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Critical Issues For  
The Rule of Law In Myanmar  
and  
Human Rights Papers

Written By

✘ Kyaw Min San ✘

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## Foreword

Among features of the current period in Myanmar that future historians will remark upon is surely the revival of the idea of law. For fifty years, Myanmar gradually lost touch with legality. Of course it still had instruments called laws, people called lawyers, and places called law offices and law courts. But despite these things, it was absent law as a distinctive, autonomous domain for action. Nobody expected anything much of law, and law had nothing much to offer.

Today the idea of law has returned powerfully to Myanmar. With it has come an upsurge in talk and activity around the rule-of-law ideal. After decades of arbitrary government, the rule of law signifies the possibility of something better. It encapsulates desire for political arrangements that are more certain, more equitable, more just. It acts as a placeholder for a host of substantive aspirations: participatory democracy, human dignity and equality.

Myanmar's rule-of-law revival gets much of its momentum from people like Kyaw Min San, and his colleagues at Justice for All. They are, in a sense, its vanguard: opening new pathways, forging new alliances, and establishing new beachheads from which to continue the struggle.

Kyaw Min San seems to have been destined for this role,



reading classics in legal and political theory from a young age and getting sage advice from sympathetic mentors. His keen intellect and scholarly talents took him to the University of Hong Kong, where he completed an LL.M. Returning to Myanmar in the days of its incipient political rebirth, he has since seized every opportunity to communicate on matters of law, human rights and democracy, travelling the length and breadth of the country to work with people from all walks of life for meaningful and lasting legal and political change.

This book is the latest of Kyaw Min San's many initiatives. As he makes amply clear in a number of its chapters, whether or not Myanmar's rule-of-law revival succeeds in passing from the realm of ideas to the realm of practices remains to be seen. Some of the tremendous problems the country confronts include blanket impunity that the armed forces enjoy under current constitutional and structural arrangements, the persistence of executive control over the judiciary, and widespread abuses of power and corruption. So far, little progress has been made beyond the earnest idea that these conditions are inimical to the interests of Myanmar's people. Solutions are still wanting, and for the most part, seem a long way off.

Of course, the rule-of-law\_ as law professor Martin Krygier observed with the collapse of communism and the rise of analogous demands for legality in Eastern Europe\_ is no panacea. It does not and cannot remedy a lot of ills, including many afflicting Myanmar: among them, religious intolerance and religiously motivated violence, habitual militarism and persistent civil war. Nor do the more sensible rule-of-law advocates pretend that it can. They know that the solutions to problems like these lie elsewhere. But they also know that the idea of law is important because it animates thought and debate about arrangements we encounter in the present.

Without such thought and debate, things don't get

better, as decades of stifling ultraconservative military rule in Myanmar prove. With them, we've no guarantees that things will improve either, but they just might—although the experience of other countries coming out of protracted repressive rule has been that in the short to medium term, things could well get worse. Which is precisely why Myanmar needs the likes of Kyaw Min San to keep reminding it of the long-term goals that the rule of law signifies, and to act as sane, informed interpreters of change amid times of flux: times when less rational, less knowledgeable voices are especially prone to dominate public discourse.

So I commend Kyaw Min San not only for this book but also for his and his colleagues' efforts beyond its pages. May they continue to advocate for the rule of law, not as a hopelessly utopian ideal to which people in Myanmar might aspire but will never realize, or as a generic answer to whatever militancy or strife their country encounters, but as a necessary if not sufficient condition for a civilized, modern political order suited to people in Myanmar.

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## Preface

Myanmar is in the period and process of transition to Democracy. For me, Rule of law is very important for successful smooth transition to democracy. Without rule of law, there will not be development and democracy. Myanmar is facing a lot of challenges for the rule of law in the past, present and future such as constitutional reform, to solve land issues, to set up labor standards, to do educational reform and to stop armed conflict. If there is no proper effort and due care of these issues, it will be much more challenging even in the year of 2015 and 2016. Election commission declared that Election will be around 2015 November and it is highly important to be free and fair. Possibly the new government after 2015 election will have to deal with the issues on rule of law in Myanmar and smooth transition to democracy and development of the country and it is uneasy task for the new government.

Within 18 months of 2014 and 2015, I have been travelling across the country for more than 25 times and meeting with Civil society, political activists, lawyers, Farmers and workers and did discussion with them at the rule of law and fundamental rights seminars done by Justice for All law firm. I shared the ideas of human rights to local residents from different regions

and states and learnt a lot from them about rule of law issues such as land confiscation, labor issues, constitutional issues and human rights issues.

Some of the articles in the book have been published in Academic journals. One article titled the Critical issues for rule of law in Myanmar was published in Journal of ISEAS titled Myanmar's Transition and it is the result of Australia National University ANU Burma Update Conference in 2012. One article focused on the right to living standard and the right to work based on economic, social and cultural rights and it was published in law journal of Attorney General Office of the Union of Myanmar in 2014. Another article is analysis on 2008 constitution and it was also published in Human rights and Democracy Journal based in Yangon in 2013. Most of the articles that I wrote here is around 2011-2014 based on papers that I wrote for the postgraduate degree of laws for international human rights.

I hope the book will be helpful for the rule of law in Myanmar and transition to democracy. I would like to say "Thanks" to my parents first for growing me up in the right way and showing the way to be educated and efficient. To my wife, Zar Hmee , advocate and son Pyaet Tae Za Kyaw who are patient with my work , I want to say that without their support , I cannot do successfully. At the same time, my elder sisters and brothers who helped me a lot morally and physically. Particularly I am very pleased with discussion with my colleagues from Justice for All law firm and our lawyers struggling for access to justice and fundamental rights. In addition friends from ICJ Daniel and Vani who discussed with me for the legal issues and improved me to understand the current issues from the International human rights perspectives within the period that I worked with them.

Thanks to my all teachers who help me showing the way to improve my knowledge and understanding. Again, I want to say special thanks to Nick ( Ko Aye Chan) who encouraged me

to write academic paper on rule of law issues based on my own experience of legal practices. I want to say thanks to Shwe Yi Lynn, office manager of Justice for All who assists me in the printing of draft of the articles and helps me office matter. In particular again, Thank a lot to U Than Htaik who encourages me to publish the book and helps me for the whole editing and printing process. Finally I would like to say “Thanks a lot” to Uncle U Myat Hla who mentors me to improve my legal skills and political knowledge and to help me to be a good lawyer.





## PART - ONE

# CRITICAL ISSUES FOR THE RULE OF LAW IN MYANMAR

## INTRODUCTION

Jurists debate the meaning of the rule of law, and define it from various points of view, yet for centuries the basic principle has rested in the idea that the law applies to all. In *The Republic*, written in the first century BC, Cicero condemned the king who does not abide by the law as a despot who is the foulest and most repellant creature imaginable (Tamanaha 2004, p. 11–12). The Magna Carta reinforced this idea of the ruler bound to the law along with his subjects.

These traditional ideas of the rule of law for some scholars today would be classed as “rule by law”, now that a distinction is being drawn between the two concepts. According to a 2004 report of the UN Secretary-General, rule of law requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of power, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. (United Nations 2004) Similarly, Kleinfeld Belton has argued that the rule of law “is not a single, unified good but is composed of five separate, socially desirable goods, or ends: (1) a government



bound by law (2) equality before the law (3) law and order (4) predictable and efficient rulings, and (5) human rights” (Kleinfeld Belton 2005, p. 27). On the other hand, according to Kirsti Samuels:

Rule by law requires the use of legal rules in order to assure the uniformity and regularity of an existing legal system. Thus, even an authoritarian legal system, or one which does not protect human rights, will qualify as ruling by law if it uses and enforces legal rules routinely through the use of officials and some form of a judiciary, as long as it achieves a relative degree of certainty and predictability (2006, p. 3).

Political science professor Li Shuguang puts it more bluntly: “The difference... is that, under the rule of law, the law is preeminent and can serve as a check against the abuse of power. Under rule by law, the law is a mere tool for a government, that suppresses in a legalistic fashion” (Tamanaha 2004, p. 3). Indeed, some dictatorial regimes associate rule of law with suppression, and justify their actions on the grounds of law and order, oriented towards an insistence on harmony and security, rather than justice and fundamental human freedoms.

The point of view that I adopt in writing this chapter is that the rule of law in its true sense means that everybody is equal before the law and no one is above the law. It means that the government, which is responsible for the writing of law, cannot also be a violator of the law. The rule of law in its true sense can coexist only with democracy and depends upon respect for citizens’ fundamental rights. It means that a fair trial and due process of law are guaranteed according to international standards and norms recognized by the United Nations.

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Now Myanmar is in a period of transition to democracy, and the rule of law is of prime importance for the country's future. President U Thein Sein said in his inaugural address on March 31, 2011 that:

Another important task is to ensure the rule of law, which is essential for building up a modern and developed democratic nation. It is the duty of not only judicial bodies but also legislative bodies to ensure the rule of law. It is required of judicial bodies to carry out judicial tasks in accord with the provisions of the constitution such as openly handling judicial affairs and the right to pass judgment in the presence of the public except legislative constraints [sic], and the rights to defence and appellate jurisdiction in criminal cases (New Light of Myanmar 2011, p. 7).

Subsequently, Thura U Shwe Mann, President of the Pyithu Hluttaw (lower house), reinforced the message by stating in the Yangon Region parliament that, "No one is above the law and all persons must live under the law according to the saying 'No one can stay beyond the law'" (Weekly Eleven 2011, p. 3).

The question that we now face is how much can the new government achieve these goals for the rule of law in reality? Although Myanmar is now in transition to become a democratic country, other countries in Asia that have made the transition have not succeeded in addressing their rule-of-law problems. For example, the Philippines is well known as a more fully democratic country than most in Southeast Asia, but it is still facing rule-of-

law problems, and its legal system is also corrupted. So this is the time for Myanmar to consider how to make its democratic transition an effective one also to develop the rule of law.

There are many critical issues for the rule of law in Myanmar. Among them, in this chapter I will concentrate on three. The first one is the role of the Supreme Court as the apex court in the union. The second is a lack of authority and complicated procedures, compounded by pressure on the courts from the administration. The third one is abuses of power and corruption.

#### STATUS, COMPOSITION AND BUDGET OF THE SUPREME COURT

In this section, I want to mention three aspects of the role of the Supreme Court under the 2008 Constitution of the Republic of the Union of Myanmar. The first is the relationship between the Supreme Court and the Courts-Martial. The second is the composition of the Supreme Court, and the third concerns its budget.

Even though, under article 294 of the 2008 Constitution of the Republic of the Union of Myanmar, the Supreme Court of the Union is the highest court of the country, in reality the power of the Supreme Court cannot surpass that of military tribunals (Courts-Martial), because military tribunals have authority to decide military cases as final appeals. In the adjudication of military cases, the decision of the Commander-in-Chief of the Defence Services is final and conclusive, according to article 343(b). This arrangement appears to pose problems for the rule of law in Myanmar, since it undermines the authority of the Supreme Court as the apex court. It also undermines the separation of powers on which the rule of law is dependent.

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In fact, not only can the Supreme Court not overrule the Courts-Martial, but also in the present Supreme Court, three judges are understood to have come from the Defence Services.

Aside from them, one is understood to have come from the department of economic cooperation and another from mining. Therefore, the question arises as to whether these five judges have sufficient experience in legal matters or not. But, at the time of writing, no information about the Supreme Court judges has so far been published in the newspapers and no detailed biographies of these judges have been made known. Even among legal professionals, the qualities and experiences of these judges are not known. So people cannot decide whether the qualifications of the judges conform with constitutional requirements and the needs of the courts or not.

In my point of view, highly experienced lawyers and judges should be appointed to the Supreme Court, according to article 301 of the 2008 Constitution, which provides that a judge of the Supreme Court shall be a person:

- (a) not younger than 50 years and not older than 70 years;
- (b) who has qualifications, with the exception of the age limit, prescribed in [article] 120 for Pyithu Hluttaw representatives;
- (c) whose qualifications do not breach the provisions under [article] 121 which disqualify him from standing for election as Pyithu Hluttaw representatives;
- (d) (i) who has served as a Judge of the High Court of the Region or State for at least five years; or (ii) who has served as a Judicial Officer or a Law Officer at least 10 years not lower than that of the Region or State level; or (iii) who has practiced as an Advocate for at least 20 years; or (iv)

who is, in the opinion of the President, an eminent jurist; (e) loyal to the Union and its citizens; (f) who is not a member of a political party; (g) who is not a Hluttaw representative.

Incidentally, the President of the Union also appoints judges to the new High Courts of states and regions, according to article 308(b) of the Constitution. Moreover, according to the article, region and state legislatures cannot refuse judges nominated by the President. So far as the appointment of judges of these High Courts is concerned, perhaps the chief ministers of respective states and regions should instead be given the power to appoint judges in their states and regions so that the power of the national level does not overwhelm that of the states and regions.

One other issue that I want to mention briefly in this section is the judiciary budget. Article 297 of the Constitution reads, “The Supreme Court of the Union shall submit judiciary budget to the Union Government in order to include and present in the Annual Budget Bill of the Union in accord with the provisions of the Constitution.” From my point of view, because the Union Government can decide on the question of the judicial budget, it means that the executive can potentially restrict the amount of money going to the judiciary. This arrangement may affect the independence of the courts and damage the rule of law, since control over the courts’ purse strings can affect their overall operations. So as to enable more independent jurisdiction of the courts, the Supreme Court should submit the proposed judicial budget to the Union Parliament directly, and the Union Parliament too should decide on the matter directly. Then the courts would be subject to less executive control.

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### LACK OF AUTHORITY AND EXTERNAL PRESSURE

A second major issue for the rule of law in Myanmar today is that the courts in some cases do not follow the law exactly because of pressure from the administration and in some cases they do not have authority to decide matters because with the rearrangement of laws and institutions executive agencies have assumed quasi-judicial roles.

According to my experience, in one case I represented in 2006, I could not argue orally in a divisional court because the court did not follow the law exactly due to pressure applied by the local administration. This happened even though paragraph 154(12) of the Burma Courts Manual expressly mentions that lawyers must give final arguments orally. (The Courts Manual, 1999, p- 157) In that case, the accused went to the Myanmar-Thai border, connected with an unlawful association and took 500,000 Kyat from this organization. The police charged the accused with crossing borders illegally and joining with an unlawful association, and he was sentenced to 26 years' imprisonment in the divisional court. In this case, as a lawyer, I did not get the right to plead orally in the court, even though the law on this matter is clear, and the court accepted only a written argument. In my point of view, to give meaning to the rule of law in Myanmar, courts should follow the laws exactly and should decide on cases in accordance with principles of justice.

Another example of a similar kind comes from the law reports. According to sections 24, 25 and 26 of the Evidence Act, a confession to a police officer is inadmissible in court. But in *Union of Myanmar v U Ye Naung and Another* (MLR 1991), the Supreme Court decided that a confession to a military intelligence officer is admissible. This ruling seemingly went

contrary to the procedure of the Evidence Act and damaged the rule of law, because it gave military intelligence the authority to obtain confessions. In fact, the decision in this case shook and moved the Myanmar legal world. Lawyers were worried at that time that a legal pillar would be destroyed as a result, since it undermined fundamental principles of the Evidence Act.

Subsequently, in *U Ko Gyi v Union of Myanmar* (MLR 2005) the Supreme Court found that an admission of an accused in a military camp was insufficient to convict a co-accused of the crime. The reason in this case for the decision was that there was no supporting evidence. In the ruling the judge wrote:

It appears that there is only the interrogation record of co-accused Tin Shwe (a.k.a.) Than Htike at Military Intelligence-7 [as evidence]. This case has no other testimonies to link [the accused to the crime] as in the ruling *Union of Myanmar v U Ye Naung & Another*, on which the Yangon Eastern District Court relied. The conviction by Yangon East District court of U Ko Gyi under section 19(a)/21 of the 1993 Narcotic Drugs and Psychotropic Substances Law and the confirmation of Yangon Divisional Court of this judgment are not correct, as there is no circumstantial evidence to support the co-accused Tin Shwe (a.k.a.) Than Htike's admission that the accused U Ko Gyi is guilty (p. 26, translation by the author).

Although the above decision was a good one for the accused, it still did not overturn *Union of Myanmar v U Ye Naung* because the court described the facts as different from that case. Therefore, the *U Ye Naung* case is still recognized. The lack of clarity around the use of evidence and the court's jurisdiction to inquire into evidence that the case has generated also can damage justice and the rule of law, and is one matter for

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both the courts and the new legislatures to consider seriously.

Aside from the types of problems in certain sorts of criminal cases arising from outside pressure, as described above, in civil matters the shifting of authority to non-judicial agencies and introduction of more complicated procedures raise questions about the capacity of state agencies to operate according to the rule of law.

Take the registration of deeds for buying and selling of houses. Even though this is officially a matter for the registration office of the agriculture department, under a relatively new procedure committees have been set up for the purpose of assessing tax on the selling and buying of land and houses. The committees have been formed with six officers apiece: one from the land registration department, one from the revenue department, one from the police department, one from the general administration department, one from the economic planning department and one from the municipality.

Before the new procedure appeared, registration allowing individuals to sell and buy land and houses was easy, and there was no need for a committee to evaluate property. Now, the six township officers are supposed to meet as a committee to evaluate houses and land and then give permission to sell the stamps for the deeds to the lawyers concerned. The lawyers can then access the land registration office under the agriculture department for the purpose of registration. In the process, the state collects 10 per cent of the value in tax. The procedure is much more complicated than previously, and in reality, as the officers concerned are very busy, they find it difficult to meet together to evaluate land and houses for the purpose of taxation. Their difficulties in meeting result in delays, which in turn can



result in corruption, since persons who want to sell and buy houses and land without delay find it better to bribe the authorities so that they get a quicker outcome, and also so that there will be low tax on evaluation of their land and houses. Some lawyers take responsibility on behalf of their clients to bribe the concerned authorities so as to smooth out this unnecessarily complicated process.

One of the difficulties associated with vesting committees of administrators with powers over complicated procedures is that it enables officials with personal interests to use the system to cause delays and adopt other tactics to the disadvantage of one party or another in a case. For instance, following the introduction of a law to allow for the nationalization of land in 1963, the authority to decide on disputes over land was placed in land committees at various levels, formed with administrative rather than judicial officers. Consequently, courts lack authority to decide disputes over land title that they would have in the jurisdictions of other countries.

In one case that I handled, Mrs. C had a dispute with Mr. A, a relative of the village head, over land. According to section 3 of the 1963 Law Protecting Peasants' Rights, no one can prohibit farmers from entering and cultivating land. (U Ba Kyaing, 1999, P. 60) By law, Mrs. C had the right to cultivate the farmland. But the village head, through his relative, prevented her from cultivating it. Thereafter, Mrs. C faced a delayed process at the land committee and the case was still pending in 2010 even though it started in 2008. Throughout this time she had not been able to cultivate or even enter into this land. She faces financial loss and also her rights to cultivate the land have been infringed, but because of the present procedure, she has been unable to obtain redress.

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It is clear from cases like this that there should be changes to laws so as to simplify complicated procedures, and reduce delays and opportunities for abuse. It is also evident that we need to undertake more research to determine how much the rule of law has deteriorated because of interventions from the administration into judicial matters, and so as to take necessary steps to prevent needless and potentially harmful interventions.

### ABUSES OF POWER AND CORRUPTION

The final issue for the rule of law that I want to mention is bribery and corruption in the court system and police mechanism. In fact, corruption is one of the greatest hindrances in the administration of justice. It is widespread, both in the courts and the police mechanism.

The clear phenomenon in the courts showing that bribery is rife is that some lawyers and public prosecutors and clerks work as brokers (pwe sar in Burmese). Court clerks also engage in this work, serving as buffers between clients and judges for the purpose of bribery, so that judges can abstain from risk by using others to take money. In addition, the filling out of legal forms under the authority of the clerks has become a kind of marketplace in the courthouses, and if lawyers or clients do not give money to the clerks, their cases will not proceed smoothly.

Actually, in all aspects of the system, where someone has control over some part of the legal process, they can demand money in exchange for their authorization or action. By way of another example, if a plaintiff in a criminal case wants to hire an independent lawyer to appear on his behalf, the lawyer needs permission from the public prosecutor because he or she (the public prosecutor) is the one responsible for the plaintiff

according to procedural law. To get permission from the public prosecutor, the client or a lawyer hired by the client may have to offer a bribe.

One reason for the high levels of corruption in the courts is that the salaries of judges, public prosecutors and police officers are low. Township-level officers receive an average rate of about 100,000 Kyat (USD 120) per month. It is difficult for a family to survive on this amount, and consequently, bribery and corruption is rife in the various levels of the courts, public prosecution and police departments. So to eliminate bribery and corruption, judges, public prosecutors and police officers obviously must have large enough salaries, social security and decent living standards.

One practising lawyer told me that the biggest difficulty for him is that he always has to enter the backdoor of the court, meaning, he has to bribe the judge. Without giving a bribe, there is no smooth procedure for the party in court. A highly experienced lawyer said that he believes bribery and corruption are now prevalent in more than 50 per cent of courts in the present legal system. He said that in his opinion without giving a bribe, there is no possibility to win a case. Another highly experienced lawyer said that most of the courts in which he practices take bribes from clients, but some judges decide impartially and without payment. He also added that bribery at the courts was not under the table but that it was on the table, meaning that judges take bribes as if the laws permit it.<sup>1</sup> From these accounts, corruption at various levels of the courts, in both civil and criminal cases, is continuously happening in Myanmar.

In one case concerning cheating that I handled, my client was charged under section 420 of the Penal Code because the

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other party paid the prosecutor to lodge the charge as a criminal offence rather than as a civil matter. The facts of the case, briefly, are that a company established by an armed group in ceasefire with the government started legal action against Mr. A, a timber trader, in 2008. The company agent sold timber to Mr. A and Mr. A gave five million Kyat to the company agent, Mr. B, as a part of the consideration. The full amount that Mr. A needed to give the company was 50 million kyat. Because of the advance payment to the company, the agent gave Mr. A the permit which is the necessary legal document produced by the forestry department allowing citizens to take timber from the forestry department and to carry the logs across states. But the company agent misused the advance payment and then died before the logs were obtained. At that time, the company asked Mr. A to give back the permit. Mr. A in turn asked the company to return the consideration that he gave to Mr. B. But the company refused Mr. A's demand and started criminal charges against him.

Even though the company should have brought a civil action against Mr. A to return the documents, the company misused the criminal mechanism as an attempted shortcut to get the permit. Despite the public prosecutor knowing that it was procedurally wrong, he used the criminal mechanism. Fortunately, the court judged the case correctly and acquitted Mr. A. But the case took nearly two years and Mr. A had to spend money on lawyer's fees and other expenses, such as traveling costs and meals. He could not perform his daily business as a trader of logs.

When I discussed this case with one highly experienced lawyer, he said that according to his experience, the line between civil and criminal matters is often a thin one, and it is not easy to differentiate. Some dishonest public prosecutors take advantage

of this so as to use the criminal mechanism to get money, instead of commencing a civil suit, even though the case may be civil in nature. Such misuse of the criminal legal mechanism is another barrier to the rule of law.

Police play the main role in the investigation of criminal cases and they have authority to detain accused persons on charges that may be brought for the purpose of the payment of bribes rather than through proper investigation. For example, in one case that I handled in 2009, the police brought a case against one woman, Mrs. C, on allegation that she had stolen a gold chain. In fact, Mrs. C was conducting an illegal lottery and she had not paid the amount that she needed to pay to the lottery broker, Mrs. D. The broker used the police to bring a false charge against Mrs. C in an attempt to get the payment. However, in that case although the police had been bribed to bring the false charge, the prosecutor was of good character and the case did not go to court because he released her from the charges.

Not only do the police have powers of detention but they also have powers to release accused persons under section 169 of the Code of Criminal Procedure, which reads as follows:

If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station or to the police-officer making the investigation that there is not sufficient evidence or reasonable ground of suspicion to justify forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate when, powered to take cognizance of the offence on a police-report and to try the accused or commit him for trial.

