The Administration of Justice and Court Procedure in Myanmar

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This article is published verbatim with comments at the end of each theme. This will be a fair appraisal and enable readers to understand the mindset of the so-called legal reformers inside the junta ruled country.

Introduction

Every independent sovereign State has its own administration of Justice and Court Procedure. The Administration of Justice is carried out by the Courts of different levels. The establishment of Courts in Myanmar is prescribed in the following laws:

(a) By the provisions contained in the Constitutions of 1947 and 1974. At present, the said Constitutions are suspended and a new constitution is on drafting process.
(b) By the provisions contained in the Judiciary Law 2000.

It is mentioned that the establishment of courts in Myanmar is prescribed in the following laws:

(a) By the provisions contained in the Constitutions of 1947. At present, the said Constitutions are suspended and a new constitution is on drafting process.
(b) By the provisions contained in the Judiciary Law, 2000.

In (a) that is law no. 5/2003 it is mentioned that “at present, the said constitution are suspended”. Question arises: constitutions are suspended then what is the basis of establishment of courts. The answer indirectly given is that (b) provisions in the Judicial
Law 2000 apply. This is not a law. It is an order couched as law and proclaimed by the higher of Executive organ, the SPDC when the very basis is flawed how can Justice be administered. Here is also an admission, “a new constitution is on drafting process”, means there is no constitution. It is the rule of man which is the hallmark of administration of Justice and that is conspicuously absent.

Establishment of courts in Myanmar

At present different levels of Court are formed under the Judiciary Law, 2000. At the apex, there is a Supreme Court. The State Peace and Development Council shall constitute the Supreme Court with a Chief Justice, 3 Deputy Chief Justice and minimum of 7 Justices to a maximum of 12 Justices. (see section 3 of the Judiciary Law, 2000 and section 2 of the Law Amending the Judiciary Law, 2000.) The Supreme Court shall sit in Yangon and Mandalay respectively, provided that, if necessary, it may sit at any other appropriate place. (see section 4 of the Judiciary Law, 2000.) The Supreme Court shall form the State or Divisional Courts, the Township Courts. (see section 12 of the Judiciary Law, 2000.) The Supreme Court shall appoint Judicial Officers and confer upon them appropriate judicial powers to act as Judges at the State or Divisional Courts, the District Courts and the Township Courts and prescribe their functions and duties. (see section 13 of the Judiciary Law, 2000)

At present in Myanmar different levels of Court are formed as follows : -
(a) The Supreme Court (constituted by the State Peace and Development Council) It is regarded as the highest Court in Myanmar.
(b) The State or Divisional Courts (formed by the supreme Court)
(c) The District Courts (formed by the Supreme Court)
(d) The Township Court. (formed by the Supreme Court)

“The SPDC shall constitute the supreme court”. SPDC is not Parliament. When parliament appoints Supreme Court, it represents the will of the people. Accountability of the Judges is to this parliament. Here accountability of the Judiciary is to coterie of Generals styled as junta. There can never be any independence of Judiciary the S.C shall appoint Judicial officers. The S.C Judges are selected by Junta and when they appoint judicial officers, it is on the direction of the Junta.

Judicial Principles

The administration of justice shall be based upon the following principles : -
(a) administering justice independently according to law;
(b) protecting and safeguarding the interests of the people and aiding in the restoration of law and order and regional peace and tranquility;
(c) educating the people to understand and abide by the law and cultivating in the people the habit of abiding by the law;
(d) working within the framework of law for the settlement of cases;
(e) dispensing justice in open court unless otherwise prohibited by law;
(f) guaranteeing in all cases the right of defence and the right of appeal under the law;
(g) Aiming at reforming moral character in meting out punishment to offenders (see section 2 of the judicial law, 2000)

(a) administering justice independently according to law stated above two questions are: (1) what is “independently” and (2) what is “Law” As there is no separation of powers between the Executive and Judiciary, on the contrary judiciary is the creation of the SPDC, there cannot be any independence.

Secondly, “according to law”, this law is the one that has been promulgated by SPDC as orders calling them as laws. Therefore administration of justice is eroded from top to bottom. It is a fraud on justice that the SPDC is perpetuating.

