so in the period of the Revolutionary Council would indicate that at least some of the courts in the post-1962 period had become vehicles to implement the (executive) government's policy and ideology.

As regards the post-1962 ruling on confessions, the author has, over a period of about two years unsuccessfully tried to obtain a copy of the ruling *Maung Saw Pe and three others v The Union of Burma*.[11] The attempt to obtain the ruling included efforts to obtain it through friends and colleagues in Burma and in London and an attempt to secure a copy of the ruling through inter-library loans.[12] Instead the author has to rely on an excerpt of the ruling from *Maung Saw Pe* which was reproduced in *Digest of Burma Rulings (Civil and Criminal) [1956-1976]*.[13]

The ruling in *Maung Saw Pe* contradicts that which was held in a ruling of the Burmese Supreme Court eight years earlier in the case of *Aung Tun v The Union of Burma*,[14] which held that:

> where there is no other evidence to show affirmatively that any portion of the exculpatory element in a confession is false, the court must accept or reject the confession as a whole and cannot accept only the inculpatory element, while rejecting the exculpatory element as incredible.[15]

The Issue

Whether a criminal defendant's confession should be accepted or rejected as a whole[16] or whether unbelievable aspects of a criminal defendant's confession can be excluded and the believable (credible) aspects of a confession can be extracted and accepted (as a basis for conviction) by a court.[17]

11 (1966) BLR (SCCAC) (Special Criminal Courts Appeal Court) 57. The ruling was written in Burmese.

12 The author would like to express his thanks to Ms Elizabeth Broadfoot and staff of Deakin University interlibrary loans in Geelong, Victoria, Australia for their efforts in trying to locate the ruling which as of this time of writing in April 2001, has not borne fruit.

13 Compiled By U Thein Han, (2nd ed, 1983). The extracts from *Maung Saw Pe* was reproduced in page 170 of the book under the title 'Criminal Cases' and sub-title 'Confessions'. The excerpts from the rulings appeared in the original language in which the rulings were written. Hence the excerpts were in both Burmese and English.

14 (1958) BLR (SC) (Supreme Court) 1. The Supreme Court Bench consisted of U Myint Thein, Chief Justice of the Union, U Chan Htoon, J and U Aung Tha Gyaw, J. The judgment was delivered in English and was delivered by U Myint Thein, Chief Justice of the Union, on 8 February 1958.

15 Ibid 7. This particular extract from the judgment in *Aung Tun* also appeared in U Thein Han's *Digest of Burma Rulings*, above n 13, 155.

16 As per the ruling in *Aung Tun* (1958) BLR (SC) 1.

17 As per the ruling in *Maung Saw Pe* (1966) BLR (SCCAC) 57.

The Decision in *Aung Tun v The Union of Burma* and the Cases Cited in the Decision

The *ratio decidendi* of the decision in *Aung Tun* is stated above.[18] The Supreme Court rejected the appeal of the Government from the decision of the High Court.[19] The government appealed the decision of the High Court that had given ten years' rigorous imprisonment to Aung Tun for murder and sought from the Supreme Court 'enhancement of sentence to death'. The main reason the Government furnished in appealing the sentence of the High Court was that the High Court 'had erred in accepting [both the exculpatory and inculpatory aspects] of confession as a whole'.[20] The defendant Aung Tun had also, by special leave, appealed against the conviction itself.[21] The Supreme Court dismissed the appeal of both Aung Tun[22] and the Government.[23]

In affirming the decision of the High Court that 'the confession of the [defendant] Aung Tun must be accept[ed] as a whole'[24] the Supreme Court cited among others, an Indian Case decided by the Allahabad High Court[25] which was 'endorsed' by the Supreme Court of India in *Palvinder Kaur v The State of Punjab*.[26] U Myint Thein CJ also stated that 'the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as incredible' as being 'the accepted dictum in Burma' and cited the 1881 case of *Maung Po Thin v The Queen-Empress* which ruled that

> [u]nless the prosecution can show that any part of a confession of an accused, so far as it exculpates him is untrue or violently improbable, it is not fair to act on so much that [in]criminates him, omitting all that

18 See text accompanying above note 15.

19 Under the 1947 Constitution, which was still in force in 1958, the two apex courts were the High Court and Supreme Court respectively. Decisions of the High Court could, with leave, be appealed to the Supreme Court whose decision was final.

20 *Aung Tun* (1958) BLR (SC) 1, 4.

