

Union Judiciary under *the Myanmar 1947 Constitution*: Judicial Independence?

Kyi Mar¹

Abstract

Under *the 1947 Constitution*, the Union judiciary was entrusted to the Judges who were appointed according to the Constitution. The Judges headed the Courts officially established by the law and the Constitution. There were two types of Courts, namely Courts of First Instance and Courts of Appeal. The Courts of the first instance included a High Court which had original and appellate jurisdiction and power to determine all matters and questions whether of law or fact. The Court of final appeal was the Supreme Court, which had only appellate jurisdiction from all decisions of the High Court and such decisions of other Courts prescribed by law. After Myanmar's independence, the ideal of the independence of the Judiciary was a shining beacon of the Union of Myanmar. To ensure judicial independence, the Judiciary must be given security of tenure of office, and must not be influenced by political and personal considerations. However, the appointment of the Judges rested with Parliament which had a majority of the ruling party. So, over time, the Judges will be of the same political complexion as the Government and tend to be less critical towards the executive authorities. Moreover, as the Government could command an unchallenged majority in Parliament, it could overrule the decisions of the Courts against it, by legislating later. Thus, the Union judiciary under *the 1947 Constitution* was only relatively independent of the Executive. This research examines the Union judiciary under *the 1947 Constitution* and argues the possibility of the Executive's control over the independence of the Union judiciary of Myanmar. In doing research, the qualitative research method is used to analyze the primary and secondary data in the literature.

Keywords: *The 1947 Constitution*, Union Judiciary, Judiciary independence, Executive control

Introduction

On 4 January 1948, Myanmar became an independent sovereign state. In drawing up a Constitution for the newly independent sovereign state, it is of crucial importance to ensure a proper and systematic separation of the legislative, executive, and judicial powers of that state. Only when there is independence of the judiciary there can be a strong administrative or executive foundation of that state. If the independence of the judiciary wants or if the judiciary is subjected directly or indirectly to the influence of the executive, or if the judiciary is manipulated by the party in power, then there can be no justice in that state and its Constitution will be rendered weak and ineffectual.

Even before Myanmar became independent, Bogyoke Aung San led the Governor's Executive Council to form the Constituent Assembly to draw up a draft constitution in June 1947. In drawing up the Constitution of the Union of Myanmar, U Chan Htoon and Sir Benegal Rau, a constitutional adviser to the Government of India, served as the chief advisers.² The framers of the Constitution accepted the ideal of the independence of the judiciary, and they also appreciated that to ensure judicial independence, the judiciary must be given security of tenure of office and must be placed far above the daily ebb and flow of politics and affairs. But, the fathers of the Constitution were young radicals and revolutionaries. They held the respected customs and the ancient dignities of things in some contempt.³ Thus, in drafting the

¹ Associate Professor, Dr., Department of International Relations, University of Mandalay

² U Aung Than Tun, *The Law in the Four Periods* (Yangon: Kalaungpyan Publication, 1968), 204.

³ Maung Maung, *Burma's Constitution* (Netherlands: the Hague Martinus Nijhoff, 1959), 148.

Constitution, the young revolutionaries searched for means to combine independence and tradition with some elements of democracy such as accountability to the people.

Research Methodology

This research used qualitative method in analyzing the Union judiciary under *the 1947 Constitution* in terms of judicial independence. It has primarily relied on *the Constitution of the Union of Burma, 1947, the Union Judiciary Act, 1948, the Code of Civil Procedure, the Code of Criminal Procedure*, Local Newspapers in Myanmar and publications. It also studied all reliable documents and articles.

Research Questions

How did the Union Government administer justice in Myanmar under *the 1947 Constitution*? And how far was the Union judiciary under *the 1947 Constitution* independent from the Executive control?

Literature Review

In his book "*Burma's Constitution*," Dr. Maung Maung attempts to study and interpret the Constitution of the Union of Myanmar. He also states the independence of the Union Judiciary and organization and functions of the administration of justice throughout the Union after independence.

U Aung Than Tun, in his book "*The Law in the Four Periods*", tried to study the development of Myanmar laws from the ancient Myanmar Kings' period to the Revolutionary period. In so doing, he explained the development of *the 1947 Constitution* of the Union of Myanmar. He also presented the laws concerning the administration of justice in the Revolutionary period.

Myanmar and foreign scholars highlighted the judicial system in Myanmar after independence. There has been no comprehensive study of the Myanmar Union Judiciary under *the 1947 Constitution* from the perspective of judicial independence. So, this research tries to study the Union Judiciary of Myanmar under *the 1947 Constitution* in terms of judicial independence.