(b) “protecting and safeguarding the interests of the people and aiding in the restoration of law and order and regional peace and tranquility”; stated above. According to the author administration of justice shall be based on the above principle. How law and order and regional peace and tranquility be based on the above principle. Justice is different from “law and order”. When the two elements are clubbed, justice becomes causality. “Law and order” is the domain of the executive, the police force. How can the judiciary aid the police for enforcement of law and order. No doubt this has resulted in Burma becoming a police state. All the trials that are held are framed on the ground that they are threat to “law and order” and end in conviction with total disregard to justice.

(c) “educating the people to understand and abide by the law and cultivating in the people the habit of abiding by the law”; There have been so many trials. None are reported in the media which the State Controls. The only way to educate is to lay before the people the judgments of the trials so that they can understand how law was breached. Even the detention of Daw Aung San Suu Kyi has not been reported in any newspaper not to say of publishing the reasons for the detention. Freedom of Press and freedom of expression are the only means of education the people.
(d) dispensing justice in open court unless otherwise prohibited by law;
“Open Court” is anathema to the Junta. Hundred of trials have been held in Insein Court in accessible to the public. Even the trial of its own point man Khin Nyunt was held secretly and he was given 40 years imprisonment. Of recent date is the trial of Khun Htun Oo, a respected and elected Shan leader. He has been sentenced to 40 years imprisonment, nobody knows where the trial was held. “Open Court” means transparency. For military clique which is holding to power for over decades, transparency is the last thing. There is no accountability. There is no rule of law and rule is by the coterie.

(e) guaranteeing in all cases the right of defence and the right of appeal under the law;
In many cases no lawyers have been engaged and no appeal allowed. The “right of defence” is a false statement.

(f) Aiming at reforming moral character in meting out punishment to offenders (see section 2 of the judicial law, 2000)
There is no question of “reforming”. The entire policy is directed to vindictiveness. It is fundamental in criminal law that punishment has to be in consonant with value in society. The Eight Amendment to the U.S, Constitution forbade cruel and unusual punishment. Punishment which is cruelly disproportionate to the crime offends humanitarian concepts. All the political trials that had been held have ended in maximum punishment in contravention of the time honored practice in criminal justice.

Jurisdiction of the Supreme Court

The jurisdiction of the Supreme Court shall be as follows:-
(a) adjudication on original criminal and civil cases;
(b) adjudicating on a case transferred to its by own decision;
(c) adjudicating on transfer of a case from any Court to any other Court;
(d) adjudicating on an appeal case against any judgment, order and decision passed by the State or Divisional Court;
(e) adjudicating on a revision case against any judgment, order and decision passed by any Court;
(f) confirming death sentence passed by the State or Divisional Court or the District Court and adjudicating on an appeal case against the death sentence;
(g) examining any judgment, order and decision of any Court, which is not
in conformity with the law relating to the Legal rights of a citizen and altering or setting aside as may be necessary;
(h) examining any order and decision which is not in conformity with the law relating to the legal rights of a citizen and altering or setting aside as may be necessary; adjudicating on an admiralty case;

Powers of the Supreme Court

The Supreme Court shall supervise the respective Courts. (see section 6 of the Judiciary Law, 2000).

A case finally and conclusively adjudicated by the Supreme Court exercising its original Jurisdiction or a case finally and conclusively adjudicated by the Supreme Court on the final and conclusive decision of any court may, on being admitted for special appeal by the Special Bench in accordance with the procedures, be heard and adjudicated the Special Appellate Bench consisting a total of 3 Justices including the Chief Justice, the Deputy Chief Justices and a Justice of the Supreme Court or a total of 3 Justices including the Deputy Chief Justice and 2 Justices of the Supreme Court or a total of 3 Justices including the Deputy Chief Justice and 2 Justices of the Supreme Court. (see section 7 of the Judiciary Law, 2000).