21 Ibid.

22 Ibid 7.

23 Ibid 8.

24 Ibid 7.

25 *Emperor v Balmukund*, ILR 52 ALL. 1011 as cited in fn 1 of *Aung Tun*, ibid.

26 (1953) SCR vol IV, 94 as cited in fn 2 of *Aung Tun*, ibid.

> which goes to explain his own conduct and diminish the gravity of his offence. The only fair method is to take the confession as a whole.[27]

After reproducing this extract from a case that was decided in 1881, U Myint Thein CJ stated that '[w]ith great respect we give full endorsement to this view'.[28] Hence in its 1958 ruling the Supreme Court cited three rulings, two of which were given by foreign (Indian courts) and one by a colonial British court in 1881.[29] This is illustrative of the role and significance of case law and precedent in Burmese law especially in its pre-1962 decisions.[30]

The Ruling in *Maung Saw Pe* and its 'Relationship' with *Aung Tun*

After the advent of the Revolutionary Council in 1962 it established 'Special Criminal Courts' and it also established a Special Criminal Courts Appeal Court ('SCCAC') by decree. Members of the Revolutionary Council and Revolutionary Government presided as judges in the three-member 'special court of appeal'. Dr Maung Maung was, during the period of 1965 to 1971, Chief Judge of the Chief Court of Burma. Dr Maung Maung also, at times, presided in the SCCAC. Although the author cannot give citations due to the unavailability of the ruling he considers that the judgment in *Maung Saw Pe* was written by Dr Maung Maung.

Regarding the admissibility of the criminal defendant's confession the SCCAC ruling in 1966 was totally different from that of the Supreme Court eight years earlier in 1958. U Thein Han's *Digest of Burma Rulings* contains an extract from the SCCAC ruling in *Maung Saw Pe*. In translation it reads:

27 (1881) SJLB (Selected Judgments of Lower Burma) 324 as cited in fn 3 of *Aung Tun*, ibid. It is to be noted that the ruling was given during the time of 'Queen-Empress' Victoria and four years before Upper Burma fell to the British and the whole country was annexed into the British-Indian Empire.

28 *Aung Tun*, ibid 8.

29 All three cases were mentioned in the head notes of *Aung Tun*, ibid followed by the phrase 'approved'.

30 See text and notes accompanying above nn 2 and 3. Note also U Myint Thein CJ's deferential tone ('with great respect') in referring to the dictum in the 1881 case of *Maung Po Thin* in *Aung Tun* Ibid 8. In the post-1962 era and especially starting around the mid-1960s the Revolutionary Government's ideology and rhetoric has occasionally seeped through the courts including the Chief Court then the highest court in the country. From the mid-1960s onwards even if a decision of the colonial era has been followed by the Chief Court such a 'deferential tone' in approving a decision of the colonial era would not be used in court judgments especially if they were written in Burmese. By the mid-1960s an overwhelming majority of the judgments were written in Burmese though a few judgments of the Chief Court were still written in English until 1968.

> When a confession is judicially considered it is not the case that the entire confession must be believed [accepted] (or) that the entire confession must be discarded. What is believable [credible] in the confession must be extracted and accepted and what is considered to be incredible or unbelievable in the confession needs to be discarded. [However] parts of the confession which are extracted [from the confession as a whole] and accepted must be corroborated by other independent evidence.[31]

Hence it is clear that the ruling in SCCAC differs from that of Supreme Court in *Aung Tun* case. The author is quite positive however that the ruling of the Supreme Court in *Aung Tun* [32] was *not* explicitly overruled by the contrary finding on the same subject by the SCCAC in *Maung Saw Pe*.[33] From the author's memory the (contrary) ruling of *Aung Tun* might not even have been mentioned in the case of *Maung Saw Pe*. One possible reason for the ruling not being explicitly overruled might possibly be due to the 'hierarchy' of the Special Criminal Courts Appeal Court vis-a-vis the late Supreme Court of the Union of Burma.[34] Strictly speaking, only the Chief Court (*Taya Yone Gyoke)* that was established by the Revolutionary Council to replace the Supreme Court and High Courts that the Council had abolished, would be in a position to overrule a ruling of the late Supreme Court.