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(Myanmar, The Code of Criminal Procedure, P.62)

Some dishonest police use this section for moneymaking. They exploit detainees who do not know about law and legal procedures by threatening and extorting money from accused who are worried about the possibility of having to go to court, and promise to get them released instead. For example, before the case arrives at court, dishonest police may tell the accused that they can get him or her released if there is not sufficient evidence or by destroying or omitting evidence. Accused people with money who do not want to go to court bribe the police and public prosecutor, even in the police station or prosecutorial offices, so as to abstain from going to court and cut their cases. In addition, according to section 157(b) of the Code of Criminal procedure, police officer in charge of a police station has authority not to investigate the case if it appears that there is no sufficient ground for entering on an investigation. (Myanmar, The Code of Criminal Procedure, P.57)

Actually bribery and corruption in the courts and police is causing miscarriages of justice in specific cases, and the failure of rule of law in the country also. We need to watch to how the present government which claims that it wants clean government and good governance will be able to fight against bribery and corruption in order to instill in judges, prosecutors, lawyers and police the real meaning of the rule of law.

### CONCLUSION

The present time is the transition to democracy in Myanmar and there is hope that the country will have an improved and more transparent legal system in the future. In terms of the three critical issues mentioned here, at this time I would like to recommend the following aspects of the system need to be

addressed.

The Supreme Court should be the court of final appeal and conclusive in all cases, including military cases. Freedom of expression and fundamental citizens' rights should be granted for the benefit of the country. The courts need to enforce and grant these fundamental rights expressed in the constitution without bias. Courts should also have the authority to enforce fundamental rights in the constitution at all levels, not only via application to the Supreme Court, as is presently the case. If citizens have easy and convenient to access to justice through the courts without much expense then this will be the surest way to give life to constitutional provisions on citizens' rights. It will also allow for review by higher courts of the lower courts' determinations on issues of rights.

The Supreme Court also needs to monitor constantly to determine whether the lower courts follow the law exactly or not, and should give guidance if necessary for the maintenance of justice and for procedural matters to be simple and transparent. To these ends too, the judicial budget should be adequate, and it would be better if the Supreme Court could present its budgetary request directly to the parliament, as noted above.

The new government should also consider what sort of constitutional process might best ensure the rule of law through gradual development of more open and transparent practices. Perhaps in this respect it could take Indonesia as a good example. Indonesia is a Southeast Asian country like Myanmar, with certain historical and constitutional parallels, including a politically active military. In recent years it has made a lot of progress towards the rule of law and reduction of corruption in judicial affairs from which Myanmar also could learn.

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As to the issue of corruption, again the government could learn more from other territories that have been successful in fighting against bribery and corruption. I think those in Asia deserving of study would be Hong Kong and Singapore. In both places, one of the concerns in addressing these practices was to greatly increase the salaries of judicial and police personnel to be even higher than those of other comparable officials. The government of Myanmar too needs to consider how to improve the salaries and social security of public servants in order to reduce bribery and corruption. There is a Myanmar saying, “If the stomach is full, moral precepts are kept”. What this means is that if people do not have enough food to eat, they cannot possibly maintain a high level of morality. Hence, to fight against corruption, the new government also needs to consider how to promote the living standards of the people in the country. Then there will be the rule of law and justice and the future of Myanmar will be brighter.



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Notes

<sup>1</sup>Confidential conversations with author.



## PART - TWO

### Myanmar, 2008 Constitution and Public Policy

#### 1. Introduction

Law and policy is playing the pivotal role in every country. Law maintains the society to get peace, order and tranquility. In a democratic country, law is based on the separation of powers and check and balance. Men create laws to make society free, equal and just. Law is a system of rules created by human beings for the good of society and good order of the community. The Constitution is not only the supreme law but also the basic law in every country with a written constitution and it is very important for the country and divides power into three pillars of supreme authority: Executive, legislative and judiciary. While law is the beacon for the country, policy is the guidance for the people. Government draws up public policies to implement their goals and purposes. Understanding law and policy gives us what kind of law and policy we should pursue for the benefits and good of our society and community. While law is drawn up by the representatives of the country in the parliaments, public policy is normally drawn up by the government to lead the country to become a more safe and secure and prosperous, especially in the democratic country. In this paper, I will focus all my attention on the Myanmar 2008 constitution from the perspective of law and policy to analyze whether the 2008 constitution of Myanmar recognizes democracy and human rights.

## 2. A brief history of Myanmar

Myanmar is a country between India and China in the North and in the east bordered with Laos and Thailand, in the west Bangladesh and in the Southern part around with the Bay of Bengal and the Andaman sea .The area is 671,000 sq km. Myanmar had been occupied by the British by three wars: the first in 1824, the second in 1856 and the third in 1885. Myanmar regained independence from the British in 1948. There are seven states and seven regions in Myanmar. There are eight nationalities: Kachin, Kayar, Karin, Chin, Mon, Bamar, Rakhine and Shan.

Myanmar is rich in natural resources and different climate in different regions. Myanmar was a democratic country under 1947 constitution from 1948 to 1958. The 1947 constitution was drawn up by Myanmar Independent leaders led by General Aung San who is the father of the democratic leader, Aung San Su Kyi. The 1947 constitution strongly recognized fundamental human rights and democracy in the country. There was a civil war since 1958 to 1960. In 1962 there was military coup by General Ne Win and U Nu government was thrown down by General Ne Win. The 1947 constitution was also abolished in 1962. The period of 1962 to 1974 was under the Military rule led by General Ne Win. There was the 1974 constitution drawn up by Burmese Socialist Program Party (BSPP) led by U Ne Win and the country was under one party system from 1974 to 1988.

The 1974 constitution was written by Socialist party and did not recognize fundamental rights of the people and democracy in the country. The constitution was based on a unitary system and Ethnic nationalities were not satisfied with lack of their rights and of self-determination in that constitution. There has been armed struggle between the military and some national minority groups. In 1988, there was general strike of the people demanding democracy and human rights ,and U Ne Win

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Government and Burmese Socialist program Party were also abolished by Military government call the State Law and Restoration Council by means of military coup. In May 1990 the military government held an election and the National league for democracy (NLD) led by Noble laureate Aung San Su Kyi won a land slide victory in this election .But the military government did not recognize the result of election and did not convene the parliament .

As a result, there is no transfer of state authority to NLD by Military regime. The military government had drawn up the new constitution since 1993 to 2008 for 15 years in the national conference, and finished and ratified in 2008. But NLD elected representatives withdrew their participation in the national conference in 1995 to show the disagreement. According to 2008 constitution, the government held election in 7 November 2010 and the government supporting party, Union Solidarity and Development Party (USDP) won in this election. But NLD did not enter the election because of the reason that they did not believe in this election held by the government and boycotted it.

There are arguments that 2010 Election is not free and fair according to international norms and standards. After 2010 election, the new government led by President Thein Sein started reform process for transition to democracy to be smooth. But it is still challenging for constitutional reform until 2015. The Union election commission declared that the coming election will be in November 8, 2015.

### **3. The objective of the paper**

The objective of the paper is to advocate for amendment of the 2008 constitution of Myanmar to be democratic, free and fair in the future. The constitution must recognize and promote and protect democracy and human rights for the reasons that the democracy is the system of ‘the government of the people, by

the people and for the people'. The constitution which recognizes democracy. Check and balance system can promote the political, economic and social lives of the people in the long term. Democracy is the key factor for the development of the people, justice, equality and freedom not only because democracy recognizes fundamental human rights but also because it can bring rule of law and check and balance system of the government institutions.

#### **4. What is the main problem in 2008 constitution that requires resolution?**

The main problem in the 2008 constitution of Myanmar is its lack of democracy. The people cannot be fully represented in the government according to democratic norms because of the military leadership in all the three pillars of state power: legislative, administrative and judiciary in the constitution.

#### **5. Basic principles of 2008 constitution**

The 2008 constitution of Myanmar is necessary to be examined whether it is based on democratic principles. Basic principles of the constitution are provided in section 6 as follows:

*“(a) non-disintegration of the Union;(b) non-disintegration of National solidarity;(c) perpetuation of sovereignty;(d) flourishing of a genuine, disciplined multi-party democratic system;(e) enhancing the eternal principles of Justice, Liberty and Equality in the Union and;(f) enabling the Defense Services to be able to participate in the National political leadership role of the State.”<sup>1</sup>*

In section 6 (d) and section 7, even though the constitution expressed the flourishing of a genuine , discipline multi-party democratic system , it also expresses the role of defense service to be able to participate in the national political leadership in section 6 (f). According to section 14, the

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commander in chief has the authority to nominate the army personals to the Hluttaw (Parliament) <sup>2</sup>. Therefore the leadership of Military is clearly visible in the constitution.

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### Notes

<sup>1</sup> Section 6, chapter 1, 2008 constitution of Burma (first publication, September 2008).

<sup>2</sup> Section 14, chapter 1, *ibid*.

## 6. The legislative sector

### 6.1 Federal level

In the legislation, Pyidaungsu Hluttaw (the Union parliament) is composed of two Hluttaws. One is the Pyithu Hluttaw (House of Representatives) and another is the Amyothar Hluttaw (House of nationalities). Section 74 provides as follows:

*“(a) in accord with the provisions of Section 109, the Pyithu Hluttaw formed with Hluttaw representatives elected on the basis of township as well as population and Hluttaw representatives being the Defense Services Personnel nominated by the Commander-in-Chief of the Defense Services; (b) in accord with the provisions of Section 141, the Amyotha Hluttaw formed with Hluttaw representatives elected in equal numbers from Regions and States and Hluttaw representatives being the Defense Services Personnel nominated by the Commander-in-Chief of the Defense Services.”<sup>3</sup>*

In the Pyithu Hluttaw, there are a maximum 440 representatives. 330 representatives must be elected from the people and township and 110 representatives from the military nominated by the commander in chief of defense service.<sup>4</sup>

Therefore the Military takes 25% of seats in the house



of representatives by force. In the house of nationalities, there are a maximum of 224 representatives. “168 Amyotha Hluttaw representatives elected in an equal number of 12 representatives from each Region or State inclusive of relevant Union territories and including one representative from each Self-Administered Division or Self-Administered Zone and 56 Amyotha Hluttaw representatives who are the Defense Services personnel nominated by the Commander-in-Chief of the Defense Services in accord with the law, four representatives from each Region or State inclusive of relevant Union territories.”<sup>5</sup> Therefore the military took also 25 % of seats in the house of nationalities.

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Notes

<sup>3</sup> Section 74, 2008 constitution

<sup>4</sup> Section 109, *ibid.*

<sup>5</sup> Section 141, *ibid.*

## 6.2 State and regional level

In the states and region level, there are State and region Hlut Taw. “The Region or State Hluttaw shall be formed with the following persons:(a) representatives of the Region or State Hluttaw, two of each are elected from each township in the Regions or the States; (b) representatives of the Region Hluttaw, each is elected from each national race determined by the authorities concerned as having a population which constitutes 0.1 percent and above of the population of the Union, of the remaining national races other than those who have already obtained the respective Region or a Self-Administered Area in that Region; (c) representatives of the State Hluttaw, each is elected from each national race determined by the authorities concerned as having a population which constitutes 0.1 percent and above of the population of the Union, of the remaining

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national races other than those who have already obtained respective State or a Self-Administered Area in that State; (d) representatives of the Region or State Hluttaw who are the Defense Services personnel nominated by the Commander-in-Chief of the Defense Services in accord with the law for an equal number of one-third of the total number of Hluttaw representatives elected under Sub-Sections (a) and (b) or (a) and (c).”<sup>6</sup> Therefore it is clear that the military take 25% of seats of the region or the state Hluttaw according to section 161 of the constitution.

### **7. The administrative sector**

#### **7.1. Federal level**

In the executive branch, the government is composed of the following persons: the president, two vice presidents, ministers of the union and the attorney general of the union<sup>14</sup>. The president is head of the state and has the power to designate the ministers of the union as necessary and can change the number of ministers.<sup>7</sup> The president has the authority not to answer to the court or to the Hluttaw while he is doing the functions of the president according to section 215 of the constitution<sup>8</sup>. It gives extreme authority to the president and breaches the check and balance of a democratic system. More over the president must be at least 45 years old according to the qualifications stated in section 59 of the constitution<sup>9</sup> and it means the person who is under 45 years old can not be presidents and vice presidents, and this is the age discrimination. Myanmar independence leader, Aung San became Prime Minister when he was 32 years old and American president John F Canady became the president under 45 year old. Therefore age limit of at least 45 years old to be president denies the youth the opportunity to be leader of the country.

In addition as stated above, at least one president or vice

president shall come from the military according to the system of president Electoral College system. In addition, Union minister must be at least 40 years old.

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Notes

<sup>6</sup> Section 161. *ibid.*

<sup>7</sup> Section 202, *ibid.*

<sup>8</sup> Section 215, *ibid.*

<sup>9</sup> Section 59, 2008 constitution, Qualifications of the President and Vice-Presidents are as follows:XX(c) shall be an elected person who has attained at least the age of 45;

## 7.2. State and Region level

The formation of region and state government are as follow:

“(a) The Region Government is formed in the Region and State Government is formed in the State respectively

(b) The Region or State Government is formed with the following persons : (i) the Chief Minister of the Region or State;(ii) the Ministers of the Region or State;(iii) the Advocate General of the Region or State.

(c) The President, with the approval of the Region or State Hluttaw concerned, may :(i) specify the Region or State Ministries as may be necessary. Moreover, he may make changes and additions to the specified Ministries; (ii) specify the number of the Ministers of the Region or State as may be necessary. Moreover, the specified number may be increased or decreased.”<sup>10</sup>

Therefore the president has authority to increase or decrease ministers of regions or states as he likes. So also president has the authority to appoint the chief minister of Region or State from the region or state Hluttaw according to his own will. State and Region Hluttaw cannot deny the person that he nominates to the region or state Hluttaw if the person he nominates is qualified

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with the characteristic of region or state Hluttaw representatives.<sup>11</sup>

Therefore State or Region is not free from the influence of the president. If the president is a soldier, it is likely that he will choose soldiers also as the chief ministers of regions or states because in the state and region Hluttaw, 25 % of the seats of that Hluttaw come from the defense services. State or region cannot choose their Chief Minister according to their will and there is no freedom of self determination for the regions and states. It does not reflect the will of the people and international human rights norm that “the will of the people must be the basis of the authority of the government.”<sup>12</sup> It is not consistent with federal principle. The states and regions do not have self-determination for their own destiny.

### **7.3. Civil servants need to retire when they become union ministers or state ministers while the military officers are not necessary to retire.**

In the appointment of union ministers, “(i) If the Union Minister is a Civil Services personnel, it shall be deemed that he has retired according to the existing civil service rules and regulations from the day he is appointed as a Union Minister. (ii) The Defense Services personnel who are appointed as Union Ministers for the Ministries of Defense, Home Affairs and Border Affairs are not required to retire or resign from the Defense Services.”<sup>13</sup> In the above articles, it is clear that there is class discrimination between military and civil servants because civil servants need to be retired when he or she becomes Union Minister whereas the military personnel are not required to be retired or resigned from the military service. It is apparent that military class gets the most privileges protected in the constitution. The result is that civil servants cannot function after their term as ministers while military personnel can work in their previous military positions.

So there is no equality between the military and people. Justice is denied under this constitution. In the appointment of ministers of regions or states <sup>14</sup>, we can see also the above similar situation that military personnel don't need to resign and retired. On the other hand, civil servants need to resign. Discrimination between civil and military servants is clear in the federal and state or regional level. In the formation of Nay Pyi Daw Council which is the council to administer the Nay Pyi Daw, Union territory, "the president shall obtain the nomination of suitable Defense Services personnel who have prescribed qualifications for appointment as Council member or members from the Commander-in-Chief of the Defense Services for co-ordination of Security matters of Nay Pyi Daw which is the Union Territory"<sup>15</sup> Concerning Nay Pyi Daw Union Territory, there is dispute that Nay Pyi Daw is suitable or not to be the Union Capital because the former capital Yangon is suitable for all sectors of politics, economic, communication, diplomatic relation and geographically convenient and important in the country.

#### **7.4 The upper role of the military in the constitution**

In the executive branch, the military has the role to participate in the defense affairs, security and border administration according to section 17(b) of the constitution.<sup>16</sup> According to section 20 of the constitution, the defense service has the right to administer all affairs of national defense and has the right to administer the people to participate in Union security and defence.<sup>17</sup> It means the army has the authority to recruit the people to be soldiers at any time it desires. The consequence is that the military government made "the government ordinance of mandatory conscription act"<sup>18</sup> in 4th November 2010 and if this act is ratified by the Hluttaw, the people of Burma have to service in the military for two years and the skillful persons who are scholars and technicians for three years even in time of peace.

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### Notes

<sup>10</sup>. Section 248, 2008 constitution

<sup>11</sup>.Section 261. Ibid xxx (d) the appointment of a person as a Chief Minister of the Region or State nominated by the President shall not be refused by the Region or State Hluttaw unless it can clearly be proved that the person concerned does not meet the qualifications of the Chief Minister of the Region or State.

<sup>12</sup>. Article 21(c), Universal Declaration of Human rights

The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

<sup>13</sup>.Section 232 (j) (i) (ii), 2008 constitution of Burma.

<sup>14</sup>. Section 262 (n) (i) (ii), Ibid

<sup>15</sup>. Section 285(b) (iii), Ibid

<sup>16</sup>. Section 17 (b), Ibid

<sup>17</sup>. Section 20, chapter 1, ibid

<sup>18</sup>. State peace and development council, mandatory military service act, No. 27/2010, 4 November 2010.

Military has the main responsibilities to protect and safeguard the constitution according to section 20 subsection (f). It means that the military more than the people needs to protect the constitution because the constitution really benefits the military class rather than the interest of the people. The president has the right to exercise not only the executive authority but also the legislative authority in the regions, states and self administered regions if it happens the state of emergency in that regions <sup>19</sup>. The Commander in chief of army has the right to take over and exercise sovereign power in time of emergency. Here ,who has authority to decide the state of emergency? The state of emergency can be declared by the president by coordinating with National Defense and Security Council<sup>20</sup> in which among eleven

members, six members are from the military.<sup>21</sup> There are one president and two vice presidents in structure. At least one president or one vice president comes from military because of the electing procedure of president and vice presidents according to Section 60 of the constitution.<sup>22</sup> President and vice presidents are the highest authorities of the executive branch. Among three, at least one comes from the military and it is opposing democratic principles.

### 8. The judicial sector

In the judiciary, “Courts of the Union are formed as follows : (a) Supreme Court of the Union, High Courts of the Region, High Courts of the State, Courts of the Self-Administered Division, Courts of the Self-Administered Zone, District Courts, Township Courts and the other Courts constituted by law; (b) Courts-Martial; (c) Constitutional Tribunal of the Union.”<sup>23</sup> “In the Union, there shall be a supreme court of the Union. Without affecting the powers of the Constitutional Tribunal and the Courts-Martial, the Supreme Court of the Union is the highest Court of the Union.”<sup>24</sup> The Supreme Court seems to be the highest court of the union. But in practice, it is difficult for the Supreme Court to hear the case of soldiers and military cases. For instance, it can be seen that some of habeas corpus cases submitted from the Kachin States in 2012 are not successful.

In the adjudication of the military cases, “the decision of commander in chief of defense services is final and conclusive.”<sup>25</sup> It means that military tribunal is higher than Supreme Court, and Supreme Court cannot adjudicate the military cases even when soldiers make abuses of fundamental citizens’ rights. Concerning fundamental rights, the citizens can express their will and freedom of expression, of organizations and peaceful assembly according to section 354 of the constitution but there is restriction that this freedom cannot be expressed if

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contrary to the law. The term ‘ contrary to the law’ need to be careful and at present situation , some of the laws as union protection act strictly restricted the freedom of political expression and human rights within the country and in the past until 2010 ,there are over 2000 political prisoners and prisoners of conscience . In 2015, it is apparent that prisoners of conscience as journalists , students activists and rights activists are increasing.

For constitution Tribunal, the rights to submit the cases to constitutional tribunal by ordinary citizen are not recognized . According to the section 325 and 326 of the constitution , the persons who have the right to submit the matters to obtain interpretation, resolution and opinion of the Constitutional Tribunal of the Union are the President, the Speaker of the Pyidaungsu Hluttaw,the Speaker of the Pyithu Hluttaw, the Speaker of the Amyotha Hluttaw, the Chief Justice of the Union, the Chairperson of the Union Election Commission, the Chief Minister of the Region or State, the Speaker of the Region or State Hluttaw, the Chairperson of the Self-Administered Division Leading Body or the Self-Administered Zone Leading Body, Representatives numbering at least ten percent of all the representatives of the Pyithu Hluttaw or the Amyotha Hluttaw. So we can see that advocates and law professors who are very experienced and well efficient in legal matters cannot go to constitutional tribunal. As a results , people cannot get the remedy for their rights if there is no direct appeal to constitutional tribunal by the lawyers. In addition, constitutional tribunal faces challenges to interpret the laws passed whether they are in line with constitution or not.

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### Notes

<sup>19</sup>Section 40 (a) of 2008 constitution

<sup>20</sup>Section 412 (a), *ibid*



<sup>21</sup>.Section 201, Ibid

<sup>22</sup>.Section 60, Ibid

<sup>23</sup>. Section 293, Ibid

<sup>24</sup>. Section 294, Ibid

<sup>25</sup>.Section 343(b), Ibid

## 9. Analysis and recommendation

### 9.1 Analysis

By studying the above three sectors of legislation, jurisdiction and administration, we can see that military takes part in all of three sectors and lack of democracy in the constitution. It is clear that discrimination between military class and people, and military takes the privilege in all institutions of the government. Military takes 25% seats of Federal parliaments and in the state parliament without entering election and chief of staff of military has the authority to appoint army representatives to Hluttaw. There is no clear definition of self-determination of states and regions. The separation of power between the federal government and states or region governments is still weak as well as no clear power balance among the three pillars of legislative, executive and judiciary. Moreover the constitution was not written by the true representatives of the people. The Supreme Court does not have supreme authority over the military tribunal and it does not grant the rule of law, justice and equality.

Though Constitution based on presidential type, the President is not directly elected by the people. According to Myanmar History, the system of government is appropriate with parliamentary system because Myanmar is composed of multi ethnic and nationalities. President and National defense and Security Council have the authority to declare the condition of emergency in the country and it has the authority to make military coup according to constitution.

## 9.2. Recommendation

(a) So as to be democratic constitution, it needs to reduce military role in the constitution systematically and promotes the role of the people and people representatives. Discrimination between the people and military class must be perished.

(b) The constitution needs to grant fundamental human rights, rule of law, and equality before the law and justice.

(c) Politicians, Policy and law makers must use all the possible ways to promote and protect democracy and human rights and take actions step by step such as legal, political and policy ways.

(d) The constitution must grant self- determination of states and divisions and minority rights.

(e) In the jurisdiction, Supreme Court must be the final court of appeal concerning all legal matters including military cases. It must have independent, impartial and transparent procedures in adjudicating the legal cases according to international legal norms. Constitutional tribunal can be accessible by the people through advocates so that the people can be fully their constitutional grantee.

## 10. Conclusion

The 2008 Constitution of Myanmar does not base on fully democratic system. There is not freedom of legislation because of the military position in the parliament. Constitution does not clearly show the separation of power and check and balance of power. Actually 2008 constitution does not base on Federalism. Public policy according to this constitution will be the interest of military class and no equality. Military takes part in all executive, legislative and judiciary and the leading role in politics. Therefore the 2008 constitution is necessary to amend and the role of military is to be reduced step by step. Then the people of Myanmar will fully access to Justice, democracy and human rights.