Findings and Discussion

(a) The Development of the Union Judiciary of Myanmar

On 24 September 1947, the draft of the Constitution was adopted at the third session of the Constituent Assembly. Under *the 1947 Constitution*, all powers, legislative, executive and Judicial, were derived from the people in the Union of Myanmar. On their behalf, these powers were exercisable by the organs of the Union established by the Constitution.¹ The legislative power of the Union was vested in the Parliament, which consisted of the President, a Chamber of Deputies and a Chamber of Nationalities.² The First government of the Union of Myanmar or the executive was led by the Anti-Fascist People's Freedom League (AFPFL) which commanded the majority support of the people. The administration of justice in the Union was entrusted to the Judges who were appointed in accordance with the Constitution.

In the Union judiciary of Myanmar after independence, the Judges headed the Courts officially established in the manner prescribed by the law and the Constitution. Under *the 1947 Constitution*, there were two types of Courts in the Union, namely Courts of First Instance and Courts of Appeal. The Courts of the first instance included a High Court which had original and appellate jurisdiction and power to determine all matters and questions whether of law or fact under Section 134(a) of *the 1947 Constitution*. The Court of final appeal was called the

¹*The Constitution of the Union of Burma*, Reprint (Yangon: the Government Printing and Stationery, 1960), Section 4.

²*Ibid.*, Section 65.

Supreme Court, which had only appellate jurisdiction from all decisions of the High Court and such decisions of other Courts prescribed by law.

(b)The High Court of the Union of Myanmar

There was a High Court of the Union of Myanmar. It replaced the former High Court of Judicature which was established at Yangon in 1922 under *the Government of India Act, 1919*.¹ The High Court of the Union consisted of a Chief Justice of the High Court and such number of other Judges as the President might fix. But unless and until a resolution in this behalf was passed by the Union Parliament at a joint sitting recommending an increase in the number of Judges, the number of puisne Judges must not exceed ten under Section 13 of *the 1948 Union Judiciary Act*. The President has fixed tentatively the number of puisne Judges as seven.² It had the power to control and supervise Judges of all the inferior (lower) courts throughout the Union.³ It was also responsible for the appointments, promotions, and transfers of these Judges.

The High Court of the Union was constituted on the 4th January 1948 by the provisions of Section 13 of *the Union Judiciary Act, 1948*. It was made up of a Chief Justice and other Justices. The Chief Justice of the High Court was the Head of the High Court under Section 134 (b) of *the 1947 Constitution*. All the Judges of the High Court were appointed by the President by an order under his hand and seal, with the approval of both Chambers of the Parliament in a joint sitting.⁴ The Constitution provides that all the Judges should be independent in the exercise of their judicial function and subject only to the Constitution and the laws.

The qualifications necessary for appointment as a Judge of the High Court are prescribed in Section 142 (2) of *the 1947 Constitution*. For appointment as Chief Justice of the High Court, or a puisne Judge of the High Court, a person must be a citizen of the Union, an advocate of 10 years' standing, or one who has held judicial office for at least five years in a position not inferior to that of a district and session Judge or Chief Judge of the Yangon City Civil Court.⁵ Once appointed by the President, these Judges could not be demoted, dismissed, or transferred, and their salaries could not be reduced, by the Executive.⁶ Being thus unobligated to the Executive, the Judges could freely discharge their duties and boldly make the right decision.

The High Court was to be a Court of Record. It kept the record of the trial of certain cases to serve as precedents and rulings for trying cases all over the Union. It was to sit in the capital city of the Union and at such other place or places as the President might, after consultation with the Chief Justice of the Union, appoint.⁷ Thus, in October 1956, arrangements were made for a Judge of the High Court to sit permanently in Mandalay.⁸ The Constitution also directs that one or more Judges of the High Court shall sit at such place in the ShanState as the President may appoint after consultation with the Chief Justice of the Union.

¹MaungBa Han, *A Legal History of India and Burma*(Yangon: the A.M.A.K Press, 1952),107.

²*The High Court Office Manual*,Second Edition (Yangon: the Government Printing and Stationery, 1959),1.

³ Maung Maung,*The Constitution of Our Union of Burma* (Yangon: the University Press, 1959),92.

⁴*The Constitution of the Union of Burma*, Section 140 (2).

⁵ Maung Maung,*Constitution*, 150.

⁶ Maung Maung,*The Constitution of Our Union of Burma*,92.

⁷*The Constitution of the Union of Burma*, Section 148.

⁸ J.S. Furnivall, *The Governance of Modern Burma* (New York: Institute of Pacific Relations, 1960),78.

The High Court was also the principal Court of Appeal for the Whole Union in both criminal and civil matters.¹ And, all capital sentences by an inferior court require confirmation by the High Court.