Then the next logical question would be: if the Special Criminal Courts Appeal Court was arguably 'lower' in hierarchy to that of the late Supreme Court and was technically not in a position to 'overrule' the late Supreme Court, then wasn't it incumbent on the SCCAC to follow the late Supreme Court on the same subject matter? This 'paradox' perhaps illustrates the point that the author is trying to develop regarding the anomalies of case law and doctrine of precedent in a few cases that were decided in the post-1962 era in Burma. The author would submit that in the pre-1962 era all (lower) Burmese courts would be bound to follow the Supreme Court since arguably a failure to do so could either result in the invoking of the Supreme Court's jurisdiction through a writ of *certiorari*[35] or a direct appeal to

31 *Maung Saw Pe* (1966) BLR (SCCAC) 57 as cited in *Digest of Burma Rulings* (1956-1976), above n 13, 170.

32 See text accompanying above n 16.

33 See text accompanying above n 31.

34 The Supreme Court (*Taya Hluttaw Gyoke)* and the High Court (*Taya Hluttaw*) that were established under the 1947 Constitution were abolished by a decree ('Order') of the Revolutionary Council on 30 March 1962.

35 For a description and discussion of the various forms of writs that were available under the 1947 Constitution see Maung Maung, *Burma's Constitution* (1961) 98-104.

the Supreme Court. Due to the extra-constitutional and political (and in terms of effectiveness also legal)[36] act of the Revolutionary Council in abolishing the Supreme Court, the 'aura' of the Supreme Court and the persuasiveness of its rulings would have been diminished. That perhaps partly explained why, in the case of *Maung Saw Pe*, the SCCAC did not follow the dictum of the abolished Supreme Court's decision in *Aung Tun*.

It is also noteworthy that the contrary rulings of both *Aung Tun*[37] and *Maung Saw Pe*[38] are mentioned in the *Digest of Burma Rulings (1956-1976)*, but without cross-referencing to each other and without comment as to which ruling is 'settled law'. Both rulings (theoretically) 'stand' since *Aung Tun* has not been formally overruled. However, as a later and perhaps more 'politically correct' ruling - or at least a ruling given in the more politically correct post-1962 era - it is strongly arguable that the ruling in *Maung Saw Pe* is the 'settled law' in so far as a particular aspect of the law of confessions is concerned.[39]

Analysing the Ruling in *Maung Saw Pe*

As stated earlier, since the full judgment in *Maung Saw Pe* is unavailable to the author, some of the comments that follow may be more in the nature of 'conjectures'. Still, general comments concerning the context in which the ruling was given can be made.

[36] For a ruling by the Pakistani Supreme Court that the decrees of the martial law regime of Pakistan which took over power extra-constitutionally in 1958 were legal on grounds of their effectiveness see *The State v Dosso* (1958) Pak LD (SC) 53. In the case of Burma and unlike in the military takeover of Pakistan in 1958, the Supreme Court (the guardian of the 1947 Constitution) itself was abolished.

[37] *Digest of Burma Rulings*, above n 13, 155.

[38] Ibid 170.

[39] In January 1978 the author had the privilege of being introduced to and first meeting with the late U Myint Thein, the Chief Justice who delivered the ruling in *Aung Tun* almost twenty years earlier in February 1958. (For the author's obituary-tribute of U Myint Thein see Myint Zan, 'U Myint Thein, MA, LLB, LLD' (1995) 69 *The Australian Law Journal* 225-27). When the author asked the opinion of the late Chief Justice on Dr Maung Maung's ruling 'superseding' his 1958 judgment U Myint Thein replied to the effect that Dr Maung Maung's decision was inappropriate. U Myint Thein said that a court should, if in doubt, reject all of a criminal defendant's confession since the defendant may be saying total 'gibberish'. On 30 March 1998 during the course of telephone conversation with U Mya Sein, (the author's former Chamber-Master in Mandalay, Burma) the author requested U Mya Sein to send him a copy of the ruling in *Maung Saw Pe*. The author explained the nature of the ruling when U Mya Sein asked what the case was about. U Mya Sein commented that the ruling in *Maung Saw Pe* was 'settled law'. The author did not point out to U Mya Sein the earlier and contrary ruling in *Aung Tun*.

The Dictum in *Aung Tun* was Based on Foreign and Old Rulings?

