



## **Part A: Special Features**

### **(A . 1)**

# **Burma's Judiciary**

## **What changes will be required to create a new system?¹**

### **Introduction**

In order to promote human rights with the background of the Rule of Law, the role of the judiciary, as a rights protection mechanism, is of pivotal importance. During transition periods from the rule of dictators to new democracies, people as well as civil society organizations usually attempt to use their respective judiciaries to protect their own basic rights and facilitate gradual changes in society. It was the case for the Philippines, Indonesia, Cambodia and particularly South Korea. Currently, the judiciary in Thailand, despite its controversial status, has been playing an instrumental role in checking the power of the government while protecting the rights of individual citizens. The role of the judiciary should not be underestimated in any effort to bring about gradual changes in a society toward a peaceful, just, free and developed one, including in the development and strengthening of civil society.

Currently, in Burma, the judiciary has been subservient to the ruling military regime and it has become an instrument for brutal oppression. Burma's judiciary is the only institution in the world, which criminalizes the peaceful actions of the people, such as peaceful gatherings, expressions and formation of civilian organizations. The regime hands out harsh penalties to such people, ranging from 65 to 106 years imprisonment. This paper proposes how the existing judiciary in Burma should be reformed in order to facilitate and realize the establishment of an effective, efficient, independent and impartial judiciary in Burma.

## **Part (I)** **Conceptual Changes**

### **A. Independence of the 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 Burma's judiciary which seeks to be governed by the rule of law.

### **Anticipated Difficulties**

It appears that the occasional rhetoric about separation of powers and judicial independence is illusory, as can be seen in the following analysis. For some decades, there has been a lack of knowledge of and training in the concepts and practice of judicial independence in Burma. The military junta has been exercising total control over the judiciary for some decades while most armed ethnic organizations, which are able to dominate their local areas, have not yet formally expressed their commitments to the emergence of an independent judiciary. As such, there will assuredly be considerable obstacles in attempting to reintroduce judicial independence in Burma.

### **B. Separation of Power**

Montesquieu wrote: "There is no liberty yet, if the power to judge is not separated from the legislature and executive powers". That statement was made in the context of a monarchical society. The king was the lawmaker as well as the commander-in-chief. So it is today, in Burma, for Sr. General Than Shwe.

In Burma, the doctrine of separation of the judiciary must be exercised, at least, from the executive and legislative organs of the state, which is closely linked to the idea of the rule of law, as the foundation for judicial independence. The whole concept is to reduce the dangers of abuse of power and bring about more efficient governance.

### **Anticipated Difficulties**

One of the major problems with the military dictatorship is the desire of the junta to exert its political dominance in all three branches of government: the executive, legislative and judicial branches. In addition to local mafias which are heavily armed and involved in narcotics trafficking, many armed ethnic resistance organizations may be reluctant to submit to the adjudication of an independent judiciary.

### **C. Fair Trial**

In order for the concept of a 'fair trial' to become a reality, it must be understood and applied as a wide concept which covers all stages of a trial. The pre-trial, trial and post-trial procedures must be conducted 'fairly.' 'Fairness' and 'fair trial' rights should be rendered to both victims and the accused, commencing from the pre-trial stage.



The defendants must be presumed innocent, and a detained suspect shall have the right to legal counsel immediately after he or she is arrested, to communicate with his or her family and the outside world, to be granted bail in accordance with the effective laws, to receive basic needs and required materials from prison authorities, his or her family, or the outside world before he or she is indicted in the court.

For the victims, equality before the law must be guaranteed in practice in an institutionalized legal aid system, in addition to the existence of civil society organizations which will provide assistance to the vulnerable sectors of society such as women, children and disabled victims of crime.

Fair trial safeguards include the right to have adequate time and resources to prepare for defense, the right to call and question witnesses, the right not to have confessions obtained under torture admitted as evidence, the right to an open trial, etc. Procedural protection against arbitrary arrest shall be guaranteed; pre-trial detainees shall have the right to challenge the legality of their detention, not to be held incommunicado and to obtain the assistance of legal counsel immediately after arrest. There should be judicial oversight of their arrest and detention.

The judiciary shall take responsibility for unlawful detentions, which deprive fair trial rights, legal recourse and/or compensation for victims.

#### **D. Judicial Activism and Judicial Review**

To ensure good governance, the judiciary has to act efficiently with a vision of judicial activism. The judiciary must be involved in making new laws based on Court rulings, and adjudicating disputes between individuals and other organizations including the State. In the future Burma, with the emergence of a competent judiciary, there should be a check on majority power. The Courts must be vested with powers of judicial review and act as the guardian of citizens' rights and the rights of federal units.

#### **E. Protection of Individual Liberty and Fundamental Rights**

The judicial system in Burma operates on a common law tradition, inherited from the British, as its basic legal system. However, a number of its positive factors have been disappearing for several decades as the judiciary has become more and more subservient to the executive, which exercises rigid centralization of powers under a strong state concept. 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 neutral, objective, competent and free of all external influences. The tradition of the common law system, which essentially protects all individuals from arbitrary intervention of the government, must be reinstated in the future Burma.

