Legal Issues on Burma
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PREFACE

An examination of the Burmese Judiciary is a suitable topic for analysis by jurists rather than by activists or political scientists. This article is an attempt to highlight the important role of judiciary with the current political background of Burma where the National League for Democracy (NLD) and a number of common people have started to apply the judicial system. For instance, by filing law suits against the military authorities for the release of Daw Aung San Suu Kyi and opening of NLD's offices, in order to protect the rights of individuals as well as a political party, in conjunction with the mass movement such as the signature campaign.

We expect that Burma's transition to democracy should be peaceful, systematic and non-violent while the fundamental rights and freedoms of all individual citizens are protected. To make this a reality, the rule of law must be preserved under the safeguard of an independent judiciary with the existence of fair and impartial trials. Burma inherited the Common Law system from the British. Her judicial system was relatively stronger than those practiced in the countries in Indochina and even in Thailand. In spite of the military rule in Burma for over four decades, a fundamental judicial mechanism remains unchanged and as such many proactive judicial procedures, that can be applied by the victims in seeking justice, still exist.

With this background scenario, it entails to encourage the efforts of local people and the various levels of democratic and ethnic leaders in making their efforts to take advantage of the worth of current judicial system while simultaneously criticizing its negative points. Such efforts of people in Burma and a close watch of the international community alike may facilitate the reformation of negative aspects of the current judiciary into positive ones as well as the laying down a proper foundation for future judicial system in Burma. To this end, Burma Lawyers' Council attempts to produce a Brief Analysis paper on judicial system in Burma.

A Brief Analysis On The Judiciary Of Burma

Our Concept in Conformity with International Standards

Harold Laski wrote:

"The importance of judiciary in political construction is rather profound than prominent. On the one hand in popular discussion of forms and changes of government, the judicial organ often drops out of sight: On the other hand, in determining a nation's rank in political civilization, no test is more decisive than the degree in which justice as defined by the law, is actually realized in its judicial administration, both as between one private citizen and another, and as between private citizens and members of government"

How appropriate is this observation can be ascertained from the state of the Judiciary under the military dictatorship in Burma. That the importance of judiciary is profound in political construction of a closed society, the generals had realized at the out set when they seized power. Steadily they modeled the judiciary according to their needs. The only difference is that it does not rule by martial law and make the judges wear uniforms. That of course is with an ulterior motive. Civilian judges with military mind set give better legitimacy in the eyes of the people and to the international community. Also is the fact that the junta in order to survive has to have a running economy. Facade of a civilian judiciary in a military dictatorship will lure foreign investors who follow market economy. Foreign investors will look at the investment and other relevant laws and see who administer those laws. Military judges have no respect for law. When one understands these dynamics, it becomes easy to understand the core of the junta's judiciary, shorn off its mask. Important also is the fact that conflict resolution in a society is the most basic kind of political process, without which no social order is conceivable. Judiciary whatever its form be, provides that requirement. Truth of this is further revealed from the Soviet judiciary. The Soviet regime could not dispense with a judiciary. It had to have one but it was subject to the directions of the Party and the courts were servants of the government. The other point in the quote, is also significant Judicial organ in today' Burma has been dropped out of sight. Media, which is controlled by the state never reports any significant cases. Given that, there is absolute absence of Freedom of expression, Judiciary is out of the sight of the common man.

The third point is the decisive test is that as between private citizens and members of government, the judiciary plays the role of sympathetic to the victim. Not a single case between private citizens and a member of government has before the court. The role of judiciary as a vital component of the governmental process has been well appreciated by the junta. Separation of powers is the hallmark of good governance. Separation of the judiciary from the other arms of government is regarded as characteristic of a nation's political civilization and also the extent to which democracy prevails in the country. Unashamedly the junta openly kept the judiciary under its executive. It has many ministries like Home, Foreign, Defense, Education etc. However, there is no ministry of Law or Justice. All the courts are under the Ministry of Home Affairs.

There is no forum for testing the arbitrariness of the executive nor is there accountability. The executive is the sole judge of its' own actions. Montesquieu wrote; "There is no liberty yet, if the power to judge is not separated from the legislature and executive powers". That was in the context when the monarchs ruled. The king was the law maker and the commander-in-chief. So it is today in Burma. Sr. General Than Shwe is the law maker. All laws, notifications come out under his signature as he is the Commander-in-chief. The separation power is the foundation of judicial independence. The principle of the separation of powers is embodied in international agreements and instruments and the need for separation is clearly affirmed. Even as far as 1907, Chief Justice Coke reminded King James (1) that the king was "under god and law". In Burma the Commander-in-chief is neither under "Buddha and law" because he constructs a number of pagodas and is exonerated from sins committed having earned merits. One of the major problems with military dictatorship is the desires of the junta to be politically dominant in all fields which they occupy and they exercise control in all three fields; legislature, executive and judiciary. This doctrine of the separation of powers is closely linked with the idea of the rule of law, which requires a separation between at least the executive and judiciary. The whole concept is to reduce the dangers of abuse of power and make more efficient government.

In addition to those restrictions/limits created externally through the processes of the separating of powers (i.e. judicial, legislative, and executive) there exist in addition internal mechanisms which work as limits/restrictions. These internal mechanisms, which prevent abuses by the judiciary itself, are manifested in the form of special safeguards; as delineated below.

Special safeguards

To ensure the independence of the judiciary, it must be protected by safeguards, which are not usually provided for other officials of the government. This will be discussed later in this article. The legal system in Burma is based on common-law and the judicial system also operates in common law tradition. It pro-

tects the individual from arbitrary intervention of government by issuing directions of Habeas Corpus, Mandamus and other writs. Common law, doctrine of legality applies to Judicial review of legislative action, no matter whether the law or constitution provides it or not. In UK, there is no written Constitution but the principle of legality operates because of Common Law. The Generals also admit that Burma's legal system is based on Common Law. Therefore whether there is Constitution or not as stated above the Judiciary is bound to act on the principle of Common Law. A statute is to be interpreted and applied which is in conformity and not in conflict with established rules and international norms. Most important problem of social order is putting legal constraint upon Law making. That the Judiciary can only do. In Burma's context it is a lost case.

The Rule of Law does not prevail in Burma while due process of law is fundamentally and systemically denied. The uses of arbitrary powers by the military intelligence, absence of fair trials, and failure to publicize the verdicts undermine justice. The poor, women, and the ignorant don't have means to obtain full procedural or due process rights. The courts are now forced into validating the political actions of the government. The judiciary performs as an instrument for the functioning of the existing dominating political system, which for the time-being is dominated by the military. As Ball suggests, "the courts are an important aspect of legitimizing the outputs of government, and it is a necessary feature that they should reflect conservative opinions". The conservative opinions in the case of Burma are not to have a constitution and Rule of Law. Administrative Courts are a new phenomenon, which did not exist in common law countries. However, with the advance of democratic ideas mechanisms to restrict the arbitrariness of executive had to evolve, these mechanisms appeared in the form of administrative courts. Citizens can go to court to seek remedies for multifarious grievances, from service conditions to facilities for good life. In the field of administrative law, the courts have found themselves in conflict with government. The concept of welfare state provides that the tribunals rather than ordinary courts should resolve these sorts of disputes. Burma has no administrative courts and the age old colonial legal system has been freely manipulated to entrench the authoritarian system. Summing up, it is contended that Burma's Judiciary lacks independence. What is obvious is that the basic components, which determine independence are totally absent, namely separation of powers, absence of the rule of Law, and due process.

International Standards

The concepts and principals, which the authors of this article espouse are not merely drawn from the individual opinions of the authors, but in contrast are rather fundamental conceptions of the judicial system that have evolved over hundreds of years of human history. The principle of judicial independence has

been recognized and endorsed by the international community and thus it has become a fundamental norm of the laws of nations; Lex Lata

The Universal Declaration of Human Rights (1948) recognizes:

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." (Article - 10)

The International Covenant on Civil and Political Rights (1966) reaffirmed the importance of judicial independence in Article 14(1) as follows:

> "..... in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

These international proscriptive instruments embody the international community's basic acceptance of the principle of judicial independence. The United Nations General Assembly in Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 unanimously endorsed the "basic principles of the independence of the judiciary".

More recently, in the context of the Asia-Pacific Region, the Sixth Conference of Chief Justices of Asia and the Pacific was held in Beijing in 1995 and adopted the "Statement of the Principles of the Independence of the Judiciary" (known as the "Beijing Statement of Principles").

The Beijing Statement of Principles embraced the notions contained in Article 10 of the Universal Declaration of Human Rights and Article 14(1) of the International Covenant on Civil and Political Rights. The Statement asserts that an independent judiciary is indispensable to the achievement of the fundamental human rights of a fair and public hearing by an impartial tribunal.

The Statement recognizes that a necessary component of an independent judiciary requires that a tribunal must decide matters "in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source and that the judiciary must have jurisdiction, directly or by way of review, over all issues of a justiciable nature". The Statement emphasizes that an independent judiciary is a necessary component for the attainment of the Rule of Law in any society and it further states in paragraph 8:

> "To the extent consistent with their duties as members of the judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly."

The Statement recognizes that persons appointed to the judiciary must be the

"best qualified for judicial office" on the basis of "proven competence, integrity and independence".

The Beijing Statement concludes with the recognition by the Chief Justices and judges of Asia and the Pacific that the standards contained in the Statement "represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the Judiciary".

The Concept of Security of Judicial Tenure:

Security of judicial tenure is the most elementary requirement for preserving judicial independence. This is recognized in the Beijing Statement, which emphasizes that judges must have security of tenure and that such tenure "must not be altered to the disadvantage of the judge during her or his term of office" (paragraph 21). Paragraph 22 of the Statement declares:

> "Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge."

The importance of security of judicial tenure is again reflected in the provisions of paragraph 29 which provides that the abolition of a court of which a judge is a member must not constitute a reason or occasion for the removal of a judge. The paragraph provides that all members appointed to a court which is abolished or restructured must be reappointed to another judicial office of equivalent status and tenure or be fully compensated if no alternative position can be found.

The Beijing Statement also requires any removal of a judge from office for reasons of judicial misconduct to be the subject of a fair hearing and that any judgment following from such hearing must be published. In this respect, the draft Universal Declaration of the Independence of Justice, recommended to the member countries of the United Nations by the Commission on Human Rights at its 45th Session in 1989, adopted the following principle at paragraph 26(b):

> "The proceedings for judicial removal or discipline shall be held before a court or a board predominantly composed of members of the judiciary. The power of removal may, however, be vested in the legislature by impeachment or joint address, preferably upon a recommendation of such a court or board."

Practical Considerations to Ensure Judicial Independence:
Obviously, complete judicial independence from the other two arms of government is not theoretically perfect given that most judicial appointments and all judicial funding comes from government sources. However, it should be realized that the key to judicial independence is in providing various constitutional

and legislative safeguards and maintaining respect for long standing traditions for the appointment to the judiciary of persons of independence and integrity. Further protection can be ensured by upholding security of judicial tenure subject only to removal for proven misconduct or incapacity and by institutionalizing the processes upon which a contested removal from judicial office may occur. Without such safeguards, there can be no guarantees for an independent judiciary.

There are also certain practical features necessary for an independent judiciary to enable a satisfactory degree of freedom from all forms of interference, whether governmental or otherwise. This can partly be ensured by guaranteeing that the judiciary is provided with appropriate statutory immunities and protections in the discharge of their duties as well as by the payment of adequate salaries and allowances. Failure to ensure suitable remuneration for judges can of itself weaken judicial independence and the proper functioning of the judiciary as has been highlighted in Cambodia in recent years.

The concept of judicial independence cannot be taken for granted. Judicial independence is seriously weakened by arbitrary removals of judges from their judicial offices. Asia Watch reported (Human Rights in Burma (Myanmar), 1990) that 62 civilian judges were relieved of their duties in 1989 for refusing to sentence political offenders to terms longer than the legal maximum sentence. Further, all judicial officials have been required to attend training courses to assist them in fulfilling their duty to assist SLORC in producing necessary changes in the system and in implementing state policies. (Summary Injustice: Military Tribunals in Burma, Lawyers Committee for Human Rights, 1991).

The Absence of Judicial Independence in SLORC's Burma:

After independence from Great Britain in 1948, Burma's High Court judges were nominated by the President and approved by Parliament. Those judges have been described by Silverstein as follows:

"The Justices of the Supreme Court and the High Court established an enviable record for independence of action and created respect for their jurisdiction. During the first decade of independence, when the union and the constitution stood in danger of being overthrown, and afterward, the Supreme Court worked unremittingly to establish a tradition of due process of law in Burma. Despite the grave conditions at the time, the courts worked to protect the individual against arbitrary actions by the government." (Joseph Silverstein, Burma: Military Rule and the Politics of Stagnation, 1977).

Prior to the 1962 military coup, Burma's judicial system at its appellate levels managed to still maintain a high degree of independence from the government and played a significant role in defending basic human rights. After the 1962

coup, the Revolutionary Council abolished the Supreme and High Courts and replaced them with a single Chief Court of Burma. In 1972 the Chief Court was renamed the Supreme Court and became the Supreme Peoples' Court after the adoption of the 1974 Constitution.

Generally, the courts after 1962 were staffed by retired members of the Judge, or Advocate General's office or other individuals who had the support of the military. The Ministry of Judicial Affairs assumed control and management of the court system as well as law enforcement. The restructured legal system therefore served as an aspect of military rule and the courts became another instrument for maintaining political control. There was no judicial independence either in name or practice.

After 1988 when SLORC assumed power, any possibility of achieving a semblance of judicial independence vanished. Immediately upon taking power in September 1988, SLORC decreed Judicial Law No.2/88 of 26 September 1988 which established a Supreme Court and provided for the creation of civilian courts at trial level. The Judicial Law stated:

> "Judicial proceedings shall be independent and in accordance with law" and "shall contribute to the restoration of peace and tranquility and law and order".

In reality however, there is only the pretence of any judicial independence. All courts are subservient to the directions of SLORC and there is no protection for a judge in terms of tenure or other provisions regarding dismissal from office. Martial Law Order No.1/89 issued on 17 July 1989 empowered the military tribunals to conduct summary trials of civilians. Fifteen military tribunals were established by SLORC under its Martial Law Order and the tribunals were presided over by officers of the rank of lieutenant colonel with its other two members comprised of junior military officers. Only three sentences were imposed for alleged martial law offenders, namely:

(i) Three years imprisonment with hard labour;
(ii) Life imprisonment; or
(iii) Death sentence.

There is no reported instance of any acquittal by a military tribunal. There were no rights of appeal by virtue of Martial Law Order No.2/89 which also provided that witnesses could be dispensed with and convictions could be obtained without hearing prosecution witnesses. The military tribunals established by Martial Law Order No.1/89 were staffed by military officers who were completely subject to military authority. Those tribunals were empowered to conduct summary trials of civilians from 17 July 1989 until September 1992 when they were abolished.