The High Court also had exclusive original jurisdiction for the City of Yangon and in all matters arising under any treaty made by the Union; in all disputes between the Union and a unit or between one unit and another; and in such other matters as might be defined by law. It was required to transfer to itself any case pending in an inferior court if it was satisfied that a constitutional issue was involved under Section 135(1) and (2) of *the 1947 Constitution*. Moreover, it had the power to exercise ordinary original civil jurisdiction within such local limits as might, from time to time, be declared by the President, and until such local limits were so declared, within the limits of the ordinary original civil jurisdiction of the High Court of Judicature at Yangon immediately before the commencement of the Constitution.² In the exercise of its ordinary original civil jurisdiction, it had the power to receive, try and determine suits of every description if, in the case of suits for land or other immovable property such land or property must be situated, or in all other cases if the cause of action must have arisen either wholly or, in case the leave of the High Court must have been first obtained; in part within the local limits of the ordinary original civil jurisdiction of the High Court, or if the defendant at the commencement of the suit must carry on business, or personally work for gain within such limits.³ But, provided that if the High Court sat in Yangon, it had no such original jurisdiction in cases falling within the jurisdiction of the Yangon City Civil Court, and if it sat in any other place, it had no such original jurisdiction in cases falling within the jurisdiction of any other Court of Civil Judicature in such place.

The High Court was a Court of extraordinary civil and criminal jurisdiction. Thus, it had the power to remove and to try and determine any suit being or falling within the jurisdiction of any court subordinate thereto, when the High Court might think proper to do so, either on the agreement of the parties to that effect or for purposes of justice.⁴ The High Court was also vested ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction. And, in the exercise of such jurisdiction, it had the power to try all persons brought before it in due course of law.⁵ Moreover, it had all such civil and maritime jurisdiction as might have been exercised by the High Court of Judicature at Yangon and all such criminal jurisdiction as might have been exercised by the High Court of Judicature at Yangon as Court of Admiralty or otherwise in connection with a maritime matter or matters of the prize had not the Constitution come into operation.

The High Court was a Court of Appeal from all the Civil Courts of the Union other than the Supreme Court. Appeals against the decision of a Single Judge of the High Court made in the exercise of the original jurisdiction or in the exercise of the appellate jurisdiction, not including revisional jurisdiction, vested in him by the Constitution could be made only to the High Court.⁶ Subject to the provisions contained in *the Code of Criminal Procedure*, there was no appeal to the High Court from any sentence or order passed or made in any criminal trial before the Court of original criminal jurisdiction, which might be constituted by one or

¹HugeTinker, *The Union of Burma* (New York: Oxford University Press, 1957), 140.

²*The Union Judiciary Act, 1948* (Yangon: the Government Printing and Stationery, 1955), Section 14.

³*The Courts Manual*, Third Edition (Yangon: the Government Printing, 1970), 862.

⁴*The Union Judiciary Act, 1948*, Section 16 and 18.

⁵*The Union Judiciary Act, 1948*, Section 17.

⁶*Ibid.*, Section 20.

more Judges of the High Court. However, provided that any such Court might reserve any point or points of law for the opinion of the High Court.¹ It was also a Court of Criminal Appeal from the criminal courts subordinate thereto and from all other courts for which the High Court must be declared to be a Court of appeal by any law for the time being in force.

Moreover, the High Court was a Court of reference and revision from the criminal courts subject to its appellate jurisdiction. It had the power to hear and determine all such cases as might be referred to it by any Judge or other authority following the law; or to revise all such cases as were subject to revision under any law.² It had the power to transfer any criminal case or appeal from one subordinate Court to any other subordinate Court of equal or superior jurisdiction.³ It also had the power of superintendence over all Courts in the Union for the time being subject to its appellate jurisdiction.

From time to time, the High Court had the power to make rules consistent with the Constitution and any other law for the time being in force applicable to the High Court to enable it more effectively to exercise the jurisdiction conferred upon it under *the Constitution* and *the 1948 Union Judiciary Act*. Subject to such rules and restrictions prescribed by the Parliament, the Chief Justice of the High Court must appoint so many and such clerks and other ministerial officers as might be found necessary for the administration of justice and the due execution of all the powers and authorities granted to it.⁴ According to Section 29 of *the 1948 Union Judiciary Act*, the High Court must frame such rules as might be necessary with the previous approval of the President, prescribing the terms and conditions of service of all persons appointed to the staff of the High Court.

(c) The Supreme Court of the Union of Myanmar

The Court of final appeal in the Union of Myanmar during this period was the Supreme Court. Without prejudice to the powers conferred upon the Supreme Court by any other provisions of their Constitution, the Court must have appellate jurisdiction from all decisions of the High Court, and also have appellate jurisdiction from such decisions of other Courts as might be prescribed by law.⁵ Under Section 138 of *the 1947 Constitution*, the decisions of the Supreme Court in all cases must be final.

Section 3, Part II of *the Union Judiciary Act, 1948*, states:

‘The Supreme Court shall consist of the Chief Justice of the Union and such number of other Judges as the President may deem necessary, but unless and until a resolution in this behalf is passed by the Union Parliament at a joint sitting recommending an increase in the number of Judges, the number of puisne Judges shall not exceed four.’

