

# A COMPARISON OF THE FIRST AND FIFTIETH YEAR OF INDEPENDENT BURMA'S LAW REPORTS

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*This article compares the annual Law Reports of the first year of Burmese independence in 1948 with those published in the fiftieth year of Burmese independence (1998). In making the comparison, the author highlights the fundamental changes that occurred in the structure and composition of the highest courts in Burma, along with relevant background and factors effecting these changes. There was a movement away from the predominant use of English in 1948 towards judgments exclusively in Burmese in the 1998 Law Reports. Burma's neighbours, who shared a common law legal heritage, did not follow this trend after their independence. This shift, combined with Burma's isolation from the rest of the world, makes analysis of Burmese case law from the past three and a half decades very difficult for anyone not proficient in the Burmese language. This article tries to fill the lacunae as far as the Law Report from the fiftieth year of Burma's independence is concerned.*

*Cet article propose une comparaison des recueils de jurisprudence publiés annuellement sur une période d'un demi-siècle, à compter de la première année de l'indépendance birmane en 1948, jusqu'au cinquantième anniversaire de son indépendance en 1998. A la faveur de cette comparaison, l'auteur souligne les changements fondamentaux qui ont affecté la structure et composition des cours birmanes mais s'intéresse aussi au contexte dans lesquels ces changements ont été effectués. Il souligne ainsi que le mouvement contre l'usage de l'anglais dans les recueils des décisions de justice des cours birmanes, amorcé après 1948, a trouvé son point d'aboutissement en 1998, date à laquelle seule la langue birmane est utilisée. L'auteur note que les pays voisins de la Birmanie, qui pourtant se réclament aussi de la tradition de la common law, n'ont pas pour autant suivi une évolution similaire après avoir accédé à l'indépendance puisqu'elles accordent encore une place importante aux décisions de justice rendues en langue anglaise. Par ailleurs, cette évolution propre à la Birmanie, combinée à la relative isolation de ce pays, rend l'analyse des précédents jurisprudentiels, très délicate pour ceux qui ne maîtrisent pas suffisamment la langue birmane.*

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## I INTRODUCTION

Burma obtained independence from Britain on 4 January 1948. Some parts of the country were under British rule for more than one hundred years. During colonial times, starting from the late 19<sup>th</sup> century, the British colonial administration had compiled the decisions of the various colonial courts in various law reports.<sup>1</sup> All of the appellate court decisions which were compiled and published in various law reports during the colonial days were written in English. When Burma regained independence in 1948, the practice of issuing yearly Law Reports of the two apex courts of Burma<sup>2</sup> continued. The decisions and judgments of various "apex" courts of Burma, either in English or in Burmese are published annually in the "Law Reports". From 1948 to about the mid-1960s these annual Law Reports were officially known in English as *Burma Law Reports* and this appeared

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For being the author's mentor and good friend throughout the years, the author would like to dedicate this article to "Mal", Professor Malcolm Smith, foundation Professor of Asian Law, Faculty of Law, University of Melbourne, Australia.

The author would also like to thank Marco Simons, then with Earth Rights International, who at the author's request arranged to photocopy the more than 900 pages of the 1948 *Burma Law Reports* and send them from the United States to Vanuatu in May 2002.

- 1 The earliest law reports of court decisions, all of them written in English, were the *Selected Judgments of Lower Burma* (1872-1892) and the last series of law reports before independence were the *Rangoon Law Reports* (1937-1947). For a complete list of the Law Reports that were published during the colonial times see Maung Maung *Law and Custom in Burma and the Burmese Family* (Martinus Nijhoff, The Hague, 1963) 146.
- 2 Under the 1947 Constitution which was in force in Burma between 1947 and 1962 there were two "apex" courts which exercised both original and appellate jurisdiction. The Supreme Court (in Burmese nomenclature *Tayar Hluttaw Gyoke*) was the final court of appeal. During the colonial days appeals from the High Court of Judicature at Rangoon, could, with special leave, be made to the Privy Council and there were cases decided by the Privy Council in relation to Burmese Buddhist law as early as the year 1907: see, for example, the case of *Ma Wun Di v Ma Kin* (1907) 4 Lower Burma Reports 175 (PC). Since Burma was perhaps the only former British colony which did not join the British Commonwealth from the time of independence, the Supreme Court was the final court of appeal and – unlike other neighbouring countries such as Ceylon which shared the British colonial heritage – no more appeals were allowed to the Privy Council after independence. Still in perhaps the most important case in 1948 – the year of independence and one of the cases that are being reviewed in this article – *U Saw and four others v The Union of Burma* (1948) Burma Law Reports (Bu LR) 249, 251 (SC) (in a ruling written in English), the former Burmese Supreme Court observed that "[t]hrough the jurisdiction of this Court and that of the Privy Council in criminal matters flow from two different sources and this difference in the origin of the jurisdiction of the two Courts is a matter which must not be lost sight of, yet it is clear that many of the rules laid down by the Privy Council in England in the various cases coming before it on applications for special leave to appeal in criminal matters, are rules of wisdom and should receive from this Court a respectful attention and should ordinarily act as guidance in the discharge of its functions under section 6 of the Union Judiciary Act".

either as the sole title of the publication (as in the 1948 *Burma Law Reports*) or together with its Burmese equivalent.

This article compares the Law Reports of the first year of Burmese independence (1948) and the fiftieth year of Burmese independence (1998). By 1998, no English nomenclature appears at all on the cover pages, "spine" or elsewhere in what, transliterating from the Burmese, is *Pyidaug-su Myamar Naing-ngan daw Tayar-Yone-Gyoke Tayar-SeyinHtone Myar* ("Union of Myanmar Supreme Court<sup>3</sup> Cases") with the year 1998 in Burmese script appearing underneath. However in generic terms and for the purposes of this article the 1998 "Union of Myanmar Supreme Court Cases" will be described as a "Law Report".

It is this author's contention that of all the former British colonies in Asia, aspects of Burma's post-independence legal system are peculiar if not unique in terms of departure from the common law heritage it shared with its fellow former British colonies in Asia. And this is so not only in relation to the operation of the common law as a legacy of or inheritance from British rule. Between the first and fiftieth year of Burmese independence there are significant changes in terms of the structure, composition of the apex court or courts in Burma which are unique in the sense that such extensive – indeed radical – changes cannot be discerned in other countries in the Asia-Pacific region which shared the British legal heritage. For example, both India and Pakistan gained

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3 A note on the nomenclatures or the name changes of the "apex" Courts in Burma during the first fifty years of independence is appropriate here. The top two apex courts from the period of 4 January 1948 to 29 March 1962 were the Supreme Court (*Tayar Hluttaw Gyoke*) and High Court (*Tayar Hluttaw*). On 30 March 1962, the Revolutionary Council (RC) of the Union of Burma which had taken over power in the military coup of 2 March 1962 abolished the Supreme Court and the High Court of Burma. Soon thereafter the RC formed a new court which in official nomenclature was called the "Chief Court" in English (*Tayar-Yone-Gyoke* in Burmese). The nomenclature of the new Court was different in both its Burmese and English versions. In the early 1970s the English nomenclature of the apex court was changed from "Chief Court" to that of "Supreme Court" though the Burmese nomenclature of *Tayar-Yone-Gyoke* remained and did not revert back to that of the pre-1962 "*Tayar Hluttaw Gyoke*". In March 1974 with the coming into force of the 1974 Constitution, the "Supreme Court" (of the early 1970s to March 1974 period) was replaced by what is officially termed in English "Central Court of Justice" (*Baho Tayaryone*). The Central Court of Justice was the final court of appeal during the period when the 1974 (socialist one-party) Constitution was in force and its members belonged to the "Council of People's Justices" (CPJ) – an "organ of State power" under the 1974 Constitution. On 18 September 1988 the State Law and Order Restoration Council (SLORC) took over power and abolished by Order 2/1988 all "organs of State power" including the CPJ. On 27 September 1988 the SLORC, in what it claimed to be an exercise of its powers under the Union Judiciary Act 1948 established a "Supreme Court" (*Tayar-Yone-Gyoke*). The English nomenclature of the apex court was that of the official term of the (abolished) Supreme Court of the period from 1948 to March 1962 and the period from the early 1970s to March 1974, but the Burmese nomenclature was not that of *Tayar Hluttaw Gyoke* (pre-1962) period but that of *Tayar-Yone-Gyoke* (the period from April 1962 to March 1974). In establishing the Supreme Court, SLORC eschewed the socialist-sounding nomenclature "Central Court of Justice". The Supreme Court that was established by the SLORC has, since late September 1988, operated as the highest court and final court of appeal. To avoid confusion, the highest court since late September 1988 will be referred to as the "Myanmar Supreme Court".

independence from the British in August 1947 only a few months before Burma regained her independence on 4 January 1948. Fifty years after independence and in terms of continuity, general structure, role and functions, the apex courts of both India and Pakistan did not radically depart from those that were established at the time of independence. Moreover, both the Supreme Court of Pakistan and the Supreme Court of India still write their judgments in English.<sup>4</sup> Hence for the English-speaking researcher wanting to compare the Law Reports (that is decisions by the apex courts) of the first and fiftieth year of India's or Pakistan's independence, the task would not be insurmountable as far as the language barrier is concerned. They are "there", and for those interested in studying and researching them they are written in English. Therefore a general comparison of the Law Reports of the first and fiftieth year of independence of India may be superfluous unless the researcher wants to compare the different approaches the apex courts took on a particular legal topic like, say, product liability from different judicial decisions made in those years. As far as the language factor is concerned the same statement can be made of Sri Lanka, another neighbour of Burma, which shared or had inherited – at least in part – both the British colonial legacy and the common law system. The decisions of the Ceylonese Supreme Court in 1948 and those of the Supreme Court of Sri Lanka in 1998 were written in English.<sup>5</sup> The same would be true of Malaysia which gained its independence from Britain in 1957 in that in its 45<sup>th</sup> year of independence in 2002 many if not most of Malaysia's apex courts still write their judgments in English.<sup>6</sup>

Hence the writing of judgments at least by the apex courts and publication of law reports of the apex courts mainly in the English language continue to be the norm in countries such as Malaysia, India, Pakistan and Sri Lanka.<sup>7</sup> This certainly is not the case and has not been the case in Burma for

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4 For the web site address of the Supreme Court of India, see <[http://supremecourtfindia.nic.in/new\\_s/wl\\_p1.htm](http://supremecourtfindia.nic.in/new_s/wl_p1.htm)> (last accessed 23 May 2004). An "Order" of the Pakistani Supreme Court which in effect validated or endorsed the extra-constitutional takeover of power by General Pervez Musharraf of 12 October 1999 is reproduced in <[Hhttp://www.scp.com.pk/sub\\_links/judgements/jo2.htm](http://www.scp.com.pk/sub_links/judgements/jo2.htm)> (last accessed 23 May 2004).

5 For information concerning the current Supreme Court of Sri Lanka, see <[Hhttp://www.justiceministry.gov.lk](http://www.justiceministry.gov.lk)> (last accessed 23 May 2004). It contains the biography and qualifications of the judges of the Supreme Court of Sri Lanka and has links to other pages in which decisions written in English can be reviewed. The country's name was officially changed from Ceylon in 1972.

6 For a web site on the Malaysian judiciary, see <[Hhttp://www.kehakiman.gov.my](http://www.kehakiman.gov.my)> (last accessed 23 May 2004). The biographies of the judges and information about the appellate Malaysian judicial process are also stated in the website. The web site does not explicitly state that all the judgments of the Federal Court of Malaysia are written in English. In the case of Malaysia it is realised that some of the judgments of the lower courts are now written in Malay (Bahasa Malaysia). Still, at least some if not most of the decisions of the top Malaysian courts like the Federal Court, Court of Appeal and High Court are written in English. (Bahasa Malaysia summaries are available for most of the judgments that are written in English).

7 Also, the main judgments in all the countries in the South Pacific region which have had British colonial "heritage" or contacts continue to be in English.

more than three decades. The last judgments in the Burma Law Reports that were written in English appeared in the 1968 Burma Law Reports.<sup>8</sup> Hence it is hoped that this contribution from a "vernacularist" of aspects of the 1998 Law Reports (all of which were written in Burmese) in comparison with that of its 1948 predecessor (an overwhelming majority of which were in English) is of possible benefit to those who are interested in Burma's legal development. In the comparison of these two different Law Reports – fifty years apart – the author will also try to present snippets of legal, historical, political, and at times "personal" information which might help to explain the radical differences that could be discerned in the formation, structure and contents of the 1948 and 1998 Burma Law Reports.

In comparison with two decades ago or even a decade ago much international attention has been focussed on Burma's political developments. Quite a few books and articles on and about Burma have been published in recent years, most of which deals with political developments. Yet in terms of academic books and articles, publications on modern Burmese law have been rare. What has been published mainly deals with Burmese commercial laws and foreign investment laws.<sup>9</sup> Since some foreign firms are investing in the country and dealing in commercial matters with the Burmese government and its Burmese and foreign clients the publications that are focussed in these areas have obvious utility value. Beyond commercial law however, jurisprudential analysis of modern Burmese case law is rare. This is due to the fact that for more than thirty years they have been written in Burmese. Hence a brief analysis of selected case law in a few different areas as decided in 1998 compared with case law in 1948 should be of some academic interest.

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8 This, at least, was according to the author's best recollection at the time of writing. In December 2003 and January 2004, the author visited Burma for the first time in more than fifteen years. In early January 2004, in the law library of the author's friend and colleague Daw Moe Thu, an advocate and (mainly) now a business woman in Mandalay, the author perused the 1968, 1969, 1970 and 1971 Burma Law Reports. None of the Law Reports subsequent to 1968 contained any judgments that were written in English. The 1968 Burma Law Reports contain 15 judgments that are written in English and 54 that are written in Burmese. Subsequent to 1968, none of the Law Reports that the author has had the chance to peruse contain even a single judgment that is written in English.

9 See for example Alex Christie and Suzanne Smith *Foreign Direct Investment in Myanmar* (Sweet & Maxwell, Hong Kong, 1997). In recent years there have been some articles dealing with post-independence and non-commercial matters in academic or refereed law publications: see for example, Andrew Huxley "The Last Fifty Years of Burmese Law: E Maung and Maung Maung" (1996-97) *Law Asia* 9. For a correction of one factual error – among a few others – in Huxley's article and 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 Magazine* 39-40. The author was also involved as co-editor of the Special Burma Edition (2000) 4 *Southern Cross U LR*. See also Hilary McGeachy "The Invention of Burmese Buddhist Law: A Case Study in Legal Orientalism" (2002) 4 *Australian Journal of Asian Law* 30-52. McGeachy's article deals with pre-1948 (in fact mostly with pre or early 20<sup>th</sup> century developments) without including any references to post-1948, post-1962 or post-1988 legal developments. See also Russell Thirgood "The State: Enemy of the People: Suppression of Human Rights in Burma" 8(2) *AJHR* 1 ["The State: Enemy of the People"]. A brief summary of the article can be seen on <<http://www.hhrcentre.org/AJHR>> (last accessed 8 February 2003).

Additionally some Australian academic legal circles have become formally involved with the government of Burma. Two academics from the Faculty of Law of Monash University as well as a former Commissioner of Australia's Human Rights and Equal Opportunity Commission have, since 2000, given quite a few courses on "Human Rights Training" to middle-level Burmese government officials in Rangoon. The intention is to continue to give this training on a regular basis.<sup>10</sup> From the perspective of the "human rights trainers", the workshops arranged by the Australian government for Burmese government officials in order to impart to them a rudimentary knowledge of international human rights law is a worthwhile task notwithstanding the questioning and protests by some Australians as well as (expatriate) Burmese of the desirability and productivity (in real terms) of such moves. It is hoped that this article will be of interest to groups of policy-makers, government officials and academics who have now become involved in Burmese political as well as legal matters.<sup>11</sup>

## **II 1948 BURMA LAW REPORTS AND THE 1998 MYANMAR NAING TAYA SEEYIN HTONE PAUNG GYOKE ("TAYAR YONE GYOKE"):<sup>12</sup> A COMPARISON OF SELECTED FEATURES AND CASES**

### **A General Characteristics of the 1948 Burma Law Reports and 1998 Myanmar Law Reports**

#### *1 Supreme and High Court Judges in 1948*

The names of the "Judges and Law Officers of the Union" are stated in the opening pages of the Law Reports. Under "Supreme Court" the names of three judges appear:

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10 As a result of the 30 May 2003 incident that occurred in the town of Depayin in Upper Burma in which the entourage of Aung San Suu Kyi and company was attacked, the author understands that the Human Rights training given by the Australian government to Burmese officials has – for the time being – been suspended: Chris Sidoti, former Human Rights and Equal Opportunity Commissioner of Australia and one of the "human rights trainers", personal email to the author (25 August 2003). As of April 2004, the author has no information as to whether or not they will be resumed.