## PART - THREE

### The right to an adequate standard of living and the right to work

#### 1. Introduction

Universal declaration of human rights is based on justice, equality, freedom, peace and inherent dignity of human beings and it is the mixture of 'civil and political rights' and 'economic, social and cultural rights'. Not Only Civil and political rights are very important for human being but also economic, social and cultural rights are sine qua non for human beings. Economic, social and cultural rights includes the right to work and favorable condition of work, the right to health, the right to cultural right , the right to land and property , the right to education , the right to adequate housing, food and water, etc.. All rights are important and herein I will focus on the right to an adequate standard of living and the right to work and how they are interrelated and interconnected.

#### 2. A background of economic, social and cultural rights.

“The idea of human rights, that is the notion that any one is a set of inviolable rights simply on ground of being human regardless of legal status, origin or conviction for crimes, emerges as an idea of humanism in the early modern period and becomes a position in the 18th century age of enlightenment .The modern human rights movement as a consequence comes to bear in the post world war two era”<sup>1</sup>Historically the foundation of human

rights comes from after world war two and the most significant document was Universal declaration of human rights in 10th December 1948. UN charter in 1945 was world constitutional order and it is the basic of freedom, justice, peace and the idea of human rights. United Nations becomes the center for the International community and states to respect human rights, fundamental freedom and world peace. "United Nations Charter reaffirmed faith in fundamental human rights, in the dignity, worth of the human person and determined to promote social progress and better standards of life in larger freedom, and to employ international machinery for the promotion of the economic, and social advancement of all peoples."<sup>2</sup> One of the purposes of United Nations is "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."<sup>3</sup> It is clear that economic, social and cultural characters are the world concern and clearly stated in the UN charter.

Universal declaration of human right were agreed and signed in 1948 and it was set up both civil and political rights and economic, social and cultural rights. "In 1941, President Roosevelt nominated freedom from want as one of the four freedoms that should characterize the future world order. He spelled out this vision in his 1944 state of the Union address<sup>4</sup>: *We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not true free men.' People who are out of a job are the staff of which dictatorships are made.* The proposal made by the American law institute such as the right to education, work, reasonable condition of work, adequate food and housing, social security influenced the first draft of universal declaration in 1947 and the relevant provisions (article 22- 28) were strongly

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supported by US delegation led by Eleanor Roosevelt, Egypt, several Latin American countries and the communist countries of Eastern Europe. But Australia and UK opposed their inclusion.<sup>6</sup> Ideologically Western countries favored civil and political rights called the first generation rights while soviet states favored economic, social and cultural rights called the second generation rights. The conflict was that later two separate covenants were drafted and called ICCPR and ICESCR.<sup>6</sup> But according to Universal declaration of human rights and Vienna declaration and program of action, all right are universal, indivisible, interdependent and interrelated.<sup>7</sup> ICESCR was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entry into force on 3 January 1976 in accordance with article 27.<sup>8</sup>

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### Notes

<sup>1</sup>Human rights and humanitarian affairs, byPK Goyal, p-1.

<sup>2</sup>Preamble of Charter of United Nations, p- 1, 2

<sup>3</sup>Purpose of United Nation, UN charter, p- 2

<sup>4</sup>International human rights in context: law, Politics, Morals, by Henry J. Steiner and Philip Alston, p- 258. [Eleventh Annual Message to congress (Jan.11, 1944), in J .Israel (ed.), The state of the Union Messages of the Presidents (1966), Vol.3, 2875, 2881]

<sup>5</sup>Ibid, p- 260.

<sup>6</sup>The international covenant on economic, social and cultural rights, A perspective on its development, by Matthew C.R. Craven. P- 8, 9./ Economic, social and cultural rights as human rights , by Asbjorn Eide , p- 10

<sup>7</sup>UDHR and world conference on Human rights: Vienna Declaration and program of action , UN doc. A/ CONF.157/ 23 part I , para-5.

<sup>8</sup>ICESCR

### 3. The right to an adequate standard of living

#### Article -11 of ICESCR

1. The state party to the present covenant recognizes the right of every one to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. The state parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

2. The state parties to the present covenant, recognizing the fundamental right of everyone to be free from hunger, shall take individually and through international co-operation, the measures, including specific programs, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.

(b) Taking into account the problems of both food-exporting and food-importing countries, to ensure an equitable distribution of world food supplies in relation to need.

The right to an adequate standard of living is one of the rights in Economic, social and cultural rights and it is pivotal in the development of the lives of people around the world. The right to an adequate standard of living includes the right to an adequate food, clothing and the continuous improvement of living conditions.<sup>9</sup> Actually the right to an adequate standard of

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living cannot be separated from other rights such as the right to work, the right to health, the right to water, the right to education, the right to life, the right to be free from hunger, the right to self-determination and these rights are interrelated to each other because all human rights are indivisible, interdependent and universal and other rights can fulfill the need of the right to an adequate standard of living impliedly. We cannot deny that poverty caused several serious human right abuses. The poor cannot access to justice and proper legal representation because of their lack of economic ability. The right to an adequate standard of living is stated in article 25 of universal declaration of human rights. Actually the right to an adequate standard of living extends to the right to medical care and social security, and mother and child care.<sup>10</sup>

The right to an adequate standard of living also includes family living condition. The right to an adequate standard extends also to the disable persons concerning food, housing and other basic material needs and wherever possible, appropriate personal assistance should also be provided<sup>11</sup> and the older person persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help.<sup>12</sup> Article 11 of ESC rights includes two parts and the first part is in concern with the right to food, clothing and housing, the right to continuous improvement of living condition and the second part is the right to be free from hunger.

### **3.1 The right to adequate food.**

The President of the World Bank wrote: “Poverty remains a global problem of huge proportions. Of the world's 6 billion people, 2.8 billion live on less than \$2 a day, and 1.2 billion on less than \$1 a day. Six infants of every 100 do not see their



first birthday, and 8 do not survive to their fifth. Of those who do reach school age, 9 boys in 100, and 14 girls, do not go to primary school.”<sup>13</sup> According to this report, the 4 billion

People which is two third of world population are suffering under the lack condition of an adequate standard of living in 2000 and it means that they cannot get the right to adequate food. The right to adequate food is prime important for the life of human being and it is connected with the right to life. The right to adequate food cannot be defined narrowly and it is connected with the right to life and the right to water because water is necessary thing not only for producing food but also for the right to life also.

“More than 840 million people throughout the world, most of them in developing countries, are chronically hungry; millions of people are suffering from famine as the result of natural disaster, the increasing incidence of civil strife and wars in some regions and the use of food as a political weapon and fundamentally the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food, inter alia because of poverty, by large segments of the world’ population.”<sup>14</sup>

The right to adequate food and the right to be free from hunger are closely related and it is not easy to draw the line between them. But the right to an adequate food is more fundamental and it is not derogated in any circumstance because it is interconnected with the life to food. In my view, the right to adequate food is enough term and if a person gets adequate food, it is enough for him and he or she will be free from hunger and malnutrition. Actually a person does not get adequate food, it causes hunger for that person and at the same time, it causes malnutrition and physical and mental problems. The right to an adequate food must be agreed with ‘minimum core content of the right to adequate food’ which are:

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“(a) The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individual, free from adverse substances, and acceptable within a given culture;  
(b) The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”<sup>15</sup>

The states have responsibility to respect, protect and fulfill the fundamental human rights. The states need to follow these fundamental obligations according to article 2 of ICESCR and “the state needs to undertake steps individually and through international assistance”<sup>16</sup> to achieving the full realizing of the right to food by using all appropriate means such as legislative, administrative, judicial, educational, political and cultural aspects. “The obligation to respect existing access to adequate food requires State parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the state to ensure that enterprises or individuals do not deprive individuals of their access to state to adequate food. The obligation to fulfill (facilitate) means the state must proactively engage in activities intended to strengthen People’s access to and utilizing of resources and means to ensure their livelihood, including food security.”<sup>17</sup> The state will have to use all possible means for the right to adequate food such as legislative, administrative, judicial ways, education, policy, cultural aspects and cooperation with international and local NGO.

### **3.2 The right to adequate clothing and housing.**

The right to clothing and housing is important rights also and granted in article 11(1) of ICESCR. But the committee did not comment on the right to clothing and less interested in it. Even though the right to clothing is fundamental matter in real world we live, the committee and the governments are not much

interested in this right. But the government needs to take care of its citizens to get enough clothing especially in the poor family. The right to clothing must be enough for the protection of weather and environmental effect and diseases. In the work place, there should be appropriate dress for the healthy condition of workers. The right to clothing is also related in the culture matter, and the country and people maintain their dress style and their culture. For instance, we can see many Asian Nations preserve the style of dress form such as Japan, China, India and Myanmar even though the world is going to the age of globalization. The right to clothing is one of the conditions to improve the living standard of human beings and the state needs to fulfill and provide to the poor if they are in need. But the right to clothing is not much more important in comparison with the right to food and the right to housing, there is no guidelines and comments made by the committee and the states are not interested in this right which is not “the matter of great deal of control for the state.”<sup>18</sup>

The right to housing is one of the rights granted in article 11 of ICESCR and it is deriving from the right to adequate standard of living. The right to housing get more attention from the committee other than the other economic rights. The people around the world are still facing housing problem and “the United Nation estimates that there are 100 millions persons homeless worldwide and over 1 billion inadequately housed. There is no indication that this number is decreasing. It seems clear that no state party is free of significant problems of one kind or another in relation to the right to housing.”<sup>19</sup> The right to housing is not only getting the house but also getting adequate facilities for the purpose of attaining the adequate standard of living. The right to adequate housing must be appropriate with the population and it must be reasonable for the healthy condition of human beings. The meaning of housing is not narrow in sense



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and not itself house but the right to water, shower, sanitation and environment of house must be for the healthy condition of human being and the right to life. The committee comments that “the right to housing is integrally linked to other human rights and the fundamental principles upon which the covenant is premised and the term housing needs to take account other consideration.

Adequate shatter means adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities, all at reasonable cost.”<sup>20</sup> Many people left their houses because of internal armed conflict and natural disaster, and they became homeless such as the countries Myanmar, India, Bangladesh, Bosnia Chechnya, Rwanda and Sri Lanka<sup>21</sup> and Refugees who are stateless are one of the problems concerning the right to housing that UNHCR is facing at the present era. The state parties need to take necessary steps to realize all the rights and must grant equality and non-discrimination according to article 2 of ICESCR and “the concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.”<sup>22</sup>

The state parties have responsibility to respect, promote, protect and fulfill the right to housing and need to take all measures such as legislative, administrative, judicial, educational, cultural, economic aspects. Most refugees are stateless and homeless because of forced eviction by the states and the states need to refrain from using forces by intervening to ethnic minority and their home, private properties and land. In my point of view, legislative measure is the most effective way for protecting, and fulfilling the right to housing and the governments need to write the right to housing and adequate standard of living

in their constitutions. In one of the case, “the measures must establish a coherent public housing program directed towards the progressive realization of the right of access to adequate housing within the state’s available means. The obligation to fulfill the right to adequate housing was violated where housing policy did not prioritize the improvement of the housing condition of those living with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations. Although the measures were statistically successful, the housing program failed to provide any form of temporary relief to those in desperate need, with no roof over their heads, or living in crisis conditions. Thus it was not reasonable and failed to satisfy state’s obligation to achieve progressive realization of these rights.”<sup>23</sup>

In the case of the construction of a wall in the occupied Palestinian territory, the construction of the wall by the Israel caused the disappearance of vast amount of property, notably private agricultural land and olive trees, wells, citrus grow and hothouses upon which tens of thousands of Palestinians rely for their survival. The court observed that the restriction on the enjoyment by the Palestinian population of their ESC rights failed to conform with the condition of article 4 ICESCR , that such restrictions must be ‘ solely for the purpose of promoting the general welfare in a democratic society’ and ICJ directed Israel to cease construction and dismantle the wall, provide compensation and other forms of reparation to the Palestinian population, and to return any land and other immovable property seized for the purpose of constructing the wall.<sup>24</sup>

#### **4. The right to work**

##### **Article -6 of ICESCR**

1. The state parties to the present covenant recognize the right to work, which includes the right of everyone to the

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opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a state party to the present covenant to achieve the full realization of this right shall include technical and vocational guidance and training program, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

The right to work is sine qua non for the survival of human being so as to live with dignity and respect in the environment and society. The right to work is very fundamental and connected with other rights such as the right to life, the right to food. Therefore the right to work cannot be separable from other human rights. The right to work must includes the right to equality in the work and there must be no discrimination for men and women for the opportunity of work and in the work place. The right to work needs to grant fair labor standard without discrimination based on age, sex, national or ethnic origin, religion and race. Actually the right to work is an important right for human being and his or her family without fear and worry for their security and integrity. Women must be protected from sex or gender discrimination concerning the right to work . More or less women are suffering the infringement of their rights to work and they cannot access to the job concerning the administration and government services in some countries and male dominant society. It needs to grant ‘the equal pays for equal work’ concerning the right to work. The right to work also includes ‘the right of everyone to the enjoyment of just and favorable condition of work’<sup>25</sup> which are the right to remuneration and fair wages, the right to decent living for themselves and family, the right to rest, leisure and reasonable limitation of working hours

and the right to safe and healthy condition. Workers can form trade union and workers' association to protect their rights accordingly and article 8 of ICESCR grant the right to form trade union and the right to strike if workers' rights are infringed. The right to work is also granted in article 23 of universal declaration of human rights. Workers have the right to choose their work freely according to article 6 of ICECR and this right includes not depriving or losing their work arbitrarily. Work must be for the purpose of personal development of human beings and it can give satisfaction for individual development and personality. "International labor organization convention No. 122 concerning employment policy (1964) speaks of 'full, productive and freely chosen employment with the obligation of states parties to create the conditions for full employment with the obligation to ensure the absence of forced labor. Nevertheless, for millions of human beings throughout the world, full enjoyment of the right to freely chosen or accepted work remains a remote prospect."<sup>26</sup>

Labor Union and workers' associations are very important to protect and promote labor rights and labor standard. Without labor organizations, there cannot be fully protected labor right for the workers. ILO is the best example of protecting labor rights across the world. Freedom of association is closely related with forming labor union and in some countries such as authoritarian states and dictatorial states, there is no freedom of associations, and political party and labor union are strictly prohibited and the right to work is infringed by the states and employers. Any form of forced labor is the degrading of human dignity and the states parties need to grant to free from forced labor and any form of slavery. "Forced or compulsory labor shall mean all work or service which is exacted from any penalty and for which the said person has not offered himself voluntarily".<sup>27</sup> "Although forced labor is universally condemned, the ILO

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recently estimated that at least 12.3 million people are victims of forced labor worldwide. Of these, 9.8 million are exploited by private agents, including more than 2.4 million in forced labor as a result of human trafficking. Another 2.5 million are forced to work by the State or by rebel military groups. Traditional slavery is still found in some parts of Africa, while forced labor in the form of coercive recruitment is present in many countries of Latin America, in parts of the Caribbean and elsewhere. In numerous countries, domestic workers are trapped in situations of forced labor, and in many cases they are restrained from leaving the employers' home by means of threat or actual violence. Bonded labor persists in South Asia where millions of men, women, and children are tied to their work through a vicious cycle of debt. In Europe and North America, an increasing number of women and children are victims of traffickers who sell them into forced prostitution or sweatshops. Finally, forced labor is sometimes still imposed as a punishment for expressing one's political views. For many governments around the world the elimination of forced labor remains an important challenge for the 21st century. Not only is forced labor a serious violation of a fundamental human right, it is a leading cause of poverty and a hindrance to economic development.<sup>228</sup> Therefore any form of slavery or forced labor is intolerable and states parties must keep to eradicate forced labor and slavery by using all reasonable measures including legislative, administrative, policy, judicial, cultural and educational aspects.

States parties need to take the steps so as to grant for the full realization of the right to work. The right to work is 'an absolute right' which is interrelated with the right to life and the right to an adequate standard of living and states parties need to fulfill hundred percent of employment for the development and wellbeing of human beings. The state parties need to grant just and favorable condition of work, reasonable working hours, the



right to leisure and holidays, equality and remuneration also. The state parties need to ensure the minimum core obligations and the committee confirmed that these obligation includes the following requirements as follows: “(a) to ensure the rights of access to employment, especially for the disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity; (b) to avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups; (c ) To adopt and implement a national employment strategy and plan of actions based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers’ and workers’ organization.”<sup>29</sup>

The purpose of article 6 (2) of ICESCR is also very clear and states need to perform to achieve the economic, social, cultural development and full employment. Political and economic freedom need to be granted for individual by the state parties according to article 6(2) of ICESCR.

## **5. How the right to an adequate standard of living and the right to work are interrelated.**

The right to an adequate standard of living is directly interrelated with the right to work because the workers can get reasonable income if he or she has the right to work and reasonable work for his or her survival and living. Actually the right to adequate standard of living includes the right to food, clothing and housing and it depends upon the right to work and the right to favorable condition and income. If the person does not have the reasonable work for his life, he cannot live for the proper living standard and he cannot fulfill for the house, clothes, food and for his family. Actually according to the Universal

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Declaration of human rights, all human rights are indivisible, inseparable, inborn and inalienable. Income distribution is directly related with the poor and rich of world population and “ as reiterated by the President of the World Bank, of the world's 6 billion people, 2.8 billion live on less than \$2 per day, and 1.2 billion live on less than \$1 a day. In other words, half the world's people live for a whole year on less than what many would consider the cost of a single good suit or dress, a plane ticket, or a couple of nights in a good hotel.”<sup>9,10</sup>

Therefore the right to work and the right to adequate standard of living are directly related and without a good job and favorable condition of work, how can the people live a decent living for him and his family. In my point of view, the right to work is supreme important as the right to life and the right to food because the right to work gives us fundamental income for survival and dignity and integrity. Really the right to work defines our life and it cannot be denied that the right to work is directly interrelated with the right to an adequate standard of living.

### 6. Conclusion

To conclude, the right to an adequate standard of living and the right to work are playing a pivotal role in our practical life and the people around the world are still struggling for the adequate standard of living and the right to work. In fact the right to work strongly effected to the adequate standard of living, and interrelated to each other. Therefore these two rights are necessary to be protected, promoted and fulfilled by both the government, NGO and the people.



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#### Notes

<sup>9</sup>. Article 11 (1) of ICESCR

<sup>10</sup>. Article 25 of Universal Declaration of Human rights.

<sup>11</sup>General comment No. 5 of ESC committee. Eleventh session 1994 contained in document E/1995/22.

<sup>12</sup> General comment No. 6. of ESC committee. The economic, social and cultural rights of older persons. Thirteenth session 1995 contained in document E /1996/22.

<sup>13</sup> Poverty and the international covenant on Economic, social and cultural rights 05/10/2001. E/C. 12/ 2001/10 (Other Treaty- related Document ) [World Bank, World Development Report 2000/2001: Attacking Poverty, Oxford University Press, p.v.]

<sup>14</sup>General comment No12 : the right to adequate food ( art. 11) adopted by CESCR .Twentieth session (1999) contained in document E/C. 12 /1999/5. Para- 5

<sup>15</sup>. Ibid, Para- 8.

<sup>16</sup>. Article 2 of ICESCR

<sup>17</sup>. General comment No. 12. The right to adequate food( art.11) , Twentieth session ( 1999) contained in Document E/C.12 /1999/5.

<sup>18</sup>The international covenant on Economic, social and cultural rights, A perspective on its development by Matthew C. R .Craven , p- 349.( Clarendon press. Oxford. 1995).

<sup>19</sup>. General comment No. 4 of the committee of ESC: the right to adequate housing contained in document E/1992/23.

<sup>20</sup>. Ibid.

<sup>21</sup>. Refugees and Human rights by Dr. V T Patil , Dr. PR Triveda , p- 123, 124

<sup>22</sup> General comment No. 3 of ESC committee. 'The natures of state parties' obligation. ( Fifth session 1990)

<sup>23</sup>. Government of the republic of South Africa and Others V. Grootboom and others 2000.

<sup>24</sup>. Legal consequences of the construction of a wall in the occupied Palestinian Territory. Advisory Opinion of 9 July 2004 (International court of Justice). 2004, 9 July General list No. 131.

<sup>25</sup>. Article – 7 of ICESCR

<sup>26</sup>. General comment No. 18 of the committee of economic, social and cultural rights. The right to work ( art -6) , Thirteenth- fifth session( 2005).

<sup>27</sup>. Forced labor convention , 1930 , article -2 , Human rights and social justice by Narasimham RK , p- 75.

<sup>28</sup><http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/forced-labour/lang--en/index.htm>

<sup>29</sup>. General comment No. 18: the right to work( art.6) of ESC committee.

<sup>30</sup>. The first U.N social forum: History and Analysis.[ Bengoa, U.N Doc. E / CN .4. Sub.2/1997/9]

## PART - FOUR

### A Credible Human Rights Mechanism in ASEAN

The critical issue for ASEAN to be an effective human rights mechanism is how the ASEAN Inter-Government Commission on Human Rights and Commission on the Protection of the Rights of Women and Children have to deal with and implement the human rights matter of the ASEAN within the region effectively.

“The association of South East Asia Nations (ASEAN) was established on 8th August 1967 in Bangkok ,Thailand with the assigning of the ASEAN declaration(Bangkok declaration by the founding father of ASEAN, namely Indonesia, Malaysia, Philippines, Singapore and Thailand. Brunei Darussalam then joined on 8 January 1984, Viet Nam on 28July 1995, LAO PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999 , making up what is today the ten Member States of ASEAN.”<sup>1</sup>

ASEAN Charter was signed by all ten leaders of members of ASEAN at 13th ASEAN summit on November 2007. ASEAN adhere to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedom according to the preamble of ASEAN charter. In article(1) section- 7 , chapter (1) purpose and principle of ASEAN charter , ASEAN firmly established that that ASEAN strengthen democracy ,enhance good governance and to promote and protect human rights and fundamental freedom with due regard to the rights and responsibilities of member states of ASEAN. In Article (2),section 2(i) ASEAN

expresses to respect for fundamental freedom, promotion and protection of human rights, and the promotion of social justice , and in subsection (j) to hold the United Nation Charter and international law, including international humanitarian law.

ASEAN established two human rights bodies, namely ASEAN commission for the promotion and protection of the rights of women and children(ACWC) and Intergovernmental commission on human rights according to ASEAN Charter article (14).

Even though the purpose and principles of ASEAN charter is good, there is concerned about the political situation of ASEAN .In reality, there is concerned that member states of ASEAN can promote and protect the citizens of ASEAN in their basic human rights especially in Myanmar, Cambodia, Laos and Vietnam. For example, ASEAN cannot handle Myanmar Human rights situation even though United Nations and International community demanded several times to ASEAN. There is about 1400 political prisoners including Noble price winner Aung San Su Kyi in Myanmar.

In addition according to article 14(2) of Charter of ASEAN, ASEAN human rights body shall operate in accordance with the term of reference (TOR) to be determined by the ASEAN foreign minister meeting. It is very doubtful that ASEAN human rights body is independent in the decisional process because ASEAN foreign ministers have the authority according to the article 14(2) of the Charter to decide upon the matter of human rights. “The TOR characteristics the commission as an intergovernmental and consultative body comprised of state representatives according to article 4 and 5(2) of AICHR TOR. When appointing representatives, member states must pay due consideration to gender equality, integrity and competence in the field of human rights(article 5(3) AICHR ) , but independence is conspicuously absent from this list. In practice, this has meant

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that most commission are current or former government officials (such as diplomats), though notable exception will be mentioned in the concluding section of this article. As for decision making, it shall be based on consultation and consensus in accordance with Article 20 of the ASEAN Charter. As Amnesty International has commented, such an arrangement means that each state would be able to reject any criticism of its own human rights record by veto.<sup>22</sup> International Human rights organizations are concerned that in practice ASEAN foreign ministers really promote and protect human rights rather than to promote and protect their states interest. For instance, Thailand cooperates with the present Myanmar regime for economic interest rather than to promote and protect Myanmar human rights. I am really concerned that ASEAN governments protect states interest than human rights.