The absence of judicial independence in contemporary Burma and its continued violation is of great concern to the international community. Burma is not

a party to the International Covenant on Civil and Political Rights. Civilians were frequently tried before the military tribunals in violation of generally recognized principles of International law. SLORC has however shamefully maintained the false notion that the Burmese judicial system "is based on universally recognized basic norms and principles" (see for example a letter from Khin Maung Win, Director, Ministry of Foreign Affairs to Lawyers Committee for Human Rights dated 19 February 1991; quoted in Summary Injustice: Military Tribunals in Burma, supra).

The Basis for Judicial Independence in a Future Democratic Burma:

For genuine democracy to exist in Burma once there has been a successful transition of power from SLORC to the democratic opposition, an understanding and respect for judicial independence will be the cornerstone for a new democratic society governed by the rule of law. Democracy cannot prevail in Burma without institutional, legal, and practical safeguards for ensuring proper procedures for the appointment and removal of judges and for the exercise of their functions without undue external influence so that judges remain impartial and independent of the executive and legislative branches of government.

Preliminary Summary; Respect for Judicial Independence:

Judicial independence must be founded not merely in formal constitutional terms, but also by a deep and abiding respect for the very traditions of judicial independence. Those matters underline the recognition by the international community of the importance of each of the elements embodying the notion of judicial independence such as the doctrine of the separation of powers, security of tenure, judicial immunities and proper remuneration for judicial officers. Those concepts and notions have been variously expressed in the international legal instruments discussed at the beginning of this article as well as being contained in the traditions of the English common law system inherited by the Burmese in the former part of this century.

The protection of fundamental human rights and of democratic processes requires a judiciary that is not only independent from legislative and executive controls but also one which is neutral, objective, competent and free of all external influences. Constitutional safeguards can go only so far in ensuring those qualities in a country's judiciary.

The doctrine of the separation of powers and the various ingredients necessary to maintain the independence of the judiciary must be respected at all levels of government and not merely proclaimed in constitutional provisions and legal pronouncements, it is essential that judicial independence be understood and

institutionalized as an enduring concept and an inherent component of any democratic society which seeks to be governed by the rule of law.

Historical background of the Judicial System in Burma

The Judicial system in Burma dated back to the time when Burma did not become a nation State. Before advent of Kings, the country was ruled by Chieftains and like all feudal states land was administered by the tribal heads according to custom laid down by them. When the Kings came to rule and the country was more geographically united, more laws became transparent and customary law was the predominant force. Buddhism played a dominant role and written law-texts known as *Dammathats* became the guide to the Judicial System. In spite of that, even with passage of time, Burmese Buddhist law has not been codified. It deals with marriages, divorce, inheritance and other family related matters. Similarly, the ethnic nationalists, Chins, Kachins, Shans, Arakanese and etc., all have their respective special customs. The Kings and other local chiefs administered their own laws in their domain. Then, the British introduced the Common law in provinces conquered by them. The positive aspect of the Judicial System which worked hardship to the people was revealed in the land-mark case of Bombay Burma Trading Corporation. It was a British firm operating in Upper Burma under the reign of Kings. It had adopted enormously unfair means and looted the log wealth. Once this was caught and put up before court the Burmese judiciary under the Burmese King took action. The judgment of the Hlutdaw levied a fine of 23 lakhs rupees for illegal extraction of teak logs. That was the ostensible cause of third Anglo-Burmese war resulting in the British Annexation of the Burmese Kingdom. It was the vindication of the cardinal principle in a Judicial System that justice must be administered without fear or favor.

With the coming of Britishers, a new Judicial System was evolved. At first cases were tried through Myooks, as township administrators, and village Head men. A legal history indicates four highly valued principles which Burmese law acquired form British precedent.

1. The principle of liberty conferred and controlled by law.
2. Sacredness of the guarantee of freedom witnesses the law, covered by writ safe guards.
3. Independence of the Judiciary from political interference.
4. The principle of a person's rights to impartial justice.

In 1863, six grades of court were setup and civil procedure Code extended. There was Bench of Judicial Commissioner. Burma was then a province of India. In 1900, the bench became chief court of lower Burma. In 1923; the High Court of Judicator was established at Rangoon. With introduction of reforms,

like Diarchy and provincial Autonomy, separation of Executive and judicial functions was effected. Privy Council became the Apex Court of Appeal. Myoyon (township) Courts and Hluttaw based on familiar customary law was replaced. The English Judicial System became a game of technicalities and rules which the people not did at all understand.

With the Independence of Burma, the 1947 Constitution came into force and that was landmark in Burma's journey to democracy. The Judicial system was based upon the British pattern. The main difference was the establishment of the Supreme Court, as the Highest Court of the land. It was the Court of final appeals, but the feature of the system was that it was vested with powers to enforce fundamental rights guaranteed in the Constitution. It had powers of writs of Habeus Corpus, Mandamus, Prohibition, Certiorari and Quo warranto. Habeus Corpus is a court order to release a prisoner being held in custody illegally . A person could come forward before the Supreme Court and apply for Habeus Corpus for a family member or a friend under illegal detention to set him free. With the effectiveness of other writs, an administrative order not according to law could be quashed. A public servant refusing to fulfill a duty cast upon him by law could be forced to carry out that duty. Under the Supreme Court, which had overall power of superintendence, over all Courts including High Court of Rangoon and a Bench of it at Mandalay. Under the High Court there were District Courts and subdivision Courts. All had Civil and Criminal Jurisdiction. The trial in Criminal Court was mostly under Criminal Procedure Code and Penal Code. In Civil Courts, the Civil Procedure applied to both the Courts. Evidence Act is the law under, which evidence whether oral or documentary are determined to be admitted or rejected and proof of a case determined.

In the aftermath of the independence of Burma, most of the laws were those which the British Colonialists left but the Parliament had passed an enabling Act to give them legal force. The Burma parliament no doubt passed many other Acts and special Laws relating to economic offenses, Emergency Provisions Act, Land Act etc. The Judges of the court from middle order downward were selected through competitive examination known as judicial service. They had to be legally qualified and join the judicial service. By and large, the judicial system earned accolade from abroad.

General Ne Win seized power in 1962. He continued to carry on the post- Independence Juridical system for some time. However, when he failed to get political backing, he abolished the constitution. He re-designated, the Supreme Court as Chief Court. Stripped of all the power of sitting judges of High Court who were eminent Judges and he made Dr. Maung Maung, his hand-picked person, as Chief Justice. Dr. Maung Maung appointed new Judges. Mediocre, Sycophants became judges. The old law continued to be effective with addition of several draconian laws. The judicial system became hybrid neither fish nor frog.

This ended with the promulgation of the 1974 constitution and the judicial system was an openly Fascist document. It functioned under the control of the Burma Socialist Programme Party.

Except Dr. Maung Maung, the majority of chief court judges were ex-army personnel, Brigadiers in rank. They knew nothing of law. They were appointed by parliament established under 1974 constitution. The Judges were assisted by legal advisors. These legal advisers were mostly subordinate Judges with legal qualification. Their positions were so degraded that they could not sit in open court during hearing or trials. Before a judgment or an order was given the judges who sat in a bench three at a time discussed the matter amongst themselves and made a decision. The legal advisors were directed to write judgment accordingly. The role of the advisors was nothing but a fraud on the entire judicial system.

Important cases, that were politically motivated, were decided according to the dictates of policy makers. In other case, the judges were given some liberty so that they could make money and became victims of corruption. There was no fixed tenure of service. The cost of living was so high that their salaries were not sufficient to meet the daily needs of their formatives. As a result, there was deep apathy and erosion of trust on judiciary. It earned perhaps the worst contempt of the people.

Post-Independence Judiciary; An Analytical Critique

The judiciary in Burma after independence and prior to installation of military dictatorship made landmark decisions, upholding the fundamental rights of its citizens, which were protected under the 1947 Constitution.

In a series of cases, the Supreme Court showed its independence by striking down many executive actions in preventive detention cases. For example, in Ma Thaung Kyi v. The Deputy Commissioner, Hanthawaddy and One. The Supreme Court held that rubber stamping detention orders was illegal. In Daw Mya Tin v. Deputy Commissioner, Shwebo, and one, the Court also held that it was illegal to delegate the powers of preventive detention, which the law entrusts only to certain officers.

The Supreme Court even went as far as to declare an action of the President of the Union to be ultra vires. In the case of Ah Kam v. U Shwe Phone et al, the Court held that the President to whose judgment, wisdom, and patriotism the duty of amending the schedule to the Bureau of Special Investigation Act has been entrusted cannot relieve himself of the responsibility by choosing another agency upon which the duty should be devolved.

However, in 1962, there was a military takeover and the concept and practice of judicial independence began a downward spiral. General Ne Win had seized the government in a bloodless take-over in March 1962. He suspended the 1947 Constitution and set up a Revolutionary Council of military leaders to rule Burma. Human rights violations multiplied.

During the Revolutionary Council period from 1962 to 1974, the judicial independence and the separation of powers that distinguished the previous period under the 1947 Constitution was virtually nonexistent. On March 30, 1962, The Supreme Court and High Courts were abolished. While the previous judges continued to serve in the new regime, the Chief Justice was kept in detention.

Thereafter, the "People's Judicial System" was introduced. This system was characterized by the appointment by the single ruling party, Burma Socialist Programme Party, of "People's Judges" in "People's Courts", many of whom had no legal training.

The practice of issuing writs became irrelevant with the abolition of the Supreme Court and High Court, the guardians of the Constitution. Without writs, the Burmese had no system whereby to challenge the excesses of the executive branch in matters of preventive detention. As a result, detentions without charge and trial were commonplace.

Under the 1974 Constitution, during the period 1974 to 1988, the concepts of separation of powers and the independence of the judiciary were further eroded. On March 2, 1974, the country adopted a new Constitution that officially created the Socialist Republic of the Union of Burma, with Ne Win as president.

It established the Council of People's Justices. The judges were elected, and required no legal qualifications in order to perform their duties as a judge. The decisions of the highest judicial body, the Council of People's Justices, were subject to the decisions of the Council of State (the cabinet), therefore further eroding the concept of separation of powers.

The judiciary's structure, composition, role, and function under the provisions of the 1974 Constitution, especially Article 11, are predicated on the judiciary following the leadership of the then single and ruling Burma Socialist Programme Party. Party membership was compulsory. Article 11 of the 1974 Constitution stated that "the State shall adopt a single Party System. The Burma Socialist Programme Party is the sole political party and it shall lead the State."

This provision was in the Chapter entitled "Basic Principles."
In 1988, large numbers of Burmese demonstrated against the government. They

called for an end to one-party rule. Protests continued into September, at which time the army overthrew the government, replacing it with the newly established State Law and Order Restoration Council (SLORC). Before and after the coup, troops killed thousands of protesters.

In 1989, the SLORC arrested the leader of the National League for Democracy (NLD), Aung San Suu Kyi, the daughter of independence leader Aung San. She was placed under house arrest.

The SLORC allowed multiparty elections to take place in May 1990. The NLD won 60 percents of the vote and 80 percents of the seats in the legislature. But many of the elected representatives were imprisoned. The SLORC said it would not allow a transfer of power until a new constitution was written and approved, with a leading role for the military. Although several meetings were held, the revised constitution was never completed.

The SLORC started with Court Martial then returned to the 1948 system but without the Supreme Court having the powers of writs. The SLORC abolished the Council of People's Justices. It created a SLORC appointed "Supreme Court" which purports to be independent from SLORC in that no member of SLORC presides as a judge in that Court. However, how independent can the judiciary be if the SLORC, which was recently renamed the State Peace and Development Council (SPDC), appoints and dismisses the Supreme Court judges?

It appears that the occasional rhetoric about separation of powers and judicial independence is illusory, as will be seen in the following Analysis. There is a lack of knowledge of and training in the concepts and practice of judicial independence in Burma. In sum, the military exercises total control over the judiciary and there are considerable obstacles to overcome in order to reintroduce judicial independence in Burma.

Current Judicial System

The judiciary is not independent of the executive and is subject to military control. The military junta rules by decree and there is no guarantee of a fair public trial.

In fact, the military have explicitly stated there is no separation of powers: The SLORC being a military government is one that is governing with martial law. Accordingly it is using the following three powers in governing Myanmar:

A. Legislative Power.
Only the SLORC has the right of legislative power.

B. Administrative Power.
The SLORC has the right to administer, but that power has been delegated to the government and states and divisions and law and order restoration councils at different level.

C. Judicial Power.
Only the SLORC has judicial power. However, various levels of courts have been formed to handle ordinary criminal and civil cases in order to prepare them for a time when the constitution emerges.

The Judiciary represents a single integrated system of Courts. At the head is the Supreme Court. Above the Supreme Court is the senior General Than Sein. That is the hierarchy. There is no distribution of powers between the union and the states. As a result ethnic nationalities have been kept outside the entire frame work.

Judicial Laws:

Union Judiciary Act 1948 governed the judiciary. It was replaced by Law 2/62. Thereafter, the 1974 Constitution created People's judiciary. Then Judicial Law 2/88, decreed by the military regime shortly after they took power in September 1988, stated:

"Judicial proceedings shall be independent and in accordance with the law…[and] shall contribute to the restoration of peace, tranquility, and law and order."

That law also established the Supreme Court, the highest appeal body, and civilian courts at the trial level.

In practice, however, judicial proceedings are anything but independent; judges in Burma are under specific instructions from the military, have no security of tenure, and face dismissal for any purported exercise of judicial independence. The notion of a fair public trial in Burma is nonexistent.

Judiciary Law 5/2000 sets out the judicial principles to be followed by the judiciary in the administration of 'justice' in Burma:

1. administer justice independently according to law;
2. protect and safeguard the interests of the people and aid in the restoration of law and order and regional peace and tranquility;
3. educate the people to understand and abide by the law, and cultivate in the people the habit of abiding by the law;
4. work within the frame work of the law for the settlement of cases;
5. dispense justice in open court unless otherwise prohibited by the law;

6. guarantee in all cases the right of defense and the right of appeal under the law;
7. aim to reform moral character in meting out punishment to offenders;
8. protect and safeguard the interests of the people, and aid in the restoration of law and order and regional peace and tranquility.

Note that the only reference to 'independence' in the Judiciary Law 2000 is principle 1, a circular provision that appears to be a general statement imposing no obligation on the military regime or any other party: "administer justice independently according to law".

Administration of justice (court systems):
The court system is based on the British system. There are various levels of courts:

- Supreme Court
- State or Divisional courts
- District courts
- Township courts.

The military appoints justices to the Supreme Court and the Supreme Court in turn appoints Justices to the lower courts (after approval of the picking by the military junta).

Corruption is rife in the military's court system and trials are not open to the public. The courts deliver verdicts essentially dictated by military decrees, which effectively have the force of law.

Appointment

The military dictates which Justices will sit in the Supreme Court and must approve those Justices' choices for the lower court appointment. Thus, the power structure is a top to bottom model, as opposed to a bottom up model. The latter of the two encourages the independence of the judiciary, whereas, the former invites subordination of lower judges to the higher judges whom they are appointed by.