11 One trusts, though, that this article would not merely be utility-based without considering the moral issues pertaining to the real situation in contemporary Burma. Russell Thirgood rightly complains about the statement in the CCH guide *Doing Business in Asia* which states that "[s]ince late 1988 the Government of the Union of Myanmar has made significant economic reforms and introduced liberal trade policies to promote the development of the Myanmar economy" ("The State: Enemy of the People", above n 9, 3). Thirgood further comments that the CCH guide does not mention "Aung San Suu Kyi, the 1990 elections and the National League for Democracy. There is no mention of the thousands that died in the streets of Rangoon when the SLORC seized power . . . . Significantly the *Unocal* Case and the potential consequences for corporations who choose to do deal with the SLORC is not referred to. As a final insult to the hundreds of political prisoners, some of which have received no trial, it is stated that "[t]he courts in Myanmar operate independently" ("The State: Enemy of the People", above n 9, 3).

12 The title of the 1998 Myanmar Law Reports can be literally translated as *Cases of the Supreme Court of Myanmar [decided in] 1998*.

- Hon'ble Sir Ba U,<sup>13</sup> Kt, MA (Cantab), Barrister-at-Law, Chief Justice of the Union of Burma.
- Hon'ble Mr Justice E Maung,<sup>14</sup> MA, LLB (Cantab), Barrister-at-Law.
- Hon'ble Mr Justice Kyaw Myint,<sup>15</sup> Barrister-at-Law.

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13 The names of the Justices and other details are not reproduced exactly as they are written in the 1948 *Burma Law Reports*. The original uses capital letters for the names of the justices. In 1952 Sir Ba U retired as Chief Justice and was appointed by the then Burmese Parliament as President of the Union of Burma. As the 1947 Constitution did not allow the President of the Union to be conferred or to retain designations awarded by foreign governments Sir Ba U "returned" the title "Sir" to Her Britannic Majesty and during his Presidency and afterwards was formally called "Dr Ba U" or U Ba U. (Dr Ba U was awarded an honorary LLD degree by the University of Rangoon in the early 1950s). The first "U" – pronounced "Oo" – is a Burmese honorific roughly meaning "Mr" or "Uncle". The author remembers reading in June Bingham *U Thant: The Search for Peace* (Knopf, New York, 1966) that the honorific U stands roughly between an English "Sir" and an American "sir". Dr Ba U retired from the Presidency in March 1957 and died in 1963 in Rangoon, Burma. In 1958 he published his memoirs entitled *My Burma: An Autobiography of a President* (Taplinger, New York, 1958).

14 (1898-1977). Dr E Maung (awarded an honorary LLD degree from the University of Rangoon in the early 1950s) was a leading authority on what was then called Burmese Buddhist Law. His book by that name was first published in 1937 (New Light of Burma Press, Rangoon) and a revised edition was published in 1970 (Sarpay Lawka Press, Rangoon). Another of Dr E Maung's books (now out of print) is *The Expansion of Buddhist Law* (Royal Printing Works, Rangoon, 1952). In the early 1950s Mr Justice E Maung resigned from the Supreme Court and went into private practice. Later he founded and led a political party and also served as Judicial Minister from 1960 approximately until the military coup of 2 March 1962. During the period of the Revolutionary Government (March 1962 to March 1974) Dr E Maung was, from March 1962, for a few years, put into "protective custody". From the mid-1960s until about the time he died in Rangoon in July 1977, Dr E Maung was one of the leading senior practitioners. In one of the last and major leading cases that he appeared as counsel, his submission on a point of Burmese customary law (previously called Burmese Buddhist law) was rejected by the then Chief Court of Burma. The case was *Daw Khin Mya Mar (alias) Mar Mar v U Nyunt Hlaing* (1972, Civil Appeal No 38). The case is discussed in Myint Zan "Of Consummation, Matrimonial Promises, Faults and Parallel Wives: the Role of Original Texts, Interpretation, Ideology and Policy in pre-and post 1962 Burmese Case Law" (2000) 14 Colum J Asian L 154, 163-73 and especially at 168; 169 and n 59 ["Of Consummation, Matrimonial Promises, Faults and Parallel Wives"]. For the usage of the terms "Burmese Buddhist law"/"Burmese customary law" see "Of Consummation, Matrimonial Promises, Faults and Parallel Wives", 155-57.

15 Mr Justice Kyaw Myint was the Chairman of the Tribunal which tried the assassins of General Aung San and his colleagues who were assassinated on 19 July 1947: *U Saw and Others v The Union of Burma*. The case is discussed below (see text starting at note 102). Mr Justice Kyaw Myint was a Justice of the Supreme Court of the Union of Burma when the appeal of *U Saw and others* came before the Supreme Court in March/April 1948. Since he was the Chairman of the tribunal which tried U Saw and his accomplices he recused himself from hearing the case in the Supreme Court. Mr Justice Kyaw Myint resigned from the Supreme Court in the late 1940s and was active in practice in the 1950s and 1960s. He died on 11 May 1988 at the age of ninety. The obituary notice of U Kyaw Myint can be seen in (12 May 1988) *The [Rangoon] Guardian* and *The Working People's Daily* 4. Dr Thaneoke Kyaw-Myint, son of the late U Kyaw Myint, told the author when the author met him in Port Vila in May 2003, that his father was admitted as Barrister-of-Law at the Middle Temple on 26 January 1921. Thaneoke discovered this fact when he was studying for

Under the title "High Court" the following name appears:

- Hon'ble U Thein Maung<sup>16</sup> MA, LLB (Cantab), Barrister-at-Law, Chief Justice.

Under the heading "Puisne Judges" the following names appear:

- Hon'ble U Tun Byu, MA (Cantab), Barrister-at-Law
- Hon'ble U Ohn Pe, BA, Barrister-at-Law
- Hon'ble U San Maung, BA, ICS<sup>17</sup> (Retd)
- Hon'ble U Thoung Sein,<sup>18</sup> BA, ICS (Retd)
- Hon'ble U Aung Tha Gyaw, BA, BL
- Hon'ble U Bo Gyi,<sup>19</sup> BA, BL (On deputation)
- Hon'ble U Aung Khine, Barrister-at-Law (Officiating on Deputation).

Under the title "Attorney-General" the following name appears:

- U Chan Htoon,<sup>20</sup> LLB (Lond), Barrister-at-Law.

his postgraduate medical degree in the United Kingdom in 1971 and as a result of his visit to the Middle Temple. Thaneoke also stated that during his visit to the Middle Temple, in honour of his father, he was invited to "dine" with barristers at the Middle Temple.

- 16 (1890-1975). U Thein Maung became the second Chief Justice of the Supreme Court (formal term Chief Justice of the Union of Burma) some time in 1952 when Chief Justice Sir Ba U retired and became President. Hence U Thein Maung was the second Chief Justice of independent Burma and served in that post until October 1957. U Thein Maung died in Rangoon on 11 March 1975. The news items can be found in (12 March 1975) *The [Rangoon] Guardian* and *The Working People's Daily* 1 and the obituary notices of U Thein Maung's death can be seen in (12 March 1975) *The [Rangoon] Guardian* and *The Working People's Daily* 4.
- 17 "ICS" means "member of the Indian Civil Service".
- 18 U Thoung Sein migrated to Australia in the late 1960s/early 1970s and died in Canberra in 1989.
- 19 U Bo Gyi was a Justice of the Supreme Court when the Revolutionary Council took over power on 2 March 1962. The Supreme Court was abolished by a decree of the Revolutionary Council on 30 March 1962. Soon thereafter the Revolutionary Council established a new Court called the Chief Court to which U Bo Gyi was appointed as "Chief Judge" (*Tayar Thugyee Gyoke* in Burmese) (later the nomenclature changed to "Chief Justice"). U Bo Gyi served as Chief Judge/Chief Justice till June 1965 when the late Dr Maung Maung (1925-1994) was appointed as Chief Justice by the Revolutionary Council. See Dr Maung Maung *The 1988 Uprising in Burma* (Yale University Southeast Asian Studies, New Haven (Conn), 2000) 56. U Bo Gyi probably died in the 1970s in Burma.
- 20 U Chan Htoon was also a Justice of the Supreme Court of the Union of Burma when the Revolutionary Council took over on 2 March 1962. Unlike his fellow Justice, U Bo Gyi, who was appointed as Chief Judge of the Chief Court, U Chan Htoon's services on the Supreme Court were terminated and he – like his other fellow Justice Dr E Maung – spent some time in "protective custody" during the Revolutionary



Under the title "Assistant Attorney-General" the following name appears:

- U Chan Tun Aung,<sup>21</sup> BA, BL, Barrister-at-Law.

2 *Judges of the Myanmar Supreme Court in the year 1998*

In the unnumbered pages of the 1998 Myanmar Law Reports,<sup>22</sup> in two separate pages the list of the judges of the Supreme Court are stated. The first page mentions the names, qualifications and designations of the six judges. The names of the judges and their designations are written in Burmese whereas their qualifications are written in English letters. The names of the judges on the first page of the 1998 Myanmar Law Reports ("List One") are:

- U Aung Toe, BA; BL<sup>23</sup> Chief Justice<sup>24</sup> (*Tayar-Thugyee-Gyoke* in Burmese)

Council period in the 1960s. The late U Myint Thein (1900-1994), the Chief Justice of the Union at that time of the 1962 military takeover, was arrested together with the President, Prime Minister, and Cabinet Ministers in the early morning hours of 2 March 1962. U Myint Thein spent nearly six years in custody before being released on 28 February 1968. U Chan Tun's services on the Supreme Court as well as those of U Myint Thein were (extra-constitutionally) terminated by the Revolutionary Council on 30 March 1962. U Myint Thein died in Rangoon on 3 October 1994. See Myint Zan "Obituary: U Myint Thein, MA, LLB, LLD" (1995) 69 ALJ 225.

21 U Chan Tun Aung became Chief Justice of the High Court in the mid-1950s and he was the Judicial Minister in the Caretaker government of the late General Ne Win (1911?- 2002) from October 1958 to April 1960. U Chan Tun Aung taught the author and his classmates "Introduction to Law" and Criminal Law and Procedure in the 1970s. On 2 November 1986 the author visited *Sayagyi* ("Revered teacher") U Chan Tun Aung's house in Rangoon to give obeisance to him on his 85<sup>th</sup> birthday. U Chan Tun Aung died in May 1987.

22 See above n12.

23 The "BL" is the Bachelor of Laws degree conferred by the University of Rangoon (renamed Rangoon Arts and Science University in 1964). The BL course was a part-time two-year course. One had to have a basic degree before one could enrol in the BL course. From 1963-64, a new LLB course of five years duration was established at the Rangoon Arts and Science University. Unlike the BL courses, where a basic degree was required before enrolment in the course, a High School graduate, provided he obtained a minimum number of marks in the High School Examination, could apply for enrolment in the five year LLB (also designated as Bachelor of Laws) course. The last batch of graduates for the BL course was in 1968 – the same year as the first batch of LLB graduates. Hence depending on whether one's degree is a "BL" or a "LLB" one can guess whether one is a pre-1969 or post-1967 law graduate.

24 U Aung Toe was appointed Chief Justice by the State Law and Order Restoration Council (SLORC) on 29 September 1988. When SLORC took over power on 18 September 1988 it abolished all the "organs of State power" that were formed under the 1974 Constitution. "The Council of People's Justices" was an organ of State power that was formed under the 1974 Constitution. All members of the Central Court of Justice (*Baho Tayar Yone*) were also members of the Council of People's Justices. Hence for approximately ten days after the SLORC takeover there was no Higher Court in Burma. Apparently to fill this lacuna the SLORC established a Supreme Court (*Tayar-Yone-Gyoke*) and appointed U Aung Toe as Chief Justice (*Tayar Thugyee Gyoke*). As of April 2004, U Aung Toe has served as Chief Justice for 15 years and seven months: the longest tenure as Chief Justice/head of the judiciary in independent Burma. Prior to his

- U Kyaw Win, BA Judge (*Tayar-Thugyee* in Burmese)
- U Aung Myin, BA; RL<sup>25</sup> Judge
- U Than Pe, BA; BL Judge
- U Tin Ohn BA; BL Advocate<sup>26</sup> Judge
- U Tin Htut Naing BA; BL Judge

On the next page, another list of Union of Myanmar Supreme Court, Chief Justice and the names of other Judges appear ("List Two")

- U Aung Toe, BA; BL Chief Justice
- U Than U, BA (from 14 November 1998) Judge
- 3. U Khin Maung Latt, BA; BL (Advocate) (from 14 November 1998) Judge
- 4. U Khin Myint, Master Mariner (FG),<sup>27</sup> HGP;<sup>28</sup> RL (from 14 November 1998) Judge

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appointment by SLORC as Chief Justice, U Aung Toe was a retired Registrar of the Central Court of Justice (CCJ). The author will use the term "Justices" for the judicial personnel that served in the former Burmese Supreme Court and High Court in 1948 and, apart from the SLORC-appointed Chief Justice U Aung Toe, the appointees to the 1998 Myanmar Supreme Court will be referred to as "Judges" unless citing directly from original sources (where the nomenclature that is mentioned in those sources will be used).

- 25 RL means "Registered Lawyer". Since the late-1970s, graduates of a university in Burma can attend a part-time two-year course and if one passes the subjects, one is awarded the Registered Lawyer certificate. Since it is not conferred by a university it is not clear whether the RL can be officially considered a University degree, though it could be its rough equivalent.
- 26 The word "Advocate" is mentioned in English in the list. An "Advocate" (*Tayar-Yone-Gyoke-Shay-Nay* in Burmese) in the Burmese context is a legal practitioner who can practise in all the Courts of Burma including the highest court. In the 1960s, 1970s and 1980s and perhaps even now, a person who had a BL or LLB degree and who had done one year of "chamber-reading" attachment with a "chamber-master" was eligible to practice as a "Higher Grade Pleader" (HGP). After one year of practice as a HGP, on payment of fees, the person could apply for, and if approved by the Highest Court, be registered as an advocate. It is not known why the designation Advocate appears for this particular Judge (and one other in the next list) since all the other Judges could or should have been advocates too. It may be that, one, the particular Judges were appointed directly from among (practising) advocates and that the Judges, including the Chief Justice, after whose names the word "Advocate" does not appear were either retired or serving magistrates and Judges or law officers (in the lower Courts) and not practising advocates at the time of their appointment by SLORC or the State Peace and Development Council (SPDC). Alternatively, it may be that apart from those stated as "Advocates", the other Judges are not advocates (that is, although they "sit" on the Supreme Court as Judges, they are not eligible to practice as advocates before the Supreme Court). This latter explanation seems unlikely to be the case and perhaps the earlier presumption is the correct one.
- 27 "Master Mariner" is of course not a degree but a (non-law) professional qualification. The author is not sure what "FG" means; it may be "Foreign Going".

- 5. Dr Tin Aung Aye, BSc, BL; LLM; LLD<sup>29</sup> (from 14 November 1998) Judge

All of the judges in the current Myanmar Supreme Court and also those judges whose names appear in the 1998 Myanmar Law Reports were appointed either by the ruling military councils (the State Law and Order Restoration Council ("SLORC")<sup>30</sup> or State Peace and Development Council ("SPDC")). In contrast, the justices of the 1948 Burmese Supreme Court were appointed under the 1947 Constitution. Chapter VII, sections 133 to 153 of the 1947 Constitution<sup>31</sup> laid down the methods and procedures that must be followed in the appointment of judges to the (former) Supreme Court and High Court of Burma. Section 140(1) of the 1947 Constitution stated that "the Chief Justice of the Union shall be appointed by the President ... with the approval of both Chambers of the Parliament in joint sitting". Section 140(2) of the 1947 Constitution stated that "all the judges of the Supreme Court and all the judges of the High Court shall be appointed by the President ... with

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- 28 HGP is "Higher Grade Pleader" which is not a degree. Apart from BL and LLB graduates being able to practice as a HGP provided they do one year of "chamber-reading" attachment with a "chamber-master", there is another way that a Higher Grade Peadership certificate can be obtained. Prior to 1977, any person who passed the second year of any university course could sit for the "Higher Grade Peadership" examination. Since 1977, any person who passes the High School Examination from the "B" List also becomes eligible to sit for the Higher Grade Peadership examination. In the 1960s, 1970s and 1980s, the nation-wide High School Examinations (called the Basic Education High School Examinations, BEHS) were held annually. Those who pass from the "A" list are eligible to apply for admission to various courses in universities and colleges throughout the country. Those who pass from the "B" List are not eligible to apply for admission to the universities and colleges but are eligible to apply for admission to "technical schools" where students can enrol in courses dealing with, say, motor machinery or pottery. Since 1977 those who cannot enrol in a university or college are eligible to sit for the Higher Grade Peadership examination. From the 1960s to the 1980s, persons who become Higher Grade Peaders through the written exam (without going through the formal BL or LLB course), had to practice for seven years and sit the Advocateship examination and pass it before they were formally designated as Advocates. During the author's visit to Burma in January 2004 one of his Rangoon University Law School classmates, an advocate, told him that for some years now the RL and the HGP exams have been suspended.
- 29 Dr Tin Aung Aye studied and obtained his postgraduate degrees in labour law in the early 1970s and worked for a while in the Burma Pharmaceutical Industry (BPI) before joining the teaching staff of the Department of Law of (what was then called) Rangoon Arts and Science University. Later Professor Tin Aung Aye was appointed as Rector of the University of Yangon (as it is now called). As stated in the 1998 *Myanmar Law Reports*, from 14 November 1998 he was appointed by the State Peace and Development Council (SPDC) as a Judge in the current Myanmar Supreme Court.
- 30 The SLORC came to power on 18 September 1988, dissolved itself and reconstituted itself as the State Peace and Development Council (SPDC) on 15 November 1997. Most – though not all – of the members of the SLORC were reappointed in the SPDC together with some new appointments. As of January 2004, the SPDC had made five new appointments to the current Myanmar Supreme Court. Order No 1/2003 of 2 February 2003 stated that U Thein Soe had been appointed "Deputy Chief Justice" and four other persons were also appointed "Supreme Court Justices". The Order is reproduced in (3 February 2003) *The New Light of Myanmar [Newspaper]* 16.
- 31 The 1947 Constitution is reproduced in Maung Maung *Burma's Constitution* (Martinus Nijhoff, The Hague, 1959; revised edition 1961) Appendix.

the approval of the both Chambers of the Parliament in joint sitting". Hence all the judges of the former Supreme Court were appointed in accordance with that constitutional process. Moreover under the provisions of chapter VII of the 1947 Constitution a judge of the Supreme Court or High Court cannot be removed from office until a proper and successful impeachment has taken place.