The Chief Justice of the Union was the leader or head of the other Judges of the Supreme Court. The position of the other Judges of the Supreme Court was determined by their seniority of service in the Supreme Court under Section 33 of *the 1948 Union Judiciary Act*. The Chief Justice of the Union and all the other Judges of the Supreme Court were appointed by the President by an order under his hand and seal, with the approval of both Chambers of

¹*The Union Judiciary Act, 1948*, Section 22.

²*The Courts Manual*, 863.

³*The Union Judiciary Act, 1948*, Section 25.

⁴ *Ibid*, Section 29(1).

⁵*The Constitution of the Union of Burma*, Section 136 (3).

the Parliament in joint sitting.¹ As the Chief Justice of the Union, only Judges of the highest calibre and unquestionable moral character were appointed to this post of greatest esteem.² Every Judge of the Supreme Court or the High Court had to make the declaration, or oath, on his appointment to that post. This oath had to be made and signed by the Chief Justice of the Union in the presence of the President. Any Judge who declined or neglected to take the oath would be deemed to have declined to accept the appointment under Section 139(4) of *the 1947 Constitution*.

The qualifications necessary for appointment as a Judge of the Supreme Court are described in Section 142(1) of *the 1947 Constitution*. For appointment as a Judge of the Supreme Court, a person must be a citizen who was, or whose parents were, born in the Union, or a citizen of the Union of at least five years' standing. He must be an advocate of the High Court of at least 15 years' standing, or who has been for five years at least a Judge of the High Court, or of its predecessor, the High Court of Judicature at Yangon. An additional qualification was necessary for the Chief Justice of the Union. He must have come from the Bar, being an advocate of at least 15 years' standing, and, if he is holding judicial office at the time of his elevation to be Chief Justice of the Union, having been an advocate before taking that judicial office.³ A Judge of the Supreme Court, or of the High Court, might by resignation under his hand addressed to the President resign his office.

The Supreme Court of the Union was constituted on 4 January 1948 by the provisions of Section 3 of *the Union Judiciary Act, 1948* with Chief Justice of the Union and other Justices. The first person to become the Chief Justice of the Union was Sir Ba U and the other Justices of the Supreme Court appointed under him were U E Maung and U Kyaw Myint.⁴ It replaced the Judicial Committee of His Majesty's Privy Council of the British colonial administration.⁵ It was a Court of Record and had supervision over all courts in the Union. It sat in the capital city of the Union and also at such other place or places as the President might, after consultation with the Chief Justice of the Union, from time to time, appoint.⁶ The Chief Justice of the Union made appointments to the staff of the Supreme Court. With the previous approval of the President, he might frame such rules necessary for regulating their emoluments and other conditions of service according to Section 11 of *the Union Judiciary Act, 1948*.

The Supreme Court had appellate jurisdiction from all decisions of the High Court and other Courts prescribed by law. Subject to such rules as might be made by the Supreme Court regarding appeals from other Courts in the Union of Myanmar, an appeal must lie to the Supreme Court- (a) from any decree or final order passed on appeal by the High Court or by any other Court of final appellate jurisdiction; (b) from any decree or final order passed by the High Court in the exercise of original civil jurisdiction; and (c) from any decree or order when the case was certified to be a fit one for appeal to the Supreme Court.⁷ In each of the cases mentioned in clauses (a) and (b) of Section 109 of *the Code of Civil Procedure*, the amount or value of the subject matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amounts or value of the subject-matter in dispute on appeal to the Supreme

¹*The Constitution of the Union of Burma*, Section 140 (1), (2).

² Maung Maung, *The Constitution of Our Union of Burma*, 92.

³ Maung Maung, *Constitution*, 150.

⁴*Burma Law Reports, Supreme Court, 1948* (Yangon: the Government Printing and Stationery, 1949), 1.

⁵*The Union Judiciary Act, 1948*, Section 12.

⁶*The Courts Manual*, 859.

⁷*The Code of Civil Procedure* (Yangon: the Government Printing and Stationery, 1958), Section 109.

Court must be the same sum or upwards, or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value.¹ And, where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

The Constitution also gave the Supreme Court the power to issue directions in the nature of writs to protect the rights of citizens guaranteed by it, such as *Habeas Corpus*², *Mandamus*³, *Prohibition*⁴, *Quo Warranto*⁵ and *Certiorari*⁶. Any person had the right to move the Supreme Court to issue directions in the nature of writs appropriate to the fundamental rights guaranteed under Chapter II of *the 1947 Constitution*. This right has been freely exercised. In 1954, there were only 6 criminal appeals and 20 civil appeals but there were no less than 183 criminal and 152 civil miscellaneous applications.⁷ In protecting the rights of the citizen, the Supreme Court had construed its powers and functions liberally and had not shown any reluctance to take up jurisdiction in preventing a miscarriage of justice. Out of the five writs mentioned, only the power to issue *habeas corpus* was given to the High Court⁸, whereas the Supreme Court enjoyed the power to issue all of them.