The requisite judicial qualifications are vague and sparsely defined. Lieutenant General Khin Nyunt, Secretary (1) of the military, defined the qualifications of judges:

1. he who keeps noble precepts;
2. he who seeks and promotes the truth;
3. he who is competent;
4. he who speaks lovely; and
5. he who knows 'win' and 'lose'.

In order for the judiciary to be effective the judges must have legal qualifica-

tions. However, order the above described requisites there is no guarantee that a qualified judge will be appointed.

The Judiciary Law 2000 has no provision for how judges are to be appointed or how they can be removed, nor are their conditions of service delineated. These matters are not provided in any other current law or constitution in Burma, and so are left to the military's discretion.

The military appoints judges. For instance, the current Chief Justice was appointed by the military in 1998. This was done by a military decree, which also effectively dismissed over 60 judges, closed the courts until mid 1989 and established military tribunals.

Dismissal

The Judiciary Law 5/2000 provides no security of tenure for judges. The Burmese military junta arbitrarily dismisses judges, including Supreme Court judges. For example, on November 14, 1998, the SPDC "permitted to retire" five out of six judges in the Supreme Court. The military gave no reasons for the resignation, and simply announced four replacement judges. The possibility of 80% of the Supreme Court judiciary simultaneously retiring is so unlikely that the event raises questions as to the independence and autonomy of Burma's judiciary. In fact, the remaining judge, the then Supreme Court Chief Justice U Aung Toe, was known to play a crucial role in legalizing the political maneuvers of the junta. He was a member of the Political Affairs Committee, which is headed by MI chief and SPDC Secretary-1 Khin Nyunt, and he was a member of the Convening Committee for the National Convention.

It is clear that the SPDC has no tolerance for independent judges. Judges that seek to perform their judicial duties as impartial adjudicators cognizant of the democratic separation of powers are typically dismissed while others bow to pressure from the military to retain their appointments. As to the removal of judges at lower levels, it is difficult for international observers to know how bad the situation is, as this information is kept from the international community.

Judicial Tenure:

Judicial tenure is fragile thing in Burma. Yet tenure and respect for the judicial office are fundamental for judicial independence, maintenance of the rule of law, and for the protection of fundamental human rights. Independent and impartial adjudication is essential to a free and democratic society. Therefore, it is necessary to have an independent judiciary with a selection process that is transparent and independent.

The Judiciary Law 5/2000 Provides No Security of Tenure for Judges:
Judges should have security of tenure. This entails limited scope for removal

and ideally should be limited to proven incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge. The circumstances in which a judge may be dismissed should be clearly defined and prescribed by law. Moreover, the rule of law dictates that any judge sought to be removed is entitled to a fair hearing.

Law Enforcement Agencies: Military Intelligence and Police Usurping the Role of the Judiciary:

The Military Intelligence (MI) and the Special Branch (SB) of the Myanmar Police Force conduct the vast majority of political arrests according to 15 years of AI research both outside and inside Burma.
When AI interviewed Burma's Attorney General regarding these arbitrary arrests and detentions without judicial oversight, he responded dubiously by distinguishing between the "investigation" phase of a case and the "detention" phase; he stated that different agencies are permitted to be involved in the investigation phase pursuant to the National Intelligence Bureau Law (Law No. 10/ 1983), i.e. the MI, and that detention starts when the police take over.

MI officers are known to force judges at all levels to over punish democracy activists thereby further destroying the independent role of judges. For example, in early 1999 the judge deciding the case of a student arrested for discussing the future constitution was forced by MI officials to sentence him to seven years imprisonment.

An excellent illustration of the MI's usurping of the role of the judiciary is the leading case reported in the Burma Law Report-1991 at P.63. The judgment reveals the impotency of the present judiciary in Burma. The reported case was under the Arms Act. The facts involved one army officer and a sergeant along with some civilians whom were caught with ammunition cartridges. All involved individuals were put on trial before the court. The Township Courts and Division Courts convicted them under Section 19(a) of the Arms Act. However, on appeal to the Supreme Court the conviction was set aside. The Attorney General requested a Special Appeal before the full Bench and the full Bench reversed the previous ruling by the Supreme Court, confirming the lower courts and reinstating the convictions. The issue was purely legal, namely, whether a confession taken by MI is admissible in a criminal court, which is governed by the Evidence Act in questions of the admittance of evidence. The Supreme Court in the Special Appeal held that under Rule 22(2)(3)(4) of the Burma Army Act, the MI was authorized to take confessions and that any court entertaining a relevant controversy may deem the confession admissible pursuant to Section 24 of the Evidence Act.

Section 1 of the Evidence Act reads:
"This Act applies to all judicial proceeding in or before any Court, including

Courts-martial, other than Courts-martial convened under any Act relating to the Army, Navy or Air Force".

The following are the errors made by the Judges in this precedent setting decision, which has had a broad and detrimental effect upon the judiciary in Burma;

1. The Judges did not distinguish between the confessions given by the army personnel and the civilians before the MI. In the case under review there were only two army personnel, a few were retired, whilst the others were civilians who had give confessions to the MI.

2. The FIR was opened by the police, the case was tried in ordinary criminal court and the criminal procedure came into play and due process demand that criminal procedure be followed. This means the police investigation had to be made by the police and all documents to be prepared by the police and accordingly presented and properly admitted into court.

3. Section 84 of the Burma Army Act reads: "The Evidence Act shall, subject to the provision of this Act, apply to all proceeding before a Court-martial". In the case under review Section 24 of the Evidence Act is not at all relevant. It is Section 26 that is in fact relevant, which reads; "No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person".

4. Similarly the confessions in military custody that is (MI) are likewise inadmissible. No rules, as the judgment referred to Rule 22 of the Army Rule, can override the statutory provision of law. In fact Rule 22 lays down the procedure for trial and it has nothing to do with confessions. This judgment stretched the law to enable the Court to give the MI what it wanted; namely the convictions of the accused. In one stroke the Court had legalized all the activities of the MI, e.g., military custody, interrogation, taking statements of the accused, which would be allowed to be admitted directly into evidence without any questioning of the authenticity of such confessions. This reported case has become the Bible for judges and a series of judgments have come out following this tragedy of so called justice. This speaks volumes as to the extent the judiciary can be manipulated by the MI and its present plight truly appalling.

Judicary Put Under Various External Fetters

Bar and Lawyers' Associations

There exists in a properly functioning judiciary external fetters; these fetters, if functioning as they should be, are intended to both ensure justice is served prior to the admittance of the controversy to the judiciary and to prevent the judiciary itself from committing abuses. External fetters prevent the court from

becoming a tool by which abuses of law enforcement agencies and the government are legitimized and given a seal of approval by the courts.

The effectiveness of an independent judiciary will be limited if the other elements in the justice system are not operating properly, for example, effective lawyers and prosecutors.

This is especially notable in common law jurisdictions, such as Burma, because criminal prosecution is typically the domain of the Executive branch of government. The independence of lawyers is so important that the UN has enumerated principles and guidelines on the topic:

A. The Basic Principles on the Role of Lawyers
- emphasise the necessity of governments to ensure that citizens have easy access to independent legal advice and representation, particularly when detained by government officers.

B. The Guidelines on the Role of Prosecutors
- note that prosecutors must properly investigate and conduct their functions impartially and without discrimination.

This includes prosecuting government officials where appropriate.

There are also international statements and principles which have been developed outside the UN, for example, through the International Bar Association, judges' association, or through non-government activity.

What is more, Burma's Chief Justice has signed the 1995 Beijing Principles on Judiciary, which were adopted by the Conference of Chief Justices of Asia and Pacific, thereby agreeing that:

> "These principles represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary".

Despite this apparent undertaking to uphold the independence of the judicial branch, in practice, this is not the case. Practically speaking, bar and lawyers' associations are another area upon which the military exercises a tight rein. The Bar Council, the body that supervises the admission of advocates and higher-grade pleaders (different 'ranks' of lawyers), is hand-picked by the SPDC. The SPDC ultimately decides the list of those that will fill the positions of the advocates. The Attorney General's journal, which purports to represent the cause and interest of the Burmese legal profession, is only a mouthpiece of the force which oppresses it, i.e. the SPDC.

Lack of a Fair Trial result of erosion of independence of judiciary
The government rules by decree and is not bound by any constitutional provi-

sions providing for fair public trials or any other rights. The lack of a fair trial in political cases is particularly worrisome. Reliable reports indicate that senior military authorities dictate verdicts in political cases, regardless of the evidence or the law. Political trials are not open to the public.

1. Existence of Unjust Laws restricts independence of judiciary

LEGAL system and its flexibility enables the judiciary to play an independent role. Unjust laws which have been enacted prevent the judiciary to act independently, even if they want to play a role. The government misuses overly broad laws and the manipulation of the courts for political ends, which deprive citizens of the right to a fair trial. The courts once again show their lack of independence by interpreting these laws in line with what the military dictates. Since law of Evidence is manifestly violated ,the judges have no scope to be independent. The evidence is fabricated to fit in with unjust laws. The following laws are typically employed by the government to deny defendants their right to a fair trial.

1. State Protection Act 1975,
2. The Unlawful Associations Act 1908,
3. Printers and Publishers Registration Act 1962,
4. The Emergency Provisions Act 1950,
5. Law No. 5/96,
6. The Habitual Offenders Act,
7. The Law on Safeguarding the State from the Danger of Destructionists,
8. Act for Protection of National Solidarity 1964,
9. The Official Secrets Act,
10. The Video Law 1985,
11. Law No. 6/88, (Law on Formation of Associations and Organizations)

State Protection Act 1975

This Act allows the Burmese authorities to detain people without charge or trial for up to five years with no right of appeal to any authority.

This is ostensibly for such persons who, "have performed or is performing or is believed to be performing an act endangering the state sovereignty and security, and public law and order…"

Unlawful Associations Act 1908

This extremely broad piece of legislation authorizes the head of state to declare any association unlawful for no reason without any evidentiary basis and may be based solely upon the opinion of the head of state.

Anyone who is a member of such an association or organization may be imprisoned for two to three years, and anyone who manages the organization may be sentenced to three to five years in prison.

The practical result is that anyone who has any contact with, say, exiled opposition groups in Thailand may find themselves a victim of the Unlawful Associations Act and a lengthy arbitrary detention.

Printers and Publishers Registration Law 1962

This law is used to curtail the right to freedom of expression. All printing and publishing businesses must register and must not seek to, "harm the ideology and views of the Revolutionary Government of the Union of Myanmar."

The penalty for noncompliance is three years' imprisonment.

The Emergency Provisions Act 1950

This law has been used to sentence many political prisoners. It provides for seven years' imprisonment for anyone who, "causes or intends to disrupt the morality or the behaviour of a group of people or the general public, or to disrupt the security of the reconstruction of stability of the Union."

For example, most of the opposition people arrested in connection with the Depayin Massacre were charged under Article 5.

Law No. 5/96

This law provides for three to 20 years' imprisonment for anyone who drafts a constitution or promulgates a draft constitution without permission.

Law No. 6/88

A vigorous Civil Society is the correlate of the role of the Courts. Civil Society sees the courts as an effective guarantor of their rights. But in Burma the Civil Society is dead and naturally the Judiciary. The Law 6/88, " Relating to Forming of Organizations" has taken care that no Civil Society can ever emerge. This law prescribes that except for religious bodies, all other organizations must take prior permission of the Home Ministry before they are formed. Otherwise they are illegal and punishment of maximum five years is provided. Action was taken under this law against five University students for forming a student union and punishment was given. Judiciary helped in that action. Absence of a Civil Society, weak political parties make Judiciary subordinate to the Executive.

Influence and Intervention of Executive:
As noted in other sections of this Analysis, the Executive, i.e. the military junta,

regularly and on a systematic basis influences and intervenes in the judicial function of the government. For example, notwithstanding the right to presumption of innocence, which requires that judges, juries, and all public officials refrain from prejudging any case, the Burmese military dictates the verdicts often before the case has even been heard, especially in political cases. In addition, the military appoints judges who will tow the military line in the execution of their duties and dismisses judges who attempt to fulfill their role as an independent arbiter of justice.

Subservience of Justices to the Executive:

As noted above, Justices must in all facets of their role be subservient to the Executive, and if they do not they risk arbitrary dismissal. The courts are expected to work under the military's guidance. The military appoints and dismisses judges. The Chief Justice considers the courts to be a part of the Executive. There are financial links between the judiciary, politics and the military. The Chief Justice's role in political and governmental processes also calls into question the independence of the judiciary.

Pervasive corruption serves to further undermine the impartiality of the justice system and is rife amongst government officials in Burma. This common practice impacts upon the entire judicial system, especially the investigation processes, which are performed by the police, and the trial processes, which are administered by the courts. Practically speaking, there exist few punishments for officials who engage in bribery. By way of illustration, from January 1992 to June 1993, the Supreme Court took action against a mere 81 personnel, a number far less than those that take place in practice.

Unlawful Arrest and Detention:

Principle 2 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: "Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose."

However, in Burma the arrest and pre-trial detention process includes arbitrary arrest by MI personnel; prolonged interrogation accompanied by torture and ill-treatment; incommunicado pre-trial detention, including denial of access to lawyers, families, and adequate medical care; and the inability of the accused to challenge the legality of their detention.

Arbitrary arrest

Sections 10 (a) and (b) of the 1975 State Protection Law provide that authorities to detain people for up to five years without charge or trial and with no right of

appeal to any judicial authority. This law allows the SPDC to detain anyone whom they consider to endanger the state, without having to take them to court. As is the case with other security legislation in Myanmar, the provisions of this law do not define what constitutes a danger to the state – and thereby enable authorities to unlawfully detain and imprison people for their expression of peaceful political views. Authorities have in the past characterized activities such as telling jokes, writing poems and histories as a threat to state security, and sentenced them under other security legislation.

MI personnel normally arrest political suspects at their home, where they often search the premises. Suspects are generally not given a reason for their arrest.

Many prisoners who were originally detained in 1989 during a broad crackdown on all political activists and sentenced on account of their alleged connections with the Burmese Communist Party, are currently being held under this law (The State Protection Law). The General Secretary of the main opposition party in Myanmar, the National League for Democracy, Daw Aung San Suu Kyi, was held under house arrest under this legislation between 1989 and 1995.

This goes against fundamental principles of international law, including the right to liberty of the person, to freedom from arbitrary arrest, and to be informed of the reasons for arrest. Political suspects are then extensively interrogated by MI staff and are not permitted to inform their families or seek legal or medical assistance. Moreover families are not informed about their relative's whereabouts.

Former political prisoners report that during initial detention at MI branch offices, interrogation may last for several hours or even days by rotating teams of MI officers.

Different agencies can become involved in the investigation phase of a case, including MI, under the provisions of the National Intelligence Bureau Law (Law No. 10/1983). The other agency which is sometimes also involved in political arrests is the Special Branch (SB) of the Myanmar Police Force.