The appointment of all justices of the Myanmar Supreme Court in 1998 as well as the current Myanmar Supreme Court were made by either by SLORC or SPDC. Just as the SLORC or SPDC can appoint judges of the Supreme Court, the ruling SPDC can remove or terminate them at will. This can be seen from the two different "lists" of judges provided in the 1998 Myanmar Law Reports. Except for Chief Justice U Aung Toe, none of the judges in "List One" appeared in "List Two" where four more judges were appointed to the Supreme Court with effect from 14 November 1998. These four judges replaced the other five judges who served till 13 November 1998. The services of five judges in "List One" were terminated by the SPDC, though the official announcement used the phrase "permitted to retire".

As far as formal qualifications are concerned it can be seen that out of the 11 judges who sat on the Supreme and High Courts of Burma during 1948, seven were barristers, and four had foreign degrees – all of them from Cambridge University in the United Kingdom ("Cantab"). In 1998 altogether nine judges sat on the Myanmar Supreme Court. Only the Chief Justice U Aung Toe occupied the Supreme Court bench for the whole year. Among the nine judges, none were barristers, which reflects the fact that the practice, mainly in vogue during the colonial days or a decade or so after independence, of studying and "dining" to become barristers from the Inns of Courts of England had ceased.<sup>32</sup> Among the nine judges, one, Dr Tin Aung Aye, has postgraduate degrees from a foreign university.<sup>33</sup>

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32 Among the elder legal practitioners or Advocates in Burma, there will still be those who are also barristers-of-law. Most of these surviving barristers would have retired from private practice. The last Justice or Judge in the top echelons of Burma's judiciary who was a barrister was the late U Moun Moun Kyaw Win who was Chairman of the Council of People's Justices ("Chief Justice" though that designation was not formally used during that time under the 1974 one-Party Constitution). U Moun Moun Kyaw Win, a retired Brigadier and a Barrister, served as Chairman of the Council of People's Justices from November 1981 until his death in July 1982. His tenure as "Chief Justice" or Head of the Judiciary was the shortest in independent Burma. Before he became the Chairman of the Council of People's Justices U Moun Moun Kyaw Win was for several years Chairman of the Council of People's Attorneys ("Attorney-General" though that designation was never officially used during the period) under the 1974 Constitution.

In contrast, in Malaysia, the situation is different. Among the Judges of the March 2003 apex courts of Malaysia, at least two are listed as barristers on the Malaysian judiciary's website <<http://www.kehakiman.gov.my>> (last accessed 23 May 2004). The biographical information on the website stated that The Right Honourable Tun Mohammed Dzaddin bin Haji Abdullah, Chief Justice of Malaysia, and the Right Honourable Tan Sri Datuk Steve Shim Co Kiong are barristers-at-law.

33 Dr Tin Aung Aye got his "LLD" (or equivalent thereof) and perhaps also his "LLM" (or equivalent thereof) from a university in the then German Democratic Republic (East Germany). In the 1948 Burma Law Reports when the Justices' and Law Officers' academic qualifications are mentioned, the name of the

### 3 *The number of cases, format and the languages that were used in the 1948 Burma Law Reports*

The 1948 Burma Law Reports is an impressive document and consists of 876 numbered pages, plus some unnumbered pages. There are about 40 pages which are listed with Roman numerals (consisting of sections on List of Cases Reported, Table of Cases Cited and Subject Matter Index). Hence in total there are more than nine hundred pages in the 1948 Burma Law Reports. It is perhaps one of the thickest Law Reports in independent Burma. "Table of Cases Reported" is listed from pages VII to XI of the Law Report. The name of the cases are arranged alphabetically (in English) by first name of the appellant, then the name of the respondent and then followed by the page number. Under the title "Supreme Court", 16 cases that were decided by the Supreme Court in the year 1948 are listed.

Under the title "High Court" there are sub-headings under the names "Special Bench (Civil)", "Full Bench (Civil)", "Civil Reference", "Appellate Civil", "Appellate Criminal", "Civil Revision", "Criminal Revision" and "Original Civil". Altogether it lists 91 judgments which were delivered by the High Court of the Union of Burma in 1948 and prior to that some of the judgments given by the High Court of Judicature in Rangoon in 1947.<sup>34</sup> The 91 cases that were decided and the rulings of which are written in English by the High Court of Union of Burma are listed in the "Table of Cases Reported". All of the rulings that are written in Burmese were decided by the High Court. Hence among the 107 rulings or judgments of the Supreme Courts and High Courts of the Union of Burma that were reported in the 1948 Burma Law Reports, three of the total (less than three per cent) were written in the vernacular. In a sense, the 1948 Burma Law Reports broke with tradition in that this was the first time any case in a Law Report of appellate courts was written in Burmese. In the colonial times from the time the Law Reports were first compiled in the 1870s up to 1947 – the year before independence – all of the judgments were written in English.

There is also a "Table of List of Cases Cited" (all of which are in English) and a "General Index" which classifies the cases by legal subject matter. The summary and *ratio decidendi* of the cases that were decided are mentioned in the General Index, including those three judgments that were written in Burmese. There is also an erratum where five typographical errors in various pages of the Law

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degree-awarding institution is also mentioned if the university from which the Justices or law officers obtained their degrees is a foreign institution. In contrast, the 1998 Myanmar Law Reports do not mention the name of the university which awarded Dr Tin Aung Aye the LLM and LLD degrees.

34 Burma obtained independence on 4 January 1948 and the two apex courts under the 1947 Constitution were formally established during that year. Some cases decided by the High Court of Judicature in Rangoon (of pre-independence days) during 1947 are included in the 1948 Burma Law Reports. Unlike the Supreme Court, which mainly exercised appellate jurisdiction, the High Court and High Court of Judicature in Rangoon exercised original jurisdiction in some instances and five cases listed under the title "Original Civil" were decided by the High Court. In the "List of Cases Reported", English letters were used even for the three cases whose main judgments were written in Burmese. In the pages where the judgments appear, the names of the cases – and the judgments – were in Burmese.

Reports are stated and corrected. The 1948 Burma Law Reports are in hard-cover binding with both the spines and the front hard cover mentioning the words (in English) "1948 Burma Law Reports". It is not stated how many copies of the 1948 Burma Law Reports were printed, though one could assume that it was first published some time after 1948, possibly during the year 1949.

4 *The number of cases, format and the languages that were used in the 1998 Myanmar Law Reports*

The 1998 Myanmar Law Reports is in terms of both quantity and quality small in comparison with its 1948 predecessor. Unlike the 1948 Burma Law Reports, whereby the phrase "Burma Law Reports" is printed in bold printing on a brown foreground, the cover of the 1998 Law Report is green. The spine seems to be somewhat hastily bound by a black cloth and it gives the impression of an exercise book. The opening page reproduces the words on the cover which state in Burmese: "Union of Myanmar, Supreme Court, Cases ('Rulings')", the year 1998, "published with the permission of the Supreme Court". On the next page (in Burmese) under the title "publication history" are the words "first printing, October 1999". It also states that 6000 copies were printed for the first publication and this information is followed again by the phrase printed with the permission of the Union of Myanmar Supreme Court". On the next pages, are the names of the Chief Justice and judges (both "List One" and "List Two").

These lists of judges and members of the law reporting lodies are followed in the next page by a quotation in Burmese "extracted" from a ruling that was reported in the 1966 Burma Law Reports. In translation the statement reads: "[i]n the administration of justice it is not only necessary to decide rightfully but it also important for the general public to see that it has been rightfully decided."

Below this statement appears the name of the case where the statement was made. The case is *Union of Burma v Maung Shwe (alias) Maung Shay and two others*.<sup>35</sup> By inserting this statement from the 1966 Burma Law Reports in the 1998 Myanmar Law Reports, the implication appears to be that the current Myanmar Supreme Court by publishing its decisions is making known to the public that the decisions were "rightfully decided" or that justice has been done. In pre-1962 Burma Law Reports, such a "declaration" of letting the public know that legal decisions have been rightfully made was not included in the opening pages.<sup>36</sup>

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35 (1966) Bu LR 616 (Chief Court) (CC). The citation of the case in Burmese was given in a footnote in the 1998 Myanmar Law Reports.

36 The author is unable to verify whether this declaration is included or not in the earlier (that is, pre-1998) annual Law Reports of the current Myanmar Supreme Court or in subsequent Law Reports that were issued after 1998. This declaration and excerpt from the 1966 decision of the then Burmese Chief Court may or may not be a one-off quotation in the annual *Law Reports* for 1998 of the Myanmar Supreme Court.

The rulings that were delivered by the Myanmar Supreme Court in 1998 are mentioned separately in two types of contents pages. The first list is the "Criminal Cases" decided by the Myanmar Supreme Court during 1998 and another is the "Civil Cases". The Criminal Cases and the Civil Cases are put in two separate sections with the Criminal Cases preceding the Civil Cases. A total of 37 criminal and civil cases that were decided by the Myanmar Supreme Court during 1998 are included. A "Subject-matter Index of the Criminal Cases" (all written in Burmese) takes up 15 pages. 19 criminal cases and 18 civil cases that were decided by the Myanmar Supreme Court in 1998 are reported in separate sections. The 37 cases, both civil and criminal, are listed in the "Contents" page in Burmese alphabetical order of the appellant's name first, and starting with the Criminal cases. Unlike in the 1948 Burma Law Reports, there is no "Table of Cases Cited" in the 1998 Myanmar Law Reports. Nor is there an erratum, though there were a few typographical errors (in Burmese). The unnumbered pages of the 1998 Myanmar Law Reports are 13 pages and the pages in Burmese alphabets (instead of figures) where the subject indexes for the criminal and civil cases are listed consist of 15 and 26 pages respectively. The 37 reported judgments of the civil and criminal cases are reproduced in 316 pages. Hence there are a total of 370 pages in the 1998 Myanmar Law Reports.

5 *Comparison of the format and reporting form of the 1948 Burma Law Reports and the 1998 Myanmar Law Reports*

The "format" for reporting cases in the 1998 Myanmar Law Reports is similar to that of the 1948 Burma Law Reports even though almost all of the rulings (104 out of 107 rulings) reported in the 1948 Burma Law Reports are written in English and all the rulings that were written in the 1998 Myanmar Law Reports are in Burmese. In both Law Reports the names of the justices or judges (at times a single Judge) appear followed underneath by the parties' names and then the "head notes" including the phrases "Held"/"Held further" (in English in the 1948 Burma Law Reports and the equivalent Burmese phrases in the 1998 Myanmar Law Reports). The headnotes of the cases are followed by the names of counsel who appeared for the applicants/appellants and respondents respectively. The dates (according to the Gregorian calendar) of the year, the month and the date appear in either the top right hand or top left hand corner in the 1948 Burma Law Reports and in the top left hand corner in the 1998 Myanmar Law Reports. In the 1948 Burma Law Reports the judgment of the Court is always preceded by the name of the justice or judge who delivered the judgment. This would be so regardless of the whether the case was been heard by a single judge<sup>37</sup>

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For a comparison of the independence of the judiciary in the pre-1962 and post-1962 period see Myint Zan "Judicial Independence in Burma: Constitutional History, Actual Practice and Future Prospects" (2000) 4 Southern Cross University Law Review 17, 22-59 ["Judicial Independence in Burma"].

37 For example, the High Court case ("Appellate Criminal") of *B Rajana v The King* (1948) Bu LR 61 (HC) was heard by Mr Justice Thein Maung (as he then was) alone. The judgment delivered on 21 October 1947 included the phrase "Thein Maung, J" before the start of the judgment. The Supreme Court case *Ma Mar Mar v PSO Ahlone and Others* (1948) Bu LR 214 (SC) was heard by a bench consisting of "Sir Ba U, Chief

or whether a number of justices or judges (a Bench of two or more judges) heard the case. In none of the 37 cases decided by the Myanmar Supreme Court in 1998 was it stated which particular judge delivered the ruling. This is so both for cases that were heard by a single judge or by a bench of two or more judges. For example the "Criminal Appeal"<sup>38</sup> case of *Union of Myanmar v U Hla Maung U*<sup>39</sup> was heard by a single judge, Judge ("*Tayar Thugyee*") U Tin Ohn. The judgment did not indicate that U Tin Ohn delivered the judgment. The 1948 Burma Law Reports did provide the information even if a single judge heard the case. Similarly the "Civil Special Appeal"<sup>40</sup> case of *U Ko Ko v Daw Tin Kywe*<sup>41</sup> was heard by a full bench<sup>42</sup> of the then Myanmar Supreme Court consisting of Chief Justice U Aung Toe, U Kyaw Win, U Aung Myin, U Than Pe, U Tin Ohn and U Tin Htut Naing, and the judgment of the Court was delivered on 2 November 1998.<sup>43</sup> It was not stated in the 1998 Myanmar Law Reports which judge "delivered" the ruling.

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Justice of the Union of Burma, E Maung, and Kyaw Myint, JJ, of the Supreme Court". It was stated before the start of the judgment that "[t]he judgment of the Court was delivered by E Maung J".

- 38 Translation from the Burmese phrase "*Pyit-Hmu Hsaing-Yar- Ayu-Khan Hmu*".
- 39 (1998) Myan LR 91. The citation method of the Myanmar Supreme Court for cases has been devised by the author since there is no precedent in English for citing Myanmar Supreme Court cases which are written in Burmese. The names of the parties is followed by the year the decision was given and reported and, to distinguish it from the Burma Law Reports (Bu LR) of yester years, the acronym "Myan LR" for "Myanmar Law Reports" is used, followed by the page number where the judgment appears.
- 40 Translation from the Burmese phrase "*Tayar-ma Ah-htoo Ayu-khan Hmu*".
- 41 (1998) Myan LR 141.
- 42 The Law Reports did not indicate that the arguments were heard and that the decision was rendered by the Full Bench ("*Sone-nyi Khone-yone*") of the ("pre-14 November 1998") Myanmar Supreme Court. Since there were only six judges (pre-14 November 1998) and five judges (post-14 November 1998) in the Myanmar Supreme Court, the author has described the decision as a "Full Bench" decision. The 1948 Burma Law Reports specifically listed three cases decided by the High Court of Burma; these were (in English) "Full Bench" Civil cases: (1948) Bu LR viii. As of January 2004, there were 15 judges in the current Myanmar Supreme Court: Interview with retired Law Professor Khin Maung Thein, University of Mandalay, (the author, Los Angeles, California, 28 June 2003). As of January 2004, the SPDC appointed five new judges (including a "Deputy Chief Justice") to the current Myanmar Supreme Court: SPDC Order No 1/2003 of 2 February 2003.
- 43 The date of the judgment (2 November 1998) is important and the author has purposely used the phrase "then Myanmar Supreme Court" because the composition of the Supreme Court dramatically changed when, on 14 November 1998, with the exception of Chief Justice U Aung Toe, all the judges (that is, five judges) who sat on the case were replaced by the SPDC. Four new judges were appointed in place of those judges who were "permitted to retire" from 14 November 1998. Hence even in 1998 the "pre- and post-14 November 1998" composition of the Supreme Court was very different. As of January 2004, the author is unable to verify whether there have been any replacements of the judges who were appointed by the SPDC on 14 November 1998, though there have been additional appointees. The SPDC Order No 1/2003 of 2 February 2003 stated that U Thein Soe had been appointed "Deputy Chief Justice" and four other persons were also appointed "Supreme Court Justices". The Order is reproduced in (3 February 2003) *The New Light of Myanmar*[Newspaper] 16.