The Supreme Court had jurisdiction throughout the Union, and the law as declared by it was binding on all Courts. From time to time, the Supreme Court might make rules consistent with *the Constitution* and *the Union Judiciary Act, 1948*, for the purpose of enabling it more effectively to exercise the jurisdiction and the power of supervision conferred upon it by the Constitution or any other law for the time being in force.⁹ The supervisory jurisdiction of the Supreme Court was a widest amplitude and vested the Court with a power that was not fettered with any restrictions and must consequently embrace all aspects or functions exercised by every court throughout the Union. It would be suggested that the power of supervision or superintendence is confined only to the administrative matters. There were no limits or fetters or restrictions placed on the power of supervision conferred upon the Supreme Court.¹⁰ Thus, the framework of the judiciary as contemplated by *the 1947 Constitution* and *the Union Judiciary Act, 1948*, seems to make the Supreme Court the custodian of justice throughout the Union.

Section 151 of *the 1947 Constitution* gave an advisory role to the Supreme Court. When an important question of law arises, the President may refer the question to the Supreme Court for an opinion. The Court then considers the question as in a trial, and delivers its opinion in open Court, and submits its report to the President. The opinion of the majority of

¹*The Burma Code*, Vol. XII (Yangon: the Government Printing and Stationery, 1958),40.

²*Habeas Corpus* is to bring a prisoner before Judge, and to state reason of his detention.

³*Mandamus* is a command issued by a higher court to a lower court to perform public or statutory duty.

⁴*Prohibition* is a command from superior court forbidding inferior court to proceed in suit deemed to be beyond its cognizance.

⁵*Quo Warranto* calls upon a person to show by what warrant he holds a franchise or office.

⁶*Certiorari* is a command by higher court for records of case tried in lower court.

⁷ Furnivall, *The Governance of Modern Burma*, 77.

⁸*The Code of Criminal Procedure* (Yangon: the Government Printing and Stationery, 1956), Section 491.

⁹*The Courts Manual*, 860.

¹⁰ Maung Maung, *Constitution*, 163.

the Judges present at the hearing of the case prevails though dissenting opinion are allowed.¹ This procedure has been found useful in connection with proposed legislation regarding the exploitation of mineral resources on which Section 219 of *the 1947 Constitution* placed certain restrictions.² Moreover, as the appellate Court for the Union of Myanmar, all appeals, applications, or other proceedings whatsoever pending immediately before the commencement of the Constitution before the Judicial Committee of His Britannic Majesty's Privy Council in the exercise of any jurisdiction vested in it by law must be continued and concluded in the Supreme Court.³ All authorities, civil and judicial, throughout the Union must act in aid of the Supreme Court.

There were several functions which the Constitution entrusted to the Chief Justice of the Union or the Judges of the Supreme Court. Under Section 64 of *the Constitution*, in the absence of the President, a Commission takes over, and the Chief Justice of the Union or if he is unavailable, a senior Judge of the Supreme Court, serves on the Commission. Such a Commission was appointed in December, 1957, for a brief period, when President U Win Maung went to the United States of America for medical treatment.⁴ Under Section 107 of *the 1947 Constitution*, a Judge of the Supreme Court must act as chairman of a "Committee of Privileges" which may be appointed by the President when the question as to whether a bill is a money bill is in dispute. Moreover, when State Council has passed a bill, the President may refer it to the Supreme Court for decision on the question whether such bill or any specified provision thereof is repugnant to the Constitution.

(d)The ideal of the independence of the Judiciary

The ideal of the independence of the Judiciary and the rule of law had been a fixed and shining light on the changing political situation in the Union of Myanmar. The Judges had been men who were steeped in the democratic tradition and men of learning who served justice. Sir Ba U, who was the first Chief Justice of the Union, became the first Burman President of the Union in 1952.⁵ Dr Kyaw Myint who was first appointed Judge of the High Court of Judicature in 1946, became a Judge of the Supreme Court when Myanmar became independent and acted as Chief Justice of the Union for a period. Dr E Maung who was an Advocate-General after the war, then Judge of the Supreme Court, Judicial Minister and other Ministers all in one in the desperate year 1949 and acted as Chief Justice of the Union.⁶ U Thein Maung, who was appointed Chief Justice of the Union after Sir Ba U, was also a distinguished jurist and a consistent fighter for national freedom in his days.⁷ Dr Myint Thein who was the Chief Justice of the Union, came from the broader background of law and military service and higher diplomacy.

Moreover, U Chan Htoon who was Judge of the Supreme Court was a barrister of standing, and he was the principal drafter of the Constitution, and the first Attorney-General of the Union of Myanmar for several years before his elevation to the Bench. Another Judge, Dr Bo Gyi had a long and distinguished career in the judicial service, and was one of the first Judges of the High Court on independence before his elevation to the Supreme Court. Justice

¹*The Constitution of the Union of Burma*, Section 151, (1), (2).