Torture and cruel, inhuman or degrading treatment of political detainees occur most frequently during initial interrogation by MI personnel. The judiciary never goes into these questions.

Arbitrary Detention and Torture

Detainees are typically held in pre-trial incommunicado detention, with no knowledge of what charges are being brought against them. They often learn the charges only once they are taken to court, which may be weeks or months after their initial arrest. Once sentenced, the individual is transferred to an area

of a prison where convicted prisoners are held. The judges do not exercise their powers to go into these questions.

Torture and psychological tactics are frequently employed. Detainees have reported in detail that they had been subjected to torture and ill treatment, usually taking the form of severe beatings, and deprivation of water, food, and sleep for days at a time. They are beaten with fists and bamboo sticks, kicked with boots and forced to stand for prolonged periods while being questioned. Some are slapped repeatedly on both ears. MI officers also subject detainees to near-suffocation by placing a plastic bag over their head. Some detainees reported being blindfolded during interrogation. Detainees are also sometimes forced to assume extremely painful positions for long periods of time while being interrogated.

The police official responded that a police officer of a higher rank than the accused would conduct an investigation. The Chief Justice confirmed this procedure and also stated that the victim could in principle complain to a judge under section 342 of the Penal Code, which provides for punishment of those who subject others to "wrongful confinement". The Chief Justice admitted that the judiciary would not typically investigate the complaint. Several former political prisoners interviewed by AI verified the Chief Justice's last comment.

Any sort of secret detention is a denial of the victim's right to a fair trial. Secret detention centers facilitate the infliction of torture, inhuman, cruel or degrading treatment upon victims by the Burmese authorities. They also mean that the detainee has no access to a lawyer, family or adequate medical care. The accused is unable to mount a defense or challenge the legality of their detention. AI research uncovered that MI personnel located inside prisons throughout Burma are responsible for political prisoners. MI reportedly give or withhold permission for medical care and determine other issues concerning political prisoners, instead of the prison authorities.

Stock Witnesses:

Stock witnesses are individuals who are detained and forced to be witnesses against suspects for cases fabricated by the administrative officials or the executive. This force is exerted through threats that stock witnesses will be listed as accused if they do not comply with the officials' instructions. The judges never cross-examines the witnesses to find out whether they are genuine witnesses. The law has given this power to the judges. But fear of the SPDC restrains them to act.

Procedural Weaknesses:

Many if not most of the fair trial guarantees under international law and standards are denied to political detainees in Burma. Such fair trial safeguards in-

clude the right to legal counsel; the right to adequate time and resources to prepare a defence; the right to call and question witnesses, inability of the accused to speak in his/her own defence; the right not to have confessions obtained under torture admitted as evidence; the right to an open trial, and an independent judiciary.

In practice there appears to be little or no procedural protection against arbitrary arrest, as pre-trial detainees have no ability to challenge the legality of their detention, and they are kept incommunicado and deprived of any legal counsel until the first trial hearing. There is no judicial oversight of their arrest and detention. Those protections which are found in Myanmar law against arbitrary detention are not in practice upheld.

In principle, there are some safeguards against unlawful arrests in the 1898 Burma Criminal Procedure Code. Section 100 provides for a judicial authority to call any person who "is confined under such circumstances that the confinement amounts to an offence" and "make such an order as in the circumstances of the case seems proper". However, this power appears to operate only when a magistrate has "reason to believe that any person is confined under such circumstances that the confinement amounts to an offence" requiring the magistrate to have detailed knowledge of the cases of all the persons in custody, and to act independently on this in order to call for individuals to be brought before the court.

In practice, in many political cases, convictions are made solely on the basis of the testimony of the prosecution, usually from MI and police personnel. Moreover, some political prisoners are charged, tried and sentenced in one day; others receive only a summary trial proceeding.

Denial of Public Hearing:

Notwithstanding the provisions of the Judiciary Law 2000, which stipulate that trials must be held in open court, political trials are held in camera, closed to the public. Moreover, transcripts of trial proceedings are extremely difficult to obtain, even by defendants.

This is a clear violation of the right to a public trial, guaranteed in the Universal Declaration of Human Rights, to which Burma is a party by virtue of its membership in the United Nations.

Social Environment Creates the Trial Fair or Unfair

Following the independence of Burma, various sectors of society could maintain its stability. The democratic government then functioned rather well and could foster the economic development. At that time, the court practices were

closely observed and learnt by the law school of Rangoon University; and as vice versa, the comments of legal academics were well regarded by the Supreme Courts. The lawyers could maintain their professional status if they possessed expertise in law. As the judges received higher remuneration than other civil service, they could maintain their status, in terms of living, without taking bribes. The corruption within the whole judicial system was also rare. With that sociological background, the impartiality of tribunal could be preserved; the cases were adjudicated mainly based on the laws; and as such, fair trial largely existed.

At present, social environment has adversely changed. Due to the poor management of the military junta, economy abruptly lowered: the prices of goods are sky-rocketing while the salaries of civil service are relatively quite low. While very small number of narcotic drug dealers, cronies of the ruling junta, and high ranking SPDC officials make enormous amounts of money, the great majority of people, regardless of whether they are middle class or farmers or workers, live in poverty. In this context, the social equilibrium has utterly collapsed. As a result, the civil service, police, army, immigration, and all local and higher leveled administrative authorities have been reduced to surviving through corruption.

This current social environment has impacts, which is felt throughout the entire justice system. Due to low wages for workers inside Burma, hundreds of thousands of people leave their mother land and work in foreign countries; in order to achieve this end, they have to pay at least over 100,000 Kyats bribe money in return for an official travel documents, such as a passport. The ordinary people, who cannot cover the cost of such an expensive travel documents, are forced to unlawfully cross the border; entering neighboring countries such as Thailand; working there; after collecting some money, re-entering Burma illegally by paying bribes to Burmese Immigration officials and local administrative authorities so that they will not be prosecuted. For those thousands of people, they are forced to employ illegal processes from beginning to end. In the beginning, they break the law as the existing law prohibits the citizen to get outside the country without official permission. In the end, they break the law again as they re-enter the country by bribing the authorities. However, the justice system is keeping silent under the influence of corrupt social environment.

Previously, the mockery on justice system was that "if you have more money, you will win the case." Currently people are making a joke that the previous saying is no longer true; they said it has already been changed; that is, "if you have less money, you will lose the case." If a person wants to communicate to his/ her family member, whom is detained in the police station as an accused suspect, or release him or her on bail, or even bring him/her before the court in a reasonable time, the police must be bribed. The police community has collapsed due to terrible corruption.

Very few lawyers achieve success in legal field only on the condition that they have particular expertise in law. However, many lawyers win the case and earn a lot of money because they can make closed friends with judges and SPDC officials by using the resources of their clients. A large number of lawyers, who want to promote legal profession to be a noble one and who are not cronies of the administrative authorities, rarely win the case, and live in poverty. These lawyers are charged with Contempt of Court Act and rendered for punishment for their alleged improper attitude against the judges. Some dozens of lawyers' licenses have been withdrawn on charge of their involvement in democratic opposition. There is no lawyers' association that can protect the professional security of lawyers. As such, the lawyers' community, which once existed and was a strong pillar of the legal and judicial system has broken apart.

The bench clerk will leave the case file behind if he/she is not bribed. The judgment of the court or the statement of the witnesses are regarded as public document in law. However, now only when the court officials are bribed, the certified copies of these documents are easily available. Given that all the judges, regardless of whether Supreme Court judges or their subordinates, receive not more than 25 US$, as monthly salaries, they have to live like paupers if they don't choose corruption. General Khin Nyunt, Secretary (1) of the ruling junta, publicly blamed the judges and other judicial staff for their alleged corruption.[1] Those judges, who granted bail to those accused in the case where the government was the complainant, were dismissed. The judges who do not comply with the strict instructions of the junta are subject to dismissal or transfer.

Supreme Court is the apex court of the country. Supreme Court judges were highly regarded by the whole society in Burma up till 1962. The similar situation usually takes place in all democratic countries. According to 1947 Constitution of Burma, appointment and dismissal of Supreme Court judges were enshrined in details paying high regards. Accordingly, it was evident that security of judicial tenure was guaranteed; and the judges could function the administration of justice independently without worrying the interference of executive or ruling government at that time.

Following the military coup in 1988, there has been no constitution in Burma. That is why, the security of judicial tenure cannot be guaranteed in accordance with the constitution. Then, the two judicial laws were enacted by the junta; one was in 1988 and another was in 2000. Furthermore, the amendment of 2000 Judicial Law was also made by junta on February 2, 2003. In all these judicial laws, there have been no provisions on appointment and dismissal of Supreme Court judges.

All appointments and dismissal were made only at the whim of ruling junta freely without publicizing any ground, consulting with the legal community, and receiving any suggestion from elected representatives. Then, out of six Supreme Court judges, five were forced to resign in 1998 and replaced with new

five judges. Then, on July 1999, another six judges were added[2] and then total number of Supreme Court judges was eleven. Since then on, no news was officially released by the junta that any one or more of Supreme Court judges were dismissed or forced to resign repeatedly. After that, in February 2003, five more judges were appointed and as such total number of Supreme Court judges is currently 16. This number is contrary to the existing Judicial Law 2000; because the maximum number of Supreme Court judges to be appointed in total is twelve. Nobody knows whether, out of 16, four Supreme Court judges have already been dismissed before the appointment of new five judges in February 2003 or whether they will be dismissed or forced to resign soon. All the processes for appointment and dismissal of Supreme Court are done at the whim of junta. The term "judicial tenure" is mockery for the current judiciary in Burma. Furthermore, there is no judges' association to protect the security of judicial tenure.

The Supreme Court, itself, has become a "Giant" with no teeth. Supreme Court is keeping silent on the issue of the 'validity of law' enacted by the junta as it does not have power on judicial review. It usually ignores the abusive action of the executive, in various levels of junta's administration, as its power on writs, that is to issue directions in the nature of Habeas Corpus, mandamus, prohibition, quo warranto and certiorari, has already been withdrawn. As the Supreme Court cannot protect the fundamental freedoms of the citizens, safeguard the genuine principles of the rule of law, and produce landmark rulings, the law schools have nothing to learn from the current court practices. The legal academics do not express their interest in functioning of Supreme Court. As vice versa, the Supreme Court itself and its subordinate courts usually hesitate to pay proper regards to the comments sometimes made by legal academics and prominent lawyers; as such, the role of legal academics and lawyers have been terribly lowered in administration of justice. Harmony between "Bar and Bench", and between "Bench and Legal Community" has already disappeared.

For all these reasons, the whole justice system has been reduced to a ramshackle. People live in constant fear as they have knowledge that although government officials violate their fundamental rights, they will not get the protection of law, the assistance of legal system, and fair adjudication of courts. This situation has been taking place in Burma for some decades.

With that sociological landscape, the judiciary cannot maintain the impartiality of tribunals. The judges adjudicate the cases mainly under the instructions of ruling military authorities or other persons who can influence the trials in one way or another. As such, a truly Fair Trial rarely now exists.

Conclusion

1. The SPDC has different ministries like Home, Finance, Education, Trade etc. However, there is no Ministry of Justice or a judicial Minister of Law. Judicial

Affairs are run by the Home Ministry, in other words it is run by the Executive. The principle of separation of powers is not followed and it is openly proclaimed that it does not exist. Through open intimidation directed against the courts and judges, they are made aware that they are subordinate to the military. Unless this basic principle of separation of powers is entrenched into the political system, no justice, fair trial or due process of law can be expected in the administration of the legal system.

2. The role of Supreme Court has to be enlarged. It has to play a more proactive role. It has to be vested with powers to intervene in case of violation of human rights and fundamental rights. The power of judicial review is an important element.

3. In all criminal cases whether between individuals or individuals and the State, there must be a time frame for determination of bail or conclusion of the trial.

4. There must be a statutory body for Legal aid so that all have equal access to justice.

5. There is a saying that a strong Bar makes a strong Bench. The Bar Council has to be made a body run by lawyers and lawyers must be free to have their elected bodies.

6. A judicial commission to be set up composed of judges, lawyers, legal academics and legal experts. It will control recruitment, promotion, service rules and service security, disciplinary actions. This will ensure not only independence of judiciary, but its impartiality and competency.

7. There has to be structural changes in the judiciary, making it more transparent, accountable and value-oriented.

Recommendation

Burma Lawyers' Council calls on the SPDC and the judiciary of Burma to respect the fundamental freedoms and human rights of the citizens of Burma and to consider the following recommendations.

1. Respect the international norms of human rights and the principles enshrined in the Universal Declaration of Human Rights and in customary international law.
2. Accede to international human rights treaties, in particular the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the International Convention on the Elimination of all Forms of Racial Discrimination.

3. Either charge detainees held under the unjust laws and try them in a trial that respects international standards for fairness, or unconditionally release those detainees.
4. Either re-try or re-hear cases already decided in courts that do not respect international standards for fairness.
5. Review, amend or revoke the 1975 State Protection Law to reflect the principles of freedom of expression, association and assembly, the right to a fair trial and the right to a presumption of innocence.
6. Reform or repeal the 1950 Emergency Provisions Law; the 1962 Printers and Publishers Law and the 1908 Illegal Associations Law, and Law No 5/96.
7. Instruct the police force, including the MI and SB, to cease incommunicado detention and torture.
8. Initiate prompt, effective, independent, and impartial investigations into all serious allegations of torture and ill treatment. Bring to justice those found responsible.
9. Ensure that political prisoners receive a fair trial in accordance with international standards, including the right to legal counsel, the right to presumption of innocence, the right to a public trial, the right to defend oneself, and the right to adequate time and resources to prepare a defense. Failing a fair trial, release political prisoners.
10. Enforce a moratorium on prosecutions which use legislation which criminalizes peaceful dissent.
11. Permit foreign lawyers to observe trial proceedings.

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7. Burma Law Report
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JUDICIARY & SOCIAL JUSTICE

*B. K. Sen**

Burma has a population of 52 million people. Eighty percent are Buddhists and the remaining are Christians and Muslims. All these religions command that every citizen shall be compassionate toward all living creatures. Compassion means that there will be no vulgarity, violence, immorality, brutality, where each shall share and care for the rest of his or her community.

The question is this: what has happened to the judiciary in Burma? The Court in Burma has been steadily fixed in its role maintaining the existing hierarchy of Burmese society, for the last few decades. It serves as a tool to propagate and uphold these inequalities. There is injustice writ large. A good example of this inequity is the law prohibiting begging. The rich will never beg. It is the poor only that begs. So they seek justice. They only hunger for righteousness. However, who will enforce this call? This is the challenge for the judiciary. The judiciary in Burma is failing to assume this fundamental role.

Therefore the judiciary as an institution raises a number of issues within Burma. Not only is there the issue of independence from the junta but there is also the issue of whether the judiciary is operating lawfully. Do the courts operate within their jurisdiction and exercise their powers appropriately? Are the courts enforcing the necessary limits on the executive and legislature?