Up until 1971, cases cited in the Burma Law Reports mention which judges heard the case and which judge delivered the rulings. This is so even in judgments that are written in Burmese. For example in a ruling written in Burmese and given by the Chief Court of Burma on 16 June 1971 in the case of *Daw Kyi Kyi v Mrs Mary Wain*, it was specifically stated that Dr Maung Maung delivered the judgment.<sup>44</sup> However in a case of *Daw Khin Mya Mar (alias) Mar Mar v U Nyunt Hlaing*<sup>45</sup> decided by the Chief Court just over a year later on 29 October 1972, the judgment was only signed by the three justices or judges. There was no indication as to who delivered (or wrote) the judgment. Hence from 1972 onwards, the judgments of the apex courts of Burma do not indicate who delivered (or wrote) the judgment. This shift, in the reportage of judicial decisions, to not mentioning the name of the justices or judges who delivered or wrote the decision may be due to a desire to emphasise the collective nature of the decision. The collective nature of the decision was made apparent in all post-1971 Law Reports by not singling out or crediting a particular justice or judge as the main author.<sup>46</sup>

In the 1948 Burma Law Reports as well as in subsequent Law Reports until about the mid-1960s, occasional separate concurring opinions are published where a case was considered by more than one judge or justice. For example, the case of *Maung San Bwint and one v Ma Than Sein*<sup>47</sup> was heard by the Full Bench of the then High Court of Judicature at Rangoon consisting of Sir Ba U, Acting Chief Justice, Mr Justice E Maung and Mr Justice Kyaw Myint but the judgment of the Court was delivered by Ba U, ACJ<sup>48</sup>. A separate concurring opinion was written by E Maung J<sup>49</sup> where the Justice (though not disagreeing with the decision) "enter[ed] a caveat" and stated that "[w]ith this reservation I am content to accept the answer propounded by my Lord".<sup>50</sup> In yet another

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44 *Daw Kyi Kyi v Mrs Mary Wain* (1971) Bu LR 52 (CC). The Chief Court bench consisted of Dr Maung Maung CJ, U Kyaw Zan U and U Thet Pe JJ. The judgment indicated that the ruling of the Court was delivered by Dr Maung Maung. The facts, decision, analysis and commentary relating to this case can be read in "Of Consummation, Matrimonial Promises, Faults and Parallel Wives", above n 14, 198-208.

45 *Daw Khin Mya Mar (alias) Mar Mar v U Nyunt Hlaing* (1972) Unreported, Civil Appeal No 38 (Chief Court of the Union of Burma).

46 It could be added that even though one could, in a generic sense, state that the decisions post-1971 given by the various apex courts of Burma are "*per curiam*" decisions, this Latin word or its English or Burmese equivalent is not mentioned in any of the judgments. It is only inferred that all the decisions of the apex courts are *per curiam* or (perhaps more appropriately) "collective decisions".

47 (1948) Bu LR 1 (HC). The case deals with a matter concerning the principles of Burmese Buddhist Law and the Full Bench of the High Court was considering "[t]he question referred to this Bench which is: 'On divorce by mutual consent between a Burmese Buddhist couple one of whom had been married and the other had not been so married, is the 'Atetpa' property of the previously married divisible and if so, in what proportion?'"

48 *Maung San Bwint and one v Ma Than Sein*, above n 47, 8-15.

49 *Maung San Bwint and one v Ma Than Sein*, above n 47, 15-17.

50 *Maung San Bwint and one v Ma Than Sein*, above n 47, 18.

concurring opinion the third member of the Bench which heard the case, Kyaw Myint J, stated that:<sup>51</sup>

I have had the advantage of reading the drafts of the judgments intended to be delivered by my Lord<sup>52</sup> the Acting Chief Justice and my learned brother<sup>53</sup> E Maung J. I have nothing to add to their observations and agree that the answer to the question referred should be as propounded by my Lord.

Hence at least some of the decisions that were heard by more than one justice of the Supreme and High Courts of Burma in 1948 had separate concurring opinions.

One final and common feature of both the 1948 Burma Law Reports and 1998 Myanmar Law Reports is that in both the Reports and in all the cases decided in those years there were no dissenting opinions. Indeed since the time of independence in 1948, it seems that, with one exception, there has never been a dissenting opinion in the judgments delivered by the apex courts of Burma.<sup>54</sup> In 1978, the author asked the late U Myint Thein (1900-1994) the last Chief Justice to

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51 *Maung San Bwint and one v Ma Than Sein*, above n 47, 18.

52 Footnote inserted. In the concurring opinions of the two Justices, in a decision delivered on 3 November 1947, the Acting Chief Justice, Sir Ba U, was mentioned as "my Lord" by both E Maung and Kyaw Myint JJ. Even though a few of the rulings in the post-1962 Burma Law Reports continued to be written in English such colonial usages, such as referring to the Chief Justice as "my Lord" ceased by the mid-1960s (if not by 1962 or 1963), perhaps even earlier. This would apparently be in consonance with the socialist ideology of the then Revolutionary government to do away with "colonial flummery". In 2003, the website of the Supreme Court of Sri Lanka still referred to the March 2003 Chief Justice of Sri Lanka, the Hon Sarath Nanda Silva as "His Lordship": see <Hhttp://www.justiceministry.gov.lkH> (last accessed 23 May 2004). However the website of the High Court of Australia referred to Chief Justice Murray Gleeson merely as "he" and did not use either the phrase "His Honour" or "His Lordship": <Hhttp://www.hcourt.gov.au/gleesonj.htmH> (last accessed 23 May 2004). Similarly the website of the Malaysian judiciary <Hhttp://www.kehakiman.gov.myH> (last accessed 23 May 2004), also referred to Chief Justice Tun Mohammed Dzaddin bin Haji Abdullah, as "he" even though the title of the brief biography referred to him as "The Right Honourable".

53 Footnote inserted. The expression "my learned brother" to refer to colleagues from the Bench also ceased to be used from around the mid-1960s, if not earlier, mainly due to the reason that from that time onwards the judges of Burma's apex courts did not write concurring opinions and almost all the judgments (since 1969 all the judgments) were written in Burmese. Up until 1971 in referring to counsel appearing in the case, the Burmese term "*Pyinnyar-shei Shanay Gyi*" (*pyinnyar shei* roughly meaning "learned" and *Shannay gyi* literally meaning "big lawyer") was used. Since 1972, the term "*pyinnyar shei*" as well as the term "big" ("*Gyi*") have been dropped and counsel is mentioned either as "appellant/plaintiff" or "respondent/defendant" counsel. The 1998 Myanmar Law Reports simply mentioned counsel "*Shanay*" without the honorifics.

54 The exception is a dissenting opinion in a judgment (written in English) delivered by the High Court of the Union of Burma that was decided on 11 August 1950 by a three-judge bench consisting of U Tun Byu CJ, U Aung Tha Gyaw and U Bo Gyi JJ. The case is *U Ohn Khin v The Union of Burma* (1950) Bu LR 226 (HC). In that case, U Aung Tha Gyaw J, at the start of a separate judgment which ran for twenty pages stated that "I have had the advantage of reading the judgment of my learned brothers, the Chief Justice and Justice Bo Gyi, and although I find myself in general agreement on the minor points dealt with by them, I feel

be appointed under the 1947 Constitution (and who served as Chief Justice from October 1957 to March 1962) why there were no dissenting opinions in the Supreme and High Courts of Burma. U Myint Thein replied that "we [the Supreme and High Courts of Burma] tried to follow the Privy Council" in not giving dissenting opinions. All the post-1962 apex Burma Law Reports do not include dissenting opinions.<sup>55</sup>

### ***B Selected Cases from the 1948 Burma Law Reports***

One hundred and seven cases decided by the Supreme and High Courts of Burma in the years 1947 and 1948 are reported in the 1948 Burma Law Reports. There is indeed "an embarrassment of riches" in the superb case laws of the long defunct two Burmese apex courts. Among the rulings that were delivered by the former Supreme and High Courts there are a few cases that can be considered landmarks, a few of which will be discussed here. However since there are three rulings (out of a total of 107 cases reported) that are written in Burmese, the author is of the opinion that they should be briefly summarised.<sup>56</sup>

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constrained to say with the deepest regret, that on the major issues involved in this case I am unable to subscribe to their views": *U Ohn Khin v The Union of Burma* (1950) Bu LR 226, 255 (HC) U Aung Tha Gyaw J. U Aung Tha Gyaw J's opinion, which disagreed with the judgment of the majority was not formally described anywhere in the ruling as a "dissenting opinion", though the main judgment was described as a "majority judgment of the Chief Justice and U Bo Gyi J" (*U Ohn Khin v The Union of Burma* (1950) Bu LR 226, 232 (HC)). Hence the above ruling would constitute a very rare – perhaps even unique – "dissenting opinion" in the post-independence Burma Law Reports. Though the author has not checked all the Law Reports, the author feels certain that the post-1962 (especially post-1974 and post-1988) Burma or Myanmar Law Reports would not contain any dissenting opinions.

55 This (that is, the decisions of the highest courts of the country not having dissenting opinions) is not the case in Sri Lanka. Basil Fernando writes that in Case Reference SD No 3 of 1982 P/Parl decided by the Supreme Court of Sri Lanka it was stated that there were "three members of the [Supreme] court of [Sri Lanka] who were 'not in agreement [with] the [majority] view'": Basil Fernando "Return to Liberal Democracy: A Precondition for Ending Sri Lanka's Civil War" (2001) 10 Human Rights Defender 9, 10. Still, there was apparently no dissenting opinion as such in that particular case of the Sri Lankan Supreme Court. However this case indicates that in 1982 in Sri Lanka – unlike the virtually unbroken tradition post-1948 in all apex Burmese courts where dissent was very rarely expressed – dissent from the majority views in the Supreme Court of Sri Lanka did occur.

56 It should be stated that, from the author's memory, every annual Burma Law Reports from 1948 to 1961 include at least one ruling – perhaps more – that is written in Burmese. But the majority of the judgments in pre-1962 annual Law Reports are in English. On 30 March 1962 the Supreme and High Courts of Burma were abolished by a decree of the Revolutionary Council. At least a third – perhaps more than a half – of the rulings in the 1962 Burma Law Reports are probably written in Burmese. The 1968 Burma Law Reports contain the last judgments that are written in English. Fewer than 3 per cent (3 out of 107) of the reported rulings in the 1948 Burma Law Reports are written in Burmese. Fifteen out of 69 rulings are written in English in the 1968 Burma Law Reports. Therefore, 21 per cent of the rulings are in English in the last Law Reports that contain any judgments written in English.

In two out of the three rulings that were written in Burmese in the 1948 Burma Law Reports, the justices of the High Court of Burma<sup>57</sup> might have been prompted by considerations of utility and pragmatism in writing their rulings in the vernacular. The first ruling was decided jointly by High Court Chief Justice<sup>58</sup> U Thein Maung<sup>59</sup> and High Court Justice<sup>60</sup> U San Maung in the case of *Saw Ba Thein, First Special Magistrate of Town of Thaton v U Ko Ko Lay, Editor and Publisher BamaKhit ["Burma's Age"] Newspaper, City of Rangoon*.<sup>61</sup> The case involved a summons on the editor of the *BamaKhit* newspaper concerning a letter<sup>62</sup> that was published in the newspaper in its 7 March 1948 issue. The article that was written in Burmese wrongly reported the facts and made accusations or cast aspersions on Magistrate U Saw Ba Thein's integrity (the plaintiff/appellant in this Appellate Civil Case).<sup>63</sup> The Court took issue with the words written in Burmese in the article which can be translated as "we do not want the fascistic magistrate's court and its bailiff who are acting in accordance with the wishes of the capitalists". The editor and publisher, in defence averred that:

1. The words were not said by the editor/publisher or even the reporter who wrote the news story since the reporter was merely reporting comments by others about the Magistrate Court and its decision; and

2. The editor had not known the magistrate, did not hold any malice against the magistrate and that the editor in "good faith" ("*thabaw yoe phyiint*") thought that what the reporter wrote must be true and published it.

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57 All of the 16 rulings that were delivered by the Supreme Court of the Union of Burma were written in English. The rest of the 93 rulings were delivered by the High Court and, among them, three were in Burmese.

58 "*Hluttaw Taya Wungyi Gyoke*" in Burmese.

59 U Thein Maung (1890-1975) became Chief Justice of the Supreme Court (the official designation was "Chief Justice of the Union") in 1952 and served in that post until October 1957 when U Myint Thein (1900-1994) succeeded him.

60 "*Hluttaw Taya Wungyi*" in Burmese.

61 (1948) Bu LR 398 (SC). The translation of the case names, as well as excerpts from the judgment, is by the author. The "Index of Cases Cited" merely mentions the case (in English) as "*Saw Ba Thein v U Ko Ko Lay*". An "\*" follows the case name and underneath the words "Civil Misc. Application No 13 of 1948" is written in English.

62 The Burmese word used is "*sar*" which can literally be translated as "letter". The subsequent paragraphs however indicate that the editor of the newspaper was asked to explain why he should not be punished under section 3 of the Contempt of Courts Act for a news item ("*thadin*") cum article ("*Hsaung-par*") that was published in the newspaper.

63 Even though the ruling was written in Burmese it appears under the heading "Appellate Civil" which was written in English.

Citing the relevant paragraphs in English from *Halsbury's Laws of England*, a sentence from which was reproduced in the ruling itself,<sup>64</sup> and also the earlier ruling of *King Emperor v Maung Tin Saw and Others*,<sup>65</sup> the justices held that both the reporter who wrote the news item and the publisher who published it were guilty under the Contempt of Courts Act. However the Court also took note of the fact that the editor and publisher had unreservedly apologised to both the High Court and the Magistrates Court. Moreover, the editor had also undertaken to publish his apology in the newspaper so that the general public would know of this fact. In addition the Court also noted that the entire judgment in the case "from beginning to the end" ("*Agh-sa hma Aghsone- Ah-hti*") would be published in the defendant's newspaper so that the public in general will become aware of the laws concerning contempt of court.

The High Court further stated that the defendant U Ko Ko Lay was genuinely remorseful for his "contempt of the Lower Court". In addition the High Court expressed the hope and belief that reporters, editors, publishers and distributors would, as a result of the ruling being published in its entirety in the newspaper become aware of the laws concerning contempt. Therefore in accordance with the first exception of section 3 of the Contempt of Courts Act, the Court accepted the defendant's apology and acquitted the defendant without convicting him under the Contempt of Courts Act.<sup>66</sup>

From the facts and summary of the judgment in the case it can be seen that the article that was found by the High Court to be a violation of the Contempt of Courts Act was written in Burmese. Therefore, writing the judgment in Burmese could assist the Court in expressing clearly which particular words, phrases or sentences that were written in Burmese were contemptuous of the court.<sup>67</sup> Moreover since the High Court required that the entire ruling be reproduced in a Burmese language newspaper it would perhaps "miss the audience" if the learned Justices of the High Court of Burma (as it then was) were to write it in English. That was perhaps the main reason why U

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64 (1948) Bu LR 398, 400 (HC).

65 (1928) 6 Rangoon Law Reports 43: as cited in *Saw Ba Thein v Ko Ko Lay*, above n 61, 41.

66 (1948) Bu LR 398, 401 (HC) (Translation by the author from the judgment written in Burmese).

67 Still, it should be said that ten years later in a judgment delivered on 7 August 1958, the then High Court Chief Justice U Chan Tun Aung wrote a judgment in English which dealt with an allegedly defamatory article that was written in a Burmese language newspaper. The excerpts from the article were reproduced in Burmese script in the ruling itself when the High Court ruled that these sentences were defamatory: see *U Ohn Khin v U Saw Han* (1958) Bu LR. As the author does not have the 1958 Burma Law Reports, the page number is currently unavailable. Hence, the fact that the newspaper article that was found to be in contempt of court was written in Burmese might not be the main reason for the High Court, in the 1948 case, to write its judgment in Burmese. The High Court required the Burmese language newspaper to publish its entire ruling. That would have been the reason that the two Justices of the High Court wrote their joint judgment in Burmese.