One of the features of the post-1962 and especially post-1972 Burmese judicial system was the de-emphasis on rulings especially 'foreign rulings'. In 1972 the then Judicial Minister Dr Maung Maung introduced a 'People's Judicial System' whereby all criminal cases before all lower courts were tried before 'People's Courts' and party appointed-People's Judges.[40] Writing about a year after the 'People's Judicial System' was adopted Dr Maung Maung stated that:

> [S]ince the circumstances vary from case to case depending on different social and historical factors reliance on previous rulings which were from different times should not be made. Foreign rulings should not be cited at all.[41]

Dr Maung Maung also chided certain

> Burmese lawyers who ritualistically recited judgments given by the Indian judges by the names of Bose, Barsu, Chowdrury of the Bombay, Allahabad and Calcutta High Courts[42]

Dr Maung Maung expressed pity on those persons who were unaware that 'our judicial system is the People's Justice System not the judicial system of the Boses, Barsus and Chowdurys'.[43]

It is to be noted that in the *Aung Tun* ruling U Myint Thein CJ cited 'with approval' two rulings from Indian courts: one from the Allahabad High Court[44] and the other from the Supreme Court of In-

[40] See the 8 August 1972 issues of *The Guardian* (Rangoon) and *The Working People's Daily* (Rangoon) for the introduction of the People's Judicial System in all lower courts (with the exception of the Chief Court) dealing with criminal cases. On 29 June 1973 all civil cases in the lower courts (with the exception of the Chief Court) were also dealt with by People's Judges in 'People's Courts'. For a contemporaneous discussion of the People's Judicial System and the then recently adopted 1974 Constitution see the articles by Maung Htin Aung and MMT (U Myint Thein, the former Chief Justice) in The *Working People's Daily* of March and April 1974 cited in notes accompanying above n 8. See also Myint Zan above n 2, 232-36 and Huxley above n 8, 15-17.

[41] Foreword by Dr Maung Maung in *Tayayone Myar Letswei* (Courts Manual, 1973) (Translation by the author.) Compare this statement of Margaret Davies:

> Law fails to recognise the particularity of cases, the otherness of one case to the next: instead it reduces them all to rules and variation on rules (analogies precedents, distinctions, policies and so on). It is important to understand that law is necessarily like this: it cannot recognise all differences, but simply provides a way of proceeding (without which we could not go anywhere).

in Margaret Davies, *Asking the Law Question* (1994), 272.

[42] *Courts Manual*, ibid.

[43] Ibid.

[44] *Emperor v Balmukund*, above n 25.

dia.[45] The third ruling cited was from an 1881 case by the Judicial Commissioner of Lower Burma.[46] Hence if Dr Maung Maung's writings - in his capacity as a Judicial Minister implementing the People's Judicial System in 1973 - were extrapolated back to the dictum of the late Supreme Court in 1958 in the *Aung Tun* case then the 'sources' (the 'original texts or rulings' so to speak) in which the Supreme Court based its decision would not be that 'persuasive'. They are after all 'Indian rulings' or those from the previous century of a colonial judicial commissioner. It is realised that Dr Maung Maung's statements chiding the lawyers of 1973 citing 'Indian rulings' were made about seven years after the ruling in *Maung Saw Pe*, of which it is presumed, but by no means proven, that Dr Maung Maung was the author. However even by 1966 the diminishing role of 'Indian' and/or foreign rulings had began to make its mark on the Burmese judicial scene.[47] Therefore one possible reason for the Special Criminal Courts Appeal Court in the case of *Maung Saw Pe* in 1966 not following the Supreme Court dictum of *Aung Tun* case of 1958 might be that of the perception on the part of the SCCAC that the Supreme Court in *Aung Tun* put sole reliance on 'foreign' or 'colonial' rulings in laying down the law regarding confessions.

Casting a 'Wider Net' to Catch Criminals?

From a 'consequentalist' perspective, the effect of Burmese courts following *Maung Saw Pe* rather than *Aung Tun* would be that it might arguably be easier to convict criminal defendants through selective use of their confessions. The dictum in *Maung Saw Pe* did add a proviso that 'parts of the confession which are extracted [from the confession as a whole] and accepted [by the Court] must be corroborated by other independent evidence'[48] before the 'credible' (in most cases

45 *Palvinder Kaur v The State of Punjab*, above n 26.

46 *Maung Po Thin v The Queen-Empress*. See text and note accompanying above n 27.

47 By the late 1970s such an attitude had become entrenched. The author remembers that his chamber master U Mya Sein once cited an 'Indian' case regarding a civil matter in U Mya Sein's arguments before the Central Court of Justice sitting in Mandalay in about the year 1978. U Mya Sein apologised to the court about three times repeating and emphasising that the foreign ruling was not binding on the Central Court of Justice; that it was cited only as an example since he was unable to find any other ruling from Burmese courts on the matter. In the pre-1962 era, such a citation from Indian rulings would not have created such an 'apologia' since in the *Aung Tun* case and in many other cases as well the Supreme Court itself has referred to and endorsed Indian and foreign rulings. This is perhaps yet another illustration of how ideology has impacted on the jurisprudence and judicial decisions of, as well as advocacy in, the Burmese courts, pre and post-1962.