With the exception of a case adjudicated by the Special Appellate Bench, in any case adjudicated by the Supreme Court if the Chief Justice is of the opinion that any substantial question has arisen in the interest of the public he may cause such question to be heard and adjudicated again by the Special Appellate Bench. (see section 8 of the Judiciary Law, 2000) The Supreme Court may, in exercising its jurisdiction, hear and adjudicate on cases by a single Justice or by a bench consisting of more than one Justice as determined by the Chief Justice. (see section 9 of the Judiciary Laws, 2000).

The Supreme Court may direct that cases in the State or Divisional Courts, the District Courts and the Township Courts be heard and adjudicated by a bench consisting of more than one judge. (see section 10 of the judiciary Law, 200) The Supreme Court shall prescribe as may be appropriate the jurisdiction of the State or Divisional Courts the District Courts and the Township Courts for enabling adjudication on criminal and civil cases. (see section 11 of the Judiciary Law, 2000).

Two instances are given as to how the powers are abused. In Burma law report, a case has been reported. The Special Appellate bench reversed the judgment of the its own Court on
the question of admissibility of evidence. The earlier Court held that statements taken by military intelligence were not admissible under Evidence Act. The Special Appellate Court however over ruled and held it is admissible. The decision is not only contrary to law but a gross abuse of the fundamentals of law. (Refer Burma law report 1993)

Another instance of glaring abuse of power is the case of Daw Aung San Suu Kyi. She has been kept under house arrest without trial and it is being extended arbitrarily. The Supreme Court did not exercise the power vested under (h) above, which empowers the court to examine the order of Daw Aung Sann Suu Kyi arrest's and set it aside.

Appeal, Reference, Review

The supreme Court has inherent power of superintendence to review any decision of lower Courts. There have been convictions in cases related to elected member of parliament, noted personalities and journalists. In none of these cases the supreme court exercised its power even to look into the proceedings.

Jurisdiction and Powers of Courts other than Supreme Court

The jurisdiction of the State or Divisional Courts, the District Courts and the Township Courts are as follows:

(a) adjudicating on original civil cases;
(b) adjudicating on original criminal cases;
(c) adjudicating under any law. (see section 14 of the Judiciary Law, 2000).

The State or Divisional Court may adjudicate on appeal or revision case against any judgment, order and decision passed by the District Court. (see section 15 of the Judiciary Law, 2000).

the State and Divisional Court may:-
(a) within, its State or Division, adjudicate on a case transferred to it by its own decision;
(b) within its State or Division, adjudicate on the transfer of case from any Court to any other Court; (see section 16 of the Judiciary Law, 2000)

The State or Divisional Court may, in exercising its jurisdiction, adjudicate on cases by a single judge or by a bench consisting of more than one judge as determined by the State or Divisional Judge in accordance with the directive of the Supreme Court, (see section 17 of the Judiciary Law, 2000).
The District Court may adjudicate on appeal or revision case against any judgment, order and decision passed by the Township Court, (see section 18 of the Judiciary Law, 2000).

The District Court may:-
(a) within its district, adjudicate on a case transferred to it by its own decision.
(b) within its district, adjudicate on the transfer of case from any Court to any other Court, (see section 19 of the Judiciary Law, 2000).

The District Court may, in exercising its jurisdiction, adjudicate on cases by a single Judge or by a bench consisting of more than one Judge as determined by the District Judge in accordance with the directive of the Supreme Court, (see section 20 of the Judiciary Law, 2000).

The Township Court may, in exercising its jurisdiction, adjudicate on cases by a single judge or by a bench consisting of more than one judge as determined by the Township Judge in accordance with the directive of the Supreme Court, (see section 21 of the Judiciary Law, 2000).

The Courts and their Jurisdiction in Myanmar

The Jurisdiction of a Civil Court is as follows:-
(a) as regards its local limits;
(b) as regards its pecuniary limits; and
(c) as regards the subject matter of suits.