² Furnivall, *The Governance of Modern Burma*, 77.

³*The Union Judiciary Act, 1948*, Section 12.

⁴Maung Maung, *Constitution*, 166.

⁵Ibid, 117

⁶ Ibid, 153

⁷Ibid, 117

Aung Tha Gyaw also came from the judicial service to the High Court Bench, and was elevated in 1957 to the Supreme Court. He was a man of uprightness and learning and his judgments had been famous not for their learning alone but for their independence and honesty.¹ On the High Court too, men of truth had served justice of the Union.

Judges of the Supreme Court and the High Court had also been fully employed. They presided over enquiry commissions and special tribunals. After every parliamentary general election, one or more Election Tribunals were appointed to try election complaints and Judges of the High Court served as chairman and members also.² Chief Justice of the Union Dr Myint Thein has led several Myanmar delegations to important United Nations General Assembly Sessions in New York. He presented at the Assembly Session the case of KMT aggression on Myanmar and led the Myanmar delegation to the same UNGA meeting to take part in the deliberations on the KMT aggression in 1953. As Chief Justice of the Union, he had ceremonial functions, and social obligations. Justice U Chan Htoon of the Supreme Court was honorary secretary of the Buddha Sasana Council, and played an important part in the organization of the Sixth Buddhist Synod. Justice Dr Bo Gyi was for many years Vice Chancellor of the University of Yangon. Justice U Aung Khine has served on several United Nations Commissions. In the social functions, Judges were invited to greet visiting heads of state and prime ministers at the airport.³ Therefore, the Judges were also kept busy.

(e) Security of Tenure for Judges of the Supreme Court and High Court

There was security of tenure for Judges of the Supreme Court and the High Court. These Judges must not be removed from office except for proved misbehaviour or incapacity under Section 143(2) of *the 1947 Constitution*. The charge must be preferred by either Chamber of Parliament subject to and in accordance with the provisions of Section 143(2) of *the 1947 Constitution*. No charge must be preferred against any Judge of the Supreme Court or the High Court except at the instance of one of the Chambers on a resolution supported by a majority of the members present. And it must then be investigated by a Special Tribunal consisting of the Speakers of the two Chambers and the President or a deputy appointed by the President.⁴ The alleged Judge had the right to appear and to be represented in the proceedings. If the Tribunal unanimously declared that the charge had not been proved, its decision was final.⁵ But, in all other cases, the report of the Special Tribunal was considered by both Chambers in joint sitting, and if the majority so decided, the President must order the removal of the culprit from his office.

Neither the salary of a Judge of the Supreme Court or of the High Court nor his rights and privileges was reduced to his disadvantage after his appointment. The Chief Justice of the Union drew a monthly salary of Ks.3500, Ks.500 more than that of the Chief Justice of the High Court. In the same way, Justices of the Supreme Court drew salaries of Ks. 3000 per month, which is equivalent to the salary of the Chief Justice of the High Court.⁶ This was only natural as the Supreme Court was the highest court in the Union of Myanmar.

¹Maung Maung, *Constitution*, 153.

²Ibid, 167

³ Ibid, 167

⁴*The Constitution of the Union of Burma*, Section 143 (5), (6).

⁵ Furnivall, *The Governance of Modern Burma*, 77.

⁶*The Union Judiciary Act, 1948*, Section 32.

The age of retirement of a Judge of the Supreme Court was 65, and that of a Judge of the High Court was 60 under Section 34 of *the Union Judiciary Act, 1948*. An amendment of the Act was passed in 1954 to enable a Judge of the Supreme Court or the High Court to retire before the age of compulsory retirement with the consent of the President.¹ Another amendment was introduced in 1955. It gave power to the President to extend the tenure of a Judge of the Supreme Court after the retirement age was passed, for one year at a time, and not more than three years in all.² The amendment was introduced by the Union Government specially to extend the term of office of U Thein Maung, the Chief Justice of the Union. It was forcefully attacked by Dr E Maung, a former Judge of the Supreme Court, in the Chamber of Deputies. He pointed out that the amendment had not been made on principle, but especially for an individual. He was willing to support a law to raise the retirement age of all Judges to 70, so that whoever was fit and able could serve to that age. He did not think that the Judges were corruptible, but it would still be wrong to expose them to temptation.³ But to leave it to the President to give extensions would expose the Judges to the temptation of pleasing the Government to get the extensions. Thereby the independence of the Judiciary would be jeopardized.