48 *Maung Saw Pe* (1966) BLR (SCCAC) 57.

inculpatory) elements are accepted and the 'incredible' (in most cases exculpatory) elements are rejected. However the 'net effect' of following *Maung Saw Pe* would be that, despite the proviso stated above, it would arguably bring more criminals or alleged criminals into the 'arms of the law' by casting a 'wider net'. This 'wider net' would have been facilitated through comparatively less stringent judicial guidelines for selectively accepting parts of a criminal defendant's confession to convict the defendant. A brief look at the facts and the Government's Advocate unsuccessful appeal to the Supreme Court in the *Aung Tun* case would perhaps illustrate this point.

The defendant Aung Tun gave a confession that he killed a 15 year old boy after the boy offered him a ride on his bicycle. Aung Tun stated in his confession that he accepted the boy's offer and actually pedalled the boy while the boy sat on the pillion. On the way the boy got down to relieve himself [and during that time] something came over him (the actual words are 'my mind became disordered') which led him to stab the boy once, that after the stabbing he came away on the bicycle.[49]

The High Court (whose decision was appealed to the Supreme Court by the Government) held:

> [T]hat the confession was substantially correct but that it was to be accepted as a whole. And thus as the statement as to the stabbing was accepted, the accompanying statement that he had acted as he did, because of a disordered mind, was also accepted. The High Court also accepted the statement that only after the stabbing the appellant thought of taking away the bicycle and that he had done so. In short the finding of the High Court was that there was no premeditation to kill but that the deed was done on a sudden impulse and the killing was not in the course of robbing the boy of the bicycle.[50]

The Government's appeal

> against the order of the High Court [which sought] enhancement of sentence to one of death was based on [among others] (1) [the fact that] [High] Court had erred in accepting the confession as a whole (2) that the circumstances revealed premeditation.[51]

The Supreme Court's dismissal of the appeal by the Government was based on the grounds that the High Court decided correctly in ac

[49] *Aung Tun* (1958) BLR (SC) 1, 2 (Burmese words in Burmese script of the phras 'my mind became disordered' omitted).

[50] Ibid 3.

[51] Ibid 4.

cepting Aung Tun's confession [in both its inculpatory and exculpatory elements] as a whole.

Arguendo if the ruling in *Maung Saw Pe* (about accepting the 'credible' elements of a confession while rejecting its 'incredible' elements) were to be employed in the case of *Aung Tun*, the appeal by the Government would probably have succeeded. Since the Government alleged in the case of *Aung Tun* 'that the circumstances revealed premeditation'[52] under the second limb of *Maung Saw Pe*[53] the Government could arguably have produced 'corroborative' evidence that the defendant in *Aung Tun* acted with premeditation and if the Supreme Court (as per *Maung Saw Pe*) rejected Aung Tun's exculpatory statements (that he acted out of impulse), the death sentence could have been given to Aung Tun. Instead, the Supreme Court in the *Aung Tun* case rejected the appeal of the Government and confirmed the sentence of the High Court on the defendant /appellant of 'ten years RI [Rigorous Imprisonment]'.[54] Therefore the appellant Aung Tun would have grounds to be grateful that the judicial standard in *Maung Saw Pe* was not employed by the Supreme Court in its decision since it was a life or death issue for him.[55]

Hence even if *Maung Saw Pe* was not intended to 'widen the net' to catch alleged criminals the effect, intended or otherwise, of the ruling in *Maung Saw Pe* becoming 'settled law' would be that there would be less obstacles for courts to convict criminal defendants if *Maung Saw Pe* instead of *Aung Tun* was followed.[56] Therefore, it would be fair to say that the decision in *Maung Saw Pe* can be said to be more 'conser-

52 Ibid.

53 See text accompanying above n 17.

54 *Aung Tun* (1958) BLR (SC) 1, 3.

55 If nothing untoward had happened to him, the defendant Aung Tun would ordinarily have been released from prison by 1966 when the ruling in *Maung Saw Pe* was made. According to the facts narrated by the Supreme Court, Aung Tun committed the murder and theft of the bicycle [belonging to the murdered boy's father] '[o]n the sixth of September 1955' and 'was arrested at Mandalay on 2nd February 1956' *Aung Tun* ibid, 1-2. Hence by 1966 Aung Tun would have spent around ten years in prison and with the usual remissions of sentence he would have been expected to be released in 1966 – when the decision in *Maung Saw Pe* was made - if not earlier. It should be briefly mentioned that the Revolutionary Government gave a General Amnesty on 1 April 1963 releasing prisoners except those who have committed rape, murder and grievous bodily injury. (See *The Guardian* (Rangoon) and *The Nation* (Rangoon) of 2 April 1963 regarding the General Amnesty). If the Amnesty includes remission of sentences for those who served time for murder, Aung Tun could have been released as early as April 1963.