Thein Maung CJ and U San Maung J felt it expedient – perhaps necessary – to write this particular ruling in Burmese.<sup>68</sup>

The next case where the same two justices of the High Court heard the case and where the judgment was written in Burmese was the case of *Ma Tin Tin v Daw Kan Shi*.<sup>69</sup> The judgment was delivered by U San Maung J<sup>70</sup> with U Thein Maung CJ writing a single concurring sentence, "I agree" in Burmese.<sup>71</sup> The case concerns the veracity and implementation of an agreement to transfer some property by the respondent Daw Kan Shi to the applicant Ma Tin Tin. The agreement or contract (in Burmese: "*gati-pa-dain-nyin-sar-choke*") was written in Burmese and was reproduced in the judgment. The respondent Daw Kan Shi was apparently illiterate since, instead of her signature, a "thumbprint" appeared in the reproduction of the agreement. The case discusses the varying testimonies of the witnesses that attended the wedding of Ma Tin Tin in October 1944. There were conflicting testimonies as to who witnessed the agreement and how it was concluded. U San Maung J held that in cases of conflicting testimonies of witnesses, the court must decide the case by referring to "admitted circumstances and resulting probabilities".<sup>72</sup> In his ruling, U San Maung J referred to and followed the ruling of the Privy Council in *GW Davis v Maung Shwe*.<sup>73</sup> Since the agreement in dispute was written in Burmese, the High Court might have felt that the judgment should be written in Burmese.

The third and final case that is written in Burmese in the 1948 Burma Law Reports is the High Court case of *Maung Kadon v The Union of Burma*.<sup>74</sup> It was decided by a single Judge of the High Court, U San Maung J, and listed as an "appellate criminal" case in the "Table of Cases Reported".<sup>75</sup> On the night of 27 November 1947, the appellant Maung<sup>76</sup> Kadon "carried a sword on his shoulder

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68 It is of course possible for the High Court to write its judgment in English in the particular case and require the editor/publisher to translate it into Burmese before publishing it. But in this "counter-factual hypothetical", there is a possibility that the editor/publisher might mistranslate the judgment. Such a mistranslation could even arguably raise the spectre of yet more contempt of court proceedings. To save all these possible complications, the High Court might have found itself (almost) obliged to write this particular judgment in the vernacular.

69 (1948) Bu LR 582 (HC).

70 *Ma Tin Tin v Daw Kan Shi*, above n 69, 582-590.

71 *Ma Tin Tin v Daw Kan Shi*, above n 69, 590.

72 *Ma Tin Tin v Daw Kan Shi*, above n 69, 587-88. The particular words in quotes were written in brackets in English in the judgment.

73 LR 38 IA 155: as referred to in the "Table of Cases Cited" (1948) Bu LR xvi.

74 *Maung Kadon v The Union of Burma* (1948) Bu LR 661 (HC).

75 (1948) Bu LR x.

76 "Maung" like "U" is a Burmese honorific and is used for "younger" persons, in age or in rank. It could at times be used as a put-down or ingratiating word. The author recalls an incident that occurred around 1978

and on the main village road in the village of Hnaw-goan [in Henzada district in Lower Burma] and walked from south to north". A group of villagers asked Kadon who he was. Three of them, including the deceased later took out spears and followed Kadon. At a certain point one of the pursuers caught up with Kadon. The deceased, who was one of the pursuers, and Kadon faced each other and they taunted each other by saying "dare you hit me, dare you pierce me". Then the deceased tried to hit Kadon with a spear which did not hit Kadon but became stuck in the ground. Immediately after the deceased tried to hit Kadon, Kadon struck him once with a sword which hit the deceased on the left cheek and the deceased fell to the ground. Then Kadon's two other pursuers also caught up with Kadon and one of them threw a spear in his direction, and then the two pursuers "ran away towards the south" and Kadon ran northwards. Sometime later when people arrived at the scene they found that the person whom Kadon had struck was already dead.

The trial judge held that Kadon's actions in hitting his pursuer could not be justified under the doctrine of self-defence since Kadon could have "fled" from the scene.<sup>77</sup> Referring to precedents U San Maung J overruled the trial judge's decision. He ruled that when someone is being pursued by a person with weapons, it is not required that the pursued person "flee" or run away from the scene. The pursued person could face the attacker and defend himself or herself. U Saw Maung J stated that if there is doubt as to whether the appellant who struck the deceased with his sword acted in accordance with the principles of self-defence then the benefit of the doubt must be given to the

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at a hearing before the highest court that was established under the 1974 Constitution, the "Central Court of Justice" (CCJ), sitting on circuit in Burma's second city of Mandalay. One of the counsel scheduled to appear before the three-Judge CCJ bench was late by a few minutes. When he finally arrived and straight away began arguing his case, one of the judges stopped him and said in Burmese "U Kan Myaing [and then] Maung Kan Myaing apologise immediately to the court for your lateness". The judge then added in English "You kept the Bench waiting". The first designation of the counsel as "U" is meant to be "proper" but the second calling of "Maung" (which is usually reserved for a person younger in age and rank) is certainly intended to convey a censorious message. In some of the cases reported in the 1948 Burma Law Reports, some of the male names of the parties are accompanied by the honorific "U" some with "Maung" and other Burmese male names do not include the honorifics "U" or "Maung". Likewise, honorifics for Burmese females are: "Daw" (elder or more formal honorific for women) or "Ma" (the honorific for younger Burmese females). The 1948 Burma Law Reports include both "Daw" and "Ma" as honorifics for the names of the parties who happened to be Burmese females. In the case of *Ma Tin Tin v Daw Kan Shi* (1948) Bu LR 582 (HC), it can be seen that "Ma" Tin Tin is an honorific for the younger female and "Daw" Kan Shi is the honorific for the elder female who happened to be the mother-in-law of Tin Tin. Generally, the 1998 Myanmar Law Reports follows the "style" of its 1948 predecessor. Most, though not all, male parties names are preceded by the honorific "U", though, unlike the 1948 Burma Law Reports, "Maung" was not used at all for any of the names of the male parties. A few of the male Burmese names appear without a honorific. In the 1998 Myanmar Law Reports most female Burmese names of the parties are also preceded by the honorific "Daw" and a few are preceded by the honorific "Ma". No Burmese female names appear without the prefix "Daw" or "Ma" in the 1998 Myanmar Law Reports.

<sup>77</sup> Summary translation of the facts of the case as stated in *Maung Kadon v The Union of Burma*, above n 74, 662.

appellant. Accordingly, U Saw Maung J vacated the conviction of Kadon meted out by the trial judge for manslaughter (or culpable homicide not amounting to murder) and acquitted him.<sup>78</sup>

There are many important rulings written in English in the 1948 *Burma Law Reports*. Only a very select few landmark cases will be mentioned here.

From 1942 to about April 1945 Burma was under Japanese occupation. The British colonial administration returned after the end of the Second World War in about May 1945. The issue as to the tenability of the laws, practices and currency issued during the Japanese occupation period of 1942 to 1945<sup>79</sup> became the subject for legal determination before the High Court of Burma in the case of *Dr T Chan Taik v Ariff Moosajee Dooply and One*.<sup>80</sup> In brief, the issue as to whether payment made in Japanese currency (rather than the British currency of the pre-war and immediate post-war years) could be considered a legitimate payment for the purposes of a mortgage by deposit of title deeds was considered by the two justices of the High Court, U Thein Maung CJ (as he then was) and U San Maung J. In a decision given on 23 June 1948 the justices held that the repayment in Japanese currency could not be considered a legitimate payment. Issues concerning the application of a few Orders of the Code of Civil Procedure were considered by the High Court which will not be summarised or discussed here. In an opinion written by U San Maung J, certain issues of the implementation of international law that pertains to the case were discussed and decided by the court. Quoting an earlier judgment<sup>81</sup> that was delivered by E Maung J (who in 1948

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78 *Maung Kadon v The Union of Burma*, above n 74, 662-664.

A brief comment on the "writing style" in Burmese of the justices of the High Court of Burma more than fifty years ago in 1948 can be made here. At times, the justices' style seems slightly quaint, though there is a certain charm to it. For example, quotes such as Kadon walking "from south to north in the village carrying a sword on his shoulder", "dare you hit me, dare you pierce me". This is an indication in part of how the Justices might have been more used to writing their judgments in English than in Burmese. The fact that the Burmese language style (as well as spelling conventions) have slightly changed in the past fifty years or so make some of the expressions sound quaint or even charming when one rereads them more than fifty years later in the early 21<sup>st</sup> century.

79 The Japanese occupation forces granted "independence" to Burma on 1 August 1943 with Japan and other Axis powers "recognising" Burmese independence. Apart from 1944 – the first anniversary of Burma's "independence" on 1 August 1943 – this date has never been commemorated as "Burmese independence day" and 4 January 1948 is now nationally and internationally recognised as Independence Day. For a partisan view and memoirs from the Head of State during the war years and relating to the immediate pre-War and inter-war years history see Ba Maw *Breakthrough in Burma: Memoirs of a Revolution 1939-1946* (Yale University Press, New Haven (Conn), 1968).

80 *Dr T Chan Taik v Ariff Moosajee Dooply and One* (1948) Bu LR 454 (HC).

81 *Maung Sein Ko v Maung Hla Din* (1947) Civil 2n Appeal No 3.



at the time of the High Court judgment was a justice of the Supreme Court of the Union of Burma), U San Maung J reiterated that:<sup>82</sup>

The Japanese Military Forces which occupied Burma and the administration set up by them in the name of the Burmese independent State never had, under International Law, any authority to set up a currency system of their own. The legislation, either of the Military administration or of the Civil administration sponsored by the Military authorities during the occupation of Burma, equating the Japanese military notes to the legal currency of the country is not within the competence of the occupying power.

Again citing the earlier case of *The King v Maung Hmin and three others*,<sup>83</sup> U San Maung J held that: "the [1907] Hague Regulations must be treated by the Courts in Burma as incorporated into the Municipal Law of Burma to such extent as they are not inconsistent with the ordinary law of the country."<sup>84</sup>

Most of the ruling deals with issues of civil procedure. However, the background or underlying issue of the application of international law principles by Burmese courts can be discerned in *Dr T Chan Taik v Dooply*.<sup>85</sup> The post-independence Burmese High Court in the *Dr T Chan Taik* case reaffirmed court decisions of the immediate pre-independence era (that is, cases decided in 1946 and 1947) and decided that, at least as far as the 1907 Hague Regulations are concerned, they are incorporated into and form part of Burmese municipal law.

Another landmark case that is reported in the 1948 Burma Law Reports was decided by the Supreme Court of the Union of Burma. It mainly dealt with matters of constitutional law (in regard to certain provisions of the 1947 Burmese Constitution) and also matters concerning Administrative Law, especially the role of writs in Burmese law as it then was.<sup>86</sup> Only a few of the major holdings of the Supreme Court will be summarised here. The case is *U Htwe (alias) AE Madari v U Tun Ohn and One*.<sup>87</sup> As far as constitutional law is concerned the Court held that:<sup>88</sup>

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82 *Dr T Chan Taik v Ariff Moosajee Dooply and One*, above n 81,469 (HC), citing *Maung Sein Ko v Maung Hla Din*, above n 80.

83 *The King v Maung Hmin and three others* (1946) Rangoon Law Reports 1, 11.

84 *Dr T Chan Taik v Ariff Moosajee Dooply and One*, above n 80, 476.

85 *Dr T Chan Taik v Ariff Moosajee Dooply and One*, above n 80, 454-55.

86 The author has written "as it then was" for unlike other British legal heritage in the areas of commercial, criminal, civil, procedural and property laws, which in current day Burmese legal practice are still based (in part) on colonial legislation, the practice of issuing writs of certiorari, prohibition, mandamus, and quo warranto by the apex courts of Burma has, since 1962, become non-existent. At the very least, the issuing of writs has fallen into desuetude, if not being totally irrelevant, in the Burmese judicial scene of the past few decades.

87 *U Htwe (alias) AE Madari v U Tun Ohn and One* (1948) Bu LR 541 (SC). The case was argued before Sir Ba U CJ, E Maung and Kyaw Myint JJ and the judgment of the Court was delivered by Ba U CJ on 23 July 1948.

Sections of the [1947] Constitution should not be interpreted in a narrow and technical manner but should on all occasions be interpreted in a large, liberal and comprehensive spirit. Constructions most beneficial to the widest possible amplitude of its powers should be adopted. The Constitution though written should be interpreted in such a way as will be subject to development through usage and convention.

The Supreme Court also cited the famous dictum of Lord Atkin in *R v Electricity Commissioner*<sup>89</sup> which laid down the criteria for a superior court issuing prerogative writs:<sup>90</sup>

Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, acts in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

The Supreme Court referred to a large number of foreign cases in discussing the meaning of "court"<sup>91</sup> and held that in the Burmese context the above dictum of Lord Atkin could be modified and (in the Court's own words) "paraphrase[d]" as follows:<sup>92</sup>

There must be a person or a body of persons (first) 'having legal authority', (secondly) 'to determine questions affecting the rights of subjects' and (thirdly) 'having the duty to act according to law', (fourthly) 'acts in excess of his or their legal authority' [the prerogative writs will be issued by the Supreme Court].

The Supreme Court also clearly acknowledged that the criteria for issuing writs "are borrowed from English law".<sup>93</sup> By modifying the phrase "the duty to act judicially" to the "duty to act according to law", the Burmese Supreme Court might have also expanded the purview and jurisdiction of these writs in the Burmese context. It should be stated though that in 1948 the Burmese Supreme Court was refining the dictum laid down 24 years earlier in 1924 by Lord Atkin in *R v Electricity Commissioner*<sup>94</sup> in the light of subsequent cases decided by courts in the United

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88 *U Htwe (alias) AE Madari v U Tun Ohn and One*, above n 87, 542 citing six cases involving Canada and Australia and decided by superior courts of the United Kingdom, including the case of *James v Commonwealth of Australia* (1936) AC 578, 614 (after citing these cases, the head notes of the case stated that the Burmese Supreme Court "followed" them).

89 *R v Electricity Commissioner* (1924) 1 KB 171.

90 *R v Electricity Commissioner*, above n 89, 205 as cited in *U Htwe (alias) AE Madari v U Tun Ohn and One*, above n 87, 548-549.

91 *U Htwe (alias) AE Madari v U Tun Ohn and One*, above n 87, 548-53.

92 *U Htwe (alias) AE Madari v U Tun Ohn and One*, above n 87, 551.

93 *U Htwe (alias) AE Madari v U Tun Ohn and One*, above n 87, 547. The relevant sentence reads "As these writs are borrowed from English law, the presumption is that, consistently with our Constitution, they must be used in the same way as they are used by English courts of law".

94 *R v Electricity Commissioner*, above n 89.

Kingdom, Canada and Australia since 1924.<sup>95</sup> The Supreme Court did not explicitly state that it was necessarily expanding Lord Atkin's dictum when it ruled that the Administrator of the Rangoon City Municipal Corporation "has legal authority to determine any question affecting the rights of the subjects" and therefore the "Administrator has to act judicially, [that is], according to law". Speaking for the Court, Sir Ba U CJ (as he then was) also held that "[t]he exercise of power by the Administrator is not administrative or mechanical but of a judicial nature".<sup>96</sup> This author wonders whether a case that was decided by the former Burmese Supreme Court in 1948 can be analogised or considered to have sown the seeds of another landmark case that was decided by the House of Lords 34 years later in 1982, *O'Reilly v Mackman*.<sup>97</sup> The relevant portion of the speech by Lord Diplock in the *O'Reilly* case reads:<sup>98</sup>

It will be noted that I have broadened the much-cited description by Atkin LJ in *R v Electricity Commissioners, ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171; [1923] All ER Rep 156 of bodies of persons subject to the supervisory jurisdiction of the High Court by prerogative remedies (which in 1924 then took the form of the prerogative writs of mandamus, prohibition, certiorari, and quo warranto) by excluding Atkin LJ's limitation of the bodies of persons to whom the prerogative writs might issue to those 'having a duty to act judicially'. For the next forty years this phrase gave rise to many attempts to draw distinctions between cases that were quasi-judicial and those that were administrative only.

The author is of the view that the former Burmese Supreme Court decision in 1948 at least contributed to the distinctions that were attempted by various courts throughout the common law world in this particular aspect of administrative law. The Burmese Supreme Court might have in its own way broadened Lord Atkin's dictum in one of the most important cases on administrative law decided in the first year of Burmese independence.

Sir Ba U CJ of the Burmese Supreme Court concludes the ruling with the following stirring<sup>99</sup> words:<sup>100</sup>

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95 Altogether five cases on the matter of writs that were decided by the King's Bench in 1927, 1929, 1931, 1934 and 1939 are discussed in *U Htwe (alias) AE Madari v U Tun Ohn and One*, above n 87, 549-551.

96 *U Htwe (alias) AE Madari v U Tun Ohn and One*, above n 87, 542.

97 *O'Reilly v Mackman* [1982] 3 All ER 1124.

98 *O'Reilly v Mackman*, above n 97, 1129-1130.