In accordance with International Human Rights standard and Universal Declaration of Human Rights, it will be more appropriate that ASEAN Human Rights body is free from political bias and state interest, and this body must be an independent body of ASEAN. ASEAN Intergovernmental Commission of Human Rights(AICHR) is lack of Mandate in the protection of Human Rights within region and lack of detail how to protect and promote Human Rights. According to UN press release, “The high commissioner expressed her disappointment at the commission’s “lack of a clear protection mandate” but said she hoped its role would expand after its lunch at the 15th ASEAN Summit in October 2009. There is concerned that ASEAN Human Rights Body will be as a smokescreen for doing nothing in actual life of ASEAN citizens. In addition, ASEAN Intergovernmental commission on Human Rights required some provision about Individual complaint and cases about Human Rights abuses within the region. AICHR need to have the authority to conduct country visit, to receive complaints

and initiate investigations, and to conduct periodic reviews of Human Rights situation in the region. “Indonesia Foreign Minister, Dr. Hassan Wirajuda, has fought for giving the AICHR more power at the ASEAN Ministers Meeting (AMM) in Thailand in July 2009. Along side Thailand, Indonesia had been pushing for the body to have the mandate to monitor and review human rights situation in every member states and to conduct country visit .The proposal has been rejected by other member states such as Myanmar which almost broke the TOR endorsement.”<sup>33</sup>Therefore in practice ASEAN human right mechanism has many challenges to protect and promote human rights in implementing its function in the region.

And at the present time, asking for ASEAN human rights Court is not appropriate not only because ASEAN is actually at the beginning of Dealing with Human Rights matter and not very mature to found ASEAN court but because the reality of political situation of the region is not appropriate for it. For example some countries like Myanmar, Laos and Vietnam cannot agree it at the present time. TOR (Term of Reference of AICHR) was adopted and approved by ASEAN foreign ministers in 2009. We can see that It is very earlier to found ASEAN court in comparison with the history of Inter- American court in 1979) (it took 30 years after the charter was signed in 1948), the African court of human and people rights in 1998 (12 years after the African charter came into force) and European court of human rights in 1958 (six years after the convention for the protection of Human Rights and Fundamental freedom came into force.) Therefore ASEAN human rights body is only at the beginning stage and it need to take time for ASEAN human rights court. If ASEAN can learn the experiences of her brother regional human rights court, it will be sooner and better in founding ASEAN human rights court. Actually ASEAN has a bright future for Human Rights but there are many challenges about it.

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ASEAN can draw some kind of experience from her brother regional organizations like European Union (EU), Organization of American States (OAS) and the Organization of African Unity (OAU). “European Union is the unique expression of Western European integration and the treaty was signed in Maastricht in 1992. The European convention on Human Rights and Fundamental Freedom came into force in 1953.”<sup>24</sup> The full purpose is to implement civil and political rights under the present constitution of state parties. The convention provides to get constitutional justice about Civil and Political rights. The convention support to implement Human rights in accordance with the domestic law of state parties. The state parties which have ratified convention need to protect and guarantee every one the fundamental civil and political rights within their Jurisdiction according to their national constitution. “European convention of human rights and fundamental freedom really provided as the easy step to establish European human rights court and the court can accept individual complaints from the remote region even if he or she has not money for the complaint to the court.”<sup>25</sup> Therefore ASEAN human rights body can create the better condition for the ASEAN court to receive individual, states and NGO complaints.

“Since the adoption of the OAS charter and the American Declaration on the rights and duties of man in 1948, the development of the Inter-American system of human rights protection has emerge as a significant achievement for the people of the Americas.”<sup>26</sup> “The value of the Inter-American System should be measured by its potential justice in individual cases, rectify a general pattern of human rights violation, and strengthen the rule of law.”<sup>27</sup> African Charter on human and people rights was adopted in 1981 and the charter established supervisory mechanism in which the African commission on Human and peoples’ rights plays a pivotal role ;in 2004 a protocol establishing



an African court on human and peoples' right entered into force. By drawing the experience of EU, OAS and OAU, ASEAN can create effective human rights mechanism step by step and systematically how to promote and protect human rights with the region.

ASEAN can strengthen her human right mechanism within the region by creating strong civil society. Without a strong civil society, there cannot be a strong human rights mechanism in the region. Aung San Su Kyi , Nobel Laureate in 1999 from Myanmar said ,“ a battle field is not necessarily a place where people are shooting at each other in civil society where basic human rights are ignored , where the rights of people are violated everyday, it is like a battle field where lives are lost and people are crippled .”<sup>8</sup> In practice Civil Society, human rights and politics are interconnected and can support to each other. Therefore to be effective human rights mechanism, there will be a strong civil society in the region and the ASEAN government should cooperate with INGO, NGO ,UN , EU ,OAS , OAU and governments to promote ,protect and preserve human rights. Roh Moo Hyun, former president of the republic of Korea,2003 said that “civil society and its movement are the central forces leading our society.”

ASEAN commission and National Human rights Institutions (NHRIs) can work together for the promotion and protection of Human rights within the region. I firmly believe that National Institution are in the essential and constructive role in promoting and protecting human rights ,in particular in their advisory capacity to the competent authorities, their role in remedying human rights violation. “ASEAN human rights body should have the power to investigate human right violation, analyze them according to International Human Rights Standard and Universal declaration of human rights ,and need to demand the member states to take action and remedy as soon as



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possible.”<sup>99</sup>.According to the VIENNA DECLARATION AND PROGRAMME OF ACTION as adopted by the world conference on human rights on 25 June 1993 , ASEAN Human Rights Body , National Human Rights Institution and other Human rights organizations can work together for promoting and encouraging respect for Human rights and fundamental freedoms for all and respect for the principles of equal rights and self-respect and self determination of peoples, peace ,democracy ,justice, equality ,rule of law, pluralism, development, better standard of living and solidarity . United Nations Human rights body and other human rights organizations like Amnesty International, Asia Pacific forum etc. can provide the technical assistance and training to ASEAN human rights body to promote and protect HR in accordance with International Standard and norms.

AICHR and ACWC can operate with UN human rights commission to make better terms and principles in ASEAN CHARTER based on Vienna declaration and program of action. ASEAN can work together with United Nation to make monitoring and to take effective measure for human rights abuses within ASEAN region in cooperation with International organizations. ASEAN human rights body can appoint special rapporteurs, representatives, experts and special working group to preserve, promote and protect Human Rights situation in ASEAN region in accordance with paragraph -95 of Vienna declaration and program of action, 25 June 1993.

In addition, ASEAN working group stated in 27 July 2009 that even though it welcomed the adoption and approval of Term of Reference for the intergovernmental commission on human rights (AICHR) by the ASEAN foreign ministers,that Term of reference is not the inspiration for working group. The working group said that “there are two very necessary processes which manifest people’s participation –the selection process for

the AICHR's composition and the review process of the terms of reference."<sup>10</sup> "The working group for ASEAN human rights mechanism was set up by the human rights committee of the law association of the Asia and the Pacific region or LAWASIA"<sup>11</sup> ASIAN Commission for the promotion and protection of the rights of women and children (ACWC) is a little different with AICHR in the background of establishing. The Term of Reference (TOR) of ACWC is based on the convention on the elimination of all forms of Discrimination against women (CEDAW) and the convention on the rights of the Child (CRC) according to article 1.1 of ACWC TOR. ACWC clearly stated to uphold, promote, protect, respect and fulfill the rights of women and children in ASEAN to live in peace, equality, justice, dignity and prosperity (ACWC TOR 2.2). In the purposes and principles of terms of reference of ACWC, it is clearly stated that ACWC uphold human rights as prescribed by the Universal declaration of Human Rights, the Vienna Declaration and Program of Action, convention on the elimination of All form of Discrimination against Women (CEDAW), Convention on the rights of the child (CRC), Beijing Platform for Action (BPFA), world fit for Children, International Humanitarian law and other international human rights instruments and regional declaration related to women's and children rights to which ASEAN member states are parties (Article 2(2.5) ACWC TOR). Therefore ACWC is clear to follow the international Human rights norms and principles and willing to cooperate with International and regional human rights organization.

ACWC is inter-governmental body and consultative body according to Article 4 of TOR of ACWC and comprised of state representatives. In article 5 "mandate and function", ACWC recognized to promote the implementation of international instruments, ASEAN instruments and other instruments related to the rights of women and children, to develop policies programs

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and innovative strategies to promote and protect the rights of women and children , to promote public awareness and education of the rights of women and children of ASEAN.ACWC accept to advocate on behalf of women and children especially the most vulnerable and marginalized , and encourage ASEAN member states to improve their situation(Article 5(5.4) Of ACWC TOR). ACWC have to encourage ASEAN member states on the collection and analysis of disaggregated data by sex, age, etc, related to the promotion and protection of the rights of women and children, and encourage ASEAN member states to undertake periodic reviews of national legislation, regulation, policies, practices related to the rights of women and children according to article 5(5.8) (5.10) of ACWC AOR.ACWC recognized to implement the international instruments like CEDAW and CRC for the wellbeing of women and children and to share experience and good practice among member states(article 5(5.11)).But in decision making ACWC shall be based on Consultation and consensus in accordance with the ASEAN charter and in practice I doubt that it is workable in the protection of human right, especially the abuses of the member state governments.

Actually ASEAN human right body need to cooperate and work together with NGO in the grass root level in the human rights educations because ASEAN human rights problem is not only the structural problem but also the grass root problem. Human rights education is really important and the two human rights body ACWC and AICHR recognized the education, public awareness, research and dissemination for information to promote and protect human man rights, the rights of women and children (Article 4(4.3)AICHR TOR and Article 5(5.3) ACWC TOR). “Education is not only a means to promote human rights. It is an end in itself. In positioning human rights to education, the framers of universal declaration relied on the notion that education is not value neutral. Education always

relates to and support value.”<sup>12</sup> Education shall be directed to the full development of human personality and to the strengthening of respect for human rights and fundamental freedom according to article 26 (2) of Universal Declaration of Human rights. According to Article 19 of International covenant on civil and political rights, everyone has the right to hold opinions without interference and the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice. According to Vienna Declaration and program of action, human rights and fundamental freedom are the birthright of all human beings; their protection and promotion is the first responsibility of government. AICHR and ACWC can cooperate together to push the governments within the region in reporting the human rights situation of their countries.

The challenges that ASEAN human rights body is facing is that ASEAN governments want to go their own way in dealing with Human rights issues. The two ASEAN human rights commission need to cooperate to promote ASEAN human rights terms of reference in accordance with International human rights instruments such as universal declaration of human rights, International covenant on civil and political rights, International covenant on economic, social and cultural rights, Convention on the rights of the child and convention on the elimination of all forms of Discrimination against women, etc. In realities, ASEAN member is facing political problems, arm conflict, economic crisis in some countries like Laos, Myanmar and Cambodia, immigration problems, constitutional problems and social issues, etc. ASEAN human right body can push the governments to change the terms and principles of their constitutions which is not granted basic human rights. If ASEAN governments granted

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the fundamental human rights in their respective countries, the people can get their rights under the constitution. ASEAN human rights body should prepare for constitutional justice by pushing the government to change their constitution in accordance with democracy, human rights, justice, equality and freedom. If the constitution is not agreed with the democratic principles and human rights standard, ASEAN will still meet the tremendous human rights abuses within the region.

In conclusion , Two ASEAN human rights body have the challenges such as ASEAN consensus policy, non-interference in the internal affairs of other states, lack of the authority, mandate and transparency , etc. Even though ASEAN is slow in progress in advancing Human Rights condition, ASEAN human rights body is the first human right body in the region and the shining light for the people in South East Asia, and can work together to promote, protect and preserve human rights hand in hand with International community to achieve the goal of Human right standards and norms within region.



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### Notes

<sup>1</sup> see [www.asean.org](http://www.asean.org)

<sup>2</sup> Human rights law review 10(2010),p514

<sup>3</sup> Stated at NTS ALERT September 01/2009 issue

<sup>4</sup> Council of Europe, OSCE, and European Union by Kevin Boyle, p-4.

<sup>5</sup> See The European Court of Human rights, the ECHR in 50 questions

<sup>6</sup> Using the Inter American System for Human Rights by Global Rights,p-61.

<sup>7</sup> Using Inter American System for human rights - by the Global Right, p-64.

<sup>8</sup> Civil society and political change in Asia, by Muthiah Alagappa p-3.

<sup>9</sup> 'The ASEAN Charter and Human Rights 'Windows of opportunity or window of dressing', by AMNESTERY INTERNATIONAL, July 2008,

<sup>10</sup> source-<http://www.aseanhumech.org/news/creation>

<sup>11</sup> see - NTS ALERT –September 01/09 Issue.

<sup>12</sup> Human right and Asian Value, edited by Michael Jacobsen and Ole Bruun, p-281.

## PART - FIVE

### Can Law Be Emancipatory?

Law can be emancipatory. Law can make society to be free, fair and equal. Good laws can maintain the emancipation of the people. Men create laws to free people and society and vice versa these laws can also perform for the people and society to get justice, equality and freedom. Actually the history of the world is the history of emancipation of people. The history of emancipation means the history of the struggle of people. Laws follow the history and history is balanced by making good and just laws.

If we study the history of the world, we can see men's struggle for emancipation. Emancipation has its various meanings from various points of views. From Carl Max point of view, emancipation is political emancipation and "equal status of individual citizens in relation to the state, equality before the law, regardless of religion, property, or other private characteristics of individual people."<sup>1</sup>In my point of view, emancipation is political, civil freedom and human emancipation. Political freedom is freedom of organization, freedom of assembly etc.

Political freedom is freedom from government suppression and interference. Civil freedom is freedom of speech, freedom of peaceful demonstration, freedom of movement and freedom of religion. Human emancipation is freedom from suffering, freedom from want, freedom from fear and the attainment of absolute happiness in human lives. Emancipation is related with natural rights and natural law.



Natural rights are rights which are inborn, inalienable and respectable in dignity and integrity. Natural rights thinkers like Thomas Hobbes, John Lock and Thomas pain' writing supported the revolutions of their age. American president and constitutional writers, Jefferson always defended individual rights because individual rights are more important than state rights. These rights needed to be defended in the constitutions because if these rights are infringed, there is no protection for them. If the state rights are infringed, state can defend because it has the authority to enforce by using military force, police force and other mechanism. According to Thomas Jefferson , the state is the violator of individual rights. Life, liberty and the pursue of happiness is the main words in the declaration of independence of United States. In his original writing of American declaration, he put the individual rights as sacred things. In declaration , he wrote , "We hold these truths to be sacred & undeniable; that all men are created equal & independent, that from that equal creation they derive rights inherent & inalienable, among which are the preservation of life, & liberty, & the pursuit of happiness; that to secure these ends, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government shall become destructive of these ends, it is the right of the people to alter or to abolish it, & to institute new government, laying its foundation on such principles & organizing its powers in such form, as to them shall seem most likely to effect their safety & happiness."<sup>22</sup> The people founded the institution of government and the ultimate purpose is the emancipation, safe and security of their lives.

Legal mechanism is very important for human emancipation because laws can be used as a tool for the process of human emancipation or human liberation. American president, the loving father of the nation, Abraham Lincoln made the amendment 13 of the constitution to abolish slavery and gave

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freedom to slaves in that time. Amendment 13 stated as follow:-

“1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdictions. 2. Congress shall have power to enforce this article by appropriate legislation.”<sup>3</sup> In practice law makes rules and regulations to balance society and to give freedom to the people. The purpose of making laws is liberty, equality and Justice, and laws follow the revolution or evolution of human beings. American civil war gave America the greatest freedom and made America the symbol of liberty in the world by abolishing slavery. The word liberty is the right to do things freely and the right to be free from restraint. Isaiah Berlin called “positive liberty and negative liberty.”<sup>4</sup>

Concerning liberty, Abraham Lincoln said in 1864, “In using the same word we do not all mean the same thing. With the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men’s labor. Here are two, not only different, but incompatible things, called by the same name – liberty.”<sup>5</sup> Liberty is in various point of view may be different as Lincoln said. But we accept generally liberty as freedom. In my point of view, liberty and rights cannot be separated and is interconnected with each other. The right to life is supreme important and all the rights cannot exit without it. The right to life and the right to be free from torture are absolute rights for all human beings. Universal declaration of human rights article (3) expressed “the right to life, the right to liberty and security of person”, and article (4) expressed as “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms” ,and Article(5) prohibited “torture” in any from and “cruel and inhuman or degrading treatment or

punishment.” Universal declaration of human rights is recognized as International customary law by International community and the ideas are recognized as rights and responsibilities for human emancipation. Human beings make laws and regulation because they want to make society safe, secure and free. Boaventura wrote, “The highest exercise of regulation is the highest exercise of emancipation.”<sup>6</sup> Human rights become the rules for modern community. International community is sensitive about the abuses of human rights because these abuses will become a disease to spread the community so as to destroy peace, justice and human emancipation.

Concerning emancipation, social contract is *sine qua non* for the emancipation of human beings. People make contract with the government to control the government power and not to treat the citizens arbitrarily. The people can abolish the government if the government used power abusively. According to Socrates, he argued that he will accept the death penalty in stead of going outside Athens because he has the right to live according to the laws of Athens. “They made it possible for his mother and father to marry, and therefore to have legitimate children, including himself. Having been born, the city of Athens, through its laws, then required that his father care for and educate him. Socrates’ life and the way in which that life has flourished in Athens are each dependent upon the Laws.”<sup>7</sup> Socrates believe in laws and these laws are made between the people and the government. In my point, Socrates accepted death because he wanted to show justice and emancipation to the future generation. Socrates was death because in that time, Athens democracy is not a complete contract one between people and the government of Athens and it lacked the check and balance power between the government and the people, and it did not grant fundamental human rights and individual rights. According to Modern social contract thinker, Thomas Hobbes’



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point of view, social contract is very good because it is the balance of the government authority. Men are by nature self interested and eager to possess the things. Men work not only because they want to survive but also because they want to possess materials for their desires. But men have “rational capacity” to decide matters both for their benefits and for the community that they live. Rationalization and reasoning are the capacity that men possess and it is separated human beings from animals. Human beings’ rationalization makes them to be emancipatory. The realization of cause and effect of people is the inspiration to make laws which give their society to be free, just and peaceful. Hobbes recognized that law of nature is important for human emancipation to control the state of nature. According to Hobbes, “The situation is not, however, hopeless. Because men are reasonable, they can see their way out of such a state by recognizing the laws of nature, which show them the means by which to escape the State of Nature and create a civil society.”<sup>8</sup> People can maintain the state of nature by using social contract to prevent the state to treat them unfair, unjust and cruel. According to John lock, he argued that man has the right to revolt against the king and “people will have the right to do things as a group that all people have the natural rights.” John lock said that “state of nature” is not “the state of license” to do the things that he likes to suppress the people.

There are two kind of social contract. One is the contract between people and another is the contract between people and the government. For the first one, people make agreement between them to carry out their performance and their functions in a legitimate ways so as to achieve their goals. They create civil society to get the achievement within their society and help people to be strong and efficient in capacity building and rights. Civil society is really the force to change the laws and institutions according to will of people. It gives spaces to people who cannot

enter government institutions and give the power for the social, political and legal change. In the twenty first century, civil society plays an important role for the human emancipation and can balance the government authority and abuses by civil movement to make the legal system to be better. The contract between the people and the government is sine qua non between the people and the government. The better form is democratic government elected by the people. The people elect their representatives to the governmental institutions and control the buses of power. There is 'nature of government' which Montesquieu described in his book "The Spirit of law". There are three kinds of government such as republican, monarchy and despotic governments. Republic government is a type of democratic government in which the power is vested in the people or the group of persons. Monarchy government is the government in which the power comes from the noble persons like the prince or the king and the king has the absolute power to decide the matters of state. Its fundamental maxim is : " no monarch, no nobility: no nobility, no monarch; but there may be a despotic prince."

The third government is the government of Despotism. One person has the absolute authority to control the state affairs and thinks himself that he can do what he likes. The ideology of Montesquieu greatly influenced in drawing the American constitution, especially check and balance system and the separation of power. Actually human desire is to be free from restraint and suppression and to get liberty. They love justice and equality. So they create the separation of power in the constitution that is entitled to them. There are three branches of power which are legislative power, executive power and judicial power. These separate powers are equal in status, and can check and control each other. Therefore there is no absolute power in this system. Constitution is the best example of social contract between the people and the government. Nations around the world drew the

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constitution which granted basic rights, fundamental freedom and democracy. In addition there are types of many governments such as dictatorship, authoritarianism and tyrant. But people in the twenty first century do not accept any type of authoritarian type of regime and they struggled for democracy and human rights which are the better form of human emancipation.

Democracy is the type of government in which the people can elect their representatives and have the right to vote not to choose or choose their representatives. In fact democracy is type of “government of people, by the people and for the people”. We see democracy as rule of law which grants the fundamental human rights. Rule of law is not the rule of men. Rule of law can be defined as governing according to the laws recognized by the community as standards and norms. One of the rule of law aspects is the safety of individual persons in the trail of Judicial process without interfering by the executive branch. The rule of laws includes the fair trial and due process of judiciary. The right to fair and public trial, the rights to be free from arbitrary arrest and detention, the right to be free from torture, the right to know the reason to arrest, the right to get legal assistance and counseling, the right to a prompt appearance before a judge, the right to be equal before the law, the right to appeal and the right to compensation for miscarriage of justice are included in the pattern of rule of laws. To return to historical root, the idea of the rule of laws can be found in Eastern and western parts of the world. In Greek, Aristotle and Plato discussed rule of laws .Plato wrote that “If law is the master of government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.”<sup>10</sup> In china, Chinese philosopher Han Fei Zi in the third century BC, discussed rule of law not only as laws written and public but also as governing of laws rather than governing of men. In Massachusetts constitution drafted by

John Adams, Samuel Adams, and James Bowdoin, freedom of worship, the right to life and liberty, and the right to possession and protection were granted. The supreme purpose is to attain peace, liberty and happiness of citizens. If the citizens did not get these rights, they have the right to change constitution. According to John Adam, the government is “the government of law and not men”<sup>11</sup>.

Moreover the meaning of the rule of laws can be viewed from two aspects which are negative point of view and positive point of view. From the positive point, rule of laws is the rule of Independent legislation and independent judiciary. Everyone is equal before the law and there is no discrimination concerning sex, race, color, religion, national entities and possession under the law. The people have the right to elect their representatives to the parliament and the right to make legislation. Law serves as the tools for the greatest good of the greatest majority of the people. For instance, we can see the above pattern in the democratic country. In the liberal democratic state, it gives the way to spread social, political and economic freedom, and also grants the individual rights of the people. The rule of law is also interrelated with economic, social and cultural rights. There are many debates about whether rule of laws promoted economic development.

In my point of view, rule of law is one of the factors for economic development. So as to be developed, good infrastructure (good institutions of government), stability and transparency are necessary factors. In liberal democratic state, people create their own institutions which are judicial, legislative and executive by making the constitution. People made laws and laws made people what to do and what not to do but in liberal democracy these functions and conduct are done by the citizens by their free consent for their security, happiness and liberty within the legal system that they made. Concerning the question of why the rule

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of law is not the rule of men and it gives liberty, Hayek wrote , “when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man’s will and are therefore free. It is because the law giver does not know particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follows from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule.”<sup>12</sup>

In addition law must be clear, transparent, exact and justice so as to prevent the disputes in the practical life. Constitution supports rule of law in the major role. Unites states constitution is based on civil liberty and political liberty, and grants the separation of power. We can generally measure rule of law and liberty which kind of constitution we do have and which terms are written in the constitution. Justice, equality and freedom are the principles that most of constitutions follows, and lack of these doctrines in the constitutions shows want of rule of laws in the countries. We called constitutional justice.