56 For the hierarchy of the decisions and *Maung Saw Pe* rather than *Aung Tun* being the settled law see text and notes accompanying above n 33 to 39.

vative' and (somewhat) less oriented towards criminal defendants' rights than that of *Aung Tun*.

'Fast Forward': Judicial Rhetoric Regarding Confessions and Convictions in the 1990s

Administration of Justice is the title of a booklet in which 11 essays written by a Judicial Officer Grade (1) were compiled and published in 1994 in Burma.[57] The articles revealed how, in current day Burma, law and administration of justice are exclusively seen as instruments of state policy - a theme started in the mid-1960s and continued in one form or the other to the present day.[58]

Excerpts from the very first article in the booklet are 'instructive':

> On 22 August, 1994, State Law and Order Restoration Council Secretary-1 Lt Gen Khin Nyunt delivered an address at the coordination meeting of the State/division and District Judges and State/Division and District Law Officers at the Institute of Nursing.
>
> In his address, the Secretary-1 ... stressed the points on administration of justice, attitudes and convictions to be adopted and codes of conduct and service rules to be followed.
>
> He underscored the need to mete out punishments in accordance with law based on truth justice and sympathy ... and to try to do away mal-practices in the vicinity of courts [sic] ...
>
> The seven basic principles on the administration of justice had been laid down by the State Law and Order Restoration Council ...
>
> It was also noted that a case in which the accused received and distributed fake currency notes, some of the fake notes were unearthed and some were burned in spite of the existence of evidence and confessions of the three accused they were set free, ...
>
> In another case, narcotic drugs were found in possession, but those in question were acquitted on the ground of illegal search.

[57] KMO [Kyi Maung Oo], *Administration of Justice: Articles*, (1994) vol 1. The first inside page of the book contains these slogans – as all books that are currently published in Burma are required to - in English and Burmese:

> Our three main national cause
> Non-disintegration of the Union - Our cause!
> Non-disintegration of National Solidarity - Our cause!
> Consolidation of National Sovereignty - Our cause!

[58] Compare text and notes accompanying above nn 9-10. Compare the following observation of Andrew Huxley in Huxley above n 8, 15: 'Legislature, executive and judiciary were to become three aspects of the one party state, rather than rival operating independently in their own autonomous zones'.

> In other cases, when testimony of witnesses before the Court was deliberately different, it was adjudged that there was no witness worthy of credit, the judgement was then passed as he [sic, who?] wished. . . .
>
> As far as my knowledge is concerned, if and when the persons on judicial body strictly adhere to the State policy, principles on administration of justice, law and procedures, directives issued by the Supreme Court, I do hope that decisions and judgments not in conformity with the State policy and existing law will no longer occur [sic] ...
>
> Eventually, in order to achieve greater and more achievements [sic] and for ensuring proper administration of justice, this writer sincerely would like to urge our colleagues not to lose sight of the State policy and thoroughly study and strictly adhere to the exhortations and guidance given by the Secretary-1. ... [59]

The above excerpts from the first article from the booklet *Administration of Justice* would illustrate how the 'dictum' of 'State Policy' and 'directives' from the executive branch of the government has to be taken as 'guidance' by the judicial branch in the 1990s. It reveals the ideology and rhetoric of official Burmese judicial thinking nowadays. It also shows how the executive branch of the Government is 'unhappy' about acquittals by a few courts on technical grounds in criminal cases.

In another article 'The value of confession of co-accused in drug-related offences',[60] KMO recounted how the [current SLORC-appointed] Supreme Court confirmed the conviction by a Lower Rakhine State Court[61] of one Aung Kyaw Soe of violating Section 6-a(b)/11 of the *1974 Narcotic and Dangerous Drugs Law* on the retracted confession of the accused and the confession of a co-accused. The conviction was confirmed by the current Myanmar Supreme Court[62] even though the appellant/defendant argued that the drugs

[59] KMO, above n 57, 2-3.

[60] Ibid 15-17.

[61] In the case of *Aung Kyaw Soe v The Union of Myanmar Naing-Ngan*, Criminal Appeal No. 197/93 as reported in Ibid 16-17.