Respect for the Judiciary of the Union of Myanmar was high. The Judges of the Supreme Court and the High Court made decisions only within the power vested in them by law. If the decisions of the High Court were found to be in accordance with the law, they were always confirmed. One such example was the appeal case of U Saw and Four Others v the Union of Myanmar (*BLR, S.C, 1948, 249*). The decision on this case passed on 27 April 1948, upholding the decision of the High Court and dismissing the appeal.⁴ But, Section 60 of *the 1947 Constitution* says that the right of pardon shall be vested in the President. Moreover, according to Section 62(1) of *the 1947 Constitution*, the President was not answerable to either Chamber of Parliament or to any Court for any act done by him in the exercise and performance of his powers and functions prescribed by the Constitution.

(f) The right of pardon of the President

In the appeal case of U Saw and Eight Others v the Union of Myanmar (*BLR, H.C, 1948, 217*), which was called the State assassination case, U Saw and four other appellants-Maung Soe, Thet Hnin, Yan Gyi Aung and Hmon Gyi- made special appeals to the Supreme Court against the confirmation by the High Court of the death sentence passed on them by the Special Tribunal.⁵ Mr. Havock acted as U Saw's attorney and U Kyar Khaing for others. After hearing the arguments presented by the appellants' attorneys, the Supreme Court headed by Chief Justice Sir Ba U, with Justice U E Maung and Justice U Thein Maung as members, dismissed the special clemency appeal on 27 April 1948.⁶ When the death sentence of U Saw and his

¹*The Burma Code*, Vol.I (Yangon: the Government Printing and Stationery, 1955),197.

²*The Union Judiciary (Temporary Amendment) Act, 1955* (Yangon, The Government Printing and Stationery, 1962), 13.

³ Debate on motion by Dr E Maung that the amendment be repealed, *Parliamentary Proceedings* (Deputies: Vol. II, No.x) (Profile of Dr E Maung, *Guardian Magazine*, March, 1957), 621-628.

⁴*BLR, S.C, 1948, 249*.

⁵ "U Saw and eight others v The Union of Myanmar", *Burma Law Reports, H.C, 1948* (Yangon: the Government Printing and Stationery, 1949), 217.

⁶ DrMaung Maung, *State Assassination, The Union V U Saw* (in Myanmar)(Yangon: Win Maw Oo Sarpay, 1974), 1974), 275.

accomplices became a certainty, certain section of the population, showing sorrow for the condemned men, urged the government to alter the death penalty. The Sangha also asked the government to spare the lives of the condemned men in charity.¹ All these were in vain. U Saw, Maung Soe, Thet Hnin and Hmon Gyi were hanged in Insein Jail just before dawn on the appointed day. Similarly, Yan Gyi Aung was hanged in the Yangon Central Jail.² The remaining appellants-Maung Sein, Thu Kha, Khin Maung Yin and Maung Ni- did not appeal to the Supreme Court, but appealed directly to the President instead for clemency and pardon.³ Therefore, on 5 May 1948 the death sentence passed on Khin Maung Yin was commuted to life-imprisonment in an order signed by U San Nyunt, Secretary to the Judicial Ministry, on behalf of the President. Similarly, in another order of Secretary U San Nyunt dated 6 May 1948, the death sentences of Thu Kha and Maung Ni were altered to life-imprisonment by order of the President. On 8 May 1948 the remaining appellant Maung Sein, who was called Sein Gyi, was hanged in Yangon Central Jail.⁴ Thus, the President was able to alter the death penalty to life imprisonment in the above appeal cases by using the power to show clemency and pardon given him by *the 1947 Constitution*.

There have also been instances of the President using this Constitutional prerogative arbitrarily. This can be seen in the cases of Maung Nyunt Tin hacking his wife to death with a dash, PVO commander Bo Min Naing killing two men, and an insurgent leader raiding Dedaye and looting arms and ammunition therefrom. In all these cases, the accused had been found guilty of the charges and condemned to death, and their death sentences had been confirmed by the High Court. However, the President, using the power vested in him by Section 60 of *the 1947 Constitution*, reversed the sentences and pardoned them.⁵ This use of the power of pardon by the President according to his whims and discretion, rather than to the law, had adversely affected the rule of law in the Union of Myanmar.

(g) Government's tendency to overrule the decision of the Judiciary

Moreover, on the part of the Government, there was a tendency to think that what the Supreme Court or the High Court decided against it could always be overruled by it by legislation later. Regarding this, there were some instances as follows:

The Supreme Court handed down a series of decisions in accordance with *the Public Order (Preservation) Act, 1947[POPA]*. These decisions pointed out that the powers of preventive detention must be used only 'with a view to prevent' the person against whom action was taken 'from acting in any manner prejudicial to public safety and maintenance of public order', and not by way of additional punishment for an act which could be punished under the ordinary penal laws.⁶ The Government got round these decisions by enlarging the meaning of 'prejudicial act' which attracts preventive detention. By Act No. 4 of 1953, the 'prejudicial act' has been enlarged to include smuggling opium and drugs, offences relating to firearms, the smuggling of mineral ores, the smuggling of rice and rice produces, and offences

¹ Maung Maung, *State Assassination*, 277.