With regards to pecuniary limits of Judges:-
(a) State or Divisional Judges is empowered with unlimited amount;
(b) Additional State or Additional Divisional Judge is empowered with unlimited amount. (see Notification No. 355/2000, dated 28-6-2000, issued by the Supreme Court)
(c) District Judge is empowered up to the limit of 3000000 Kyats;
(d) Additional District Judge is empowered up to the limit of 1500000 Kyats; (see Notification No. 356/2000, dated 28-6-2000, issued by the Supreme Court)
(e) Township Judge is empowered up to the limit of 500000 Kyats;
(f) Additional Township Judge is empowered up to the limit of 500000 Kyats;
(g) Deputy Township Judge is empowered up to the limit of 300000 Kyats; (see Notification No. 357/2000, dated 28-6-2000, issued by the Supreme Court).
The subject-matter of suits empowered to the Courts contained in the provisions of various existing laws.

**The Three Rules of Civil Jurisdiction**

1. No Court shall entertain any suit the amount or value of the subject-matter of which exceeds the Pecuniary limits of Jurisdiction, (see section 6 of the Civil Procedure Code)
2. No Court shall entertain any suit which, as regards the subject-matter thereof, has been excepted, from its cognizance;
3. Every suit shall be instituted in the court of the lowest grade competent to, try it. (see section 15 of the Civil Procedure Code)
4. Another important rule is, that Court has no Jurisdiction to try any suit unless it is of a Civil nature, (see section 9 of the Civil Procedure Code),

**In trying Civil Suits or Civil Litigation Courts have to abide Code of Civil Procedure**

Substantive Law deals with rights and liabilities, adjective law deals with practice and procedure.

The existing Code of Civil Procedure came into force on the 1st day of January of 1909. The Code consists of two parts, the first containing provisions which are more or less of a substantive character, and the second containing provisions which relate to procedural matters.

The Code of Civil procedure contains 153 sections, 54 Orders, under each Order there are rules prescribed.

“Procedure” means the manner and form of enforcing the law, the channel and means whereby law is administered and justice reached.

“Proceeding” means a measure taken in Court, a prescribed course of action for enforcing a legal right.

“Civil proceeding” may be defined as a judicial process to enforce aright and covers every, step in an action and is equivalent to an action.

The law of procedure is based on the principles of natural justice, which requires; *inter alia* -

(a) that men should not be condemned unheard,
(b) that decisions should not be reached behind their backs;
(c) that proceedings, which affect their rights and property, should, as far as possible, not be continued in their absence, and;
(d) that they should not be precluded from participating in them.

Practice means uncodified procedure. Practice supplements the procedure, in matters on which the Code or statutory law is silent, as usages supplement the codified law.

**The Court rests under a duty to deserve rules of procedure.**

Statutes prevails over general rules of practice and procedure.

One of the first and highest duties of all Courts is to take care that their acts or decisions do not injury any of the parties.

The law. of procedure is grounded .on natural Justice and wherever reasonably possible, it must be construed in the light of justice, equity and good conscience.

The inherent powers of the Court, Section 151 of the Code gives the Court ample power to follow a procedure not provided for by the Rules, if the ends of justice demand -it.

*The theme relating to civil law is narrative. Nothing has been mentioned of the short comings of the Civil Procedure Code which had been brought in by Colonial rules in 1-1-1909. It needs lot of amendments and simplification. For example under of the Civil Producer Code, no legal action can be taken against the governing state without having given a statutory notice of the intended suit with all the grounds. Only after expiry of the notice period that is section 80, two months, can the suit be filed. Therefore the provision for interim orders related to the various section and orders of the Code are rendered ineffective for citizens. Daw Aung San Suu Kyi could not file a suit for injunction against the government for its restraining activities regarding NLD. Also when an affidavit was to be sworn to because of refusal of the authority administering oath, the matter was brought before the Supreme Court which slept over the matter. The provisions of Civil Law against government or public official have no meaning under the SPDC rule.*

**Civil Appeals**

Appeals from original decrees -A person aggrieved by a decree is not entitled as of right to appeal from the decree. The right to appeal must be given by statute.
A litigant has independently of any statute, a right to institute a suit of a civil nature in a Court of Law (S.9 of the Code of Civil Procedure). And he has no right to appeal from a decree or order made against him, unless the right is clearly given by statute. Section 96 of the Code gives a right to a litigant to appeal from an original decree. That is called first appeal. Section 100 gives him a right to appeal from an appellate decree in certain cases. That is called second appeal.