[62] Throughout the article the word 'Burma' and 'Burmese' is used instead of the official 'Myanmar Naing-Ngan' (for the country) and 'Myanmar' (for the race or as an adjective). The State Law and Order Restoration Council ('SLORC') changed the country's name to 'Myanmar' on 18 June 1989. For a late (expatriate) Burmese scholar's argument that 'the new name 'Myanmar' or Myanma given to Burma is wrong phonetically and politically see Mya Maung 'The Burma road from the Union of Burma to Myanmar' (June 1990) 30 (6) *Asian Survey* 602, 602 fn 1. For a detailed etymological, political, ideological, terminological analysis and significance of the names 'Myanmar', 'Myanma', 'Bamar', Burma, Burmese etc see Gustaaf Houtman, *Mental Culture in Burmese Crisis Politics: Aung San Suu Kyi and the National League for Democracy* (1999) 43-50.

were not found in his possession, that no witnesses could state that he had abetted the co-accuseds and that he merely showed 'Maung Kyaw Sein [the alleged original seller of the marijuana who had requested appellant/defendant to resell the drugs for him] the direction to the house of Maung Myint Khin [the alleged buyer of the drugs in whose house the drugs were found]'. Based on the confession of Maung Myint Khin, the co-accused, and the retracted confession of himself, the appellant/defendant Aung Kyaw Soe was convicted and his conviction was affirmed by the current Myanmar Supreme Court.[63]

Hence from the summary of the case by KMO it would appear that the initial retracted confession of Aung Kyaw Soe ('AKS') was used to convict him. AKS claimed that he had confessed earlier 'because of ill-treatment and torture by the police'.[64] It could be said that the appellant/defendant's (retracted) confession would contain both inculpatory and exculpatory elements. The inculpatory element being that he had shown the direction to the buyer's house to the original seller Maung Kyaw Sein, the exculpatory element being that 'he (AKS) had no knowledge of what Maung Kyaw Sein brought in his hands'.[65]. AKS also argued to the effect that:

> [T]he exhibits [marijuana] [were] not found in the [his/AKS'] possession, and the exhibits were not his properties and that no witnesses could state that he had abetted with co-accuseds'.[66]

Recounting the facts of the case KMO further stated that:

> [W[hen search was conducted at the house of Aung Kyaw Soe, marijuana were not found there. When Aung Kyaw Soe was examined it was not found that he used narcotic drug.[67]

To distinguish the Supreme Court from the highest court in post-1962 and pre 1988 era the author has consistently used the term 'Chief Court' even though the name was changed back to 'Supreme Court' in the early 1970s. After its takeover the SLORC on 29 September 1988 established a 'Supreme Court'. To distinguish this SLORC-appointed Supreme Court from the (abolished) Supreme Court under the 1947 Constitution as well as from that of the Chief Court of the 1962 to 1974 period the term 'current Myanmar Supreme Court' is used in referring to the SLORC-appointed Supreme Court. (The highest court under the 1974 Constitution- from March 1974 to September 1988 - was called 'Central Court of Justice').

63 Summary of the case as reported in KMO, above n 57, 16-17.

64 Ibid 17.

65 Ibid.

66 Ibid.

67 Ibid.

From the narration of the facts and decision of the case it would seem that the appellant defendant AKS was convicted mainly on his own retracted confession and the co-accused's confession. The (retracted) confession - or at least in the claims made by AKS in the current Myanmar Supreme Court - did contain both exculpatory and inculpatory elements. It would appear - though it was not stated in KMO's article - that the original court which tried AKS 'extracted' the inculpatory elements of AKS's confession while disregarding the exculpatory elements as per *Maung Saw Pe* rather than *Aung Tun*. It should be stated that neither of these cases, nor a discussion of exculpatory and inculpatory elements of confessions vis-a-vis the *Aung Kyaw Soe* case, were mentioned in KMO's article. Since the author does not have a copy of the judgment in *Aung Kyaw Soe*, it is not known whether these were discussed in the judgment itself, which was written in Burmese. It seems unlikely though that *Aung Tun* would even be mentioned, since *Maung Saw Pe* is now generally considered 'settled law'.