99 Upon reading these words in 2002 and rereading them in 2003, the author felt nostalgic about and yearns for the good old days when the Burmese judiciary was a bulwark for the protection of citizens' rights. For the post-1962 situation in the field of judicial independence see "Judicial Independence in Burma", above n 36, 17-59.

100 *U Htwe (alias) AE Madari v U Tun Ohn and One*, above n 89, 560-61.

In conclusion, we may point out that this Court, having been constituted by the Constitution as a protector and guardian of the rights of subjects, will not hesitate to step in and afford appropriate relief whenever there is an illegal invasion of these rights.

The final twin cases that should be mentioned from the 1948 Burma Law Reports are the decisions concerning U Saw and his accomplices who had been convicted for the murder of General Aung San and his cabinet colleagues on 19 July 1947.<sup>101</sup> U Saw and his accomplices were convicted of murder by a Special Tribunal which was formed under the Special Crimes (Tribunal Act) 1947. U Saw and a few others were sentenced to death by the tribunal. U Saw and nine others appealed their sentences and conviction to the High Court of Burma. In a lengthy, comprehensive judgment the High Court consisting of U Ohn Pe, U San Maung and U Bo Gyi JJ dismissed the appeal.<sup>102</sup> Among many others factors the High Court held that "[t]here was no circumstance under which the accused could get a lesser sentence and in any case the question whether mercy should be extended to any one of the appellants is [a] matter [with] which this court is not concerned".<sup>103</sup>

U Saw and four others<sup>104</sup> sought leave to appeal the High Court decision to the Supreme Court. In the reported judgment of *U Saw and Four Others v The Union of Burma*,<sup>105</sup> the Supreme Court refused leave to appeal. Among others, the Court observed that:<sup>106</sup>

[M]any of the rules laid down by the Privy Council on applications for special leave to appeal in criminal matters are rules of wisdom and should ordinarily act as guidance to the Supreme Court in

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101 A detailed study of the assassination and trial of the assassins of General Aung San and his cabinet colleagues is made in Maung Maung *A Trial in Burma* (Martinus Nijhoff, The Hague, 1963) [*A Trial in Burma*].

102 *U Saw and Nine Others v The Union of Burma* (1948) Bu LR 217 (HC). The judgment of the Court was delivered by U Ohn Pe J on 8 March 1948. Not all of the judgment was reproduced in the 1948 Burma Law Reports. For example, it is stated in square brackets (by the Reporter) that "[t]he learned Judges then discussed the evidence of Ba Nyunt (one of the accomplices) and held that his evidence was corroborated in material particulars.": *U Saw and Nine Others v The Union of Burma* (1948) Bu LR 217, 237.

103 *U Saw and Nine Others v The Union of Burma*, above n 102, 219: citing *Aung Hla v King-Emperor* 9 Rangoon 433.

104 Apparently five persons among U Saw's co-accused and accomplices whose appeals were rejected by the High Court, decided not to appeal further to the Supreme Court. In the High Court case it was U Saw and *nine others* who appealed the decision of the Special Tribunal to the High Court. In the case before the Supreme Court it was only U Saw and *four others* who sought leave to appeal to the Supreme Court.

105 *U Saw and Four Others v The Union of Burma* (1948) Bu LR 249 (SC). The Supreme Court Bench consisted of Sir Ba U (Chief Justice of the Union of Burma), E Maung J of the Supreme Court and U Thein Maung Chief Justice of the High Court, Rangoon. The judgment of the Court was delivered by E Maung J on 27 April 1948. The author re-read the case and summarised and reported on the case on 27 April 2003, the 55<sup>th</sup> anniversary of the former Burmese Supreme Court decision.

106 Summary of the holding in this particular case, as reported in the head notes *U Saw and Four Others v The Union of Burma*, above n 105, 249.

applications under s. 6 of the Union Judiciary Act. An exhaustive definition of such limits would be futile but if the application raises questions of great and general importance which are likely to occur often to prevent wrong precedents for the future, the Supreme Court could interfere by way of appeal by special leave in criminal matters.

The Supreme Court further held that the case of *U Saw* did not fall under these categories and special leave to appeal was rejected.

Further in response to the contention of U Saw's counsel<sup>107</sup> that the "the Governor of Burma had no right by the Special Crimes (Tribunal) Act of 1947 to take away the inherent rights of a person in Rangoon to be tried in appropriate cases by a jury"<sup>108</sup> the Supreme Court held that:<sup>109</sup>

[T]rial by jury is a creation of the Code of Criminal Procedure and the rights given by the Code of Criminal Procedure can clearly be taken away by an Act of the Burma Legislature and accordingly can be taken away by an Act of the Governor made under section 139 of the Government of Burma Act.

Finally, the former Burmese Supreme Court also rightly held that:<sup>110</sup>

[The trial [that was] concluded on 30<sup>th</sup> December 1947 and the operation of the [1947 Burmese] Constitution was from 4<sup>th</sup> January 1948: a completed trial cannot be invalidated ex post facto on the alleged ground that the setting up of such a Tribunal amounted to any discrimination and therefore prohibited by the Constitution.

Hence in the case of *U Saw*, the Supreme Court refused "leave to the applicants ... to appeal by special leave [to the Supreme Court] under section 6 of the Union Judiciary Act".<sup>111</sup>

### ***C Selected Cases from the 1998 Myanmar Law Reports***

As stated earlier, in contrast to a total of 107 cases that are reported in the 1948 Burma Law Reports, only 37 cases that were decided by the Myanmar Supreme Court in 1998 are reported in the 1998 Myanmar Law Reports. In the index the cases are divided into Criminal (*Pyit-Hmu* in

107 In both the High Court (*U Saw and Nine Others v The Union of Burma*, above n 102) and Supreme Court case (*U Saw and Four Others v The Union of Burma*, above n 105), FJ Salisbury Havock, a barrister from the United Kingdom, appeared on behalf of U Saw.

108 *U Saw and Four Others v The Union of Burma*, above n 105, 253 (SC).

109 *U Saw and Four Others v The Union of Burma*, above n 105, 253 (SC).

110 *U Saw and Four Others v The Union of Burma*, above n 105, 250 (SC). For details of the argument on this point, see *U Saw and Four Others v The Union of Burma*, above n 105, 255.

111 *U Saw and Four Others v The Union of Burma*, above n 105, 256. After the Supreme Court refused leave to appeal, U Saw and a few of his accomplices were hanged on 8 May 1948. See *A Trial in Burma*, above n 101.

Burmese) and Civil (*Tayama-Hmu* in Burmese) which consist of 19 and 18 cases respectively.<sup>112</sup> According to the index in the 1998 Myanmar Law Reports, the criminal cases deal with issues arising out of various laws such as the Penal Code, Criminal Procedure Code, Evidence Act, Rangoon Municipal Act 1922, Foreign Currency Exchange and Control Act 1947, Agricultural Rent Act 1963 and Dangerous Drugs and Psychotropic Drugs Act 1993.<sup>113</sup>

Only one criminal case in the 1998 Myanmar Law Reports will be discussed here since it deals with the right of self-defence in criminal cases – a principle of which was discussed in the *Kadon* case reported in the 1948 Burma Law Reports.<sup>114</sup> The case is *Thein Dan v The Union of Myanmar*.<sup>115</sup> U Aung Myin J held that in an affray situation when persons are fighting each other there is no right of self-defence. In ruling thus, the judge referred to the case of *Maung Kyaw Kha v The Union of Burma*.<sup>116</sup> In the 1998 case, the appellant Thein Dan was asked by the deceased and her husband to return the monies owed by Thein Dan to the deceased. The deceased and her husband exchanged "abuses" with the appellant. The appellant and the deceased's husband also fought physically. When the deceased husband's struck the appellant with a spear,<sup>117</sup> the appellant

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112 While the 1998 Myanmar Law Reports in its index pages only mention (in Burmese) the criminal and civil cases, the 1948 Burma Law Reports catalogue (in English) the reported cases under "Supreme Court [both civil and criminal cases]" and under "High Court" the cases are categorised in English under "Special Bench (Civil)", "Full Bench (Civil)", "Civil Reference", "Appellate Civil", "Appellate Criminal", "Civil Revision" and "Criminal Revision": (1948) Bu LR vii-xi.

113 The names of the Acts are mentioned in the Burmese language, so the translations are that of the author. The exact English translation of the Act may not be as described above. The Penal Code, Criminal Procedure Code, Evidence Act and Rangoon Municipal Act 1922 would have been written originally in English with Burmese translations later. The author knows that the Penal Code, Criminal Procedure Code and Evidence Act do have published Burmese translations, though the Rangoon Municipal Act 1922 might not have a published translated copy in the Burmese language. The Agricultural Rent Act 1963 and Dangerous Drugs and Psychotropic Substances Act 1993 were originally written in Burmese and they were post-1948 Acts promulgated respectively by decrees in 1963 by the ruling Revolutionary Council and the State Law and Order Restoration Council in 1993.

114 *Maung Kadon v The Union of Burma* (1948) Bu LR 661 (HC).

115 *Thein Dan v The Union of Myanmar* (1998) Myan LR 134. The case was argued before U Aung Myin J and the judgment was given on 25 August 1998. Supreme Court Judge U Aung Myin served in that post only until 13 November 1998. Together with four other Supreme Court judges he was replaced when four judges were appointed by the SPDC on 14 November 1998.

116 Unfortunately the citation for *Maung Kyaw Kha v The Union of Burma* was not stated anywhere in the case or indeed anywhere in the 1998 Myanmar Law Reports, even though the case was mentioned twice in the judgment with a footnote reference. In the main ruling, there was no footnote at the end of the page nor at the end of the judgment. Unlike the 1948 Burma Law Reports, the 1998 Myanmar Law Reports do not have a "List of Cases Cited" nor is there an "Errata" page.

117 The judgment did not indicate whether or not the appellant Thein Dan was hit or wounded as a result of the deceased's husband striking him with a spear.

hit back and as a result, the deceased was hit on the thigh, the main artery burst and she died.<sup>118</sup> The single judge hearing the case rejected the contention of the appellant that he had hit the deceased only once in self-defence and that he should be acquitted of the charge of culpable homicide not amounting to murder, and that the decision of the lower court which sentenced Thein Dan to six years imprisonment be vacated. U Aung Myin J relied on the *Maung Kyaw Kha*<sup>119</sup> case where it was held that in the case of an affray there is no right of self-defence.

The ruling in this case can be briefly contrasted with the holding in the *Kadon*<sup>120</sup> case fifty years earlier. Kadon, like the appellant in this case, hit his assailant who had first tried to strike him with a spear (which did not hit Kadon). He hit his assailant only once on the cheek as a result of which the assailant died.<sup>121</sup> In that case, Kadon was acquitted of manslaughter or culpable homicide not amounting to murder. There were also some verbal taunts among the parties before the physical assault took place in the case of *Kadon*.<sup>122</sup> So, in that sense there could be an "affray" situation in *Kadon* as well. Yet Kadon, unlike the appellant Thein Dan in this case,<sup>123</sup> was able to successfully plead the right of self-defence.

From the facts narrated in the judgment of the two cases there appears to be an important legal difference between the cases of *Kadon* and *Thein Dan* which occurred fifty years apart.<sup>124</sup> In the case of *Kadon*, Kadon's would-be assailants were pursuing him with weapons and U Saw Maung J held that there was no need for Kadon to run away from his pursuers.<sup>125</sup> The circumstances in the *Thein Dan* case were different in that there was no pursuing of one party by the other. Hence on this ground, the "affray" situation in the *Kadon* case would not have negated Kadon's right of self-defence. It should be added that the *Kadon* case was not mentioned at all in the *Thein Dan* case.

118 Summary translation of the facts as stated in *Thein Dan v The Union of Myanmar*, above n 115, 136.

119 *Maung Kyaw Kha v The Union of Burma*: as cited in the judgment of U Aung Myin J in *Thein Dan v The Union of Myanmar*, above n 115. The citation details of the *Maung Kyaw Kha* case were not mentioned anywhere in the judgment in the *Thein Dan* case.

120 *Maung Kadon v The Union of Burma*, above n 74.

121 *Maung Kadon v The Union of Burma*, above n 74, 661.

122 *Maung Kadon v The Union of Burma*, above n 74, 661.

123 *Thein Dan v The Union of Myanmar*, above n 115, 134-137.

124 The incident involving Kadon occurred in a village in the Lower Burma district of Henzada on the night of 24 November 1947 at "around 7 pm": *Maung Kadon v The Union of Burma*, above n 74, 661. The incident involving Thein Dan occurred in a village in another Lower Burma district of Kyike Latt also "around 7 pm" on 20 May 1997: *Thein Dan v The Union of Myanmar*, above n 115, 135. The judgment in the *Kadon* case was delivered on 1 July 1948 by a single justice, U Saw Maung J of the then High Court. The judgment in the *Thein Dan* case was also delivered by a single Judge – Judge U Aung Myin – on 25 August 1998.

125 *Maung Kadon v The Union of Burma*, above n 74, 663.

In discussing selected cases from the 1948 Burma Law Reports, three cases out of 107 cases that were written in Burmese were first singled-out for discussion. All the cases that were decided and reported in the 1998 Myanmar Law Reports were written in Burmese. In two cases (out of 37) in the 1998 Myanmar Law Reports excerpts from earlier cases that were written in English were reproduced in the actual judgments that were written in Burmese. In the 1948 Burma Law Reports, judgments that were written in Burmese were a rarity (three out of 107 cases). Hence a summary and discussion of these two cases (where excerpts of previous rulings written in English are reproduced in the 1998 Myanmar Law Reports), is made here.

A brief reference to and reproduction in English of a short excerpt from an earlier judgment can be found in the case of *Daw Kyin Than and eight others v Daw Helen and two others*.<sup>126</sup> In a "Full Bench" decision, the Myanmar Supreme Court<sup>127</sup> reproduced the following excerpt in English from the case of *U Aung Tha v Ko Htun Khaing*:<sup>128</sup>

The characteristics of adverse possession are that the possession required must be adequate in continuity in publicity and in extent to show that it is adverse to the competitor and that it is not necessary that *the adverse possession should be brought to the knowledge of the person against whom it is claimed*, but it is sufficient if the possession is overt and without any attempt at concealment, so the person against whom time is running out, if he exercised due vigilance, [would] be aware of what is happening.<sup>129</sup>

In the case of *Daw Yin Yin May v Daw Khin Hla Maw*<sup>130</sup> a shorter excerpt of a colonial court judgment that was written in English was reproduced. The case deals in part with the nature of obiter dictum<sup>131</sup> and in explaining about it in the Burmese language, the Myanmar Supreme Court

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126 *Daw Kyin Than and eight others v Daw Helen and two others* (1998) Myan LR 147-157.

127 The case was decided on 2 November 1998. During 1998 there were six judges (including the Chief Justice) in the Myanmar Supreme Court. The names of all six judges were mentioned in the case. The case did not mention that it was a "Full Bench" ("*sone nyi khone yone*") decision. Since all the judges of the Myanmar Supreme Court heard the case, the author has described it as a "Full Bench" decision. The next "Full Bench" case of *Daw Khin Aye (U Tin Tun alias U Khin Linn as a person who has general power of Attorney [to act on the applicant's behalf]) v U Aye Kyi and ten Others* (1998) Myan LR 182-190 was decided by a new "Bench" of judges consisting of five new judges. In fact, at the top of the ruling, the names of the new bench of judges were pasted on a small piece of paper. When the author took out the piece of paper he could still read the names of the replaced judges under the faded Burmese script. The reporter or Reporting Board must have mistakenly written the names of the replaced judges, discovered the mistake just before publication and pasted the correct list of the judges on the small paper to cover up the "wrong" list of judges who heard the case.

128 *U Aung Tha v Ko Htun Khaing* (1961) Bu LR 111 (HC): as cited in *Daw Kyin Than and eight others v Daw Helen and two others*, above n 126, 155.

129 *U Aung Tha v Ko Htun Khaing*, above n 128 (emphasis in original).

130 *Daw Yin Yin May v Daw Khin Hla Maw* (1998) Myan LR 239.