The judiciary; a department under Home Ministry rather than an independent institution

The judiciary; a department under Home Ministry rather than an independent institution

When the Americans passed their great Constitution, the first case which came before Chief Justice Taney's bench raised the issue of slavery and posed the question as to whether a slave could be set free. The court ruled "no" on thebasis that a slave can be owned and he cannot own. Time has moved on in the United

States jurisprudence, however this sense of commodity remains and is writ large in the social order of Burma, under the current dictators. The present military leaders think that they are better equipped to rule the country. Their arrogance presumes that they have a better understanding of the interests and welfare of the people they rule. They believe they are superior to the politicians and the people themselves. This mindset has led them to treat the citizens as inferior. Insofar as the judiciary is concerned, the junta thinks the courts do not fully appreciate the key interests of the State. The law is ideally a tool used to preserve order in society. However, the military think they alone can promote good governance and growth. For decades, the regime has ruled with the view that might is right. The progress and sweeping changes that have taken place outside the country do not concern them. The concept of democracy, understanding Rule of Law, and the emergence of new ideas after the end of cold war have no relevance to them.

Unfortunately, the courts are also maintaining the status quo. It is equally doubtful that the judges are recruited independently, as they are those who have not read the Universal Declaration of Human Rights. This document contains all the human rights and fundamental freedoms recognized in numerous constitutions in the world. When the judiciary is embedded in a society stripped of it fundamental values, that judiciary inevitably is in the shadow of that society. The courts in Burma do not serve as an independent judiciary. Therefore, there is no justice and human rights are not defended or protected in this country.

Judiciary; violations of fundamental rights to life and liberty.

The judiciary; violations of fundamental rights to life and liberty

The judiciary in Burma has trampled the famous Fifth Amendment of the US Constitution. That principle is that "no person shall be deprived of his life, liberty or property without due process of law." This is commonly known as the right to Due Process.

The right to life is manifested by the right to live with human dignity. It also includes the following rights:

(a) shelter;
(b) livelihood;
(c) a clean environment;
(d) education (up to the Age of 14 years);
(e) health care;
(f) access to a public hospital in cases of emergency;
(g) a natural environment;
(h) not to be delayed in execution of sentences; and
(i) freedom from bonded labor.

Liberty includes the following:

(a) a speedy trial;
(b) a fair trial;
(c) the presumption of bail rather than jail; and
(d) protection of civil rights for prisoners.

Furthermore, the law must be valid and not violate any of the universal fundamental norms. It must also observe due process; that is, procedure must be reasonable, just and fair.

The judiciary must respect, secure, and advance fundamental rights. It can achieve this even when it no longer has the power to declare laws invalid or unjust. The judges in the courts in Burma are by and large people handpicked by the military. Once they occupy a chair at the bench, their primary concern is how to retain it. The best way this can be achieved is to be a servant to those who appointed them. In a climate of widespread fear among all strata of the society, it is natural that the judges will give judgments which do not undermine or challenge the actions and decisions of the military. The judicial system has remained insulated from the rest of the world. The judicial community has lost its awareness.

Civil and criminal procedure and the law of evidence have been found in many cases to be hindrances to access to justice in Burma. For example, a woman is sent to the court to be institutionalized in an asylum. The judge found that she suffered from trauma and sent her to the asylum. The cause of her trauma was sexual assault by a railway guard. However, no action was taken because no case of a rape was put up and no charges therefore laid as a result of this criminal matter. Society expects that the judiciary plays an important role in setting high ethical and legal standards, with a view to helping society progress towards the achievement of a State with a safety net and equality for all its citizens. However, the Burmese judiciary refuses to take such action. Allegations of rape committed by people who assume high offices are dismissed by the courts, for fear of political fall out. In fact, in one particular instance, the Chairman of the Township Council was alleged to have commited rape. He retaliated and filed a complaint against the victims, arguing that the claims were false. The court tried the cases and sentenced the victims to three years imprisonment.

Conscientious judiciary; a figment of the imagination

A conscientious judiciary; a figment of the imagination

Is it enough to be a conscientious judge? This question raises many other, such as whose conscience applies? Is it a judge's own conscience? What if the rule established by law is itself wrong? These questions regularly arise in a practical

sense. For example a girl was raped by a high ranking officer. The law says that prior permission of the government is required to file a criminal case against the officer. What does the judge do in such a situation? He dismisses the case when permission has not been obtained, because his conscience requires him to follow the law. There is no scope for the judge to exercise his personal conscience. However, if the requisite permission is obtained, the judge could proceed with the trial. Fear does not permit him to keep the case pending and direct the victim to apply for permission before the appropriate authority.

This occurred when Daw Aung San Suu Kyi filed a case of harassment and intimidation on behalf of her NLD party workers against the authorities. This matter required a judge with a different philosophical outlook to that of the military, in order to prevent injustice. The inherent powers of the judiciary and universal norms established by UN conventions enable a judge to invoke justice in patently unfair matters. There are commonly agreed values, norms and standards and the laws and procedures which are in keeping with these values, norms and standards. However, the situation in Burma is that legally sanctioned injustice prevails. Her case was summarily dismissed for want of santion from the authorities.

An example of the prevailing weakness of the judiciary is Burma's courts application of the commonly accepted doctrine that "acts of sovereignty" fall outside the jurisdiction of the courts. An act of sovereignty is something that states do by virtue of their nature as sovereign bodies; however this concept is so vague that it has been used to justify virtually any measure that can be presented as having a connection with foreign policy or internal security. In fact many judiciaries are prevented by law from examining acts of sovereignty. The courts in Burma fail to interpret this doctrine in the narrow sense that it should be. They refuse to question the constitutionality of the doctrine. They are based on the rarely articulated belief that the executive – rather than the people or the law – is the sovereign, and that the holder of executive authority can take whatever action is necessary, according to the most extreme versions, without any accountability or restrictions. It is difficult to think of a view of executive authority more at odds with constitutionalism. Courts in authoritarian countries regularly resort to the doctrine of "acts of sovereignty" to avoid ruling on the unlawfulness of particular executive action.

Justice accessible to the common man

Another key difficulty experienced by the majority of people of Burma is the lack of access to adequate legal advice and representation. This barrier significantly disadvantages the majority of Burmese, who have little resources. In situations where people can access legal representation, the fees are prohibitively high and the delays involved in litigation compounds the costs. Generally, the

wealthy can afford excellent representation while the majority must endure with less than excellent professional advice and advocacy. Inevitably, the courts are influenced towards the prominent lawyer. This favoritism is often shown because the advocates are superior. However, it is also the case that there is corruption within the profession, extending to the bench. There are many instances where lawyers make arrangements with the judge, bribing him to achieve a judgment in their favor.

The maxim that all are equal before law has no meaning in the context of Burma. There is no legal aid system, and, as discussed above, this results in many people not having access to advice or representation. The purpose of legal aid is to enable the poor and less advantaged to obtain representation in courts of law, to ensure the best possible remedy, sentence or decision is handed down. This, in part, ensures that due process occurs.

Law enforcement authorities: need for reforms

If the rule of law is to become a reality in Burma, reforms are required in relation to the enforcement of the law also. This institution is vital to the administration of justice. The system has fallen to its lowest depths by making extrajudicial killings possible by hundreds, as in Depayin massacre. No FIR has been registered, not to speak of bringing the offenders before a court of law. The police force has become subordinate to the MIS, rather than independent of it.

All investigations have been taken away from the hands of police. They are conducted by the MIS and, upon their completion, the papers are handed over to the police. This leads to corruption and fraud. If there is a malfunctioning police system the judges can do nothing to address this. The judges have to fear for their jobs and even lives if they find fault. The reality is that an effective justice system is administered by the police force, however in the case of Burma, this is conducted by the MIS. The bogus excuse is the National Intelligence Bureau Law (10/10/83) Law No. 10/83. This so-called law did not abrogate or amend the Statutory Law, the Criminal Procedure Code. According to the Code's provisions, all investigations have to be made by the police authorities. The junta has usurped not only state power but also usurped the due process of law and elementary justice.

The concept of the independence of the judiciary and the enforcement agencies is redundant where cases are fabricated and evidence is falsified. In a recent case 9 persons were tried under the charge of high treason and given death sentences. The evidence was weak. On appeal three defendants received reductions in their sentences. The charges against them involved allegations that they had links with the ILO. The evidence in this case was recorded by the MIS and the case was fictitious. Out of fear, the trial judge convicted the defendants, as

desired by the MIS. The result erupted in condemnation, and the ILO intervened. The appellate court therefore reduced the sentences. This case is an example of the different results that can be obtained from the courts, where the matters are leaked outside the borders of Burma. The international community is increasingly becoming involved in such political matters. Conversely, the following four case studies provide hard evidence of the miserable plight of the present judiciary under the military rulers in Burma. They demonstrate the absence of an independent judiciary and the absence of social justice.

The Mon Case

The legal situation

Under the Emergency Provisions Act 1950 (EPA), anyone who:

(1) violates or infringes upon the integrity, health, conduct and respect of the State military and government employees towards the govern ment;
(2) causes or intends to spread false news about the government; or
(3) causes or intends to disrupt the morality or the behavior of a group of people or the general public;

is liable to imprisonment for up to seven years.

Article 3 of the EPA also makes it an offence to intentionally cause or sabotage or hinder the successful function of the State military. This is punishable by death or life imprisonment.

The EPA has many articles, however but this case has been brought under Article 5(e) because it is drafted in very broad terms. Obviously, the courts will interpret what constitutes the terms of the offence. Notwithstanding its breadth, it is clear that the lack of independence of the judiciary will result in a decision that is consistent with the orders of the SPDC. The law will be interpreted and applied arbitrarily. In explaining the law and the facts of the case to the UN special Rapporteur, Government authorities themselves articulated contradictory interpretations of the article. Lawyers and elected representatives told the special Rapporteur that they were not aware which particular statutes and orders were to be applied, nor any other matters in relation to the case. (Ref: UN Doc. E/CN 4/1993/37)

The EPA violates one of the fundamental tenets of civilized jurisprudence; namely that no one shall, in the exercise of their rights and in the freedoms, be subjected to greater limitations than are determined by law, solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and gen-

eral welfare in a democratic society. This principle is enshrined in Article 29(2) of the Universal Declaration of Human Rights and in Article 5(1) of the International Covenant of Civil and Political Rights. The misleadingly-titled statute, the EPA, was primarily used to suppress dissent and entrench tyrants in power. It must be abolished immediately to ensure that a democratic and cilvilized society can be restored.

The EPA, unfortunately, was introduced at the time when there was a democratic Government and legitimate parliament in Burma. At the time of its passage, the country was plunged into a Civil War (the ethnic Kachin, Karen, Karenni, Mon, Shan, Arakan and Burmese all waged war against the Government), resulting in naming it the Rangoon Government. There was a provision in the 1947 Constitution giving power to the Government to declare a State of Emergency. Rather than exercising the provision, the democratic government introduced the Emergency Provision Act. This fact is very important for understanding the ramifications of the Act. However, it is also important to consider that at the time of its passage, the Act was made in the context of a Constitution and the rule of law prevailed. The citizens enjoyed the right to seek legal redress before the Supreme Court against alleged violations of any fundamental human rights. Equally important, the judiciary was by and large independent. Today's political and legal context is very different. There is the total absence of the rule of law, no Constitution, nor is there an independent judiciary. With this background, the Emergency Provision Act has now been given a tiger's teeth to play havoc with the peaceful citizens of Burma.

The case suffers from many other flaws besides procedural misdirection and misapplication of the laws of evidence. In 1998, the Supreme Court dismissed Daw Aung San Suu Kyi's case against the SPDC, on the grounds that there was no sanction. The same law was applied differently as the case proceeded although there was no sanction, a mandatory requirement. It is a glaring example of the law being applied inequitably. The State has absolute impunity to carry out systematic abuses and the judiciary is openly a participant of State policy.

In this case there were many procedural errors. The Criminal Procedure Code has laid down the procedure for conducting the search. The accused were under the custody of the police yet they were not brought to the places searched. The search list that was made was signed by witnesses but the contents were neither explained nor read out. None of these facts have been denied by the prosecution. The search procedure is vitiated and law on the subject was violated.

Analysis and comments

A significant aspect of the judicial proceedings should not be lost sight of, which is that the Moulmine District Court summarily dismissed the appeal against the

conviction of the lower court. The conviction carried a sentence of seven years imprisonment with hard labor. How such an appeal could be dismissed without hearing is difficult to understand, nonetheless it is clear that the basic principle of law was violated. No punishment should be given without hearing the accused. In this case, the Appellate Court was bound by the accused's right to be heard. The iron grip of the SPDC on the judiciary has once again been exposed.

The Court of final appeal also showed its utter lack of independence. The submissions made by the government advocate were repeated verbatim in the Court's judgment. The prosecution lawyer, contrary to professional ethics and the separation of powers, became part and parcel of the executive. The judge acts as the appointee of the executive–which is the SPDC. This particular case of the Mon MP is significant because it concerns a number of ethnic nationalities. Among them, 16 armed groups entered into cease fire agreements, as part of an SPDC policy, launched in the name of national reconciliation.

This matter was of significant public importance and was sufficiently serious and accordingly should have been referred to full Bench of the Supreme Court. A single judge of the High Court sitting in appeal was unwarranted. This decision itself demonstrates the contempt the SPDC has toward the rule of law.

Turning to the sentence of 7 years imprisonment, the principal object of punishment in criminal law is to ensure reformation, restraint, retribution and deterrence. None of these were applied to the accused in the case. However, under the SPDC, retribution has become the dominant principle in determining a punishment. For example, the court handed down a sentence of 7 years, the maximum prescribed.

The cardinal principle in criminal law is that inhuman and degrading punishment should never be given to an accused. Where no significant harm has been done, there is no need to resort to the punitve ends of the criminal law. What harm was caused by the accused's action of writing the letter? A rebellion did not break out nor did the cease fire breakdown. Therefore, the case miserably fails to meet the principles of criminal law. There is a truism that no human being should be made to suffer if such suffering cannot be justified by a concomitant gain to society. It is unclear what gain the punishment has yeilded to the Mon Society.

The accused people held positions of high repute in the society, with a history of long service to the Mon people. The charge laid against them was a naked attempt by the military to destroy the very fabric of this society. On the facts of this case, retribution has become the dominant force in punishment. On the facts, the Mon leaders admitted authorship of the letter. The basis of their case was that they should be allowed freedom of expression. The Court had no business handing down maximum sentences. In all fairness, the High Court should have reduced the sentence to accommodate for the period already served (this

totalled a period of one year 4 months, from the date of judgment to the date of arrest). This was a specific ground raised in the appeal, however, the High Court never addressed it. This is yet another example of the blatant miscarriage of justice. The Eighth Amendment to the US Constitution forbids cruel and unusual punishment. The principle of proportionality between the nature of crime and the quantum of the sentence must be scruplously followed.