The decision in *Aung Kyaw Soe* also brought forth the issue of the use of co-accused's confession to convict the accused. The late High Court of Burma (that was established under the 1947 Constitution and abolished by the Revolutionary Council on 30 March 1962)[68] had given a comprehensive ruling 'regarding the use of confessions (retracted or otherwise) (i) as against the maker (ii) as against the co-accused'[69] In its long ruling, the late High Court, among others ruled that:

> The confession of co-accused is not evidence in the ordinary sense of the term as defined in s 3 and cannot therefore be made the foundation of a conviction; that it can only be used in support of other evidence, that the proper way is, first, to marshall the evidence against the accused person excluding the confession of his co-accused altogether from consideration and see whether, if it is believed, a conviction could be based on it, that it is so capable of belief independently of the confession of the co-accused, it would be unnecessary to call the confession in aid, but that there may be cases where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a con-

[68] See text and notes accompanying above 6.

[69] *The Union of Burma v Ah Hla (a) Maung Hla and Two Others* (1958) BLR (HC) 29. The judgment was written in English and was delivered by the Chief Justice of the High Court U Chan Tun Aung on 17 February 1958. The ruling is wide-ranging. Excerpts from the head notes of the ruling are reproduced in *Digest of Burma Rulings 1956-1976*, above n 13, in three (column) pages (156-158) whereas the excerpts from the *Aung Tun* case are reproduced in less than one page (155).

> viction, and that it is in such a case that a Judge may call in aid the confession of the co-accused and use it to lend assurance to the other evidence, and thus fortify himself in what without the aid of the confession he would not be prepared to accept.[70]

From the facts of the case in *Aung Kyaw Soe* as described by KMO, the current Myanmar Supreme Court did not seem to have followed the dictum in the *Ah Hla* case of the late High Court regarding the use of co-accused confessions to convict the accused.

Be that as it may, it is hoped that the extracts from a booklet published in Burma in the mid-1990s and a decision of the current Myanmar Supreme Court during that time would highlight the emphasis apparently given to 'securing' convictions of criminal defendants as a matter of 'state policy'. Hence if past judicial decisions are used to buttress 'state policy' it is likely that *Maung Saw Pe* rather than *Aung Tun* or *Ah Hla* would have been referred to by the current Myanmar Supreme Court to justify its decision in *Aung Kyaw Soe* or indeed other cases involving criminal defendants' confessions. It should be stated though that, from the narration of the case by KMO, there is no evidence that any of the three cases were cited or discussed in the 1993 decision of *Aung Kyaw Soe* by the current Myanmar Supreme Court.

Conclusion

The decisions concerning the acceptability of criminal defendants' confessions that were made by Burmese courts in the 1950s, 1960s and 1990s have been discussed to highlight the vicissitudes of Burmese case law in this area. This article is also intended to illustrate how ideology, politics and state policy have come to play a dominant role in the Burmese judicial scene since the 1960s.

The executive government's views and 'instructions' on legal matters came to be increasingly important in the post-1962 era and especially in the 1990s under military rule. It can easily be noted that in the 1958 case of *Aung Tun*, the government (the prosecution) appealed the case before the Supreme Court and that the government lost the case.[71] In the 1990s, it was an important government's official's exhortation that judicial personnel and courts were urged to follow and it was the executive government official who exhorted and 'gave

70 *Union of Burma v Ah Hla*, ibid.

71 See text accompanying above n 54.

guidance to the courts.[72] Such instances would be rare, if not non-existent, in the 1940s, 1950s and early 1960s when Burma had an independent, vigorous and learned judiciary. In this regard, parts of this article are also intended to indicate how the Burmese nation's apex court has fallen, from what - in retrospect - were almost 'Olympian' heights. From the perspective of the beginning of the twenty-first century, from the 'valley' so to speak, it does appear to this author that the Burmese judiciary did occupy 'Olympian heights' in the old days of the 1940s, 1950s and early 1960s.[73]

Finally, it is hoped that this article will make a small contribution to discussing and analysing an aspect of an 'Asian legal system' - that of Burma - from both a jurisprudential and criminal law perspective. In contrast to other Asian legal systems, the scholarship on Burmese law, especially in relation to post-1962 developments, is comparatively sparse. In this article some of the rulings written both in English and Burmese have been mentioned in a descriptive manner, not only for analytical, but also for 'informational' and reference purposes.

72 See text accompanying above n 59.

73 For a discussion of the independence of the judiciary under the 1947 Constitution and its fading away and eventual absence in the post-1962 era see Myint Zan, 'Judicial Independence in Burma: No March Backwards Towards the Past' (2000) 1(1) *Asian-Pacific Law and Policy Journal* 150-196. The article can also be accessed at the web site address of http://www.hawaii.edu/aplpj/5.