131 The phrase "obiter dictum" was translated into Burmese (which can be roughly retranslated as "a judgment ("*hsone-phyat-cher*") made during the journey [and] by the way". The author is of the view that the Burmese



reproduced and quoted from the case of *KLCT Chidambram Chettiya v Aziz Meah and Others*<sup>132</sup> which was decided sixty years previously in 1938. The cited excerpt reads: "[t]hese observations were Obiter, as being unnecessary for the decision of the point before the learned Chief Justice, and from these dicta we are compelled with the greatest respect to express our dissent".<sup>133</sup>

Among other matters, the Myanmar Supreme Court held that "Obiter Dictum" is "extra analysis" ("*agh-po- thoa-thatt-hmu*") not germane to the problem (issue) at hand and this extra analysis need not be followed by the Courts. Whether a decision ("*hsone-phyat-chet*") ("statement made by the Court") is obiter dictum or not will depend on each case.<sup>134</sup> In this particular case which was a Civil Special Appeal case ("*tayama aghhtoo awu khan hmu*") against the judgment and decree of the Supreme Court,<sup>135</sup> the Myanmar Supreme Court held that the statements made by the Supreme Court in that case were not obiter dictum.<sup>136</sup>

One particular genre of law which was not included in the 1948 Burma Law Reports and which was in the 1998 Myanmar Law Reports deals with Islamic law<sup>137</sup> (and aspects of its application under the Hannafi "School"). The case of *Daw Mi Mi Lay and Daw Hla Hla (official representative*

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word "*hmat chet*" (observation/comment) would have been a more appropriate translation of "obiter dictum". Hence, in literal retranslation it should read as "an observation made during a journey and by the way".

132 *KLCT Chidambram Chettiya v Aziz Meah and Others* (1938) Rangoon Law Reports 316, 319. The name of the parties in the body of the judgment was reproduced in transliterated Burmese and not in the original English. Therefore, the author is sure that in "re-transliterating" from Burmese into English the names are not spelt correctly as stated in the original decision of 1938. The author is referring to and providing the citation details of the 1938 case as stated in the 1998 judgment of the Myanmar Supreme Court in *Daw Yin Yin May v Daw Khin Hla Maw* (1998) Myan LR 239. The shift in the use of languages in the 1948 Burma Law Reports and 1998 Myanmar Law Reports is striking. Even though the ruling *Saw Ba Thein v U Ko Ko Lay* 1948 Bu LR 389 (HC) was written in Burmese, the words "Civil Misc Application No 13 of 1948" were written in English in a footnote at the start of the judgment. The names of the parties in this case, as well as the two other cases whose judgments were written in Burmese in the 1948 Burma Law Reports, were reported in English letters in the section "Table of Cases Reported". In contrast, in the 1998 Myanmar Law Reports even when the citations of rulings which are being referred to in the judgments were originally written in English, the names of the parties of the cases and the names of the Law Reports are not reproduced in English but in transliterated Burmese.

133 As reproduced in *Daw Yin Yin May v Daw Khin Hla Maw*, above n 130, 246.

134 *Daw Yin Yin May v Daw Khin Hla Maw*, above n 130, 239 (translation from the first paragraph of the headnote).

135 *Daw Yin Yin May v Daw Khin Hla Maw* (23 April 1995) Second Civil Appeal No 194.

136 *Daw Yin Yin May v Daw Khin Hla Maw*, above n 130, 239-240.

137 In the case itself, in the headnote, as well as in the subject matter index in the earlier pages, this particular genre of law is mentioned as "Islamic law". However, in the page which lists the (civil) cases decided by the Myanmar Supreme Court by (types) of law, it is listed as "Mohammedan law" rather than "Islamic law".

*of Daw Mi Mi Gyi deceased*) v *Daw Khin Mu Mu and seven others*,<sup>138</sup> deals with the issue of who is entitled to inheritance under the Hannafi law<sup>139</sup> which was described by the Myanmar Supreme Court as "the law concerning the inheritance of Sunni Muslims".<sup>140</sup> The current Myanmar Supreme Court held that there are three types (or hierarchies) of persons under Hannafi law who can inherit, namely, "Sharers, Residues and Distant Kindred".<sup>141</sup> The Myanmar Supreme Court held that under Hannafi law the son of the deceased will, as a residuary, inherit the parents' property. It also held that the deceased Burmese Muslim's<sup>142</sup> niece born to the deceased's elder brother would inherit the deceased's property over the deceased's other niece born to the deceased's elder sister.<sup>143</sup>

Finally, one more case with arguable international (maritime) implications should be briefly mentioned. The case is *Shangri-la Yangon Co Ltd (its representative U Khin Maung Win), Department of Medical Science (its representative U Hnin Oo) v Master of MV Akademik and five others, Woo Chang Chartering & Agency Co Ltd and five others, Mr M Pochter (Ship Captain) [of] MV Akademik E Paton*.<sup>144</sup> It was decided by a single judge, U Aung Myin J. Among other issues,

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138 *Daw Mi Mi Lay and Daw Hla Hla (official representative of Daw Mi Mi Gyi deceased) v Daw Khin Mu Mu and seven others* (1998) Myan LR 208.

139 The judgment mentions the word "law" ("*Upadei*") after the word Hannafi even though at least one highly regarded book (H Patrick Glenn *Legal Traditions of the World* (Oxford University Press, Oxford, 2000) 180) stated that the Hannafi is a "school". However the author cannot think of an appropriate translation of the phrase "legal/juristic school" into Burmese. Though not exactly accurate, it is perhaps acceptable to describe it as "Hannafi law".

140 *Daw Mi Mi Lay and Daw Hla Hla (official representative of Daw Mi Mi Gyi deceased) v Daw Khin Mu Mu and seven others*, above n 138, 208-209.

141 *Daw Mi Mi Lay and Daw Hla Hla (official representative of Daw Mi Mi Gyi deceased) v Daw Khin Mu Mu and seven others*, above n 138, 209. A brief statement of these types were made in Burmese with the words in English following in brackets.

142 Under the Burma Laws Acts 1898, ss 13 and 14 (still in force) in matters concerning "succession, inheritance, marriage or caste or any religious usage or institution", courts shall apply "Buddhist law in cases where the parties are Buddhists ... except in so far as such law has by any enactment been altered or abolished". Hence between Burmese Muslims (in matters concerning what could be described as "family law") the relevant schools of Islamic law will be referred to and if the dispute is among Burmese Christians then Christian canon law will be used as references in deciding the dispute. Hence in this particular case, as the dispute was among Burmese Muslims, Islamic (Hannafi) law applied and the court was, for aspects of the case giving its judgment based on its interpretation and application of the Hannafi's school tenets or stipulations concerning inheritance.

143 *Daw Mi Mi Lay and Daw Hla Hla (official representative of Daw Mi Mi Gyi deceased) v Daw Khin Mu Mu and seven others*, above n 138, 208 (translated from the headnote of the judgment).

144 *Shangri-la Yangon Co Ltd (its representative U Khin Maung Win), Department of Medical Science (its representative U Hnin Oo) v Master of MV Akademik and five others, Woo Chang Chartering & Agency Co Ltd and five others, Mr M Pochter (Ship Captain) [of] MV Akademik E Paton* (1998) Myan LR 296. The words "Shangri La Yangon Ltd" and the words "master of MV Akademik", "Woo Change Chartering & Agency Co Ltd", "Mr M Pochter", "MV Akademik E Paton" were written in English capital letters.

maritime liens were discussed in the judgment. *U Aung Myin J* held that the right of lien can only be exercised by the charterer against goods which belong to the owner of the ship. Similarly the carrier can exercise the right of lien for non-payment of goods only against the goods owned by the charterer.<sup>145</sup> The case involved some foreign companies, shipping lines and local Burmese companies and had it been written in English it might have attracted a case commentary in a foreign (English language) publication or journal. The *Dr T Chan Taik*<sup>146</sup> case reported in the 1948 Burma Law Reports, has international law implications. The author is of the view that the *Shangri La* case of 1998 is not as important or significant as the *Dr T Chan Taik* case of 1948. The *U Saw* cases could also have been reported in certain foreign legal journals during that time.<sup>147</sup>

#### **D General Comments Regarding the Selected Cases**

The author is confident that none of the rulings decided by the Myanmar Supreme Court in 1998 and reported in the 1998 Myanmar Law Reports have been discussed in foreign legal periodicals or journals. This may be so primarily because the rulings were written in Burmese. In terms of legal analyses and the laying down of important principles of law, the most interesting cases in the 1998 Myanmar Law Reports do not reach the same status of the landmark cases from the 1948 Burma Law Reports.

As far as topics are concerned, most of the civil and criminal genre of laws that could be seen in the 1998 Myanmar Law Reports can also be discerned in the 1948 Burma Law Reports. The 1998 Myanmar Law Reports, in its index pages, classified the laws the Myanmar Supreme Court took into consideration during its judgments given during the course of that year. Under the civil cases the Limitation Act, Civil Procedure Code, Transfer of Property Act, Contract Act, Mohammedan law, Burmese customary law, Carriage of Goods by Sea Act, Burma Laws Act, Specific Relief Act

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145 *Shangri-la Yangon Co Ltd (its representative U Khin Maung Win), Department of Medical Science (its representative U Hnin Oo) v Master of MV Akademik and five others, Woo Chang Chartering & Agency Co Ltd and five others, Mr M Pochter (Ship Captain) [of] MV Akademik E Paton*, above n 144, 208-09 (translation from excerpts of the headnote).

146 *Dr T Chan Taik v Ariff Moosajee Dooply and One*, above n 80, 476.

147 The author subsequently discovered that the decision in *Dr T Chan Taik*, above n 80 (HC) is not reported in the American Journal of International Law. However, the defendant Dooply appealed the High Court decision to the former Burmese Supreme Court which, in *Dooply v Chantaik*, in an opinion delivered on 29 June 1950, rejected the appeal: information obtained in web search for "Dooply" in the archives of the Am J Int'l L. In a note below it is stated that "[Manuscript] opinion made available by E Maung, Chief Justice who with Maung Thoung Sein and On Pe formed the Court rendering this opinion": (1950) 45 Am J Int'l L 381. The case note of the former Burmese Supreme Court's decision in the Am J Int'l L does not mention the citation details of the case. The reason that the citation details are not provided may be that the decision in *Dooply* had not yet been published in the annual 1950 Burma Law Reports when the article was written. *U Saw and Nine Others v The Union of Burma*, above n 102 (HC) and *U Saw and Four Others v The Union of Burma*, above n 105 (SC) could also have been reported or commented on in foreign legal journals of that time.

and Urban Rent Control Act 1960 were listed as the laws considered by the Myanmar Supreme Court in 1998.<sup>148</sup> With the exceptions of "Mohammedan Law", Carriage of Goods by Sea Act and Urban Rent Control Act 1960, all other laws and Acts stated above were also classified and systematically indexed in the 1948 Burma Law Reports.<sup>149</sup> As stated earlier, what was conspicuously missing in the 1998 Myanmar Law Reports which features prominently in the 1948 Burma Law Reports are the categories of constitutional law and administrative law. In 1948 the newly independent country also had a new democratic 1947 Constitution. The newly established, extremely capable and independent Supreme Court interpreted certain provisions of the 1947 Burmese Constitution as shown in the *U Htwe* case.<sup>150</sup> In 1998 by contrast the 1947 Constitution had long been ineffective or inoperative.<sup>151</sup> The 1974 (socialist – one Party) Constitution which superseded the 1947 Constitution had also become inoperative. There are no constitutional law or constitutional provisions for the Myanmar Supreme Court to interpret, as there has been no Constitution in force in Burma since September 1988. Hence it is in the areas of constitutional law and administrative law that the contrast between the 1948 and 1998 Burmese Supreme Courts' independence, integrity and ability become so striking.

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148 The index of the 1998 Myanmar Law Reports lists that the Penal Code, the Criminal Procedure Code, the Evidence Act, the Rangoon [City] Municipal Act 1922, Foreign Exchange Control Act 1947, Agricultural Rent Law [a decree issued by the then Revolutionary Council] 1963, and Dangerous Drugs and Psychotropic Substances Law [a decree issued by the State Law and Order Restoration Council] 1993 were considered in the cases decided by the Myanmar Supreme Court in 1998.

149 The classification or listing of the laws and acts in the 1948 Burma Law Reports is much more systematic and comprehensive than that in the 1998 Myanmar Law Reports and runs for over thirty pages.

150 *U Htwe (alias) AE Madari v U Tun Ohn and One*, above n 87.

151 Though the Revolutionary Council which had taken over power in a military coup on 2 March 1962 never *formally* announced or decreed either the annulment or suspension of the 1947 Burmese Constitution, within days of its takeover it abolished by decree the Parliament on 8 March 1962 and the Supreme and High Courts on 30 March 1962. The practice of issuing writs also ceased with the abolition of the Supreme and High Courts of Burma. Also, the executive arm of the government – the whole Cabinet – was, at least in the initial weeks and months of the military takeover, under detention. Hence, the abolition of the main institutions under the 1947 Constitution was completed within weeks of the 1962 military takeover. To all intents and purposes the 1947 Burmese Constitution ceased to exist or operate sometime after March 1962. In any case, the 1974 Constitution superseded the 1947 Burmese Constitution. When the State Law and Order Restoration Council (SLORC) took over power on 18 September 1988, with its Order 2/1988, it abolished all the "organs of State Power" that were formed under the 1974 Constitution. SLORC and its successor the State Peace and Development Council (SPDC) announced that they were not bound by nor would they follow the provisions of either the 1947 or the 1974 Burmese Constitutions. For the adoption, aspects of their operation and demise of the 1947 and 1974 Burmese Constitutions, see Myint Zan "Law and Legal Culture, Constitutions and Constitutionalism in Burma" in Alice Tay (ed) *East Asia – Human Rights, Nation-Building, Trade* (Nomos Verl Ges, Baden-Baden (Germany), 1999) 201-254 ["Law and Legal Culture, Constitutions and Constitutionalism in Burma"].

As far as reference to case law is concerned, both the 1948 Burmese Supreme Court and 1998 Myanmar Supreme Court referred to case law of previous eras including the case law made by courts during the pre-1948 colonial era.<sup>152</sup> In fact, in one decision given by the Myanmar Supreme Court on 17 July 1998<sup>153</sup> eight cases decided by colonial courts were cited or referred to. The earliest case that is referred to in the decision that was given in 1998 is a case decided by the Privy Council and reported in the 1921-22 Upper Burma Law Reports during the colonial era.<sup>154</sup> The Myanmar Supreme Court distinguished the facts and legal issues (concerning executed and executory contracts) in the case it was deciding from those in the Privy Council decision.<sup>155</sup> Hence this particular case indicates that the current Myanmar Supreme Court finds it expedient to refer to colonial judicial precedents if they are relevant to decide the issues at hand. In a few cases decided in 1998 by the Myanmar Supreme Court, it has referred to fairly old and indeed (in a certain sense) foreign judgments<sup>156</sup> of colonial courts. This indeed can be considered a departure from the

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152 There is no separate "List of Cases Cited" in the 1998 Myanmar Law Reports. The author turned each page of the 1998 Myanmar Law Reports to count how many cases were cited in the judgments. In the "Criminal Cases" section, where there are 19 rulings altogether, the author counted 9 cases that were cited (including one where the particulars of the citation was not given). All the cases cited were from the courts of the post-1962 era. In the "Civil Cases" section, among the 18 rulings, altogether 38 rulings were cited. Among them, 18 cases were cited from the pre-1948 colonial era courts, six cases from the post-1948 Supreme and High Courts of Burma and 14 cases from the post-1962 apex courts. Hence, altogether 47 rulings were cited in 37 cases that were decided by the Myanmar Supreme Court in 1998. In contrast, the author counted 494 cases that are mentioned in the "Table of Cases Cited" section in (1948) Bu LR iii-xxx. Altogether 107 cases decided by the Rangoon High Court in 1947 and independent Burma's Supreme and High Courts were reported in the 1948 Burma Law Reports.

153 *Daw Than Sein, Daw Mya Mya (alias) Daw Mya Mya Chit v Daw Aye Aye Kyi and three others* (1998) Myan LR 263.

154 *Ma Shwe Mya v Maung Moe Hnaung* (1921) Upper Burma Law Reports 30 (PC). The case was referred to in Burmese letters and alphabets.

155 *Daw Than Sein, Daw Mya Mya (alias) Daw Mya Mya Chit v Daw Aye Aye Kyi and three others*, above n 154, 270-272.

156 Even though the decision cited was given in a case involving Burmese parties the institution that had given the judgment was the Privy Council. In 1948 Mr Justice E Maung of the Burmese Supreme Court wrote in deferential terms in the *U Saw* case that "many of the rules laid down by the Privy Council in England in the various cases coming before it on applications for special leave to appeal in criminal matters, are rules of wisdom and should receive from this Court a respectful attention": *U Saw and Four Others v The Union of Burma*, above n 105, 251 (SC). In the 1970s not only would such deferential terms according respect to the Privy Council and other foreign, especially Indian judgments, be discouraged it would almost be proscribed. Reference to the Privy Council itself in a ruling by the apex courts of Burma would be "politically incorrect". In the 1990s such stringent proscriptions – in vogue in the Burmese courts in the 1970s – about referring to foreign rulings – appear to have been somewhat relaxed. However, the deferential tone accorded to Privy Council rulings (à la Mr Justice E Maung's observation of 1948) has now departed from the Burmese judicial lexicon. For a similar respectful tone adopted as regards a British judicial commissioner's 1881 ruling by independent Burma's third Chief Justice U Myint Thein in 1958, see *Aung Tun v The Union of Burma* 1958 Bu LR 1, 8 (SC) whereby U Myint Thein stated that "[w]ith great respect we give full

guidelines or tenets laid down by the late Dr Maung Maung to the "People's Judges" in the Burmese "People's Courts" in the 1970s. During the time of the "People's Judicial system"<sup>157</sup> the late Dr Maung Maung, then Judicial Minister, wrote:<sup>158</sup>

[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.