² *Ibid.*, 294.

³ *Ibid.*, 277

⁴ *Ibid.*, 294

⁵ *Party Seminar of 1969: Speeches of Chairman General Ne Win and Political Report of the General Secretary* (in Myanmar) (Yangon: Sarpae Beikman Publication, 1970), 46-8.

⁶ Dr Maung Maung, *Burma In The Family Of Nations* (New York: International Educational Publishing House, 1956), 122.

relating to foreign exchange.¹ Therefore, the power entrusted to the Executive officers to order preventive detention was enlarged.

The Bureau of Special Investigation (BSI) was established by Act No.50 of 1951 and charged with dealing with offences relating to public property and with weeding out corruption in government services. Schedule I of *the Bureau of Special Investigation Act* specifies the offences which come within the scope of the Bureau's powers and activities, and Section 24 of the Act delegates to the President the power to amend, add to and withdraw the items in the Schedule.² The President, purporting to act on this power, added a new item to the Schedule by a notification in *the Burma Gazette*, the item being 'such offences within the mischief of the SS. 405, 415, and 463 of *the Penal Code* as are investigated and sent up for trial by the Bureau'.³ This insertion was challenged before the Supreme Court by an application for writ of *certiorari* and the Court decided that the amendment by insertion was *ultra vires* because it gave a *carte blanche* to the Bureau to 'pick and choose in which of those cases it will or will not assume powers and duties and which of those cases it will investigate and send up for trial before the Special Judge'. It was pointed out 'the President has practically refused to use his judgment and discretion and delegated his power to the Bureau of Special Investigation. Such delegation is not authorized by the Act and is against the principle that where a trust or discretion in the agent is involved and the exercise of which has been delegated such agent cannot lawfully appoint another to perform his duties' in the case of *Ah Kam v U Shwe Phone and Others*.⁴ However, the Government promptly got round this by getting an amendment passed in Act No.58 of 1953 which enlarged the powers and duties of the Bureau to cover offences specified in Schedule I and other offences cognizable by the laws in force.

It is, of course, the duty of the Union Government, which is closer than the Judiciary to the people and the changing situations in the country, to propose legislation which will help to make the inevitable gap between the laws and reality as narrow as possible. On the other hand, when the Union Government commands an unchallenged majority in Parliament and can rush through at very short notice any law it wishes to make, the temptation to assert itself becomes strong, and rushing to the pliant Parliament to get what it wants by law overriding the decisions of the Judiciary may well develop into a habit.⁵ If the temptation is not resisted, and the habit develops, then the Judiciary will slowly be reduced to a facade or a show-piece and its real functions will be negative.

By analyzing these evidences, it can be said that the ideal of the independence of the Judiciary was a shining light on the changing political situation of the Union of Myanmar. However, the appointment of the Judges rested with Parliament, and with the party which had a majority in the Parliament. So, it is probable that the Judges will be of the same political complexion as the Government over time, and the Courts will tend to be less critical towards the executive authorities. Moreover, as the Government could command an unchallenged majority in Parliament, it could overrule the decisions of the Courts against it, by legislating later. So, it is

¹ Maung Maung, *Constitution*, 154.

² *The Bureau of Special Investigation Act, 1951* (in Myanmar) (Yangon: the Government Printing and Stationery, 1956), Section 24.

³ *The Burma Gazette*, Part I, No. xxxviii (Yangon: Department of Home Affairs and Religion, 23 January 1952), 101.

⁴ *Burma Law Reports, Supreme Court, 1952* (Yangon: the Government Printing and Stationery, 1955), 222.

⁵ Maung Maung, *Constitution*, 156.

an undeniable fact that Myanmar Union judiciary under *the 1947 Constitution* was only relatively, not completely, independent of the Executive control.

Conclusion

In the Union Judiciary of Myanmar under *the 1947 Constitution*, the ideal of the independence of the Judiciary was accepted by the framers of *the 1947 Constitution*. To ensure judicial independence, the Judiciary must be given security of tenure of office, and must not be influenced by political and personal considerations. Yet, the fathers of *the 1947 Constitution* were young radicals and revolutionaries who searched for means to combine independence and tradition with some elements of democracy. After Myanmar's independence, the ideal of the independence of the Judiciary and the rule of law was a fixed and shining beacon on the changing situation of politics in the Union of Myanmar. Nevertheless, the appointment of the Judges rested with Parliament which had a majority of the party in the Parliament. So, in the course of time the Judges will be of the same political complexion as the Government, the Courts will tend to be less critical towards the executive authorities. Thus, the Union judiciary of Myanmar under *the 1947 Constitution* was only relatively, not completely, independent of the Executive. And, when the Union Government commands an unchallenged majority in Parliament, the temptation to assert itself becomes strong, and rushing to the pliant Parliament to get what it wants by law overriding the decisions of the Judiciary may well develop into a habit.

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