## **F. Seeking Justice**

The Burma which will emerge from the rule of dictators and the military regime must confront the 'past', particularly in terms of human rights abuses. The underlying question is how the judiciary will deal with heinous crimes committed by the former regime and/or its lackeys or other local non-state actors when the victims file lawsuits against them in the future, democratic Burma. In this case, all perpetrators who committed atrocious crimes under the command of the former regime must be held accountable and prosecuted on the basis of the principles of the Rule of Law. Should this happen, the society may approach a state of chaos, as there may be elements which revolt against a democratically elected government.

On the other hand, should the perpetrators be allowed to enjoy absolute impunity, crimes will certainly be repeated in the future without having any concern for being held accountable, thereby violating victims' rights for justice. The judiciary in the future Burma is to play a delicate role, that is, for short the term period. Its paramount task is to seek justice for victims by any means as it will be a daunting task to observe the genuine principles of the rule of law immediately after the democratic transition. As such, in seeking justice for victims, the judiciary itself is required to learn multifarious remedies from the experiences of other countries.

## **G. Focusing on Procedural Justice**

Attorney Bo Li from the New York law firm of Davis Polk & Wardwell, concluded that in a system emphasizing procedural justice, arbitrary governmental power will be checked, liberty will be protected, and substantive justice will be preserved in the long term. Procedural justice connotes the duty of the legal system to exercise complete and fair procedures in taking legal action for victims and perpetrators alike, and in all three stages of trial: pre-trial, trial and post-trial. The future judicial system of Burma needs to sufficiently focus on procedural justice.

## **H. Preserving the Traditional Judicial Value**

While modern judicial concepts such as 'fair trial', 'judicial review', and 'procedural justice', etc., should be emphasized, the traditional values in the judi-



cial history of Burma should not be ignored. Instead, they should be explored and utilized.

Since the reign of King Anawrahta (1044-77), customs based on Buddhism have transcended almost every cultural practice, from birth to death, of the majority of Burmese people, including Burman, Mon, Shan, Pa-oh, etc. For instance, a traditional concept relevant to the judiciary was that the judges shall have to administer justice, regardless of the four sources of bias, known as Sanda, Dawtha, Baya and Mawha. In simple terms, these may be translated as "subjectivity," "anger", "fear", and "delusion." The Buddhist principles for avoiding these sources of bias are: "don't be subjective" (i.e. adjudicate a case only on its facts, without favoring one more than another); "don't get angry" (i.e. remain calm and detached from the case); "don't feel fear" (i.e. remain courageous, do not be concerned with threats created by either party in a case, by administrative officials, or by the consequences of the case); and finally, "don't suffer from delusions" (i.e. keep a clear mind, concentrate on the case before you). In addition, one of the duties of the judiciary is to protect the customary laws of various ethnic nationalities which do not violate the fundamental human rights of individual citizens.

## **Part (II)**

### **Constitutional and Legal Changes**

#### **A. Constitutional Changes**

The future Constitution of Burma must provide unambiguous provisions for the creation of an impartial and independent judiciary with transparency, accountability and autonomy.

1. In the constitution, the following provisions relevant to the judiciary should be enshrined and guaranteed:
  - (a) non-interference of the executive branch and other, non-state, actors in the independent functioning of the judicial system;
  - (b) provisions on the right to life and dignity, the most important human rights and the source of all other basic rights, must be enforceable before the courts;
  - (c) the formation of a Supreme Court as the highest court of the land which has the powers of:
    - i. interpreting the constitution and resolving constitutional issues and complaints;
    - ii. protection of individual liberty;



- (the power to issue writs such as *habeas corpus*, and the power to scrutinize laws limiting the rights of citizen)
- iii. judicial review;
  - iv. adjudication on conflict of laws and jurisdiction disputes between the high courts of member states;
  - v. adjudication on disputes arising out of contracts between foreign companies and domestic companies or the Federal Union;
  - vi. supervision of the application of international human rights laws in the national legal system;
  - vii. inherent power of the court in the event there is no specific law to seek a remedy for a wrong, on the principle that for every wrong there must be a remedy.
- (d) qualifications of Supreme Court judges;
  - (e) procedures for the appointment and removal of Supreme Court judges, establishing their terms and grounds for disbarment;
  - (f) the formation of a Supreme Administrative Court and its powers;
  - (g) qualifications of Supreme Administrative Court judges;
  - (h) procedures for appointment and removal of Supreme Administrative Court judges, establishing their terms and grounds for disbarment;
  - (i) financial independence of the Supreme Court and Supreme Administrative Court;
  - (j) provisions for adequate salaries and benefits for Judges.