In my point of view, Justice, equality, liberty and rule of laws cannot be separated and interrelated to each other. There cannot be rule of law and justice if there are not equality and liberty. 1947 constitution of Burma written by Burmese Independent leader Aung San and other national leaders granted the basic rights of the people, and Justice , quality and liberty are the core principles of the constitution and granted the rights of nationalities. In the preamble of the constitution , “WE, THE PEOPLE OF BURMA including the Frontier Areas and the Karenni States, Determined to establish in strength and unity a SOVEREIGN INDEPENDENT STATE, To maintain social order on the basis of the eternal principles of JUSTICE, LIBERTY AND EQUALITY and To guarantee and secure to all citizens JUSTICE social, economic and political; LIBERTY of



thought, expression, belief, faith, worship, vocation, association and action; EQUALITY of status, of opportunity and before the law, IN OUR CONSTITUENT ASSEMBLY this Tenth day of Thadingyut waxing, 1309 B.E.(Twenty-fourth day of September, 1947 A.D.), DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”<sup>13</sup> But that constitution was abolished after military coup in 1962. At present, in Burma, there is constitutional debate whether 2008 constitution written by military government grants the basic rights, fundamental freedom of the people. International community criticized military regime to release all the political prisoners and prisoners of conscience including Noble price winner Aung San Su Kyi who was released in 13th November 2010. 2008 constitution of Burma (Myanmar) does not grant democracy and the military took 25% of seats of parliament without entering election. There is no clear cut separation of power and the military has the right to coup in the emergency state according to article 413 (b) of chapter XI of 2008 constitution.

The military government declared that election will be held in 7th November 2010 but that they will not allow the international monitoring group to monitor and see whether the election will be free or fair within the country. Thailand is also facing constitutional problems after several times military coups and political instability. China has one party rule and is facing corruption and political demonstration for liberation of people. Malaysia and Singapore are semi democratic countries and focusing economic development and neglecting individual rights and political freedom. Indonesia got democracy after the people movement led by Megawati Sukarnoputri threw up the Suharto regime and became one of the active members of security council for democracy and human rights. Though Philippine is democratic nation, it is facing corruption, political turmoil and terrorism in the country. Kidnapping and killing Hong Kong

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citizens by terrorist in August 2010 affects the dignity and integrity of Philippine government and there are accusations of mismanagement of police in Philippine.

From the negative point of view, Law is the tool for governing and the government suppressed its people by using laws .In the authoritarian states, we can see this pattern. According to Lenin, law is the suppressing tool to govern the people. Law can be made by the ruling class as they wish for their benefits and interests. Sometimes in democratic country like United States, law became as tool to implement the policy of government by the executive authority. For instance President George W Bush Government passed the Military order in 2001 for preventing the state interests which breached civil liberty and rule of laws such as the right to hear in the public court and the right to get lawyers and legal counseling. There was torture to accused prisoners of terrorism in Guantanamo Bay of Cuba. American civil liberty union issued paper that “the order (of president) exceeds the president’s constitutional authority. It was issued without any authorization by the congress to establish such tribunals and without a formal declaration of war.

It circumvents the basic statutory requirements- at the heart of the compromise on detention in the USA patriot act—that non citizens suspected of terrorism must be charged with a crime or immigration violation within seven days of being taken into custody, and that such detainees will have full access to the federal courts.”<sup>14</sup> The human rights abuses in Guantanamo case became one of the factors for Obama to become president because Obama declared that he will abolish this military camp. In United States , civil society is very strong in shaping US foreign policy and for pressing the executive and legislative branch to make legal changes. Many human rights organizations like Amnesty International, human rights watch are playing the major role for human rights and human emancipation. In fact , human

participation in making legislation is sine qua non for human emancipation. Domestic laws are very important for social justice and political freedom because domestic laws have a strong binding force within the judicial territory of the state. There are many arguments that international laws are in a state of no binding force to enforce them. In fact international law is based on treaty and agreement and it is customary and non binding force. States parties are the primary factors in the international arenas and they can neglect the decisions in some states and actually United Nations has many difficulties to enforce the decisions in accordance with international laws. The major question is who will enforce the international laws , especially when the big nations breached international laws. Nuclear power holder has the rights to threat and breach international laws when international laws are against their state interests. For instance, North Korea used nuclear weapons in the international politics to gain some interest and it became the crises not only for Japan and South Korea but also for the world nations.

On the other hand, international customary laws are generally recognized by the states parties and use them in the international arena in deciding state disputes. International court of Justice is in an important role in deciding the international disputes according to legal way and it gives the advisory opinions to security council and general assembly of United Nations. More or less the international community become familiar with the international norms and standard, and turning to more civilized world by recognizing human rights as soft laws in the international areas.

Universal declaration of human rights become the notions for human emancipations in the world we live and people are focusing for their liberation not only in civil and political but also in economic, cultural and social matters. If we look from the past to the present, men are fighting for democracy and human

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rights for longer time to be free, fair and just society. There are nations struggling for democracy and human rights like Burma and China. Legal institution is well founded in the system of democracy and gives the space not only for the government but also for the people. Democracy without human rights is the system as a human being without the eyes. The right to life, the right to liberty and the right to fair trial are the basic rights granting people within the democratic system. The ideology of democracy came from the ancient Greece in the philosophical perspective. In my point of view, Democracy cannot give itself freedom therefore we demand human rights and individual rights.

Liberty can be achieved by giving human rights. Even United states had faced the slave problem in the earlier period of the nation and slave had been freed by making the amendment by president Lincoln. According to Montesquieu, democratic state and aristocratic states are not free in nature and political liberty cannot be achieved by the ways of democracy. Montesquieu wrote in “the spirit of law” that “It is true that in democracies the people seem to act as they please; but political liberty does not consist in an unlimited freedom. In governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will.”<sup>15</sup>

In fact in our age democracy is controlled by civil society and human rights. Human rights become the notion of emancipation in the twenty first century. From the point of human rights, democracy is one of the rights guaranteed in the Universal declaration of human rights. According to Universal declaration of human rights article (21), democracy is granted as a rights and stated as follows: “(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.(2) Everyone has the right of equal access

to public service in his country.(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” Democracy cannot itself give freedom and sometimes democracy may produce a tyrant like Hitler in Germany. Even United States, world democracy leader breached fundamental human rights in the history. Martin Luther King, Rosa Parks and African Americans struggled for racial discrimination and abolished apartheid in United States. American civil rights movement (1955-1968) gave the way to pass the civil rights acts of 1964 which banned racial discrimination such as color, race, religion and national identity.

After world war two, many countries got independence from colonization. In India, non violence movement led by Gandhi shows how to use people power for civil and political liberation. Gandhi gave Satyagraha which is resistance to tyranny by using civil disobedient movement. Through that civil obedience India got independence and showed many nations in the world to use civil disobedience as a tool for civil liberation and freedom. Gandhi also used ahimsa or non violence as a legal way for people demonstration. Gandhi as a symbol of non cooperation and non violence opposed killing of Jews in Germany and offered non violence method to German people as a struggle to fight against tyrant. He wrote , “If I were a Jew and were born in Germany and earned my livelihood there, I would claim Germany as my home even as the tallest Gentile German might, and challenge him to shoot me or cast me in the dungeon; I would refuse to be expelled or to submit to discriminating treatment. And for doing this I should not wait for the fellow Jews to join me in civil resistance, but would have confidence that in the end the rest were bound to follow my example. If one Jew or all the Jews were to accept the prescription here offered, he or

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they cannot be worse off than now. And suffering voluntarily undergone will bring them an inner strength and joy...the calculated violence of Hitler may even result in a general massacre of the Jews by way of his first answer to the declaration of such hostilities. But if the Jewish mind could be prepared for voluntary suffering, even the massacre I have imagined could be turned into a day of thanksgiving and joy that Jehovah had wrought deliverance of the race even at the hands of the tyrant. For to the God-fearing, death has no terror.”<sup>16</sup>

World war two is the struggle of human freedom to control tyranny of the world, and leaders in the world considered for world peace and human liberty. World war two resulted so many million deaths of people not only in Europe but also in other parts of the world. It is the example of freedom struggles for people how freedom and human emancipation are worthy. Atlantic charter of 1941, an agreement between United States and Britain for the post war situation carried peace, the dignity of human beings and the foundation of human rights declaration principles, freedom from fear and freedom from want. World leaders gathered at Dumbarton oak at 1944 to discuss world peace and it become the foundation for United Nations. “In 1945, representatives of 50 countries met in San Francisco at the United Nations Conference on International organization to draw up the United Nations Charter. Those delegates deliberated on the basis of proposals worked out by the representatives of China , the Soviet Union , the United Kingdom and the United States at Dumberton Oaks , United States in August-October 1944.”<sup>17</sup> The leaders of the world set the principle for future freedom and peace. United Nations became the organization which does not represent one country or another but represents all the member states and becomes the arena of world family to solve the problems in a peaceful ways. Universal declaration of human rights of 1948 becomes the international norm for the

nations. The doctrine of human rights evolved from the philosophical and religious foundations and was accepted by world nations. Even though universal declaration of human rights is not law which has binding force, it becomes international customary law recognized by international community. International covenant on civil and political rights and International covenant on economic, cultural and social rights are the two documents for human rights and human emancipation. Freedom of speech, freedom of expression, freedom of organization, freedom of assembly, freedom of religion, freedom of worship, freedom of jurisdiction are granted for human emancipation and freedom. The nations used these freedoms in their constitution so as to grant the liberty of their citizens. But in some countries, freedom of expression is restricted for religious reason and national security. Freedom of expression includes freedom to seek, share and receive information without restriction of borders of nations. Freedom of expression will be restricted for the public good and “national security”, and “for respect of the rights or reputations of others” according to article 19 (3) of International covenant on civil and political rights. Morality and religion are the sensitive matters to ban freedom of expression.

Philippine, Malaysia, Thailand, Cambodia, Singapore, Indonesia and Burma (Myanmar) are also banning freedom of expression in media for the reason of public order, security, morality and religious matter and sex. In Malaysia there are banning of freedom of expression. “In 2006 alone there were 13 orders made banning 54 publications mainly titles regarding sex and religion.”<sup>18</sup>

In a globalizing age that we live, media is very important for freedom of expression and information. Without freedom of expression, there cannot be human emancipation. Globalization extends human liberation by means of internet connection and

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media. Authoritarian regime faced the challenge of media in the twenty first century in cutting information and it is very difficult for regimes to control media. Radio free Europe is one of the factors opening the eyes of citizens for demanding democracy and human rights in Soviet Union. Radio free Asia becomes the challenge for Military government, and people from Burma get free flow of news and ideas in a cost effective way. Internet connection supports the demonstration of people in the authoritarian states for the freedom cause. The suppressive government cannot control freedom of the will of the people because of information technology. Myanmar military government cannot cover or hide saffron revolution in 2007 (which is Buddhist monks demonstration) to the international community. The result is that the military government declared to its own people and international community to held election in seventh November 2010.

Even though there is controversy about election whether it will be free and fair election within the country, it will be one of the ways for people to expend democratic society which will grant fundamental rights and freedom and to change the present undemocratic constitution. In a globalizing age, NGO plays an important sector as a force for changing authoritarian state to democratic one by using information technology such as phone, fax, internet, radio, TV, etc. Globalization affects the national legal jurisdiction and legislation in the countries. For instance, in Cambodia, there is criminal jurisdiction about genocide in the local court including international judges. The new form of global governance and economy appeared in the international community.

Crime against humanity committed by local governments are concerned by the international community and global court like International criminal court and International court of justice are important in dealing with international disputes and



crimes committed by governments to their own people. National laws are changed to agree with international human right laws in a civilized nations. Regional organizations like EU, OAS, OAU and ASEAN played the major role in the respective regions and made regional laws to grant fundamental human rights within the regions. EU, OAS and OAU have regional human right courts not only to protect and promote the rights of people in the region but also preserve human emancipations by legal ways.

Even though the world is facing with global crime, nuclear issue, discrimination of women, child labor, economic exploitation, environmental problems such as global warming, land slide, storms , water shortage in South Africa and other parts of the world , human beings are still struggling for human emancipation by finding ways and made laws to make people free and secure in the global age. Terrorism is the major issue that the world is facing for human liberty, peace and security and threat to human rights and liberal value of people. From the philosophical point of view, terrorism is the result of radical Islamism which is interpreted by extreme Islamists .

Nine eleven event in New York city is the symbol of terrorism and shocked the world. ‘The clash of civilization’ is the force of global terrorism which threat human dignity and integrity. Religion will be not only the source of human liberty but on the other hand the source of terrorism. It is very easy to be conflict upon the matter of religious doctrine and there are historical instances such as Kashmir conflict between India and Pakistan, Israel and Arab conflict in the middle East. These issues are chronically rooted in religious matter and difficult to solve and may lead to Nuclear war. There are concern that nuclear weapons will arrive to terrorist and the government of nuclear holder are more and more strict in holding nuclear weapons. According to some political scientists, Nuclear weapons holder of nations is the cause of power balance between them.

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In conclusion, whatever worse situations we are facing in the world, the evolution of human rights laws are advancing steadily not only in the region but also in the planet we live. International human right laws are the new pattern of human emancipation and it gives not only the peace, security and liberty of people but also the stability and equality of the world. The states and regional organization make legal reform in their constitution to give liberty and freedom to the people and vice versa people struggled to change the laws which will grantee their liberty and emancipation both for the present era and for the future time that their generations will live and survive. In the longer time, the law of people will prevail the tyrants and the people will live without fear and worries and feel the safety and security of their lives because of the rule of laws representing people.



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### Notes

<sup>1</sup> Notes on political and human emancipation , Mark Rupert, Syracuse University.

<sup>2</sup> Professor Julian Bpyd's reconstruction of Jefferson's "original rough draft" of the Declaration of Independence".loc.gov.2005-07-06. / (This is Professor Julian Boyd's reconstruction of Thomas Jefferson's "original Rough draught" of the Declaration of Independence before it was revised by the other members of the Committee of Five and by Congress. From: The Papers of Thomas Jefferson. Vol. 1, 1760-1776. Ed. Julian P. Boyd. Princeton: Princeton University Press, 1950, pp 243-247)

<sup>3</sup> see US constitution

<sup>4</sup> Two concepts of liberty , by Isaiah Berlin.

<sup>5</sup> Abraham Lincoln address at sanitary affair,1864/ The political language of emancipation ,by Demetrius L, Eudell ,p 23.

<sup>6</sup> Law , globalization and emancipation , by Boaventura de Sousa Santos ,p-32.

<sup>7</sup> see "social contract theory" at Internet Encyclopedia of philosophy(IEP).

<sup>8</sup> see "social contract theory" at Internet Encyclopedia of philosophy(IEP)

<sup>9</sup> See 'The spirit of Law' Book II by Montesquieu.

<sup>10</sup>. Cooper, John et al. Complete works by Plato, p- 1402(Hackett Publishing, 1997)

<sup>11</sup>. Massachusetts constitution, Part the first , art XXX( 1780)

<sup>12</sup>Hayek , The constitution of liberty (Chicago, University of Chicago press, p-210-12 ( quoted by Randall Peerenboom in 'Asia discourses of rule of law')

<sup>13</sup>See preamble of 1947 constitution of Burma

<sup>14</sup> American Civil Liberty Union--Interested person Memo on military trials in terrorism cases (11/29/2001)

<sup>15</sup>. see 'The spirit of law' Book IX by Montesquieu.

<sup>16</sup>Jack, Homer. The Gandhi Reader, pp. 319–20.

<sup>17</sup>.see [www.history of UN](http://www.historyofun.org).

<sup>18</sup>. Freedom of Expression in South East Asia,

Trends and challenges in Media law ,May 2007 by Peter Noorlander ,p -9

## PART - SIX

### The Evolution of Human Rights and Politics

What are Human rights? Human rights are the rights of human beings which is inherent, inborn and inalienable. "Human rights are rights which some hold to be inalienable and belonging to all humans, according to natural law. Such rights are believed, by proponent, to be necessary for freedom and the maintenance of reasonable quality of life."<sup>1</sup>

According to the preamble of Universal Declaration of human rights, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Human rights are fundamentally based on justice, equality, liberty and fraternity. "The idea of human rights, that is the notion that any one is a set of inviolable rights simply on ground of being human regardless of legal status, origin or conviction for crimes, emerges as an idea of humanism in the early modern period and becomes a position in the 18th century age of enlightenment . The modern human rights movement as a consequence comes to bear in the post world war two era"<sup>2</sup> The evolution of human rights is interconnected with theory, philosophy and politics from the past to the present age.

According to Professor Tony Cathy's Human rights lecture in the University of Hong Kong, 'the contemporary foundation for human right comes from the universal declaration of human rights of 1948. The most powerful single reason for this event was the Holocaust, the genocide committed against

the Jews by the Nazi German regime between 1941 and 1948.’ “The idea of human rights may be seen as an offspring of the idea of natural rights in the seventeenth century, which became a political ideology on the American continent and in France toward the end of the eighteenth century. International human rights might be said to have been conceived on January 6th, 1941, the date of the famous “four freedom” message to congress by President Franklin Delano Roosevelt (FDR), and born on December 10, 1948, the date on which the Universal declaration of Human rights was proclaimed by the General Assembly of the United Nations.”<sup>3</sup> Roosevelt said, before US entered the war, that freedom of speech, freedom of religion, freedom from want and freedom from fear are the essential human freedom for the future of the world.

President Roosevelt and Prime Minister Winston Churchill expressed, in the Atlantic charter, their hope to see to establish “a peace which will afford assurance that all men in all the lands may live out their lives in freedom from fear and want.”<sup>4</sup> World War Two gave the lessons to the people that the regime of tyrant harmed not only the people of his country but the whole community of the world, and abolished and destroyed the individual rights of people. “Now as a result of the Second World War, it has become clear that a regime of violence and oppression within any nation of the civilized world is a matter of concern for all the rest.

It is a disease in the body politics which is contagious because the government that rest upon violence will, by its very nature, be even more ready to do violence to foreigner than to his own fellows citizens, especially if it can thus escapes the consequences of its act at home. The foreign policy of despots is inherently one which carries with it a constant risk to the peace and security of others. In short, if aggression is the key-note of domestic policy, it will also be the clue to foreign relation.”<sup>5</sup>

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There are many documents which give variety of vision about human rights and the basic for Universal declaration of human rights such as Magna Carta (1215), English bill of rights (1689), the French declaration on the rights of man and citizens (1789), American Declaration of Independence (1776) and US constitution and Bill of rights (1791). The San Francisco Conference of 1945 is sine qua non for the future Universal declaration of human rights and the appearance of United Nations. Delegates from many countries from Asia , Africa, Europe and America around the world had had the great opportunity to present their various points of views ,and the history of the world had changed from this turning point. The leaders from many nations gave a speech about rights and responsibility for the future international community, world peace based on politics.

US president Harry Truman declared that “If we should pay mere lip service to the inspiring ideals and then later do violence to simple justice ,we would draw down upon us the bitter wrath of generations and yet unborn... We must build a new world – a far better world – one in which the eternal dignity of man is respected.”<sup>6</sup> “We are all asked to be realist,” said by Ramaswami Mudaliar of the Indian Delegation “ we are asked to recognized various factors in the world set up as it is today. There is one great reality one fundamental factor, one eternal verity which all religion teach, which must be remembered by all of us, the dignity of the common man, the fundamental human rights of all beings all over the world.

Those rights are incapable of segregation or of isolation. There is neither border nor breed nor color nor creed on which those rights can be separated as between beings and beings. And, speaking as an Asiatic, may I say that this is the aspect of the question which can never be forgotten, and if we are laying the foundation for peace we can only lay them truly and justly....

Those fundamental human rights of all beings all over the world should be recognized and men and women treated as equal in every sphere, so far as opportunities are concerned.”<sup>77</sup>

Before drifting universal declaration of human rights, United Nation invited religious leaders to get the opinions and advices for setting up the fundamental human rights. The birth of human rights is evolved from religious doctrines and complex in the struggle with social and political movement. All religion is based on rights and responsibilities, and universal values such as justice, equality, compassion, loving-kindness, brotherhood and personal freedom. Religion reveals universal values in various forms and deep seated in the hearts of human beings. Hinduism, the oldest religion was founded three thousand years ago based on good and evil, wisdom and good conduct, importance of duty (dharma). It also includes charity to poor people, sick person and the hungry, the homeless.

Mahatma Gandhi stated non- injury and non violence method for his freedom struggle of India. He showed the doctrine of non- torture to others and resistant movement to get equality, non discrimination and freedom of Indian people. He said, “Non injury (chimsa) is not causing pain any living being at any time through the action of one mind ,speech or body.”<sup>78</sup> By his devotion of truth and Hinduism belief, Gandhi shows the people of India and people around the world how to get freedom and equality by non violence method.

“Genesis, the first book of Judaism’s Torah written centuries ago, begins by telling the shared fatherhood of God to all people and the fundamental importance of the creation of human beings as members of one family and as individual endorsed with worth.”<sup>79</sup>Judaism, one of the oldest religion in the world shows, in the early period, that every individual human being is valuable and worthy of dignity and personal freedom. It shows also that human being need to respect to each other as a

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member of human family. Christianity is a religion based on loving-kindness, self-suffering, tolerance, brotherhood and equality. The doctrine that “all men is created equal before the God” is really Christian doctrine, and used in the American declaration of Independence. In the American declaration of Independence , it is clear that founding fathers use the language of religion like “ all men are created equal, that they are endowed by their creator with certain unalienable rights , that among these are life, liberty, and the pursue of happiness . That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.” Apostle Paul admonish his believers to notice that “there is neither Greek nor Jew, nor slave or free, nor man or women, but we are all one in Christ.”<sup>10</sup>The pursue of happiness is the purpose of human rights and it means freedom from want and freedom from fear. Liberty concerned with freedom from fear, restraint, arbitrary arrest and detention.

According to universal declaration of human rights (Article-3), everyone has the right to life, liberty and security of person. Life is the existence of human being. The right to life is the supreme and most important in the fundamental doctrine of Human rights because without this right, there can not be human beings and human rights. The right to life, liberty and security of person are connected with the right not to be tortured and slavery. According to Universal declaration of human rights, article-5, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Jesus Christ shows tolerance and loving-kindness to people so as not to make torture and kill.

Buddhism was founded by Gautama Buddha in India over 2500 years ago. Gautama Buddha taught his disciples Morality, Concentration and Wisdom. He taught equality, justice and brotherhood, loving-kindness to people in India and he is



the first one who fought against caste system of India, making equality to respect to each other without distinction as to race, religion, language , age , or color in his community . In his famous doctrine ‘Kalama Suttanta’, he expressed freedom of thoughts and expression, and freedom of religion and belief, especially freedom from bias and bondage. The end of Buddhism is freedom from suffering and freedom from want, and it is agreeable with the purpose of Human right which is freedom from want and freedom from fear. No killing and torture (Sila) is the basic principle of Buddhism . The right to life and the right to liberty are the basic doctrine of Buddhism. “Scriptures like the Tripitaka and Anguttara-Nikaya pay consideration to the enduring problem of human suffering (dukkha), and stress that one’s duty is to overcome selfish desires and private fulfillment by practicing charity and compassion (karuna) toward all beings.” written by Pawl Gordon Lauren in his book, ‘The evolution of human rights’. King Ashoka, the founder of India empire who devoted to Buddhism at three century BC, showed respect and equality to his people and made to treat to each other without based on religion, caste, sects, color and race, and showed tolerance about religion and non-violence (ahimsa).He is famous about his tremendous donation of buildings, water dam, bridges, gardens and parks. At the modern time, Delai Lama pronounces that “ for all humanity as brother and sisters and if we understand each other’s fundamental humanity, respect each other’s rights, share each other’s problems and sufferings.”<sup>11</sup>

In Islam, Qur’an scripture tell about peace, brotherhood and justice. Mohammed’s announced that “Jews (and later Christian) who attach themselves to our common wealth shall be protected from all insults and vexations; they shall have equal right with our own people and shall practice their religion as freely as Muslims”<sup>12</sup> like the first charter of freedom of conscience in human history. According to Mohammed declaration, Islam

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accepts the religious freedom and the right to equality. Muslim needs to treat like brother and sister to bring peace within the Islamic community and expresses equality. There are the principle of justice , moderation and the protection of women, children and the environment, even in time of War laid down by Caliph Abu Bakr for the guidance of the first expedition into Syria, as follow: “ Be just: break not your plighted faith; mutilate none; slay neither children, old men nor women; injure not the date-palm nor burn it with fire , nor cut down any fruit-bearing tree; slay neither flocks nor herd nor camels, except for food; per chance you may come across men who have retired into monasteries, leave them and their works in peace.”<sup>13</sup>

Religion, in some part, gave the way for human rights and on the other hand, philosophy is the foundation of human rights. Philosophy is really the river of thoughts expending human rights from the past time to the present. Moral and political philosophy contributes us to understand the complexity how the present human rights ideas have been flowing through the history. From the philosophical point of view, natural rights gave the one source for the arising and evolution of human rights. Many natural right thinkers stated in various views about natural rights and natural law. Thomas Hobbes (1588-1679) was the leading social thinker of natural rights and social contract. Social contract theory is based on the agreement between the government and the people. The authority of the government comes from the consent of the people how to act upon them. Hobbes rejected the divine right which is vested by the god to the king. Leviathan, his master piece of work developed the nature of human beings which is connected with morality and politics.