The number of cases that were cited by the High Courts and Supreme Courts of Burma in the 1948 *Burma Law Reports* is, on average, 4.61 cases per ruling that is reported.<sup>159</sup> The number of cases that were cited in the Myanmar Supreme Court in the 1998 *Myanmar Law Reports* is 1.27 per ruling reported.<sup>160</sup> In comparing the 1948 *Burma Law Reports* and the 1998 *Myanmar Law Reports* in terms of citation of and referral to previous precedents the judges of the 1998 Myanmar Supreme Court therefore lagged behind their brethren<sup>161</sup> who graced the Burmese High Court and Supreme Court in the first year of Burmese independence.

### III CONCLUSION

In some countries the 50<sup>th</sup> anniversary of the establishment of its Supreme Court is an occasion for celebration.<sup>162</sup> In the case of Burma the Supreme Court and High Courts that were established under the 1947 Constitution were abolished in 1962 and hence, unlike its neighbouring country of India, there is no cause for celebrating its 50<sup>th</sup> anniversary for the simple reason that the former

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endorsement to this view [of the decision that was given in the year 1881 by a British judicial commissioner]". For the extreme reluctance to quote from and the apologetic tone adopted by an advocate in the year 1978 in citing a foreign (Indian) ruling in a case that was argued before the Central Court of Justice, see Myint Zan "Two Divergent Burmese Rulings Concerning Criminal Defendant's Confessions: An Ideological Analysis" (2000) 19 U Tas LR 335, 345 footnote 47.

157 For an account of the "People's Judicial System" which was in force between 1972 and 1988, see "Law and Legal Culture, Constitutions and Constitutionalism in Burma", above n 151, 232-236.

158 Foreword by Dr Maung Maung, Judicial Minister in *Tayar-Yone-Myar-Lett-Swei ["Courts Manual"]* (Chief Court Press, Rangoon, 1973). See also "Law and Legal Culture, Constitutions and Constitutionalism in Burma", above n 151, 234-236.

159 Four hundred and ninety-four citations of previous cases in the 107 cases that are reported in the 1948 *Burma Law Reports*.

160 Forty-seven citations of previous cases in the 37 cases that are reported in the 1998 *Myanmar Law Reports*.

161 More than 56 years after Burmese independence, the various apex courts of Burma have yet to be graced by a female Justice or Judge. The first female Burmese barrister-at-law from the Inns of Courts of England was the late Daw Phwar Mee who became a barrister-at-law in 1925. Daw Phwar Mee's husband was the late U Myint Thein (1900-1994) who was independent Burma's third Chief Justice. See Myint Zan "U Myint Thein, MA, LLB, LLD" (1995) 69 ALJ 225.

162 See for example the commemoration of the 50<sup>th</sup> anniversary of the Supreme Court of India at <http://supremecourtsofindia.nic.in/new\_s/golden.htmH> (last accessed 23 May 2004).

Burmese Supreme Court has long ceased to exist. Undoubtedly during the past fifty years or so there have been the expected and ordinary changes of personnel, structure of the Courts and even changes of Constitutions among Burma's neighbouring countries which have a common law legal heritage.<sup>163</sup> In comparison, the radical and generally negative changes, the deterioration or at the least discontinuities in the structure, composition, independence and law reporting of the apex courts have been most discernible in the case of Burma. The author is of the view that none of Burma's neighbouring or nearby countries that share a common law legal heritage have judiciaries or apex courts that experienced such discontinuities as in the case of Burma. This article is in part an attempt to highlight the radical discontinuities in the Burmese judicial experience by means of focusing on the 1948 and the 1998 Law Reports in comparison and in contrast.

The changes in the language of the apex Burmese Courts (almost totally) from using English in 1948 to that of writing all judgments in Burmese in the 1998 Myanmar Law Reports have been mentioned. In fact the writing of judgments only and exclusively in Burmese in all the apex Courts of Burma has been a continuing trend since the year 1969. It is to be emphasised here that the author is not stating that the change in the use of language from English to Burmese in the past thirty-five years in rulings delivered by the apex Burmese courts is necessarily a matter to be deplored.<sup>164</sup> The

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163 The Constitution of India has now lasted for more than fifty years. The Malaysian Constitution of 1957 – though subject to frequent amendments – has also lasted in its essential or core structure for more than forty-five years. Sri Lanka (previously Ceylon) has had three constitutions (1948, 1972, 1977; see generally HM Zafrullah *Sri Lanka's Hybrid Presidential and Parliamentary System and the Separation of Powers Doctrine* (University of Malaya Press, Kuala Lumpur, 1981)) and Pakistan too has had a few Constitutions since the time of its independence. Yet as has been implied in this article, it is the view of this author that, in comparison, the judiciaries or more specifically the apex courts of India, Malaysia, Sri Lanka and Pakistan – those among Burma's neighbours who were former British colonies – are, in the early 21<sup>st</sup> century, in comparison stronger, more independent and their decisions and law reporting are of a higher quality than those of the current Myanmar Supreme Court.

164 In an editorial of 4 April 1874 a Burmese language newspaper highlighted the difficulties non-English speaking Burmese participants had had to face in cases before the colonial courts of Rangoon in the year 1874. Rangoon was occupied and annexed by the British after the Second Anglo-Burmese war of 1852 and by the time the editorial was written it had been under colonial rule for more than twenty years and the colonial judicial system had perhaps been in force for that long in the city of Rangoon where the newspaper was published. The editorial in part complemented or praised "Lord/Master" ("*Thakin Phaya*") Commissioner Eden for appointing a Burmese as a magistrate. The newspaper wrote "[w]hen only English nationals administered justice the applicant and respondent in each case could not explain their cases before the judges/magistrates and had to hire English lawyers to lodge their law suits. ... When the interpreter wrongly interprets [the arguments by lawyers] before the courts and 'kick the wrong legs' the parties to the case could get into trouble. Thus seeing these scenarios our Lord/Master Commissioner Eden has appointed a Burmese magistrate": Editorial "Rangoon Gazette Newspaper and Burmese Magistrate" (4 April 1874) *Myanmar Than Daw Hsint [Newspaper (Morning Newspaper)]* as reproduced in Ludu [*The People*] U Hla (ed) *Hnit Tayar Ga Aught Pyi Aught Ywa [Lower Country, Lower Village [Lower Burma] One Hundred Years Ago]* (Kyi-pwayay Press, Mandalay (Myanmar), 2002) 7, 8-9 (translation by the author). The author would like to thank Kyee Kyee ("great aunt") Ludu Daw Ahmar (widow of the editor/compiler Ludu U Hla) for sending me a signed copy of the book. Reflecting the sentiments stated by the editorial writer in 1874, it

language apex courts use in delivering their judgments is not a guarantee or indication that the Courts are independent or even that their judgments are of good quality. For example, the judgments and holdings of the Constitutional Court of the Republic of Korea (South Korea) are written in the Korean language whereas the judgments and rulings of the apex courts of Singapore and Pakistan are written in English. Though it cannot be proven, the author would venture to suggest that the Constitutional Court of South Korea is perhaps more independent of the executive arm of its government<sup>165</sup> than that of either the current Singapore or Pakistani judiciary. At the least, it could perhaps (safely) be generalised that the South Korean judiciary is no less independent than the current Singapore<sup>166</sup> and Pakistani judiciary.<sup>167</sup> In fact irrespective of the different languages that were used by the two Burmese apex courts in the years 1948 and 1998, the independence of the Burmese judiciary and the quality of its judgments have, in the author's view, very markedly fallen in the intervening years.<sup>168</sup>

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is true that judgments in Burmese make the rulings more accessible to the general public. Yet as indicated earlier, the author feels that the writing style in Burmese of the 1998 Myanmar Law Reports is not that clear; there are quite a few expressions that could be written in clearer Burmese and the amount of typographical errors for a relatively small legal publication are quite numerous.

165 See for example Gavin Healy "Judicial Activism in the New Constitutional Court of Korea" (2000) 14 Colum J Asian L 213. Even among countries speaking (and writing) the same language, the legal and political systems can be radically different. Compare the very positive note of Healey on South Korea's Constitutional Court with the role and actions of the Courts of North Korea ("Democratic People's Republic of Korea") as discussed in Andrei Lankov "The Repressive System and the Political Control in North Korea" in Andrei Lankov *Severnaia Koreia: Vchera I Segodnia (North Korea: Yesterday and Today)* (Vostochnaia literature, Moscow, 1995) as accessed on <[http://Hwww.fortunecity.com/meltingpot/champion/65/contol\\_lankovH.htm](http://Hwww.fortunecity.com/meltingpot/champion/65/contol_lankovH.htm)> (last accessed 23 May 2004).

166 For an observation and critique concerning the independence of the Singapore judiciary see for example "Voice of the Asia Pacific Human Rights Net Work 'Bad Shot: No Sting in Singapore Sling'" at <[Hwww.hrdc.net/sahrdc/hrfchr58/issue6/htmH](http://Hwww.hrdc.net/sahrdc/hrfchr58/issue6/htmH)> (last accessed 23 May 2004). It quotes a report of the Special United Nations Rapporteur on the Independence of the Judiciary which states that "allegations concerning the independence and impartiality of the [Singapore] judiciary could have stemmed from the very high number of cases won by the Government or members of the ruling party in either contempt of court proceedings or defamation suits brought against critics of the Government, b[e] they individual[s] or the media." (Special United Nations Rapporteur *Report on the Independence of the Judiciary*, E/CN.4/1996/36, para 218 <[Hwww.hrdc.net/sahrdc/hrfchr58/issue6/htmH](http://Hwww.hrdc.net/sahrdc/hrfchr58/issue6/htmH)> (last accessed 23 May 2004)). The report also states that "[t]he frequency with which political opponents lose defamation suits in Singapore has a chilling effect on freedom of speech – self-censorship is simply a political and financial imperative."

167 See for example "Voice of the Asian Pacific Human Rights Net Work 'The Jack Boot In Pakistan: Violations of Civil and Political Rights Since the Army Takeover'" <[Hwww.hrdc.net/sahrdc/hrfeatures/HRF18.htmH](http://Hwww.hrdc.net/sahrdc/hrfeatures/HRF18.htmH)> (last accessed 23 May 2004).

168 As far as the quality of the judicial announcements are concerned, the author is much more impressed and fascinated by the Royal Orders of a Burmese King issued in 1607 than by any of the rulings that were in the



In 1948 when the former Burmese Supreme Court and High Courts were delivering judgments, some of which are indeed landmarks, 1998 was far off in the misty future. Yet if they could time-travel and visit 1998, the justices of the 1948 Burmese Supreme Court would have been surprised by the many scientific and technological changes of the past fifty years. The late justices<sup>169</sup> of the Burmese Supreme and High Courts in the year 1948 would probably have been pleasantly surprised that by 1998 – or a few years thereafter by the start of the 21<sup>st</sup> century – judgments written by the superior courts of some countries can be downloaded from the world wide web within a matter of a few hours after the decisions are given. Yet the author submits that most if not all of these justices of the apex courts of Burma in 1948 would be more than a little puzzled if not somewhat saddened if they compared the 1948 Burma Law Reports with the 1998 Myanmar Law Reports. Amongst other things, they would be disappointed that notwithstanding the much superior technology in the year 1998, the 1998 Myanmar Law Reports are not properly bound compared to the 1948 Burma Law Reports, the Index of cases in the 1998 Myanmar Law Reports is also non-comprehensive in that there is no "List of Cases Cited", the typographical errors are not corrected and a few footnotes are missing.

Moreover they would be surprised, if not shocked, that five judges of the 1998 Myanmar Supreme Court were "permitted to retire" in a single day on 13 November 1998.<sup>170</sup> The fact that the executive arm of the government can appoint and remove the judges of the apex court at will would, to say the least, be an anomaly and a disappointment for them.<sup>171</sup> One would even venture to guess or extrapolate that if the top judges of the superior colonial courts in Burma in 1898 were to time-travel fifty years ahead they would probably not suffer the same disappointment which their later brethren of 1948 would most probably experience in their time travel to the year 1998. Supposing that there were a few Burmese judges in the top colonial courts in 1898<sup>172</sup> they would be gratified

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1998 Myanmar Law Reports. See Myint Zan "Woe Unto Ye Lawyers: Three Royal Orders Concerning Pleadings in Early 17<sup>th</sup> Century Burma" (2000) 44 Am J Legal Hist 40.

169 It is assumed that most if not all of the Supreme and High Court justices that were serving in their positions and whose names appear in the opening pages of the 1948 Burma Law Reports had passed away by 1998. All three Supreme Court justices whose names appear on the title pages passed away by 1998. Sir Ba U died in 1963, Mr Justice E Maung died in July 1977 and Mr Justice Kyaw Myint died in May 1988. The then Chief Justice of the High Court, U Thein Maung, died in March 1975.

170 In the pre-1962 era, no Supreme Court justice was replaced at the whim of the executive government before he reached retirement age. The closest parallel is that in the immediate aftermath of the military coup of March 1962 many of the Supreme and High Court justices were removed from their posts by a decree of the then ruling Revolutionary Council. In the post-1962 era (after the abolition of the Supreme and High Courts of Burma), in the 1960s, 1970s and 1980s there were no occasions when five out of six judges of an apex Court were replaced and four new appointments made by the ruling military Council.

171 Chapter VII, ss 133-153 of the 1947 Constitution laid down the methods and procedures that must be followed in the appointment of Judges to the former Supreme Court and High Court of Burma.

172 There may or may not have been judges who were ethnic Burmese in the top echelon of the colonial courts in 1898. Considering that an ethnic Burmese was appointed a Magistrate in 1874 it would not be totally

that Burma obtained independence in 1948 and that all the justices of the Supreme and High Courts of Burma were Burmese nationals; that Burma asserted its independence even in the first year of independence by not allowing any more appeals to the Privy Council; that there was security and tenure of appointment of its Supreme and High Court justices and that the integrity of its apex courts and the quality of its judgments in 1948 matched, or perhaps exceeded, that of the judgments written by the colonial courts in the year 1898.

The author would again venture to suggest that if the judges of the Supreme Court of India were to visit the apex judicial scene in their country fifty years after its establishment they would *not* be disappointed. They would probably surmise that their later brethren have, in general, maintained the independence and integrity of the judiciary and that the quality of the judgments are also on par with that of their predecessors fifty years earlier. The author believes that this would not be the case with the justices of the Burmese Supreme and High Courts of the year 1948 should they be given the chance to observe and comment on the state of the Burmese judiciary in 1998.<sup>173</sup>

If the above statements appear to sound like a dirge or an elegy the author admits that, in writing this article, it has been part of his intention to lament the changed times in the Burmese judicial scene. Nevertheless the author believes that the article is not restricted to mere laments in that it has described and analysed an aspect of recent Burmese judicial history as can be gleaned from the very different Law Reports in Burma's first and fiftieth year of independence.

In comparing a country's past and present legal developments it is appropriate to project future trends. As far as Burmese judicial independence and the quality of the judgments issued by its apex courts are concerned, only the fairly distant past of the 1940s, 1950s and early to mid-1960s give the author a sense of nostalgic assurance and indeed pride for the achievements of Burma's apex courts of late and of old. Events of the past few decades and the present do not engender – in this author – any sense of optimism for the future in regards to both the quality of law reporting and as to the state, status and independence of Burma's judiciary.

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unreasonable to assume that a few elite Burmese would have reached the higher ranks of the judiciary in the British colonial courts by 1898. In any case even if no Burmese reached the highest echelons of the colonial courts in what was then "British Burma" in 1898, it would have been chastening (for the colonial administrators and judges) to learn that all the Justices of the Supreme and High Courts of independent Burma were Burmese nationals and that the judgments of the 1948 Burma Law Reports could vie not only with the superior courts of the colonial times in British Burma but also with that of any other distinguished court throughout the world.

<sup>173</sup> The author had the chance to meet the late Justice U Thoug Sein (a puisne Judge of the High Court in 1948) in Melbourne in 1979 (who died in Australia in 1989) and Justice U Chan Tun Aung (Assistant Attorney-General in 1948) in Rangoon on 2 November 1986 on his 85<sup>th</sup> Birthday (U Chan Tun Aung died about six months later in May 1987 in Rangoon, Burma). During their conversations with the author, both U Thoug Sein and U Chan Tun Aung expressed their dismay at the Burmese judicial scene during those years. The author submits that their views would not have improved were they to analyse the Burmese judicial scene in 1998.