The SPDC has become a law unto itself – it is not accountable in any way and is vested with total power over the life and death of all citizens. Everyone is aware of what is really happening – a psychosis of terror paralysing every citizen with fear has been unleased. However, the SPDC is wrong if it thinks it can extinguish the fight of the valiant prisoners. In time, the sycohpantic judges who break their sacred oath to be fair and free will not go with impunity.

All trials political or otherwise must adhere to the legal requirements set down in the domestic and international instruments. The resolution of the Unitied Nations General Assembly on December 4th declared the legal system in Burma to be "effectively used as an instrument of oppression". It said that the Junta indulged in "arbitary arrests and detention and abuse of legal system, including harsh long term prison sentences". This case is a good example of how the legal system is used as a tool of repression.

The Myo Myint Nyein Case

The Myo Myint Nyein Case is another example of how the law is being abused by the military junta in Burma. Fundamental rights, such as the right to be represented and to have assistance of counsel for defense have been eroded by the judiciary in this case. In Burma there is no statutory right to representation, in cases where defendants are not afforded the opportunity to engage counsel, the absence is construed by the courts as merely an irregularity. This means trials can be conducted and their legality is not challenged on the basis that the defendant has not had an opportunity to be represented.

The facts of this case involve 22 prisoners who were tried under the EPA in the notorious Insein Jail. The prisoners did not have access to defense counsel and were sentenced to 7 years imprisonment. The prisoners were already serving 7 year sentences under the same law. This matter illustrates the extreme politicization of the courts, as part of the military's agenda for quashing dissent.

The Facts of the Case

Among the prisoners were prominent members of the National League for Democracy. They had been convicted earlier and were serving sentences when

there was a sudden raid into their cells and some writing materials and a radio were seized. The accused were sent up for trial under Section 5(e) of the EPA, which provides the following:

> *"If a person aims to disseminate false information and has committed such an act or is in the process of doing so, knowing that the news is not correct or that there is enough proof that the news is not correct, [this person] shall be punished with up to seven years imprisonment, or a fine, or both".*

The accused prisoners had secretly written a political journal entitled "*New Blood Wave*" which contains news and articles that publicize and criticize activities of the state. The journal was distributed in the prison. An open letter addressed to the Secretary General of the United Nations was published in the journal stating the following:

> *"[We,] prisoners of conscience, unjustly detained in Insein Jail, demand human rights and freedom of politics in Burma".*

In retaliation for public criticism against it, the junta set out to extend the sentences of the activist authors. They were charged with proscribed activities including smuggling a radio into the prison and redistributing "information which they knew was false."

Evidence in the Case

The key evidence relied upon by the junta was that of a police officer who conducted the investigation. Further to this, a number of the seized articles from the prison cells were produced as exhibits. Among the main exhibits were copies of Time, Newsweek and other magazines, news bulletins, the *New Blood Wave* magazine and, of course, the radio.

The first question raised by this case relates to the legality of the search that was conducted. The search did not comply with the provisions laid down for it under section 103(1) of the Criminal Procedure Code. It was conducted by police officers in the presence of jail officals without an independent witness and without the presence of the accused. This is a legal requirement under that provision.

In handing down its decision, the court stated that the evidence of the handwriting expert proved that the New Blood Wave magazine was written by one of the accused. No mention was made by the court of the questionable admissibility of the evidence. One of the accused, Aung Myo Tint, was tortured during the investigation process. Despite this, he still denied that he had written the magazine. Also Htay Win Aung, Kyaw Min Yu, U Win Tin, and Zaw Myint Maung all stated that they saw the magazine for the first time in court.

It is also important to consider why the defendants were not charged for offences committed under the prison regulations, rather than the more serious criminal offence under the EPA. This choice also reflects the political motives that underpin the prosecution's approach. The EPA was drafted to protect the security of the State, the question must be posed as to whether the contents of a magazine alledgedly circulated in a prison amounts to sedition against the State?

The judgment did not specify the precise words published in the magazine or in the other papers which constituted the sedition or false news. It only stated that the writings were 'critical' of the military. However, criticism and sedition are very different things. The right to be critical of one's government is a fundamental right and squarely comes within the ambit of the right of free expression. The fact that the accused tried to exercise this right under the inhumane prison conditions speaks volumes of their courage. Bringing Time magazine (freely available outside the jail in the local bookshop) into the prison, or writing a letter to the Secretary General of the United Nations, or other charges made against the accused do not stand the test of the offences leveled against them.

Thu Ya Kyaw Zin case

This matter was heard and determined in the District Court of Yangon South. The accused was arrested on 1st April 2000 at Myawaddi and charged with high treason under section 122(1) of the Penal Code and sentenced to death on 12th May 2000.

Facts of the Case

The allegations against the accused were as follows:

1. he had illegally exited and re-entered Burma on a number of occasions; during his absences, he attended training seminars based at Maesot, in Thailand that were conducted by organisations banned by the military junta. In particular, he attended courses conducted by the Peoples Defiance and the Democratic Peoples New Society on Human Rights;

2. it as also alleged that the accused had attended training in Maesot relating to the use of explosives. In particular, the accused allegedly conspired with another individual to detonate a bomb upon his return to Burma. It was further alleged that this agreement/conspiracy was made with 3 individuals; Naing Naing, Ye Kyaw Swar and Myint Myint.

It was allegedly decided that the bomb would be placed near the City Hall opposite Bandoola Park. The plans did not eventuate and when Thein Win returned

to Burma, he was arrested at Myawaddi. The accused had apparently traveled outside of Burma illegally and extensively. The accused also had relations with representatives of the ABSDF, an organization banned by the government. During his time inside Burma, the accused allegedly provided information regarding the economic conditions political situation to the organizations based in Maesot.

The conduct of the trial raises many issues in terms of its compliance with due process. For instance, it is unclear whether the accused was brought before a court after his arrest. It also appears that no substantive evidence was relied upon to support the allegations made by the prosecution. Furthermore, the accused was not afforded the opportunity to present a defense, nor have access to independent representation. In the trial, the presumption of innocence was reversed and the accused was expected to rebut that presumption that he had committed the offence he was charged with. On the basis that he failed to discharge this burden, the court determined him guilty. For all these reasons, the case was a hoax and the accused was not fairly tried.

Daw Aung San Suu Kyi's inheritance case

This was a civil case filed by Daw Aung San Suu Kyi's brother, regarding her residential home. The house had belonged to their mother and on her death, according to Buddhist law, both surviving siblings receive an equal half share. The brother migrated to US and became a US citizen. According to the law in Burma, a foreigner cannot own a property. However, there is provision for a special exemption that can be obtained by making application to the courts. To make such an application, the permission of the military must be obtained.

The SPDC gave him the requisite permission and he filed a suit for partition of the property. The court must grant partition if it deems that it is in the public interest. On its facts, one interpretation would be that the "public interest" was satisfied because partition would result in undermining the NLD leader. Accordingly, the courts allowed the partition. The matter was taken up in appeal and has been kept pending instead of dismissing the suit.

This essay has attempted to highlight some of the current issues and concerns about the way in which the judiciary in Burma operates. By discussing some of the recent case law, the essay attempts to expose the erosion of some of the fundamental principles that underpin any democratic legal system. In particular, the cases highlight the way in which the independence of the Burmese Judiciary has been seriously and devastatingly compromised. In the absence of a regime change, the rule of law, separation of powers, independence of the judiciary will continue to be only legal fiction in the Burmese courts. And social justice a myth. The present systematic practice of the judiciary to prounance

conviction relying on judgment reported in 1991 Burma Law Report page 61 is a major shift in subservience of judiciary to the SPDC. The judgment laid down the principle that statement/confession taken by Military Intelligence is admissable in evidence in ordinary criminal courts. Courts are using them freely as conclusive proof and awarding punishment. What little of social justice remain in Judiciary, has now vanished.

Endnotes

* The author is an Executive Committee Member of the Burma Lawyers' Council.

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Reflection on the National Convention (The road map in Burma)

The National Convention is targeted to design the future constitution of Burma. By and large, the constitution evolves as the result of interactions of various forces of the society. The Constitution making process is vital to the evolution of the constitution. The more the process is participatory, the more it is debated, there is increasing probability of the evolution of a durable, sustainable and democratic constitution.

Burma's 50 million people had watched the drama of the Bangkok Process open and wondered if the world would stay involved and help Burma rebuild itself. It desperately needs the substantial and committed involvement of the international community if it is to have any hope of breaking out of the national death trap that more than 4 decades of ceaseless warfare have created. Conceived in the process meant to give democracy a chance to flower, the nascent experiment of an accountable government will however end in failure because of mistrust and instability. The institution of the national convention is marked by military domination and highly arbitrary rules of procedure which prevent the goal from ever being reached.

The international community has a limited window of opportunity to aid Burma's transition. Many approaches have been tried including sanctions, constructive engagement, half measures, and pursuing a "contain and isolate" strategy. Time has come to review the situation. The international community has the capacity to deal with the dictators of Burma but ironically it stands paralyzed. This is because everything has been left to the US, which is now deeply involved in multi - faceted global problems. Recently, a coalition of the willing has been assembled to commence a project called that Bangkok Process. The UN Secretary General and US Secretary of State in unambiguous terms have given the mandate to the regional forum to push forward for effective political change in Burma.

Case study of Afghanistan

In December 2001, the Bonn Accords were signed by 4 non-Taliban groups, and a six-month interim authority was established. Under the Accords, the first step in a process leading to a new constitution was for Loya Jirga to take place in June 2002. By December 2003, the second Loya Jirga was to lay down the structure of a new government. By mid 2004, a move to regularize the government was to take place by holding of a nationwide election. In Jan 2002, a meeting of donor states in Tokyo resulted in pledges of massive help for reconstruction. The focus was founding a workable government. It may be noted that the vehicle for transition has been the Accords and the time frame entrenched in them. While there have been many criticisms of the process, Afghanistan is moving forward.

It is not suggested that the same process should be adopted in Burma as it cannot be. The conditions of the two countries differ fundamentally in many respects. Instead, the point being argued is that constitution making process is vital to sustain the movement. However brilliant the design of a constitution may be, if the process is full of flaws, the entire exercise will be doomed and instability and chaos will prevail.

The Loya Jirga was designed to be as representative of the population as possible. Using the existing 32 provinces and 370 administrative districts as a starting point, 1,051 delegates were indirectly elected, with each district guaranteed at least one representative. In the Phase I voting, adults of both sexes from a given district or urban ward gathered to choose between 20 and 60 electors. A few weeks later, these electors met to name from among themselves a designated number of delegates to the Loya Jirga. To administer these elections, the country was divided into nine regions, each centered on a major city. Each region had an election team to conduct the Phase I and II elections in that zone. The teams were headed by members of the 21 persons Loya Jirga Commission and assisted by political officers of the UN Assistance Mission to Afghanistan. Twenty-seven international monitors were also dispersed around the country to observe the elections, offer guidance and assistance where possible, and report irregularities.

Phases I and II elections began in late April 2002 and continued through early June 2002. In addition to the 1,051 elected members, 399 seats were supposed to be provided to members of the Interim Authority, refugee population living outside Afghanistan, internally displaced persons, nomads, religious and civil society elites, and women (who were guaranteed a hundred seats). The grand total of Loya Jirga delegates was supposed to be 1,450, but Loya Jirga Commission members approved last-minute appointments meant to ensure Karzai's election. This brought the total number of official delegates to more than 1600. Yet, the key points are that there was an accord, representative assembly and open discussion in the first steps of the constitution-making process.

Case study of Iraq

Iraq and Burma are two different countries, two different societies with difficult problems. However, what is of relevance importance to Burma is the rapidity with which progress towards a process for designing a constitution has been made in Iraq. This essay is meant to highlight how time is important if there is political will.

In Burma, the constitution making process was supposed to commence from the date that the National Convention was convened in June 1996, years after the election result of May 1990 was declared. Whenever there is a democratic election, there should be changes in regime according to the results. In the case of Burma, it was contended that no transfer of power could be made in light of the absence of a constitution. If that be a genuine legal contention, what will the elected body then do? It is an insult to the intelligence of the people that the matter has been kept in the freeze for the last 13 years. An extra - constitutional, arbitrarily selected body, called by the grandiose name of the National Convention has been created.

In Iraq the Coalition Provisional Authority (CPA), appointed a 25 member Iraqi Governing Council (IGC) with wide-ranging decision making authority. It named a 25-member Cabinet of Technocrats to manage the ministries. Veteran US diplomat Paul Bremer holds veto power over the IGC but has not used it. This is important because the occupying power and the cabinet are not put in an adversarial relationship. The principle of inclusiveness, as far as practical purposes go has been followed. Even the Secretary General of the Communist Party of Iraq is a member. Although IGC lacked legitimacy, the CPA ended up accepting the IRC's position and agreeing on a political process of democratic transition and constitutional design that was almost in tune with IGC thinking. The cabinet also went about with its business with no CPA interference. There was a tremendous surge of local self-government and civil society. Many centers have forged governing councils chosen through consensual processes often avoiding elections. The city of Baghdad, itself, has 88 neighborhood councils with a 37- member council for the whole city. The key to the situation is that the occupying force did not suppress freedom of expression, resulting in an unprecedented amount of open debate and citizen participation. There are at least twenty political parties operating. The grip of the Bath Party's ideology over the Iraqi people has vanished except in sporadic insurgencies.

The professional syndicates which Saddam controlled broke away, ousted the old man, and inducted the newly elected. Public discussion is becoming central to Iraq's political consciousness which gives hope for the future of the country. Although Iraq is war-torn and devastated, the transition to democracy from authoritarian rule is making pace in spite of insurmountable obstacles. Burma, by comparison, is by far in an advantageous position. Here, there is no political

vacuum. The players have to show greater political will, and importantly, the key is open public debate and citizen participation. Recent news confirms that the parties in Iraq have inked an interim charter. Yet, it was on the verge of collapse. The Shiites who make up 60% raised objection to the undue power given to the Kurds, an ethnic minority group. Burner said, "not every body got every thing they wanted in this law, but that is the way democracy works". This act cleared a major hurdle in handing over power to a sovereign Iraqi government. The interim constitution enshrined basic freedoms and the protection of human rights in Iraq after decades of living under dictatorial rule. The issue of sovereignty remains crucial as the occupying forces have not yet left and the UN has not taken up a role.

African Democracy

In April 2003, 350 representatives of African Parliaments, electoral management bodies, civil society, academia etc., gathered at a conference and produced a declaration outlining principles for constitutional and legal frame works, electoral systems, political parties, election-related conflicts, observation and monitoring, and electoral processes, as well as a number of recommendations. This sort of inclusive conference is necessary to sort out many problems particularly in the context of Burma's historical baggage.

The National Convention, which has been made the target, is admittedly not to draft the future constitution. Instead, it is to evolve the principles of the constitution: the so-called 104 principles have been, by and large, drafted though arbitrarily. The National Convention has no further function to perform. The question that confronts junta is how to draft the constitution on those 104 principles. There lies the dilemma. Who drafts the constitution, who forms the new body and what mandate is required to vest the body with constitution drafting power to give it legitimacy? It appears that the junta has brought the entire situation under a vicious circle.