James A Donald writes in his book ‘Natural law and Natural rights’ that “Natural law and natural rights follow from the nature of man and the world. We have to defend ourselves and our property, because of the kind of animals that we are.

True law derives from this right, not from the arbitrary power of the omnipotent state.” According to John lock, life, liberty and property are natural rights. From the point of view of John Lock, the people can overthrow the tyrants who are bad and not dutiful. People don’t need to obey the tyrant if he is not doing in accordance with natural law. This point is really based, in the present time, on the democracy and the people can choose their own government according to their wishes, and firmly established in Universal declaration of human rights, article 21 which stated as every one has the right to take part in the government of his country, directly or through freely chosen representatives.

John lock stated in the second treaties on civil Government (1690) that “The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions; for men being all the workmanship of one omnipotent and infinitely wise Maker.” He expressed the right to life, liberty and the right to possession (economic right) and described the right to equality that we accept in the universal declaration of human rights at the modern age. John lock also greatly influenced the philosophy of American Revolution. Rousseau wrote that “man is born free, but everywhere he is in chain.”<sup>14</sup> Montesquieu expressed in ‘the Spirit of Law’ the division of power , the legislative , judicial and executive authority and shows check and balance of power and really control the government so as not to be tyrant and give the vision of how to get the rights for the subject. Paul Gordon Lauren wrote in the book “the international evolution of human rights” that ‘Montesquieu, Voltaire ,David Hume , and the Marquis de Condorcet called their movement the enlightenment, the dawning of a new age of knowledge’. These enlightenment writers highlighted the social problems, rights and responsibilities

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and caused the revolutions which overthrew the tyrant and authoritarians. American founding father, Thomas Jefferson defends individual rights that are more important than state rights because the state has the authority to do things that they want. The state can enforce the people by military or armed force or other means. He argued that the rights of the people must be protected by writing firmly in the constitution because people are defenseless if their rights are infringed. Therefore they need the protection under constitution. Thomas Jefferson is the one who is called loving-father now a day because of defending individual rights.

From the perspective of Socialism, Max and Lenin were in a leading role in defining the rights of human beings. Max rejected the rights of capitalist and favored the rights of working class. They argued that the rights must be equal among all the people and rejected the governing of capitalist. “The enforcement of the basic rights can be allowed only to the extent to which it is in accord with the interest of the working people .Barring this fundamental principles, the demand for these rights in other contract is altogether unlawful and constitutional .The social interest of the working people is the one principle of determining all the fundamental rights.”<sup>15</sup> Although Socialism does not give the universal value of human rights, its theory of working class supported the economic rights of the people. Later the international covenant on economic, social and culture rights are supported by socialist nations.

While we are thinking that natural rights are the basic for expending the ideas of human rights, we can trace back to Confucius theory of rights, harmony and peace. “Confucius (551-479 BC), according to Chinese tradition, was a thinker, political figure, educator, and founder of the Ru School of Chinese thought. His teachings, preserved in the Lunyu or Analects, form the foundation of much of subsequent Chinese

speculation on the education and comportment of the ideal man, how such an individual should live his life and interact with others, and the forms of society and government in which he should participate.”<sup>16</sup>Linyu or Analects is the collection of conversation between Confucius and his disciples. Confucius encouraged the education of citizens to get reasoning and rationalizing. He taught love and compassion and to respect to each other. ” Confucius taught, “What you do not wish for yourself, do not do to others .Since you yourself desire standing then help others achieve it, since you yourself desire success then help others attain it.” <sup>17</sup>This doctrine really gives the respect to fellow human beings and gives the meaning of responsibility. Confucius saw human nature as goodness. Confucius dictum explained us righteousness and harmony not only in the family but also for the whole country which is as follow: “If there be righteousness in the heart, there will be beauty in the character. If there is beauty in the character, there will be harmony in the home. If there is harmony in the home, there will be order in the nation. If there will be order in the nation, there will be peace in the world.”<sup>18</sup> Harmony and peace are interrelated and there is no harmony, there can not be peace and happiness.

Actually peace and happiness come from harmony between people, and harmony of people and his environment. The purpose of human rights is freedom from fear and freedom from want, and to achieve happiness of the people. Stephen C. Angle expressed his view about Confucius philosophy in his article ‘Human rights and harmony’ that “first Confucians played important roles in the early articulation of rights and human rights in China ; second , the explicit acceptance of Confucians values by human rights thinkers continued to verifying degrees thereafter. This is important for our subject because these individuals typically saw human rights and harmony as conceptually interrelated.”<sup>19</sup>Harmony in the family gives harmony

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in the state and harmony in the state gives harmony in the world, and harmony in the world give peace between the nations. In my point of view, harmony means the harmony between diversities of individuals, and accepts the differences of Individuals and tolerance between disagreements. This harmony becomes universal value and we practice these values around the whole world as human rights.

Really the ideas of human rights came from the various point of view such as religion, morality, social and political theory and cultural aspect. Michal J.Perry explained his ideas of human rights as two parts. As the first part, he explained that human being is sacred being and their rights are inviolable and inherent in dignity and worth .Human being is “an end in itself”. As the second part, he explained that “because human being is sacred, certain choice should be made and certain other choices should be rejected; in particular certain things ought not to be done to any human beings and certain other things ought to be done for every human beings.”<sup>20</sup>According to point of Perry, not only human being is valuable but also he has the right to reason, and knows cause and effect. Human being has the rights and responsibilities what should do and what should not do. He explained that the Bill of human rights is consisted of three documents.

The first is Universal declaration of human rights (1948) and the second is International Covenant on Civil and political rights (1976), and the third is the International covenant on Economic, Social and Cultural rights (1976).According to Perry Point of view, peace and respect are interrelated and peace can be achieved by extending respect and concern to all human beings. Perry cited US Secretary of state of Warren Christopher that world nations must be careful of respecting human rights and democracy as ‘the world most peaceful and stable’. “A world of democracies would be a safer world.... States that respect human

right and operate on democratic principles tend to be the world's most peaceful and stable. On the other hand, the worst violators of human rights tend to be the world's aggressors and proliferators. These states export threats to global security, whether in the shape of terrorism, massive refugee flows, or environmental pollution. Denying human rights not only lays waste to human lives; it creates instability that travels across border."<sup>21</sup> Because of 9/11 terrorism, America sees terrorism as the threat to human right and democracy.

In our modern age, human rights, democracy, civil society and politics are interconnected and support to each other for the global justice, peace and equality. The meaning of Justice was introduced through the history by many thinkers, politicians, social scientists and Jurists. If there is justice denied, there cannot be human rights and the dignity of human beings will be lost. From Plato to John Rawls through history, the concept of justice has been defined. Therefore many leaders consider justice and in various means, they establish systems to maintain justice. In United States of America, Abraham Lincoln abolished slavery and Dr. Martin Luther King fought for abolishing the racial and color discrimination. In South Africa, Nelson Mandela was sentenced to 27 years of imprisonment because of his deliberate effort against apartheid ,and in Burma, Aung San Su Kyi, noble laureate , was under house arrest for 17 years because of her devoted struggle for justice , human rights and democracy. Nelson Mandela said that he is still walking along road in the present era. He said,“ I have walked that a long road to freedom. But I have discovered that there are many more hills to climb. I have taken a moment here to rest, to steal a view of the glorious vista that surrounds me, to look back at the distance I have come. But I can only rest for a moment, for with freedom comes responsibilities, and I dare not linger, for my long walk is not yet ended.”<sup>22</sup> In south Korea, former president, a noble price winner

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fought against authoritarian so as to arrive the present South Korean developed country. These all struggles are respectable and recorded in the world history and, there are stilling struggling for the dignity and integrity of human beings for the pursuing of global justice and peace.

In the modern age, civil society is the force in the momentum and river of human rights movement. Many NGOs plays an important role in promoting and protecting human rights. There are many human rights organization in the world up to “twenty six thousand organizations”.<sup>23</sup> They play from the local level to the global extent and interconnected in the globalization age like Amnesty International, Human rights watch, Asia Human rights Commission, Arab Organization for human rights, etc. Civil society makes the space for capacity development in grass root level and becomes a force in the political change against tyrant and authoritarian regime. Vaclav Havel, a former president of Czechoslovakia and Noble prize winner said ,“civil society makes room for the richest possible self-structuring and the richest possible participation in public life.”<sup>24</sup> Burmese prodemocracy leader said , “a battle field is not necessary a place where people are shooting at each other in civil society where human rights are ignored, where the fights of people are violated everyday, it is like a battle field where lives are lost and people are crippled.”<sup>25</sup>

A well developed civil society can support people by means of limiting the government authority and the people can develop themselves by forming the association ,and becomes the uniting force for struggling their rights such as the labor rights, women rights , political rights and civil rights. United Nation is the best example for the global civil society. In the era of globalization, civil societies are more complicated by the support of media and internet communication. Jodi Williams, noble price winner of 1997, one of human rights activists from US, especially



for land mine eradication, said that she is using email and internet to connect and communicate over one thousand human rights organization around the world.

While civil society plays an important section in the community, politics is the basic factor for human rights. If we see from the practical point of view, we know that politics is the changing force for history of human rights. Civil right movements become the new political movement to change not only political paradigm in the country but also the constitution weakness. We can see many civil right movements around the world which change the political situations. For instance, Philippine and Indonesia civil rights movements in South East Asia abolished the authoritarian regimes in the country and appeared to be democratic countries. Burma is still struggling to get fundamental human rights and democracy in the country. In the Twenty first century, human rights become the foreign policy of some nations as United States. "Any state foreign policy is the result of a two level game of values and pressures combined with International standards and pressure to produce a given policy in a given situation for a given time. This combination of domestic and international factors varies from state to state, from time to time, and from place to place, making generalization difficult to fashion with reliability."<sup>26</sup>

United States of America uses democracy and human rights as a foreign policy in the twenty first century and makes citizen diplomacy to train local residents in the grass root level such as political dissidents, lawyers, teachers and scholars in the authoritarian states in changing to the democratic states which granted fundamental human rights. The developed democratic states understand that they need to promote the ideas of human rights and democracy to defend the terrorism because terrorism was grounded from the radical Islam which rejected liberal ideas. These countries understand that it is not safe by way of protecting

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with military power but it is safer to change the world to democratic one which accepted liberal democracy which granted fundamental human rights. The more the countries are democratic in the world, the less the wars in the planet we live. In the global politics, United Nations become the center and forum for the Nations.

United Nations appeared because of the demand of the history and world leaders recognized to promote and protect peace and security according to the purpose of the Charter of United Nations. United Nations becomes a new political arena in the world of politics. So as to avoid wars and to solve the problems and dispute within the UN systems, the countries use international legal and political diplomacy in the stage of United Nations. In the preamble of UN Charter, the countries in the world set up the principles ‘to save succeeding generation from the scourge of war’ and ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person.’ The countries within the particular regions set up regional organizations both for mutual interest and for promoting human rights as well as fundamental freedoms. European Union, Organization of American states , Organization of African Unity, Association of South East Asia were founded and established regional charters and human rights bodies which protect and promote human rights and human values. Regional Human rights courts were also established in Europe, America and Africa to decide upon the human rights cases and to prevent the abuses of power of governments and to protect, promote human rights within the region.

In conclusion, the history of human rights since the adoption of Universal Declaration of Human rights in December 10, 1948, is continuously changing and the ideas of human rights more and more brighten in accordance with the struggle of human rights movements around the world. The nations will

appear as the democratic nations which granted the rights of human beings, and the authoritarian states are facing the questions of human rights raised by their own people and the international community. The people, the nations, local, regional and international non profit organizations are advancing to the new era which will grantee human rights and human value which is inborn, inalienable, inherent in dignity and conscience of human beings. The struggle for human rights gives not only the vision but also hope for the freedom of human beings both in the present and future.




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#### Notes

<sup>1</sup>Human rights and humanitarian affairs ,by P.K Goyal, p-1.

<sup>2</sup>United Nations, Retrieved 2010-9-13.

<sup>3</sup>.Realizing Human Rights, Samantha Power and Graham Allison, p- 4.

<sup>4</sup>. United States department of state executive agreement series No.236, cooperative War effort, Washington D.C :US government printing office , 1942.)

<sup>5</sup> Commission to study the organization of the peace , International Safeguard of Human Rights, as reproduced in International conciliation.

<sup>6</sup>Harry Truman, Verbatim Minute,28 April 1945 ,UNCIO, documents ,1:113-15

<sup>7</sup>Ramaswami Mudaliar, Verbatim Minute,28 April 1945 ,UNCIO ,documents ,1;245.

<sup>8</sup>“Human rights in religious tradition” New York pilgrim press, 1982 , page-77-84.

<sup>9</sup>The evolution of International human rights” by Paul Gordon Lauren, page -6

<sup>10</sup>. Galatine, 3:28

<sup>11</sup>DaLai lama ,Ocean of wisdom: Guidelines for living (Santa Fe: Clear light, 1989 , p-13.

<sup>12</sup> Smith ,The religion of Man , p-249

<sup>13</sup>Human rights in Islam by M.H SYED, p-70

<sup>14</sup>. Jean- Jacques Rousseau, Contract social , ou Principes du droit politique ,

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Paris Garnier ,1990 ed. P-236

<sup>15.</sup> Human rights in Islam by M.H SYED , p-58

<sup>16.</sup> Confucius, first published wed Jul 3,2002; substantive revision, Tue Sep 5 ,  
2006 , Standard Ford Encyclopedia of philosophy

<sup>17.</sup> Lunyu12.2,6.30

<sup>18.</sup> The evolution of international human rights, Paul Gordon Lauren ,p-7

<sup>19.</sup> Human rights Quarterly 30 (2008) by John Hopkins University Press

<sup>20.</sup> The idea of human right by Michal J. Perry, p- 5

<sup>21.</sup> The idea of human rights by Michal Perry ,p- 34

<sup>22.</sup> Long walk to freedom by Nelson Mandela, p-625

<sup>23.</sup> Hsun- tzu, as cited in UNESCO, Birth right of Man, p- 303

<sup>24.</sup> Democracy reader by Sondra Myers , p- 191

<sup>25.</sup> Civil society and political change in Asia by Muthiah Alagappa, p-3

<sup>26.</sup> Human rights and comparative foreign policy, edited by David P. Forsythe.,  
p- 2



## PART - SEVEN

### Why the Land Laws Should Be Amended For the Cause of Rule of Law in Myanmar?

Rule of law is fundamental concept accepted by the international family of laws and politics as well as by Myanmar political and legal family. Without the rule of law, there cannot be sustainable development and stability for the nation. Even though there is different definition of rule of law, United Nations recognized fundamental human rights, law and order, government bound by law as basis key elements.

According to a 2004 report of the UN Secretary-General, rule of law requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of power, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. (United Nations 2004) <sup>1</sup>

In Myanmar, the legal community and political society talked about rule of law which become the popular term used by both the government, the opposition and civil society since 2010. But there are challenges mainly in constitutional amendment and land issues. Among them, land is related with political, economic, environmental and constitutional matter. Constitutionally the ultimate owner of the land is the Union including all natural resources <sup>2</sup> and the Union shall enact necessary law to supervise extraction and utilization of state owned natural resources by economic forces. At the same time the Union shall permit citizens

the right of private property, right of inheritance, right of private initiatives and patent in accord with law.<sup>3</sup> The above constitution provision is really good and in practice, it does not reflect the constitutional protection to farmers. Concerning fundamental citizens' rights, the Union Supreme court can issues writs but in practice there is no winning case concerning land confiscation and land concession apart from some of the cases in the township level court which is constructive change for Myanmar judiciary.<sup>4</sup> Currently there are two cases relating land and one is in Dawei township in Thanintharyi division and another case in Pyin Oo Lwin in Mandalay division. The first case was sued by farmers to Thai Ponepet company and ministry of mine and Dawei lawyers group is standing for the farmers. The case is interesting and it is at the jurisdiction of District court and farmers asked the company to give damages.<sup>5</sup> The latter case is that the farmers sued the company and the company sued the government for not taking responsibility of the land allocated. These two cases are inspiring cases and if these cases are won by the farmers, these will be the standard cases for farmers in the future.

Myanmar constitution mentioned about the protection of farmers as follow: the union shall enact necessary laws to protect the right of peasants and to assist peasants to obtain equitable value of their agriculture produce.<sup>6</sup>

According to constitution, the Union parliament passed two land laws: namely land law and vacant, fellow and virgin land laws (VFP). Even though the laws on lands were passed, the question is whether these land laws can really protect the rights of farmers. The answer is very simple as “No” and there are many disputes concerning land in Myanmar.

Current land laws have many weak points and favor to crony- company near to former military regime. According to official data, total land confiscation is 247,077.60 acres in 2013 and among 740 land cases – 565 cases are dispute with military

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which confiscated the land.<sup>7</sup> Until 2014, there will be around unconfirmed 500,000 acres of land confiscation according to local journals.

The key challenges in the current land law is that final decision of State and region land management body is final and conclusive<sup>8</sup> and there is no opening to judicial review and judicial appeal to High court or Supreme Court of the Union apart from writs concerning fundamental citizens' rights mentioned in the 2008 constitution<sup>9</sup> even though constitution mentioned that right of citizens to defend in all cases and appeal decisions made in an independent judiciary.<sup>10</sup> Another challenging situation is that current two land laws namely farm land law and vacant fellow and virgin land laws(VFV)<sup>11</sup> favors crony and company rather than protecting small -holder farmers and abolish the law safeguarding farmers' rights, 1963.

VFV law mentioned that the authority can lease land to company or any body to 5000 acres at a time up to a maximum of 50,000 acres with leases of up to 30 years on the land and exceptions are given for more than 5000 acres by the agreement of Government. At the same time foreign investment law granted 50 years for land tenure and can extend for two times and each for ten years<sup>12</sup>. It is inconsistent with Foreign Investment laws and favor to foreign company more than local farmers for the period of land tenure.

In addition registration process for land ownership is complex and in practice there is bribery and corruption at the registration and delayed in process.<sup>13</sup>

In summary, for the rule of law in Myanmar concerning land issue, below is recommendation to think, consider and solve. Firstly the current land laws should be amended protecting small-holder farmers rights rather than the company interest and secondly to give the space for judicial review of every administrative decision of land management body at the high



court and then to Supreme Court. Thirdly land registration process should be transparent and accountable and to think on one stop shop service or simple way if there is sufficient evidence at the basis level and fourthly the authority need to enforce and follow 1894 land acquisition act for the land confiscation. Finally UN voluntary guideline is a must for land policy for farmers in ethnic mountain region to grantee customary way of agriculture such as shifting cultivation.




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#### Notes

<sup>1</sup>“Critical issues for the rule of law in Myanmar” by Kyaw Min San , Myanmar’s Transition , p. 217, ISEAS 2012 ,

<sup>2</sup>Sect. 37 (a) of 2008 constitution, sect.18 of 1974 constitution, art. 30 of 1947 constitution

<sup>3</sup>. Sect. 37(b,c) of 2008 constitution

<sup>4</sup>Interview with Daw Zar Hmee Oo , Advocate, “Justice for All” law firm, Bago. In this case District authority confiscated the land from local resident for the purpose of HanTharWaddi International airport project. District authority charges to the client with Sect. 447 of Penal code , trespass and sect.353 , assault or criminal force to deter public servant from discharge of his duty . The township judge decided that land confiscation is not legal and it is not amount to trespass because the authority did not follow 1894 land confiscation act which states that for land confiscation the president must sign and Collector(district authority) send the notice to farmers . If they do not agree for negotiation for consent and compensation., they need to go to court for compensation.

<sup>5</sup>Interview with Dawei lawyers group in Dawei city , 2014

<sup>6</sup>. Sect. 23 of 2008 constitution

<sup>7</sup>Report of Investigation Commission for prevention of Public Disenfranchisements connected to Confiscation of Farmland and Other Lands, Union Parliament

<sup>8</sup>. Sect. 25 (c ) farm land law, 2012

<sup>9</sup> Sect. 296 of 2008 constitution

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<sup>10</sup>Sect. 19,375, 377, 378 of 2008 constitution

<sup>11</sup>Farmland Law (Law No.11/2012 (March 30), Vacant ,Fellow, Virgin land Management Law, (Law No.10/2012)

<sup>12</sup>Sect. 31/32 of VFV law.

<sup>13</sup>. Interview with farmers from Bago township, October 2014



## PART - EIGHT

### Promotion and Protection of Human Rights and Democracy in Myanmar

#### 1. Introduction

Democracy can promote and protect human rights because democracy is not only a system of government which makes check and balance of power but also a system of ‘the government of the people, by the people, for the people’. Democratic government can promote, protect and fulfill fundamental human rights and citizens rights. In fact, the responsibility of the government is to perform for the greatest good of the greatest majority of the people with the greatest prudence. In my point of view, democracy can enhance the ability and capacity of citizens in the nation to realize their rights and freedom. In this paper, I will focus on the movements and issues of protection of human rights and democracy in Myanmar as a case study.