**Appeals from orders**

Section 104 of the Code gives a right to appeal from orders as distinguished from decrees. No appeal lies from a decree passed by the Court with the consent of parties. No second appeal lies when the pecuniary limit does not exceed 2000000 Kyats. (Amended by SPDC Law No. 6/2000)

The decisions of a Court of Law may be divided into 2 classes, namely (1) decrees and (2) orders. Orders again may be divided into two classes, namely, appealable orders and non-appealable orders.

The following are the two points of distinction between a decree and an order:

1. Every decree is appealable, unless it is provided that no appeal shall lie from it (S.96); but every order is not appealable, only those orders are appealable which are specified in S.104 and if 0.43, R.1.
2. In the case of decrees, a second appeal lies to the High Court (now Supreme Court) if there is a question of law involved (S.100). No second appeal lies in case of orders at all (S.104, sub-sec.2)

The term “order” is defined in the Code as the formal expression of any “decision of a Civil Court which is not a decree”.

The term “Decree” is defined in the Code as meaning “the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit”.

To constitute a decision in a decree, the following conditions must be present:

(a) The decision must have been expressed in a suit.
(b) The decision must have been expressed on the rights of the parties with regard to all or any of the matters in controversy in the suit.
(c) The decision must be one which conclusively determines those rights.

If all the elements set forth above concur in a decision, the decision is a decree; if not, it is an order, for all decisions which are not decrees or orders.
The law does not allow a second appeal from an order, whether it can be interlocutory or final. It does not allow an appeal to the Supreme Court from an order which is final in its character. An order is said to be final, if it has the effect of deciding finally the cardinal point in the suit.

Reference

Where no appeal lies to the High Court (now Supreme Court) the Code of Civil Procedure empowered the subordinate. Courts to refer questions of law for the decision to the High Court. This is called Reference. A reference may be made by a subordinate Court to the High Court -
(a) in a suit in which the decree is not subject to appeal at all, or in an appeal in which the decree is not subject to a second appeal to the High Court;
(b) before or on the hearing of the suit or appeal;
(c) on any question of law or usage having the force of law, on which the Court trying the suit or appeal entertains reasonable doubt.

Such reference maybe made by the Court either of its own motion or On the application of any of the parties. Where a question of the validity of any law in issue, a reference must be made. The High Court then hears the parties, and decides the points referred; a copy of its judgment is then sent to the Court by which the reference was made. It is the duty of the latter Court, on receipt of the Judgment, to dispose of the case in conformity with the decision of the High Court, (S.I 13; 0.46)

Revision

The High Court (now including the State or Divisional Court or the District Court) may call for the record of any case which, has been decided by any Court subordinate to it, and in which no appeal lies thereto, if the subordinate Court appears-
(a) to have exercised a jurisdiction not vested in by law; or
(b) to have failed to exercise a jurisdiction vested in it by law; or
(c) to have acted in the exercise of its jurisdiction illegally or with material irregularly; and the High Court may make such order in the case as it thinks fit (S.115ofthe Code of Civil Procedure read with Law No. 6/2000, promulgated by SPDC).

Review of Judgment (Order 47)

A party aggrieved by a decree or order may apply for a review of judgment not only where no appeal is allowed from it, but also where an appeal is allowed from it, provided that “no appeal has been preferred by him.
An application for a review of judgment may be made on any of the following grounds:

1. discovery by the applicant of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed;
2. on account of some mistake or error apparent on the face of the record;
3. for any other sufficient reason.

Every application for a review of judgment should be made to the Judge who passed the decree, and failing him, to his successor in office.

The application of review should be in the form of a memorandum of appeal. After: the application is admitted, a notice will be issued to the opposite party: The application will then be heard. It is to be heard by the very Judge who passed the decree, unless he is no longer attached to the Court, or is precluded from hearing it by absence of other cause for a period of 6 months next after the application.

An appeal from a decree lies to a Judge other than the one who passed the decree. A review of Judgment lies to the same Judge who passed the decree,. Where there is not sufficient ground for a review, the application should be rejected. Otherwise the Court may grant the application. Where the application is granted, the Court may at once rehear the case or appoint a day for re-hearing. After re-hearing the case, the Court may pass such decree as it thinks proper.