From the above it emerges that a constitution making process must have the following characteristics;

1. There must be democratic discussion, debate and accountability to people;
2. Participation must be include different ethnicities, minorities, and other groups;
3. There must be transparency and the people must be informed of all the developments;
4. The representatives must have decision making power;
5. The principle of consensus must be followed;
6. A legitimate body for writing a draft constitution must be formed;

7. The constitution has to be put to referendum and accepted by people's mandate;
8. A general election must be held in accordance with the provisions of the constitution and Parliament is formed;
9. The incumbents must transfer power according to the mandate of the election;
10. The majority winning the election forms the government;

Even in a country like Afghanistan, the democratic process in constitution drafting is being followed. This process had to be written down into the Bonn Accords between the players in the transition. It cannot be a unilaterally drafted and decided document. Rules of any game cannot be decided by only one team. Another hard question that will be confronted is how will the transitional government be organized. Will there be a power-sharing arrangement or will there be some form of a transitional administration to give legitimacy to the transition? The rules of procedure which the last National Convention followed raised questions about the validity of the process. The very first step necessary is to change these rules and not to merely march to drum beat of the seven steps. Obviously, no lessons have been drawn from the past. The opportunity presented in the Bangkok Process will be squandered and the bitterest tragedy will be the fate of the country which has known little but tragedy for far too long.

Assuming that the National Convention produces agreed upon principles of the constitution, these are still not the constitution itself. Who then is the competent body to draft the final constitution? Not the National Convention as it was vested with only a narrow scope, namely to develop the principles. If the National Convention goes beyond that scope, it will be illegal and void. The junta cannot solve the dilemma and bypass the NLD. The 1990 election result has become an albatross in the neck of the junta. Ironically, the constitution making process itself will become unconstitutional and without legitimacy. The only way is to compromise with the mandate holders and develop a new road map which does not invalidate the fundamentals of the 1990 elections.

Case of Nine Innocent Persons Condemned to Death

Facts of the case

Sometime last year, 9 persons were charged with high treason under Section 122 (1) of the Penal Code, High Treason, for having carried out activities against the security of the State. The case, Criminal Trial No. 111/2003 of the District Court of Northern Yangon, was tried by the Special Court in Insein Jail where members of the public could not be present. The judgment was delivered on November 24, 2003. Section 122 (1) is a case of high treason against the State.

Initiation of the proceedings

Under Section 196 of the Burma Criminal Procedure Code, sanction of the President is required in cases of high treason. The judgment in this case makes no mention of any such sanction. It can be reasonably said that this mandatory provision was not met.

A direct complaint was filed by a police officer giving his statement before the court. In addition, he submitted the interrogation reports completed by the Military Intelligence in lieu of a police investigation. As a result, the law established under Section 158 of the Criminal Procedure Code was circumvented, as it requires an independent police investigation to be made.

Under section 190 of the Criminal Procedure Code, it is indicated that on the basis of a police report action can be taken. Under Section 158 of the Criminal Procedure Code, an FIR has to be opened, which then authorizes an investigation. In the above mentioned case, there was no FIR filed as a direct complaint.

Due process

Under Section 5 of the Criminal Procedure Code, all offences under the Penal Code shall be investigated, inquired into, tried and otherwise dealt with according

to the provisions hereafter contained. The trial was under Section 122(B) of the Penal Code and an investigation should have been conducted as required above. Under Section 61 of the Criminal Procedure Code, a person arrested shall not be detained for more than 24 hours. In this case the accused were kept in military custody for an indefinite period. They were denied access to lawyers/relatives and kept incommunicado. Two of the accused were unable to have lawyers to defend them. Military investigators manipulated all of the evidence and superseded the due process.

Inadmissible evidence

Statements taken by police or MI are not admissible under Sections 24 to 28 of the Evidence Act. The statement made by prosecution witness no. 5 is tainted and unreliable. He was arrested together with the accused but he was not charged with the same crime and cited as a witness for the prosecution instead. He could give evidence only as an approver after having been made an accused and given a pardon by the court for his testimony. The due process was subverted and inadmissible evidence was relied upon for entering conviction.

Evidence on which conviction entered

The crux of a high treason case is conspiracy. In order to bring the case within the parameters of a high treason case there must be some connection between the conspiracy and those accused. In the circumstance of this case some of those accused persons who were not at all connected to the case were merely roped in. For example, accused no. 8, whom no mention was made of when judgement was made or when the evidence of the accused was evaluated in order in the summary of the total evidence. In addition, evidence regarding accused no. 4, 6, and 9 is a flimsy allegation that they had connection with unlawful associations operating in exile. If that were true, which it was not proven to be, it would come under the Unlawful Associations Act and not high treason. Fear of losing his job and of being a prisoner himself eroded the morality of the judge. The law permitted the judge's discretion in the given case to give benefit of doubt or to state that evidence provided for the case was not conclusive enough to prove the charge. Further, seized materials were not produced and exhibited in court. Concomitantly, not a single witness was cited to testify that the materials were seized from the accused.

Evidence against accused no. 9, the famous editor of a popular magazine, *Sport Eleven*, was that he had a phone connection with someone in exile who belonged to an unlawful association. There was no evidence as to the nature of his conversation or the nature of the connection. The presumption was drawn that he must have been engaged in subversive activity against the government. Yet, it

is clear that he had nothing to do with the conspiracy, assuming that there was a conspiracy law ordaining presumption of innocence and not presumption of guilt. The evidence against accused no. 5, who is a lawyer, was that he sent false information about the government to a person in exile. As a result, the court stated that he must be punished. The evidence against accused no. 9 was that he was found in possesion of the book "Forced Labor in Burma" and which he is said to have used to send false information on government outside of the country. The ILO on March 30, 2004 condemned the sentence of high treason against three who were accused for having contacts with the organization and has demanded their release. Finally, the trial was held in a special court in Insein jail where public entry is barred. The principle that a trial has to be public was therefore violated.

The summary of evidence on which the conviction was based was that the accused carried activities contacting opposition groups in exile, detonating mines and bombs, planning to assassinate the heads of State, sending false information about the government to organizations in exile. All of these activities constituted high treason. There are domestic laws such as the Arms Act, Unlawful Associations Act, Emergency Provisions Act and State Protection Law under which the Court could have exercised its powers and convicted the defendants, if there was conclusive evidence. Yet, because the case was filed by the Military Intelligence under Section 122 of the Penal Code, the subservient court had no option but to comply and enter a sentence of the death penalty for an imaginary crime.

The death sentence cannot be carried out unless it is confirmed by the High Court. At the same time, an appeal against the conviction may not be filed by the accused in the High Court. The case of the 9 persons condemned to death is now before the High Court for confirmation in its revision of the proceedings. The High Court should order the acquittal of all of the accused on reappraisal of evidence and on grounds of mistrial and violation of norms of fair trial. In this case it is not a question of exercising inherent power for the goal of justice. Instead, it is a patent case of abuse of due process of law. The provisional powers of the High Court encompass the ability to set right a wrong where the records reveal that the MI took charge of the case. Thus, this is a simple case of the integrity of the highest judicial organ, which is in question.

Conclusion

It is well known that all political cases are orchestrated by the Military Intelligence. But this is the first landmark case where it has been made an open fact. The entire pre-trial process has been reduced to a system. It is an established fact that the Judiciary is subservient to the military and there is no rule of law, which has been long contended by democracy forces. Laws in Burma are made and

signed by Senior General Than Shwe. The administration of justice is carried out by the SPDC under him and by the Ministry of Home Affairs. There is no separate Ministry of Justice or Law, although there are separate ministries for other affairs such as finance and education. The Supreme Court, the Office of the Attorney General and law enforcement are all under the Ministry of Home Affairs. Separation of powers is anathema to the junta.

Total dictatorial rule is the fate under which the people of Burma live. The existing cease-fires are fragile and the junta can victimize any of the leaders of cease-fire groups at its will. The so-called ringleader of the case set up is a leading figure in the New Mon State Party, which has entered into a cease–fire. Any popular figure not toeing the line of the junta, nor doing politics has to be aware that popularity in the context of Burma means the potential of a rival of the regime. This was the case with the Editor of Sports Eleven. The dialogue, road map and all the promises made by junta will remain as hypocrisy as a long as it does not show respect for law, justice and elementary human rights. The harassment, intimidation and persecution of prisoners of conscience must stop.

Burmese Migrant Workers A Question of Human Rights

It is estimated that the number of Burmese migrants in Thailand is more than one million. Cross border migration into Thailand from Burma has been steadily increasing. Simultaneously, the Thai government has been passing regulation after regulation permitting Thai companies to employ foreign labor including registration of undocumented migrants in authorized sectors. Migrants have swelled into the roles of domestic servants and sex workers. In addition, human trafficking, drug dealers, child labor are other repulsive features of migration.

Migration is the result of the policies of the Burmese military regime. Migrants want to escape forced labor, chronic unemployment, dramatic increases in the prices of essential commodities and inhuman exploitation of labor by way of underpayment of wages. They migrate to Thailand and obtain jobs which yield better wages, although living conditions are inhuman and there is persistent insecurity of service. There are certain Thai Laws which provide for the protection of registered migrant workers but they are simply on paper.

The military regime's attitude toward the explosive problem of migrant labor is one of callous neglect, to say the least. The continuing neglect of the life-and death problems faced by the migrants constitutes a serious violation of human rights enshrined in various international covenants. Recognition of migrants' rights as human rights is the need of the hour.

The Universal Declaration of Human Rights (UDHR) affirms the right to life. The Declaration on the Right to Development affirms that states have a duty to formulate appropriate development policies that aim at the well-being of all individuals. The right to life includes the right to livelihood because no person can live without the means of living i.e. the means of livelihood. The life so guaranteed does not connote animal existence but a right to live with human dignity, free from exploitation.

The major reason for large-scale migration from Burma is the abysmal failure of the SPDC regime to provide the people of Burma with jobs and security. There are no institutions which can provide credit to the farmers or mechanisms which can ensure basic living conditions for them. The economic system of Burma has widened the gap between the poor and the affluent. No agrarian reforms or modernization in agriculture have been introduced resulting in a stagnation of growth. This dysfunctional policy of the State affects the women and children compromising both the CEDAW and the Conventions on the Rights of Child. Migration, in other words the uprooting of traditional life-style, is the result of State negligence, the authorities' gross callousness in providing protection and the failure of responsibilities to implement policies leading to violation of human rights. The regime must recognize migrants' rights as human rights and develops policies that would stand the test of such rights.

"Family Law of Thailand"

by Ms. Wimolsiri Jamanarnwej, Associated Professor of Law, Dean of Law, Saint John's University, Former Minister of Office of Universities Affairs, Chulalongkorn Law Review, Thailand's First English Law Journal by the Faculty of Law Chulalongkorn University, Bangkok, Thailand Copyright 1999.

University has a very important role to play in educating the nation about family law in Thailand. The urgency of this issue has increased due to mounting tourism and rapid globalization. Family is the one institution which barbarism in human history had failed to destroy. It has survived the twists, turns, storms and stresses of history. It is more important in failed societies where families have broken up, large displacement has upturned the roots, children and women have become grave victims of the sex trade, human trafficking and even H.I.V. This is the grave situation in Burma where the institution of family has eroded. Fortunately, the democracy movement in Thailand has achieved end of the military dictatorship. Thailand is trying its best to put off the onslaughts of invasion of foreign culture and construct a modern society preserving the best of the traditions and the institution of family. Few have written of the family more insightfully than did Wimolsiri in her essay "Family Law of Thailand". Thailand and Burma are close neighbors and there are some common traits as well as differences in the family institution.

Differences:

A Promise to marry

An engagement can be effected between two parties at least 17 years of age. Below that age consent of the parents/guardians is necessary. The agreement can be effective only when the man gives engagement property to the woman. In case of breaches, remedies are provided. This is different from a promise to marry. There is no Thai Law for such breach. This is also similar in the case of Burma. But an engagement agreement cannot be effected. Consent of parents/ guardians is required when the female party wishing to become engaged is below

20 years old. There is no age limit for males. The law only indicates that if he is able bodied, he can marry.

Marriage Age:

Thai Law - 17 but under 20 consent of parents.
In Burma - The age is 18 with consent of parents, 21 and above no consent is required.

Prohibited Degrees.

(a) Marriage between close relatives are prohibited. It is same in Burma.
(b) Unsound Mind;
(c) Monogamy;

In October 1935, it was abolished in Thailand. Burma has not officially abolished polygamy, but taking a second wife is grounds for divorce. Registration of marriage in order to validate the marriage is compulsory under civil and commercial code, Article 1458 of Thailand. In Burma no registration or writing is necessary. Living together as husband and wife acknowledged by friends and relatives, visiting pagodas together as husband and wife, wide publicity and cohabitation constitute marriage.

Foreign Marriage

Thai citizen can marry foreigner if it conforms to the Thai procedure or law of the country where it takes place.

Dissolution of Marriage

Dissolution of the marriage may occur under the following circumstances;

1. Breach of the conditions of marriage;
2. By court on mutual consent in writing and registration;
3. As result of a Court judgment;

Dissolution of the marriage may also occur due to the following;

(a) Adultery (by husband and wife in Thailand, only by the wife in Burma)
(b) Gross misconduct
(c) Cruelty
(d) Desertion (1 year Thailand –by both husband and wife) (In Burma, 1 year by a wife and 3 years by a husband)
(e) Disappearance (3 years in Thailand, 7 years in Burma)
(f) Non-Support of maintenance

(g) Insanity (Breach of a bond of good behavior, not applicable in Burma)
(h) Communicable disease
(i) Incompetence (one year limitation for filing divorce suit)

Property of husband and wife

The husband and wife have equal rights to manage their property. There are 2 kinds of property. The first is private property which belonged to them before marriage, movable or unmovable. This includes gifted property and engagement property the husband gave to the wife. These are all private properties.

Common property

Property acquired during marriage including gifted if so mentioned jointly for both. The fruits of the property belong to both. There is presumption of law that the property is common in case of doubt. This is same in Burma.

Management

Husband and wife can enter into a pre-marriage agreement. The agreement must not be contrary to public order. It must not be governed by foreign laws and it must be in writing and registered. It is not an agreement for management to whom the property belongs. There is no such agreement in Burma.

Common property with be jointly dealt with in selling, mortgaging, leasing, making a loan, conferring a gift, making a compromise, referring to arbitration, and putting the property in a guarantee, subjecting it to limitation and revocation. This is also the law in Burma.

In addition, debts incurred by either husband or wife are considered common debts both in Thailand or in Burma.

Division of property

On divorce the common property is returned to equally. Common debts are equally shared. The law is same in Burma.

Maintenance

Both husband, wife and children are entitled to maintain and support. The court can be moved and amount fixed. It can compel the employer to pay out of the earning. The author has stated that enforcement by the court is weak. Husband who honestly complies with the maintenance order is rare. This is also the same in Burma.