#### 2. Democracy and human rights movement in Myanmar

Myanmar got independence from the British in 1948 and the country was under democratic system according to 1947 constitution from 1948 to 1958. U Nu was the prime minister in this period. From 1958 to 1960, there was civil war between the government and ethnic minority and communist. Ethnic minority did not satisfy in the constitution of 1947 because even though 1947 constitution is democratic one but in the opinion of Ethnic group, constitution is ‘federal in theory and unitary in practice.’<sup>1</sup>In

1962, U NE Win took the state power by means of military coup and the country was under military rule since that time to the present. In 1974, U Ne Win drew the 1974 socialist constitution and ruled the country until 1988. In 1988, there occurred the people general demonstration against military system of U Ne Win and Ne Win government was thrown down by this movement. The demonstration occurred because of the small conflict between the Rangoon Institute of Technology (RIT) students and the civilian at the tea shop in Insein Township at Yangon in March 12 1988. The student movement was stronger after the young student Phone Maw was gunned down by the police<sup>2</sup> and it led to the general civil movement which was included by the people across the country. But the prodemocracy and human rights movement of 1988 was cracked down by the military led by General Sein Lwin and Military took the state power at September 1988 under the name of State Law and Restoration council (SLORC) led by General Saw Maung. This civil rights movement demanded to change the country to fully democratic country which grants fundamental human rights and democracy in the country. Aung San Su Kyi, 43 year old at that time and the daughter of Burmese Independent leader Aung San, arrived to Myanmar for the purpose of treating the ailing mother, Daw Khin Kyi and took part in the democracy movement by giving a speech to hundred of thousands of people on the western slope of Shwe Dagon Pagoda hill on August 26 1988.<sup>3</sup> In May 1990 ,the military government held the election and National league for democracy won in this election with the landslide victory of 80% seats of the parliament of the country. But the government refused the result of the election and proposed the constitutional drafting program under the name of National convention in 1993. Even though National league for democracy led by Aung San Su Kyi attended the convention at the start, later in 2005 NLD did not participate in National

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convention because there was no freedom of discussion in the convention. National convention was postponed by the government for various reasons and in reality there were a few people representatives in the convention. Secretary General said his concern about national convention which was not free and transparent in the UN statement of February 2005 and he said to Myanmar authorities to let participate national league for democracy, ethnic minority and other opposition group for the change to democratic government and to release Shan leaders from Shan National league for democracy and to make national convention to be more 'inclusive and credible' according to international norm and standard.<sup>4</sup> National league for democracy is continuing its struggle under the leadership of Aung San Su Kyi who becomes the global icon for democracy and human rights in the world for her devotion to Burmese democracy and human rights movement and her detainment for 15 years under house arrest. During her house arrest, Aung San Su Kyi was awarded with Sakharov price for freedom of thought in 1990 and noble peace price in 1991 for her endeavor for the democracy and human rights movement in Myanmar. In fact, Burmese democracy and human rights movement cannot be separated from the leadership of Aung San Su Kyi and her party, National league for democracy which is the key opposition party to the military regime in Myanmar. Even though NLD was severely suppressed by the military regime since 1990 to 2010, NLD is still struggling for the democratic movement in the country. At the end of May 2001, there was positive sign of the government releasing Aung San Su Kyi from house arrest and other political prisoners and reducing strict restriction upon NLD and other opposition parties. But these signs were faded by the incident of Depayin in Sagaing division which was the brutal attack to Aung San Su Kyi motor car and NLD convoy by the military-affiliated group and killed at least 100 people in this incident in May 30

2002.<sup>5</sup> The military regime created this accident because of the concern to the growing civil movement organized by Aung San Su Kyi by going across the country. “The brutal attack was the regime response to unwavering support of the people to NLD during Aung San Su Kyi’s numerous trips throughout the country, following her release from 19 months of house arrest in May 2002.”<sup>6</sup> Aung San Su Kyi ,NLD members and a total of 256 democracy activists were detained in relation to Depayin Massacre and the subsequent months<sup>7</sup> and NLD office was closed national wide and NLD head quarter was reopened in 2004 but other offices in states and division were closed until 2008. 1996 student movement of Yangon University was one of the movements for democracy and human rights in the country and it was also suppressed by the military government and the Yangon University was closed down until now and the new Universities were opened in the areas which are away from the Yangon City. Yangon Institute of technology which was the active university in student movement was moved to Pyi City which is more than 100 miles away from Yangon City.

In 2007, there occurred the saffron revolution led by Buddhist monks and they demanded to release Aung San Su Kyi and political prisoners in the country and asking for democratic changes in the country. In my point of view, saffron revolution was caused by the political instigation of 88 generation students led by 1988 student leaders Min Ko Naing and Ko Ko Gyi and Htay Kywe who were detained since 1989 and released in 2005, and they started their civil movement as soon as they released. But the present cause for saffron movement is the opposition against the rising cost of oil prices. Student leaders together with NLD activist organized the movement actively and they were detained again in August 2007 for peaceful marching in the street of Yangon and sentenced to 65 years imprisonment.<sup>8</sup> Saffron revolution was the biggest revolution after 1988

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demonstration and the military regime under the name of the state peace and development council which was changed in 1997 crushed down the saffron movement severely and International community condemned the military regime for human rights abuses. Because of the result of saffron revolution and international pressure, the military government finished the constitution and rectified in 2008 by means of referendum. The government held the election in 7 November 2010 and the government party union solidarity and development party(USDP) won in this election. But international community commented that the election was not free and fair and it was not in accordance with the international norms and standards. Even though United Nations tried to mediate between the NLD and SPDC, there is no visible result. “The United Nations has been able to have two quite interlocutors (special envoys Tan Sri Razali Ismail and Ibrahim Gambari) try to mediate between the junta and Aung San Su Kyi and the junta in 2007 assigned the minister of labor as an intermediary”<sup>9</sup>. The government neglects the international community and UN efforts and there is no apparent progress in the process of democratization of Myanmar. NLD is still trying for the process of democratization and welcomed the military to participate in this process. NLD even said in its statement in March 27 2011 that NLD paved “the way towards finding the solutions for political problems through political means, national reconciliation and peaceful transition to democracy for the benefit of the country and the people. When system of democracy develops in the country, the members of the Tatmadaw(military) also shall enjoy the human rights and the benefits of a prosperous country just like other citizens.”<sup>10</sup> NLD asked the government to release political prisoners unconditionally and to eliminate the misunderstanding between the democratic forces and the military and shows its determination to ‘achieve democracy and human rights aspired by the nationalities’ in 2011. On the other hand the



government is afraid of the consequences for human right abuses and crimes that they committed and continues to hold state power by saying that the military is defending the state security. Therefore the government continued their road map plan and government party won the election in 2010. Even though 15 political parties entered the election, the government party, State peace and development party completely controlled the parliament and Thein Sein who was the former military prime minister becomes the president in the new government in 2011. NLD did not enter the 2010 election because NLD did not believe that election was free and fair. In reality, the military controlled 25% seats of parliament by force according to 2008 constitution<sup>12</sup> which is the military controlled system in all sectors such as administrative, legislative and judicial branches, and there is no possibility to amend the constitution in the present situation. But Burmese are still struggling to fully achieve democratic government and fundamental human rights in the country since 1962 to the present day 2011 even though they faced severed suppression by the military regime. In my point of view, the political situation of Burma is seem to be more flexible in comparison with the past years and political parties are being allowed to some extent even though there is political prisoners in the country and restriction on freedom of speech and fundamental human right such as freedom of demonstration. We need to watch how much the new government led by President U Thein Sein who swore as president in March 30th 2011, can be patient in the civil and political rights, the movements of political parties and of democratic forces in the future, and to what extent it is free from the control of former military regime led by Senior General Than Shwe, and how much the new government can perform the development of the country.

### 3. Human rights abuses in the country

Burma is notorious for the abuses of human rights and the suppression to the democratic forces by the military regime within the year of 1988 to 2011. Freedom of expression and organization was strictly restricted in the past years of 1988 to 2009. When measuring with International human rights instruments such as International covenant on civil and political rights (ICCPR) and International covenant on economic, social and cultural rights (ICESCR), Burmese human rights situation does not progress in the present moment according to United Nation special rapporteur on human rights to Burma, Mr. Tomas Ojea Quintana. He said in March 2011 that Myanmar human rights situation is still getting worse but the present time is the historical period for the development of Myanmar.<sup>13</sup> In my point of view, if the new government use this situation as an opportunity to change the country to the democratic one, this present time is the best time for national reconciliation, unity and development of the country.

In reality, he was not allowed by the Military junta to meet with Myanmar Democracy leader, Aung San Su Kyi in his visit to Myanmar in February 2009. In 2010, the government held the election which is one of the seven steps of road map to democracy proposed by former primer minister general Khin Nyunt in August 2003.<sup>14</sup> According to evidence collected by human rights organization, the 2010 election is not free and fair and there is election rigging. There are threat, intimidation, and dishonest way of collecting advanced votes, no free and transparent in vote counting in the election period and there is no freedom of expression before and after the election.<sup>15</sup> According to my experience in that time when I was in Burma, even I as a lawyer cannot access to vote counting in the election period even though there is election law which allows every citizens to watch and see vote counting. This is the infringement of universal

declaration of human rights, article 19 and article 21 and the domestic election law. Article 19 of universal declaration of human rights expressed “freedom of expression” and article 21 expressed the democratic principle as follow: “the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”<sup>16</sup> Therefore the citizens cannot get their rights to participation in this election and their rights have been infringed by the local authority. In reality, the State Peace and Development Council (SPDC) did not allow United Nations, International monitoring group and INGO into the country in the election period. In addition, Union election committee (UEC) delayed in the process of accepting electoral complaint and there are limitations of the court to perform the duty for the offences of election such as fraud, irregularities and dishonest action concerning election.<sup>17</sup> National court is also under the pressure of the government and it cannot decide the cases without intervention of the authority in the-election period and it cannot give effective remedy according to article-8 of universal declaration of human rights.<sup>18</sup> Even though United nations general assembly welcomed the release of Aung San Su Kyi in November 13 of 2010, the general assembly deeply concerned the situation of restriction on political parties including NLD, other pro-democracy actors and minority groups in ‘a genuine process of dialogue, national reconciliation and transition to democracy.’<sup>19</sup> According to 2010 report of human rights , the government of Burma did not participate to ensure ‘a free , fair, transparent and inclusive electoral process’ and there were ‘restriction imposed by the electoral laws’ and ‘ restriction on freedom of assembly’ and media as well as the detention of political activists.<sup>20</sup> The above situation infringed International covenant on civil and political rights such as ‘ the right to liberty

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and security of person<sup>21</sup>, ‘the right to equality before the court’<sup>22</sup>, ‘the right to self determination and the right to determine political status’<sup>23</sup>, ‘the right to hold opinions without interference’<sup>24</sup>, and ‘the right to freedom of thought’<sup>25</sup>, ‘the right to freedom of association’<sup>26</sup> and ‘the right to equal protection before the law without discrimination’.<sup>27</sup>

In concern with political prisoners, according to the source of assistant association for political prisoners (Burma), there are ‘2076 political prisoners’ in February 2011 which is ‘a decrease of 113 prisoners from last month’s figure of 2189’.<sup>28</sup> Among them, 71 political prisoners were arrested and sentenced prior to February 2011 of which 71 prisoners are ethnic Karen who were charged under section 17(1) of the Unlawful association act.<sup>29</sup> At least 152 political prisoners are suffering under the poor condition of health not only because of the harsh condition of prisons, torture and transferring to remote prisons but also because of no physicians and the denial of medical care.<sup>30</sup> There were further 12 political prisoners which were under the condition of solitary confinement after releasing a statement welcoming the release of Aung San Su Kyi and NLD efforts for democracy and national reconciliation. Khun Htun Oo, the chairperson of Shan National league for democracy who was arrested and detained together with seven other Shan leaders in November 2005, was sentenced to 93 years, and he is suffering ‘the poor health condition of sever prostate’<sup>31</sup> which could lead to cancer.<sup>32</sup> He is now in the Pauto prison in Kachin state. By seeing the above situation, the military regime infringed international covenant on civil and political rights such as ‘the right to be treated with humanity and with respect’<sup>33</sup>, the right not to be treated with torture, inhuman or degrading treatment or punishment<sup>34</sup>, the right to public hearing by a competent, independent, and impartial tribunal established by law<sup>35</sup>, ‘the right not to be arrested arbitrarily’<sup>36</sup> and ‘the right to freedom of

thought, organization and expression.<sup>337</sup> In addition, the above situation seriously infringed ‘the right to health’<sup>338</sup>, the right to standard of living which include the right to food, water and clothes<sup>339</sup> granted in International covenant on economic social and cultural rights (ICESCR). The right to health is one of fundamental right of every human being without the distinction of race, religion, political belief, economic or social condition<sup>40</sup> and it needs to be granted by the state parties to realize the highest attainable standard of that right. Actually the prison situation in Burma is not agreeable with international standard of health standard such as “the state of complete physical, mental and social well being and not merely the absence of diseases or infirmity”<sup>41</sup>. The right to health includes “access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information including sexual and reproductive health.”<sup>42</sup> The military regime has responsibility not to discriminate the political prisoner base on political belief and expression of his or her opinions. According to international covenant on economic, social and cultural rights and International covenant on civil and political rights, the government has the obligation to respect, protect and fulfill the fundamental human rights. Myanmar became the member of United Nations in 1948 as soon as it got independence from British, and the government has the obligation to respect the fundamental right of the people. The obligation to respect requires states to refrain from interfering directly or indirectly with the enjoyment of fundamental human rights, and the obligation to protect requires states to take measures that prevent third parties from interfering with article 12 of ICESCR grantees and finally the obligation to fulfill requires the states parties to adopt appropriate legislative, administrative, judicial, educational and other measures towards

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the full realization of human rights.<sup>43</sup>

In 2nd May 2008, because of the cyclone Nargis, natural disaster to the lower part of Burma, more than 200,000 people died in this area. But the government underestimated the dead tolls and did not allow the International humanitarian aid until 6 May and the dead toll arose because of the delayed process of the government. International non-governmental organization cannot enter the country because the government did not permit Visas to NGO. This is the infringement of the right to life and the right to health granted in ICESCR. The right to life is the most supreme right in fundamental human rights. Even though the people were suffering as well as the dead toll and destruction were tremendous, the military regime materialized the referendum of 2008 constitution in 10 May 2008. General assembly called upon the military government “to cooperate on humanitarian access in all other areas of the country where the United Nations, other international humanitarian organizations and their partners continue to experience difficulties in delivering assistance to persons in need”.<sup>43</sup>

Moreover, the situation of human rights in Myanmar is still gloomy because of the armed conflict between the government force and the ethnic armed groups. In the ethnic areas, there are still continuing armed conflict, and the result is that there are forced labor, eviction from land, torture, lack of education, poor health condition and poor living standard in these areas. According to the year book of 2008, “The Pa’an District of Karen state was subject to a heavy military presence in 2008 which included both SPDC troops and DKBA (Democratic Karen Buddhist Army) soldiers. Many villagers were subjected to forced labor and extortion, which placed them under an incredible strain.”<sup>44</sup>In 14 July 2008, there were forced labor and extortion in Mon state.<sup>45</sup> In Shan State also, “SPDC and United Wa State Army continued to use forced labor for the transportation of supplies

and the expression of military infrastructure across Shan State. Villagers were regularly required to carry loads, fetch water and dig trenches. Fines of up to 5,000 kyat were levied on those who were unable, or unwilling, to work when called. Villagers in Eastern Shan State were required to work an average of four times per month.<sup>46</sup> By seeing the above situation, the right to work<sup>47</sup> under the convention of INCESR was infringed. Forced labor is defined by ILO as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.<sup>48</sup> Any discrimination to the right to work on the ground of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status, sexual orientation, or civil, political, social or other status, which has the intention or effect the intention or nullifying exercise of the right to work on a basis of equality, is prohibited and every government has the responsibility to protect any discrimination to his own citizens. Even though I mentioned a few cases about forced labor in Karen, Mon and Shan states, there was systematic and wide spread infringement of economic, social and cultural rights as well as civil and political rights across the country such as killing, torture, land confiscation, arrest, detention, violence against women and child abuses as well as lack of health, forced labor, lack of education, abuses of the right to food and houses, and abuses of culture and language of minorities.<sup>49</sup>

#### **4. The issues for protection of human rights and democracy in Myanmar**

In my point of view, there are three issues in promoting and protecting human rights in Myanmar. The first is national infrastructure that involves political and constitutional issue. If Burma wants to promote and protect fundamental human rights

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within the country, it needs to change the present military dominated government to democratic government. Even though there are expressions of fundamental citizens' rights in the 2008 constitution, in reality the purpose of constitution is to protect the present military class rather than to protect the rights of the people. Defense services must be in a national political leadership role according to section 6(f) of the 2008 constitution<sup>50</sup> and the new government is also formed with former military officers. According to the lecture of national protection of human rights by my professor Tony Cathy, democracy is the basic foundation for promoting human rights in the national level because democracy itself. The government needs to respect freedom of organization and political parties and needs to negotiate and cooperate with political party including the main opposition party led by Aung San Su Kyi for the political stability of the country. The military government must ensure the check and balance system of legislative, administrative and judicial system to ensure human rights and democracy. Therefore the government needs to reduce the military role in the constitution so as to abolish the military domination in the politics and discrimination between military and civilians. The second issue is the rule of law in the country, and at the present time there is no rule of law according to international standard. There is no freedom of jurisdiction, and military tribunal is the most supreme authority in the jurisdiction and even the supreme court of the country cannot have judicial authority over the soldiers and the decision of chief of army is final.<sup>51</sup> The result is that the supreme court cannot adjudicate in the case of human rights abuses by the military. The third issue is armed conflict in the ethnic area and federal issue. Ethnic group did not satisfy the present status of their rights and determination, and they want fully federalism which grants autonomy so as to protect their identity and culture. As I mentioned above, human rights abuses continues because



of armed conflict and poor living condition in that area in the country.

## 5. Conclusion

So as to perish and eliminate the human rights abuses in Myanmar, the new government needs to have the vision of globalization and needs to follow the international norms and standard of human rights in the 21st century. Myanmar became the member of United nation in 1948 and it need to maintain peace and security, social justice of the region and the world according to the UN Charter. The Government of Myanmar has the most important responsibility to protect fundamental human rights and freedom in the country according to domestic law and International declaration of human rights. Now the new government needs to promote, protect and fulfill the fundamental human rights without discrimination on the basic of equality according to International human rights law. But Myanmar failed the maintenance of human rights within the country even though Myanmar signed ASEAN charter which includes human rights terms. Hopefully Myanmar will be on the right way to transition to democracy and sustainable development if the new government do and promote fundamental human rights in line with International human rights law. To conclude, now the present time is the transition to democracy in the country. We need to watch how the new government led by President Thein Sein deals with the present situation as an opportunity for the promotion of democracy, human rights and the development of the country by cooperating with the main opposition party led by Nobel laureate Aun San Su Kyi.



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### Notes

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<sup>2</sup>The repression of the August 8-12 -1988(8-8-88) uprising in Burma/Myanmar, by Egreteau, Renaud Wednesday, 25 February, 2009. [[http://www.massviolence.org/IMG/article\\_PDF/The-repression-of-the-August-8-12-1988-8-8-88-uprising-in.pdf](http://www.massviolence.org/IMG/article_PDF/The-repression-of-the-August-8-12-1988-8-8-88-uprising-in.pdf)]

<sup>3</sup> Page-42, Historical dictionary of Burma (Myanmar), by Donald M. Seekins. The Scarecrow Press, Inc. Lanham, Maryland.Toronto. Oxford 2006.

<sup>4</sup> Exclusion of political group from Myanmar national convention concerns Annan (18 February 2005). UN News Center.

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<sup>5</sup> View on Myanmar/Burma by Minh Nguyen, September 2004.

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<sup>6</sup> The Depayin Massacre, 2 year on, Justice denied (30 May 2005), ASEAN Inter-Parliamentary Myanmar Caucus. See- <http://www.aseanmp.org/resources/Depayin%20Massacre.pdf>

<sup>7</sup> Ibid, page -2.

<sup>8</sup>Burma Jails Min Ko Naing and student leader, November 15 2008.

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<sup>9</sup> Page 89, Burma/Myanmar 'What everyone needs to know.' By David I. Steinberg, Oxford University press, 2010.

<sup>10</sup>. NLD statement on the Anti Fascist Resistance Day , 27 March 2011. Statement No-6/03/11

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<sup>11</sup>. Ibid

<sup>12</sup> see-section 109 of 2008 constitution of Myanmar. September 2008. Printing and Publishing enterprise, Ministry of information of Myanmar.

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<sup>14</sup> Page-2, Congressional research service, Burma's 2010 elections: Implication of the new constitution and election laws by Michael F. Martin, Specialist in Asian Affairs, April 29, 2010.

<sup>15</sup> See- Concerning human rights and Burma's election (2010) (Analysis Report), Human rights defender and Promoters net work.2010, December. [<http://>

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<sup>16.</sup> See Universal declaration of human rights, article 19 and article 21 <http://www.ohchr.org/en/udhr/pages/language.aspx?langid=eng>

<sup>17.</sup> Page-6, Concerning human rights and Burma's election (2010) (Analysis Report), Human rights defender and Promoters net work.2010, December. [<http://burma.ahrchk.net/pdf/HRDPRReport-ebook-en.pdf>]

<sup>18.</sup> Article-8 of UDHR –‘Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law’.

<sup>19.</sup> United nation general assembly, A/C.3/65/L.48/Rev.1, 15 November2010, sixty-fifth session, Third committee, Agenda Item 68(c). Promotion and protection of human rights: human rights, situations and reports of special rapporteurs and representatives, “Situation of human rights in Myanmar”, page-2

See-<http://www.burmalibrary.org/docs09/GA2010-L48-Rev.1%28en%29.pdf>

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<sup>21.</sup> International covenant on political and civil rights, article-9.

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<sup>22.</sup> Ibid, article-14

<sup>23.</sup> Ibid, article- 1

<sup>24.</sup> Ibid, article-19

<sup>25.</sup> Ibid, article-18

<sup>26.</sup> Ibid, article-22

<sup>27.</sup> Ibid, article- 26

<sup>28.</sup> Monthly chronology February 2011, ‘Summary of current situation’, Assistant association for political prisoners (Burma).See- <http://www.aappb.org/>

<sup>29.</sup> Ibid

<sup>30.</sup> Monthly Trend Analysis, Assistant association for political prisoners (Burma). See- <http://www.aappb.org/>

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<sup>32.</sup> Shan leader Khun Htun Oo awarded Nationalities Hero prize, Tuesday, 31 March 2011 ,by Myo Thant

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<sup>33.</sup> International covenant on civil and political rights, article- 10

<sup>34.</sup> Ibid, article-7.

<sup>35.</sup> Ibid, article-14

<sup>36.</sup> Ibid, article-19

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<sup>37</sup> Ibid, article-18, 19, 22

<sup>38</sup> International covenant on economic, social and cultural rights, article- 12.

<sup>39</sup> Ibid, article-11.

<sup>40</sup> WHO constitution.

<sup>41</sup> 1946 WHO constitution.

<sup>42</sup> General comment No. 14, The right to the highest attainable standard of health(article-12) , Twenty-second session(2000). HRI/GEN/1/Rev.9 (Vol. I)

<sup>43</sup> United nation general assembly, A/RES/63/245, 23 January 2009, sixty-third session, Agenda Item 64(c). Resolution adopted by General assembly [on the report of the third committee (A/63/430/Add.3 and Corr.10)], 63/245  
“Situation of human rights in Myanmar, page- 2.

See-<http://www.burmalibrary.org/docs07/UNGA2008-res63-245en.pdf>

<sup>44</sup> Page-332, Burma Human rights year book 2008, 15th annual edition. Written, edited and published by The Human Rights documentation Unit (HRDU) November 2009.

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<sup>45</sup> Page-339, Ibid.

<sup>46</sup> Page-339, Ibid.

<sup>47</sup> Article-6 of ICESCR

<sup>48</sup> General comment No. 18: The right to work (art.6)

<sup>49</sup> See - Burma Human rights year book 2008, 15th annual edition. Written, edited and published by The Human Rights documentation Unit (HRDU) November 2009.

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<sup>50</sup> see- section 6(f) of 2008 constitution of Myanmar.

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## PART - NINE

### How To Deal With World Crisis Within the Frame of International Law

#### Studying Kosovo Case

The world is facing many international crises from the past to the present era we live. There are global financial crisis, environmental problem such as global warming, storms, earthquakes, flood, health problem such as epidemic like HIV/AIDS, TB, food shortage in India and in some African countries, educational problems, etc. United Nation become the major organization to solve the crises of the world and international court of justice become very important court to decide the world cases from the international legal point of view and its legal opinions are in the crucial role to solve the issues concerning international peace and security. We can know how the world is going on and how to solve crises and maintain peace and security by studying the major crises in the world such as Kosovo crises, Taiwan and China crises, Israel and Palestinian case, the crises between India and Pakistan, North Korea' threat to Japan and South Korea, China and Burma human rights abuses, Terrorism, war in Iraq and Afghanistan within the frame of International laws and we can know the judicial and legal aspect of international court of justice. Herein I will focus on the nature of the right to self-determination, territorial integrity and state sovereignty by studying Kosovo case.

Firstly, Kosovo is the area of war conflict in Europe.

The territory has been disputed between Serbs and Albanians for generation. Kosovo declared independence in 17 February 2008 and Serbia did not accept Kosovo unilateral declaration of Independence which was the result of long, brutal and intolerable suppression of Belgrade. There were human rights abuses in Kosovo. The people of Kosovo also suffered the ethnic cleansing systematically made by the Serbian forces. We can study Kosovo case from the aspect of international law and it is the problem of self-determination of the state whether the state can determine its destiny by declaring Independence by itself. The advisory opinion of International court of justice is very important in deciding the Kosovo status in the international area.