The law does not allow a second review, that is to say, there can be no review of an order made on an application for a review and no review of a decree passed on a review.

**Supplemental Proceedings**

Supplemental Proceedings as prescribed in the Code of Civil Procedure are as follows:

(a) Arrest of defendant or Judgment-debtor before Judgment or in execution. (SS. 94-95; 0.38, rr. 1-4)
(b) Attachment of property before Judgment. (SS.94-95; 0.38, rr.5-12)
(c) Injunction (SS.94-95; 0.39)
(d) Appointment of Receiver (S.94; 0.40)
(e) Security for Costs (0.25)
(f) Withdrawal of Suits (0.23, rr.1-2)
(g) Payment into Court (0.24)
(h) Comprise of Suit (0.23,r.3)
Criminal Powers of Courts other than the Supreme Court

According to the Notification No. 358/2000, dated 28-6-2000, issued by the Supreme Court, the following courts are empowered as follows:-

(a) State or Divisional or Additional State or Divisional Judge is empowered with Powers of the Session Judge.

(b) District or Additional District Judge is empowered with Powers of the Session Judge;

(c) Township or Additional Township or Deputy Township Judges are empowered with Criminal Powers as prescribed in the Criminal procedure Code, by the Supreme Court, on the efficiency of individual Judge; such as Special power (that is power to imprison up to 7 years). First class power (that is power to imprison up to 1 year.) Second class power (that is power to imprison up to 6 months).

Supervision on the administration of Justice

The Chief Justice, the Deputy Chief Justices, the Judges of the Supreme Court, the Judges of the State or Divisional Court and the Judges of the District Court may, if necessary, inspect prisons, yebet (correction) camps and police lockups for enabling convicted persons and those detention to enjoy rights to which they are entitled to in accordance with law and relating to the proceedings and for preventing under delay in the trial of cases.(see section 25 of the Judiciary Law 2000)

The Supreme Court may issue such rules, procedures, orders, notifications, directives and manuals as may be necessary, relating to administration of Justice and supervision. At every six months period, Supreme Court holds a seminar regularly relating to the administration of Justice. At the seminar, Secretary I of the State Peace and Development Council, delivered a speech to the Judges to be honest and make effort in speedy disposal of cases.

Supervision on the administration of justice.

Inspect prisoners, yebet (correction) camps and police lockups.

There has been no instance where this has been complied with because the prisoners languish behind the bars under inhuman condition and imprisonment is retribution. Seminars are to brain wash. The very fact that the secretary of SPDC, deliver a speech to the judges to be honest and make effort in speedy disposal of cases is proof enough of the domination of SPDC over judiciary. The speech is guideline to the judges to be obedient to executive.
Training Courses for Judges

The Supreme Court has in recent years implemented a number of measures to improve the administration of Judicial System.

To enable the Judiciary to achieve its objectives and perform its functions effectively, in service training programmes are being conducted for the efficiency of Judicial officers at different levels.

*Training courses are held to brainwash the judicial officers and make them more timid and loyal.*

Recruiting of Judges

The lowest grade Judges (that is grade 4 level) are recruited as required by the Supreme Court, on the basis, of entrance examination.

It is not only on entrance examination but also interviews and check-up of the background of the candidates that recruitment is made loyalty to SPDC is the first criteria.

Conclusion

To develop and promote speedy trial of cases in Myanmar, all the Judges of different levels should be honest, efficient and decide the cases in accordance with the laws and follow the instructions issued by the Supreme Court.

*There is no mention of Fair Trial but only of speedy trial. Fair trial is the rock bottom of criminal justice. Honesty and efficiency are the two things most lacking, Therefore their need is emphasized. Cases are decided according to laws laid down by the Junta. The very fact that there is no Ministry of Law or Ministry of Justice speaks volume about the arbitrariness of the ruling junta. Conclusion makes no recommendation leaving the readers with false illusion that everything is fine in the administration of justice in present Burma.*