When one takes an overview of the family laws of the two countries one is surprised by the similarities. Probably Buddhism has put its impact on the laws of the two countries and the family values could be preserved in spite of ups and downs in their respective societies.

The author has stated that enforcement by the court is weak. Husbands who honestly comply with the maintenance orders are rare. This is also the case in Burma.

When considering the family laws of Burma and Thailand, the similarities are surprising.

" With a Deep Desire to Promote Judiciary"

May 2000, Volume (1) No.7
Judicial Journal, Supreme Court, Myanmar
U Soe Nyunt

The above article states that "to develop and promote Judiciary in Myanmar, all the Judicial personnel should be efficient and well-versed in Judiciary" toward that end, it states that in-service training programmes are being conducted by the Supreme Court.

In the same Journal there is a head line "Secretary -1 attends opening of Special Refresher Course No. 3 for judicial officers. He not only attends the function but gives the key note speech to which the Chief Justice of Supreme Court focuses his main theme. There is no mention of Independence of Judiciary, the vital component of a democratic judiciary." In building a peaceful and developed society, it is of vital importance to strive for rule of law and order, to make sure that all the citizens respect and abide by the law, and to protect them according to the law. That is the key address. There is no such thing as rule of law and order. There is rule of law, and there is "Law & order". The two are distinct and separate. What he meant was "Law & Order"? All citizens must abide by the law. Is the training – class to be a venue for lecturing trainees to be law abiding? He stated of "high moral character" of judicial officer? What he meant was constructive thinking about Political, Economics and Social, objectives of the state. He referred to the guidance given by the head of the State Sr. General Than Shwe: that Judges are government employees, to become good Judge who decides cases correctly and fairly with good will towards the State.

Further the author stated not only are courts a machinery of the State which has to deal with a human society and persons according to the law, but they also have the duty to safeguard the state and citizens against danger which can have a detrimental effect on the interests of the State and the people, disrupt the unity of national people and hinder development of the State. This refers to state only without any reference to law an the welfare of the people

"Judicial officers are responsible to get the people to understand the concept that the practice of respecting and abiding by the law contributes towards emergence of human society with high standard of living and that the law does not restrict the individual person but protect them and the entire human society; and so,

they are to adopt that notion. Who is the law giver, what mandate it has, and whether the laws are just laws, are questions conveniently avoided and the Course reduced to a dull sleeping session.

Abiding to the Law, the questions is who is the Law maker, a few generals, will of the people has nothing to do with it. This as has become more pertinent after May 1990 election which gave mandate to NLD to represent them. The mandate was also verdict to end military rule, the already illegitimate status of SPDC, became doubly illegitimate. All Laws parsed by it or being enforced by its Courts are devoid of legitimacy and people have right to resist. This was highlighted by the American war of Independence.

The author has the audacity to write;

> "They also need to hand down effective and deterrent punishment to those who violate laws with the intention of destroying development, stability and peace and tranquility of human society."

"The major duty of the court is to safeguard the interests of the State and the People in accord with the law, and harmonious cooperation of the judicial sector, the legal sector and administrative sector for the emergency of a peaceful, development nation,"

The principle of separation of power has not only been eroded, it is being openly proclaimed in the negative. It is also ingrained through Training classes- 245 trainees (6 weeks). It was course No. 3, Jan 2000. Average 245 x 3 = 735 already, by 2003, the program has run into thousands.

There are 4 different types of courses;

1) recruits for new,
2) refresher courses for judges,
3) higher courses for senior judges,
4) special refresher courses for judicial officers,

The author states, it would be beneficial to know what other countries are doing. Singapore has been chosen as his model. He refers to pretrial conferences in civil suits honestly he states that our present judicial procedure does not allow judges to take part in settlement conferences. The main reason behind it is that it may create apprehension in the minds of the parties that the Judge is more or less in favour of one party or the other. But naively he mixed up Trial procedure with settlement conferences.

Order [12] Rule (6), Order [15] Rule (1), Order [23] Rule (1), of Civil Procedure Code which the author referred to are all procedural matters concerning the various steps to be followed in hearing of the Suits. The title of the article is

totally his misleading. It makes no reference to how to promote Judiciary, at least if it contained one line of constructive criticism of the judiciary, there would have been some credibility. Give him the benefit of doubt. He is probably a product of the Training class. The key issue is that the people have no faith in the SPDC Judiciary and this should have been addressed at least obliquely.

NEWS AND NOTES

1. N.L.D's fresh suits

On 16.8.04, the NLD leaders went to the Supreme Court to file a petition under Section 45 of the Special Relief Act. It related to getting reliefs against the unlawful activities of SPDC, to release Daw Aung San Suu Kyi, her deputy Tin Oo and to reopen party offices. Usually, the petition has to be accompanied with an affidavit setting out all the facts of the case. The Commissioner of Oaths, the authorised person, was approached. Strangely he refused to administer oath to the petitioner as required under Oaths Act. He stated that section 8 of the Act disables him to administer Oath.

There is no law or Act which empowers the Commissioner of Oaths to reject/refuse administrating oath. It is for the Judge to decide on its merits. The Commissioner has to satisfy himself with the identity of the person making oath. The matter was sent to the Chief Justice, Supreme Court for opinion. The fundamental Justice requires the parties be heard and then given a decision. The C.J has no business to deal with the matter. It was for the Registrar of the Court to deal with it. The procedure is laid down that a case when being filed is to be registered with number and reasons for rejecting have to be recorded. The over stepping shows how sensitive the matter is considered. Obviously it was sent for instruction from the junta. Even on small technical matter, Judicial Independence is lacking. The petition has been sent by post to the Supreme court. Its fate is anybody's guess.

2. The Case of Rangoon University students' union

The Land mark Judgment of the Supreme Court, Burma in January 7, 2004.

CRT 1348/2003
Insein Jail Annex Court

Ye Nyunt Deputy Police Inspector Vs Aung Gyi & 5

Facts of the Case

The accused in the case are 5 students of Rangoon University.

1. Aung Gyi (2nd year LLB), 2. Nan Shin Mon (1st year LLB), 3. Myo Min Htun (2nd year LLB), 4. Win Htut Lwin (1st year Chemistry), 5. Aung Ko Oo (1st year).

The allegations against them were that;

1. They had formed University Students Union in March 2003. No.1, was temporary Chairman, No.3, temporary Vice Chairman, No.4, temporary Secretary and the other two were Executive Committee members.
2. In July they typed printed a leaflet in a computer and distributed it among student centres.
3. They scheduled to hold a conference on December 10 near the University Damayon.

Military Intelligence 6, took them in its custody and interrogation was completed by MI, Kyaw Naing Oo. Thereafter the case record and the accused were handed over to Htun Soe Thein, the Investigating Officer in the case. After the Investigation was completed by MI the matter came under police.

The Prosecution cited 9 witnesses out of which 3 were police and 2 search witnesses others Ma Su Mon Thwe (PW-I), Pho Tha Aung (PW-5), U Shwe Toke (PW-8). The Judgment doesn't refer to the evidence given by the PWS.

The law applied was section 6 of the "Law for formation of associations", Law No. 6/88. It makes mandatory to have prior permission of Home Ministery for formation of any organization even a club. On failure penal conviction is given. Accused 1and 2 were convicted for 4 years and the other for 3 years. For same offence different accused were given different sentences.

There are several flaws in the case and conviction and sentences have to be set aside.

Due process of law was flouted openly. The accused were kept in the MI custody for more than the period prescribed under Criminal Procedure code. The confessions were taken by MI and admitted as evidence. In the Criminal Court relying on section 24 of Evidence Act Section 24 of the Evidence Act cited by the judge has been clearly misapplied. Evidence Act only refers to confessions taken by police or magistrates. Taking of confession by MI to be submitted as evidence in Criminal Case is not provided either in Evidence Act or Burma Army Act rules.

Section 23 of Evidence Act states Confession before a police officer's irrelevant. Similarly confession before M.I is not admissible by analogy.

The core issue is confession and its admissibility or non admissibility is clearly

laid down in Evidence Act. The Judgment virtually legalized procession of cases by M.I with police in the shadow. Such miscarriage of justice is being done by the highest organ of the Judiciary.

3. Depayin Case in Doldrums

Depayin Issue in Doldrums

In 57th General Assembly the Special Rapporteur on the Situation of Human Rights in Myanmar, Professor Paulo Pinheiro, in presenting his report on recent developments in Burma said, "he had observed, during his last visit from 3 to 8 November of 2003, significant setbacks in the country's human rights situation since his last mission in March 2003". Interviews with victims and eyewitnesses, discussions with Daw Aung San Suu Kyi and authorities, provided prima facie evidence that the incident in Depayin in May 2003 could not have happened without the connivance of State agents.

Professor Pinheiro called for the immediate and unconditional release of all those who were detained or who remain under house arrest since May, as well as compensation for surviving victims and the families of those who died. He urged a thorough investigation, in accordance with international standards, including public announcement of the results and accountability of those responsible.

The Depayin incident has impacted the peace process. Daw Aung San Suu Kyi was arrested from the crime of scene. She was abducted by MI and there was no news about her till it was officially announced that she underwent surgery and was in good health. She was removed from hospital to her residence with an order for house arrest. 15 months have passed and she has not been released in spite of world-wide call for her release. It proves how important it is for the Junta to keep her in confinement. The present detention is made to serve two purposes. Firstly, that the Depayin episode can be buried once for all. Secondly, any anti-junta activitiy, which her freedom may generate is nipped in the bud.

The junta will be well advised to agree to a probe. It can take this opportunity and come clean. Even Bush and Blair who rejected calls for an inquiry into the intelligence failure which led to the war against Iraq eventually agreed to a probe. The junta's agreement to a probe can only have a significant impact on the process of the road map. It will improve its credibility which is at its nadir, due to the Debayin incident. The key to the entire peace process is credibility. The main point is not punishment of the offenders but to secure that such incidents are not repeated. If such incidents happen, which is likely to be repeated if the perpetrators are let off, it does little to advance peace. It will embolden those

responsible to perpetrate such actions again. The entire road map process will be jeopardized as peaceful environment is the sine quo non for any talks between the stake-holder.

Under Act No. 4/1950 Inquiry Committees Act clause 2, read with article 37 of 1850, (Public Servants Inquiries Act) an Inquiry Commission can be formed for special purposes. Depayin is a special case and it comes within the purview of this act. In Newin's time when some prisoners died of suffocation in a police van, an inquiry was instituted. Similarly, in 1988 before 8888 uprising, students were shot dead in a scuffle in a teashop by army soldiers. Inquiry was also instituted. In both the cases, actions were taken against the perpetrators for the crimes. The junta in the Depayin case has not taken any action although 15 months have passed. The reason for not taking action was obvious. It could open a Pandora's Box and become a public inquiry where the NLD leaders could come and speak the truth. This could have been a big shakeup to its long undisturbed rule of being in power. That there is no rule of law but a reign of terror prevails in Burma is the one and only conclusion that has to be drawn.

4. Junta is Confrontation with Rule of Law

(a) Extract, Kofi Anan statements dated 19th August 2004

United Nations Secretary-General Kofi Annan has called for the immediate release of Burma's opposition leader Aung San Suu Kyi and urged the government to open "a substantive dialogue" with opposition parties and ethnic minorities to demonstrate its commitment to restore democracy.

He warned on Tuesday that Burma's efforts to draft a new constitutional credibility until the government considers opposition views.

On July 9, Burma adjourned a constitution-drafting convention after nearly two months of closed-door discussion. It is unclear when it will resume.

The convention, which began on May 17, has been billed by the Junta as a first step towards restoring democracy to the country, but has been dismissed by the opposition as a shame.

Mrs. Suu Kyi 's National League for Democracy party, or NLD, boycotted the convention because the government refused to release her from house arrest.

Mr. Annan urged Burma's ruling State Pease and Development Council, "as a first step towards democratization and national conciliation, ... to make full

use of the National Convention's adjournment by immediately releasing Daw Aung San Suu Kyi," UN association spokesman Stephane Dujarric said in a statement.

Last month, the NLD launched a campaign seeking the immediate and unconditional release of Mrs. Suu Kyi and other political detainees, collection signatures around the country. The Noble Peace Prize winner has been in detention since May 2003, when the military cracked down on her party after a violent clash between her followers and government supporters. The NLD won a landslide victory in a 1999 general election but the Junta, which seized control in 1988 after brutally suppressing mass pro-democracy protest.

Mr. Annan urged Burma's ruling junta to engage the NLD and other political parries "in substantive dialogue on how they can work together for the benefit of the people of Burma", Mr. Dujarric said.

The UN secretary-general said it also "remains essential for a mutually acceptable agreement to be reached" with ethnic minority groups that have signed ceasefires with the government. In August 2003, Burma's Prime Minister General Khin Nyunt announced a seven-point "road Map" for restoring democracy, outlining a path to national elections and a new government. In December, Burma's Foreign Minister Win Aung made a commitment at an international forum in Bangkok to implement the "road map" for restoring democracy, outlining a path to national elections and a new government. In December, Burma's Foreign Minister Win Aung made a commitment at an international forum in Bangkok to implement the "road map", beginning with a National Coalition to draft a constitution. An earlier constitution introduced in 1974 was dropped after the military assumed power in 1988.

Mr. Dujarric said "it is the secretary general's judgment that the National Convention does not currently adhere to the recommendation made by successive resolution of the General Assembly".

"The secretary-general believes that unless and until the views of the .... NLD and other political parties are sought and considered, the National Convention and the road map process will be incomplete, lacking in credibility, and therefore unable to gain the full support of the international community, including the countries of the region", he said.

Mr. Annan expect all countries in the region "to talk a leading role" in urging Burma's rulers "to accelerate the process of democratization", Mr Dujarric said.

(b) Extract, Bangkok Post editorial dated 24th August 2004

Mr. Anan, in his call on Rangoon to end the 15-month detention of Mrs. Suu Kyi, also urged Burma to open substantive dialogue aimed at forming a democratic and accountable regime in Rangoon. The UN has long been involved in attempts to replace the tyranny of Burma. Efforts aimed alternatively at pressing Burma to bring democratic change, and forcing the country to reform, have come to naught. At the moment, Rangoon will not even talk with Mr. Anan's personal envoy, Razali Ismail.

Burma would be unwise to ignore such a public appeal from the head of the United Nations. Still, this has never stopped Rangoon in the past. Perhaps most infamously, the generals organized a democratic election in 1990. They simply ignore the result, which was a massive victory for Ms Suu Kyi's National League for Democracy. Over the past 14 years, most of the election winners have been imprisoned, tortured or have fled the country, or all three. Burma has ignored pressure from human rights groups, sanctions from the United States, threats from Europe that have stopped all proceedings of the Asia-Europe Meeting, and offers to help in reconciliation from as far away as New York and as close as Bangkok.

The world has changed since the Burmese military coup of 1962 and another such coup that installed the current dictatorship in 1988. Massive human rights violators are no longer welcome in the world, and the resistance of the generals to change by evolution increases the likelihood of change by revolution.