In this case we can study from two aspects; advisory opinion of the court and the written arguments of states parties. “The question on which the advisory opinion of the court has been requested is set forth in resolution 63/ 3 adopted by the General Assembly) on 8 October 2008.”<sup>1</sup> International court of justice( ICJ) had to decide the issue, “is the unilateral declaration of independence by the provisional institutions of self-government of Kosovo in accordance with international law?”<sup>2</sup> raised by General Assembly (later call GA in this essay). “The declaration of independence was adopted at a meeting held on 17 February 2008 by 109 out of the Assembly of Kosovo, including the prime minister of Kosovo and by the president of Kosovo (who was not a member of the assembly).

The ten member of the Assembly representing the Kosovo Serb community and one member representing the Kosovo Gorani community decided not to attend this meeting.”<sup>3</sup> The main responsibility of the court is whether or not the declaration of independence is in accordance with the international law. Security council has adopted a number of resolution on the situation relating to Kosovo, including four

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resolutions under Chapter of UN Charter(1160 , 1199,1203 and 1244). In resolution 1244 , the security council, “determined to resolve the grave humanitarian situation” and “to put an end to the armed conflict in Kosovo”<sup>74</sup> ,authorized the United Nation secretary- general to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo. States parties gave written comments about Kosovo case. The kingdom of Netherland argued in 17 April 2009 that “the right to self determination as well as the obligation to refrain from any forcible action which deprives people of this right is an obligation arising under a preemptory norm of general international law. The right to self determination has been characterized as an inalienable right ( according to 1993 Vienna declaration and program of action.)”<sup>75</sup>. The holders of the right to self determination are people and the final settlement will be based on the will of the people. Netherland gave the example of East Timo cases and the advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory. The right to self determination includes the right to freely decide their political status.

Netherland stated that “ in the Socialist Federal Republic of Yugoslavia(SFRY) , Kosovo had the status of an autonomous province originated in a decision of the people’s Republic of Serbia of 1945 in accordance with the express will of the population of these areas”<sup>76</sup> according to article 111 of the 1963 constitution of the SFRY. Netherland stated that FRY and Serbia deliberately infringed the fundamental human rights by expelling at least 700,000 Kosovo Albanians, either by ordering them to leave ,or by creating an atmosphere of terror in order to effect their departure.”<sup>77</sup> Legal opinion of Netherland is based on the right to self determination which include “the right to external self determination in the case of a serious breach of the obligation to respect and promote the right to self- determination



or the obligation to refrain from any forcible action which deprives peoples of this right where all effective remedies have been exhausted.”<sup>8</sup>The Netherland argued that the proclamation of the independence of Kosovo is in accordance with International laws and this declaration has not affected the application of security council resolution 1244.

United States of America presented written comments in July 2009 to ICJ. United States argued that the declaration of independence by Kosovo is not conflict with the international law and “it is the expression of the will of the people, not the exercise of a formal grant of authority from UNMIK (United Nation Interim Administration Mission in Kosovo) which was headed by a special representatives of the Secretary-General, to be appointed by the Secretary General in consultation with the security council.

Moreover, UNMIK regulation had the character of domestic law, such that failure to comply with them would not in any event have constituted a violation of international law.”<sup>9</sup> Declaration focus on the preposition that “all people are created equal, has served as a beacon for freedom-loving people ever since.”<sup>10</sup>United States also argued that “thing in resolution 1244 requires the approval of the security council for Kosovo’s independence or any other future status for Kosovo.” Therefore Kosovo declaration of independence is not conflict with the resolution 1244. The key argument by the Unites States is that self-determination can be made by the will of the people and the will of the people is sine qua non for the independence of the state and the future political status of Kosovo. Therefore the declaration of Kosovo independence is in accordance with international law.

Ireland presented the statement of the government of Ireland about the Kosovo case in 17 April 2009. Ireland requested ICJ not to give advisory opinion in this case and if the court gave

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the advisory opinion , Ireland argued that declaration of Independence was not unlawful according to International law because “international law does not prohibit unilateral declaration of independence and it represented an exercise of self determination in the context of gross or fundamental human rights abuses.”<sup>11</sup> Ireland argued that the state cannot make separation when there is representative government and it can give its opinion in making legislation.

But if there is not the situation which doesn't give the representation in making legislation, this state can exercise the right to self determination. The foreign minister of Ireland said , “ After almost nine years under UN- led interim administration, more than 90% of Kosovo population wants independence, and this is supported by most of our partners in the EU, many of whom have already recognized Kosovo.”<sup>12</sup> So Ireland recognized the declaration of Kosovo independence and this declaration did not breach peace and security of the world. Ireland argued that according to 1947 constitution , Kosovo was not only the autonomous state within Serbia but also it had the status to represent in the decision making in the federal body “ according to the principles of agreement among the republics and the autonomous provinces”<sup>13</sup> Ireland stated that International administration of UNMIK cannot be sustainable in Kosovo in the long term and there is widespread human rights abuse by Serbia which caused “grave humanitarian situation and threat to international peace and security”<sup>14</sup>. Ireland acknowledged that in the longer time, negotiation is not possible between Kosovo and Serbia. Because of the above reason, Ireland recognized the declaration of independence of Kosovo and declaration is lawful according to International law.

Swiss confederation presented the written statement concerning Kosovo case to ICJ in accordance with the order of the court of 17 October 2008. Switzerland is one of the state

which recognized the status of Kosovo and independence declaration of Kosovo, and decided to “establish diplomatic and consular relation.”<sup>15</sup> Switzerland stated that “the declaration of independence by a state is a factual, unique event occurring at a precise, more or less important moment in history. In legal terms, a declaration of independence may often raise questions of public law, in particular of constitutional law, because it can bring with it a profound change, perhaps even a total rupture with the public law order in force at that time.”<sup>16</sup>

In March 2007, after more than one year talks with both parties, Special envoy of secretary general of UN reported that the negotiation did not work and “the outcome had been exhausted.”<sup>17</sup> “A troika, made up of representatives of European Union, Russia and United States, was formed in an attempt to keep negotiation going between the parties. After 120 days of intense negotiations, the parties failed to come to an agreement.”<sup>18</sup> The situation of Kosovo is in a difficult position to solve in a negotiated way and it showed the failure for International community attempt to solve the problem by means of negotiation. Switzerland pointed that “international law guarantees the principles of territorial integrity, but it also recognizes the right of peoples to self determination. Both principles are recognized in the UN charter, as well as in the final act of the conference on security and cooperation in Europe( Helsinki, 1975), and in the charter of Paris for a New Europe(1990).”<sup>19</sup> Switzerland said that “all people have the right to self determination according to article -1 common to the two UN covenant on human rights.”<sup>20</sup> “The right to self determination is closely linked with the principles of equality. The right to self determination applies to a collective that goes beyond a mere group of individuals.

What binds people is a shared consciousness or a common political will. This results from the exact nature of the right of peoples to self determination which is a fundamental

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standard of the democratic state.”<sup>221</sup> Switzerland quoted Rosalyn Higgins that “self –determination refers to the right of majority within a generally accepted political unit to the exercise of power.

It is necessary to start with stable boundaries and to permit political change within them. Concerning the notion of people, Swiss quoted James Crawford that “at the root, the question of defining ‘people’ concerns identifying the categories of territory to which the principle of self determining applies as a matter of right.”<sup>222</sup> Switzerland argued that “the Serbia’ parliament revoked the province’s autonomy. As a result Kosovo’s parliamentary assembly was deprived of the right to object to amendments of the constitution of the republic of Serbia. In 1990 ,Serbia’ parliament then disbanded the functioning of the Assembly and Executive council of Kosovo, and the authorities of Serbia assumed the right to administer the affairs of Kosovo directly and to nullify which Kosovo public authorities had taken.”<sup>23</sup>This is one of the reason that Kosovo declared its independence because of lack of determination for the benefit of the people of Kosovo. There are documents that showed the ‘grave and systematic violations in Kosovo of the rights of persons belonging to minorities, discrimination and the violation of the human rights of the ethnic Albanians of Kosovo as well as the large- scale repression committed by the Serbian authorities.”<sup>24</sup>Switzerland pointed that “the secretary general recommended Kosovo status should be independence , supervised by the international community. His recommendation was based on the report of his special envoy, Mr. Martti Ahtisaari, concerning the future status of Kosovo.”<sup>25</sup>

According to the report of special envoy, “independence is the only option of for the politically stable and economically viable Kosovo.”<sup>26</sup> If Kosovo is placed under the administration of Serbia against the will of the people of Kosovo , “the situation would have constituted a most dreadful step by the international

community.”<sup>27</sup> Because of the above situation, “the declaration of independence by Kosovo was indeed an act of last resort (Ultima ratio). Thereby the last criterion for Kosovo to exercise the right of peoples to self-determination is also met.”<sup>28</sup> Therefore Switzerland concluded that “firstly declaration of independence by Kosovo on 17 February 2008 does not contravene the peremptory norms of international law or any other important provisions of international law with erga omnes character. Secondly the declaration of independence is not in conflict with the principles of territorial integrity because the principle of territorial integrity defined in UN Charter applies to international relation and thus does not apply within the state. Thirdly, if Kosovo is placed again under the sovereignty of Serbia, it is not possible for the stability of Kosovo and cannot get a consensual solution within a reasonable time by the international community and finally ended in failure.”<sup>29</sup>

Russian Federation presented written statement for advisory opinion to ICJ at 16 April 2009. Russia did not accept that the declaration of Independence of Kosovo is in accordance with International law and the situation of self determination. Russia stated that Security Council resolution 1244 is applicable to the situation of Kosovo. Russia explained that “the resolution was adopted on June 1999, in the aftermath of the NATO military operation against Yugoslavia and the accords reached with the assistance of international mediators, in order to provide an interim framework for administration of Kosovo and for further efforts to find a lasting solution to the Kosovo problem .It placed Kosovo under the authority of the United Nation Interim Administration in Kosovo(UNMIK) ,thus temporarily preventing the federal republic of Yugoslavia from exercising its sovereign powers in the province, while confirming the territorial integrity of FRY.”<sup>30</sup> Russia strongly argued that “Serbia had fully abided by the resolution and importantly, had undertaken clear

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commitments not to resort to force to resolve the Kosovo problem. It is beyond doubt that today, Serbia poses no threat of use of force or any other form of oppression against Kosovo.”<sup>31</sup> Russia pointed the principles of sovereignty and territorial integrity in resolution 1244. Russia pointed that territorial integrity and sovereignty of Yugoslavia and the other states of region must be respected and reaffirmed, and political process must be in accordance with “the establishment of interim political framework agreement for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the federal republic of Yugoslavia and the other countries of the region, and the demilitarization of KLA.”<sup>32</sup> Russia argued that the concept of the right to self determination of Kosovo or “the possibility of secession”<sup>33</sup> is never mentioned in the resolution 1244 and said that the security council and its member need to avoid to use the notion of self-determination.

Russia clearly stated that Kosovo is the part of Serbia and federal republic of Yugoslavia. Russia highlighted the term ‘settlement’ in resolution 1244 and explained that the settlement of the disputes need to be solved by both parties and International community, and it is not possible to solve the disputes by one party, Kosovo, and it is not acceptable to the unilateral declaration of Independence of Kosovo. Russia quoted the meaning of settlement by using Merriam-Webster dictionary and Black’ law dictionary as “something agreed upon by parties or decided by a competent authority as well as an agreement composing differences or an agreement ending a disputes or lawsuits.”<sup>34</sup> Russia argued that the declaration of independence is ultra vires because it is not only “outside the mandate of Provisional Institution of Self –government(PISG)” which was established according to provisional constitutional frame work promulgated by Special Representative of Secretary General of UN but also

“in a breach of law that PISG were to respect.”<sup>335</sup> Because of the above reason, “Russia believes that the declaration of independence of 17 February 2008 is not in accordance with security council resolution 1244.”<sup>336</sup> Russian Federation argued that the declaration of independence is to establish a new state and “prima facie, it is contrary to the territorial integrity of Serbia.”<sup>337</sup> “Territorial integrity is an unalienable attribute of a state’s sovereignty. Article 2, paragraph 4 of the UN charter prohibits the threat or use of force against the territorial integrity of any state. This was developed in 1970 declaration of Principles, the preamble of which stated, inter alia: any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a state or country is incompatible with the purposes and principles of the Charter.”<sup>338</sup> On the other hand Russia said that the right to self determination can be exercised through the free will of the people and through the establishment of an independent state or through the achieving the political status and it includes the possibility to freely determine the economic, social and culture development of the people.”<sup>339</sup> In Russia point of view, the right to self-determination can be exercised in the extreme situation in which the people are violated their rights and discrimination is continuously occurred and “all the possibilities for the resolution of the problem within the state have been exhausted.”<sup>340</sup> Russia mainly argued that there is no reasonable ground that in 2008 or currently, a threat of extreme – and indeed of any – oppression of by Serbia against Kosovo Albanian exists<sup>341</sup> and it does not make the extreme situation to Kosovo. Russia stated that the provisional government of Kosovo were established within the framework of resolution 1244 and obliged to abide by it. Declaring independence was by far outside their competence.”<sup>342</sup> In 2008 also there is no extreme situation to declare independence by Kosovo. Because of above reasons, “Russia considered that unilateral declaration of

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independence by Provisional Institution of Self- government of Kosovo is not in accordance with international law.”<sup>243</sup>

People’s Republic of China presented the written statement on the issue of Kosovo case at 20 October 2008. China mainly argued that “UNSC resolution 1244(1999) has been an authoritative basic recognized by the international community for the handling of the issue of Kosovo’s status. The purpose of the goal is to enjoy autonomy within Federal Republic of Yugoslavia.”<sup>244</sup> China argued that respect for state sovereignty and territorial integrity is a fundamental principle of international law and “United Nation is based on the principles of the sovereign equality of all its members.”<sup>245</sup>China quoted ICJ judgment on the Corfu channel case (United kingdom of Great Britain and Northern Ireland v. Albania) that “between independent states, respect for territorial sovereignty is an essential foundation of international relations.”<sup>245</sup> In Nicaragua v. United States of America, ICJ reaffirmed that “the duty of every state to respect the territorial sovereignty of others and the fundamental principles of state sovereignty on which the whole of international law rests.”<sup>246</sup> China stated that “principles of peaceful coexistence, which were jointly initiated by China, India and Myanmar (Burma) in 1954 and have ever since been consistently upheld, also contains mutual respect for sovereignty and territorial integrity.”<sup>247</sup>China pointed that “the right to self- determination is different from the right to secession. The right of self-determination shall not undermine the sovereignty and territorial integrity of the state concerned.”<sup>248</sup> The right to self determination always applied to colonial situation and ICJ stated in the Namibia case that “the subsequent development of international law in regard to non-self- governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. That was reiterated many times by the court in the Western Sahara case, East Timor



case and Construction of a wall case. The court further stated in the Western Sahara case that the principles of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the declaration on the Granting of independence to Colonial countries and Peoples, General Assembly resolution 1514(XV).<sup>749</sup> China strongly argued that when exercising the right to self determination, “the territorial integrity of a sovereign state should be respected rather than undermined.”<sup>750</sup> China quoted the declaration on the granting of Independence to colonial countries and people that “any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”<sup>751</sup> China argued that “the self determination in International law is different in nature from secession from a sovereign state by its part. Secession is not recognized by international law and has always been opposed by international community of states.”<sup>752</sup> China quoted Secretary General of UN U Thant that he never believe “it will ever accept the principles of secession of apart of its member states.”<sup>753</sup> Therefore China argued that unilateral declaration of independence of Kosovo is not in accordance with international law while the principles of protection of territorial integrity is the corner stone of international legal order.

The kingdom of Spain presented the written statement concerning Kosovo at April 2009. Spain mainly argued on the principle of sovereign equality and territorial integrity of states. Spain stated that UN affirmed the basic importance of sovereign equality in accordance with UN Charter and the duty of the states is “to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state.”<sup>754</sup> Sovereign equality includes the following factors : “states are

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judicially equal; each state enjoys the rights inherent in full sovereignty; each state has the duty to respect the personality of other states, and the territorial integrity and political independence of the state are inviolable.”<sup>55</sup> Spain said that the Security Council had to deal with international peace and security and “it has respected the principles of sovereignty and territorial integrity of states.”<sup>56</sup> Spain pointed that these principles were applied in the case of Cyprus, the occupied Arab territories, Nicaragua and Kuwait consistently. Spain quoted the case of Georgia which “stands out due to the great number of council resolution in which the council defends the state’s sovereignty and territorial integrity.”<sup>57</sup> Spain stated that “under resolution 1244, the security council created a special regime for Kosovo, based upon two complementary pillars; (1) the interim international administration of Kosovo; and (2) the political process to determine Kosovo’s future status.”<sup>58</sup>

Spain argued that “the future status of Kosovo is in furtherance of the United Nation in Kosovo in accordance with security council resolution 1244 which includes facilitating a political process designed to determine the future status of Kosovo as well as relevant presidential statement of the security council.”<sup>59</sup> Spain concluded in the written statement that unilateral declaration of independence by the provisional institutions of Kosovo was not in accordance with international law for the following reasons that “Kosovo ignored Serbia’ right to sovereignty and territorial integrity and it is not in accordance with the interim international administration regime or with the provisional self- government regime for Kosovo , and it is conflict with the rules and principles governing the process to determine Kosovo’s future status launched by the security council.”<sup>60</sup>

International court of justice gave its legal opinion in 22 July 2010 about Kosovo case whether the Unilateral declaration

of independence of Kosovo was in accordance with international law requested by General Assembly of UN. Concerning the unilateral declaration of Kosovo, “the court’ advisory opinion would provide politically neutral, yet judicially authoritative, guidance to many countries still deliberating how to approach unilateral declaration of independence in line with international law.”<sup>61</sup> The court pointed that the paragraph 11 of the resolution 1244 described the principal responsibilities of the international civil presence in Kosovo mainly “to transfer of authority from Kosovo’s provisional institution to institutions established under a political settlement”.<sup>62</sup> “The court mainly need to decide whether declaration of independence was an act of the assemble of Kosovo, one of the provisional institutions of self government , established under chapter 9 of the Constitutional framework, or whether those who adopted the declaration were acting in a different capacity. The court concluded that declaration of independence did not act as one of the provisional institution of self- government within the constitutional framework but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.”<sup>63</sup> The court cannot accept the argument that “the security council resolution 1244 contains a prohibition, binding on the authors of the declaration of independence, against declaring independence.”<sup>64</sup> because “unlike resolution 1244, the declaration of independence is an attempt to determine finally the status of Kosovo.”<sup>65</sup> The court concluded that the adoption of declaration of independence did not violate general international law , security council resolution 1244(1999) and the constitutional framework by ten votes to four of the judges.

In conclusion , Netherland, United States, Ireland and Switzerland argued that the right to self determination can be used when it is based on the will of the people and the people is under the suppression and human rights abuses by the

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government . Russia , China and Spain argued that the territorial integrity and sovereignty is very important and the state cannot use the separation from the country when there is not serious condition of human rights abuses and no stability. ICJ decided that Kosovo case carefully on consideration of the right to self determination, sovereignty, territorial integrity, the condition of human rights abuses, state parties' presentation and the measure of conflict in the region.

Actually whether the right to self determination can be used, depends upon the situation of the conflict within the country and it need to be balanced with the sovereignty and territorial integrity. When we consider the right to self-determination, we need to take account the state characters such as territory, sovereignty , population, the capacity to relationship with other states and jurisdiction. The right to self determination means that the nation has the right to decide its own destiny of economic, social and political status, and the right to choose its sovereignty. Territorial integrity is also the principle under international law that nation states do not make the movement the separation to change the border of other nations and need to respect the territory and sovereignty of other states so as to preserve peace and security of the world. Therefore by studying Kosovo case, we know not only the nature of the right to self – determination, sovereignty, territorial integrity under international law but also how to deal with international crises within the scope of international laws.



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### Notes

<sup>1</sup> International court of justice, year 2010, 22 July 2010 , General list, No.

- 141.p-4, para-1. <sup>2</sup> Ibid p-19, para-49, <sup>3</sup> Ibid p-29,para-76, <sup>4</sup> Ibid, p-21,para-58, <sup>5</sup> International court of justice , Written statement of the Kingdom of the Netherlands, p- 7, para-3 (3.2)
- <sup>6</sup> Ibid, p-9, para-3.12(i), <sup>7</sup> Ibid, p-11, para- 3.12(ii), <sup>8</sup> Ibid , p 13, para- 3.21, <sup>9</sup>International court of justice ,Written Comment of The United States of America,p- 37, p- 32, <sup>10</sup>Ibid, p5.
- <sup>11</sup>International court of justice , the statement of the government of Ireland, p-12., <sup>12</sup> Ibid, p- 1, <sup>13</sup>Ibid, p- 10, <sup>14</sup> Ibid, p- 11, 15.
- <sup>16</sup> Ibid, p- 7,para- 26, <sup>17</sup> Ibid, p- 10, para- 39, <sup>18</sup> Ibid, p- 11, para- 41, <sup>19</sup> Ibid, p- 14, para -57.
- <sup>20</sup> Ibid, p- 18 , para – 69, <sup>21</sup> Ibid, p 19, para- 71.
- <sup>22</sup> Ibid , p-19. par – 72-73, <sup>23</sup> Ibid , p- 21, para- 81, <sup>24</sup> Ibid, p- 21 , para – 82, <sup>25</sup> ibid, p- 24. para- 87, <sup>26</sup> Ibid, p- 24 para- 89, <sup>27</sup> ibid , p- 25, para- 94, <sup>28</sup> Ibid, p- 26, para- 96.
- <sup>29</sup> Ibid, p- 27 -28 , <sup>30</sup> International court of justice , written statement by the Russian federation, p-8, Para- 23. <sup>31</sup> Ibid, p- 18, para- 52, <sup>32</sup> ibid, p- 20, para-54, <sup>33</sup>Ibid, p- 21, para- 56.
- <sup>34</sup> Ibid, p- 22, para – 60, <sup>35</sup>Ibid, p- 25,26, para- 70, <sup>36</sup> Ibid, p- 26 , para- 73, <sup>37</sup> Ibid, p- 27 , para- 76, <sup>38</sup> Ibid, p- 27 , para- 77, <sup>39</sup> Ibid, p 28-29, para- 80,
- <sup>40</sup> Ibid, p 31, para- 87, <sup>41</sup> Ibid, p 38, para 102, <sup>42</sup> Ibid, p 39, <sup>43</sup> Ibid, p 40, <sup>44</sup> Written statement of People’s republic of China to ICJ on Kosovo,p- 1, para-1, <sup>45</sup> Ibid , p- 3, <sup>46</sup> Ibid, p- 3, <sup>47</sup> Ibid, p- 3
- <sup>48</sup> Ibid, p-4, <sup>49</sup> Ibid , p-4,5, <sup>50</sup>Ibid, p- 5, <sup>51</sup> Ibid, p-5, <sup>52</sup> Ibid, p-6,
- <sup>53</sup> Ibid , p- 6,7
- <sup>54</sup>International court of justice,The written statement of the Kingdom of Spain about Kosovo case, p- 15, para -21,22, <sup>55</sup> Ibid , p- 15,16 para- 22, <sup>56</sup> Ibid, p- 20 , para- 29, <sup>57</sup> Ibid , p- 23, para- 33, <sup>58</sup> Ibid, p- 38, para- 56, <sup>59</sup> Ibid, p- 49 , para – 75, <sup>60</sup>

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Ibid, p- 55-56 .

<sup>61.</sup> ICJ ,2010 22 July General list No. 141, p 14, para- 32,   <sup>62.</sup>Ibid,  
p-22, para- 59 <sup>63.</sup> Ibid, p- 39, para- 109,   <sup>64.</sup> Ibid, p- 42, para-118

<sup>65.</sup> Ibid, p- 40, para-114