## **B. Court Powers for the Protection of Individual Liberties**

The various ethnic nationalities residing in remote mountainous areas do not usually have access to the Supreme Courts which are located in the lowlands of Burma. With reference to the previous human rights abuses committed not only by governmental authorities but also by local non-state actors and armed groups in those mountainous areas, the district courts in the whole country should also be vested with the power similar to *habeus corpus*, as has been the case in Thailand.

## **C. Judicial Tenure**

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. Further protection can be ensured by upholding the 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.

#### **D. Payment of Adequate Salaries and Benefits**

Payment of adequate salaries and benefits to judges and legal officers 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 benefits. Failure to ensure suitable remuneration for judges can, alone, weaken judicial independence and the proper functioning of the judiciary.

#### **Anticipated Difficulties**

(1) Elected politicians may regard themselves as the ones who can exercise supreme power over the people. As such, they may have concerns about the rigid control of the judiciary over their legislative and administrative activities in the event that the judiciary exercises absolute autonomy.

(2) During the long term transitional period from the rule of dictatorship to democracy, the former judges who were trained and indoctrinated with a strong concept of the state may continue to form a part of the judiciary in the future Burma. In that case, if sufficient autonomy is granted, judicial tyranny may be exercised.

#### **E. Abrogation of Abusive Laws**

The following laws that hinder the fair trial rights of people and the right to the presumption of innocence shall be abrogated:

- i. 1908 Unlawful Association Act
- ii. 1950 Emergency Provision Act
- iii. 1962 Printers and Publishers Law
- iv. 1975 State Protection Law
- v. 1988 Law Relating to Forming of Organizations
- v. 1996 Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbance and Oppositions.



## **Part (III)**

### **Structural Changes**

#### **A. The Role of the Supreme Court**

Structural changes are to be carried out, making the Supreme Court more transparent, accountable and value-oriented. The role of the Supreme Court has to be enlarged enabling it to play a more proactive role.

#### **B. Civil Justice System**

The role of military tribunals must be redefined. They shall have power to adjudicate the disputes of which both parties are military and final decisions are subject to appeal to the Supreme Court. In an emerging democracy, the civil justice system will be put to use.

#### **C. The Formation of Administrative Courts**

The administrative court is a new phenomenon which did not exist in common law countries. However, with the advancement of democratic ideas, mechanisms to restrict or check the powers of the executive branch had to be created; one such mechanism is the administrative court. Citizens can go to court to seek remedies for multifarious grievances, from service conditions to facilities for good life.

#### **D. Jury System**

In cognizable criminal cases, the jury system will be introduced. It will be composed of temporary jurors. In this way, participation and awareness of the people will be promoted and the judiciary will also be well-grounded, taking initiative based on grassroots dialogue and not only based on in-house, legal jargon.

#### **E. Judicial Service Commission**

A permanent Judicial Service Commission will be set up and entrusted with the powers of training, appointment, promotion, removal and rectification of problems surrounding the conduct of judges. The composition of the Judicial Service Commission shall be made up of the Chief Justice, two Supreme Court judges, the Chief Justices of the High Courts, three practicing senior advocates, three Members of Parliament, three deans of law schools and the Attorney General. The judges' profession will be made more people-oriented and the recruitment procedure will be guided by the Commission. It shall determine the budget for the judicial administration.



## **F. Ministry of Justice**

The Ministry of Justice will be instituted and primarily will take responsibility as the research and operations arm of the judiciary.

## **G. Police**

Today, in Burma, the placement of military intelligence and other civilians who are lackeys of the ruling regime in positions as police officers who have the power to arrest people, fabricate criminal cases, and frame innocent people within the existing criminal justice system has become a common practice that hinders the functioning of the judiciary.

A neutral, independent and collaborative police force is necessary for a peaceful, safe and just society. The police must be vested with the authority and independence to take action against any person who breaks the law, regardless of that person's identity, whether a lawyer, farmer, or government official. The police should not be biased towards any armed institution, non-state actors, or ruling political party in a democratic society and should be accountable only to the law. The "neutrality of the police" shall be exercised as an important factor that facilitates the proper functioning of the criminal justice system.

## **H. Statutory Body for Legal Aid**

The right to legal aid shall be guaranteed and there must be a statutory body for the provision of legal aid so that all people in the country can have access to justice.

## **I. Independent Existence and Functioning of a Bar Council and Lawyers' Associations**

There is a saying that a strong bar makes a strong bench. The Bar Council must facilitate changes on the bench. The Bar Council has to be created as a body run by independent lawyers. The chair of the Bar Council must not be the Attorney General. Instead, the chair of the Bar Council and other leaders shall be elected by its lawyer members. The Bar Council and Bar Associations should insist on proactive participation by their members in bringing about reform of the judiciary and the reduction of corruption.

In most countries, the judiciary plays a critical role in promoting a clean government and facilitating good governance. However, in Burma, the judiciary



is as corrupt as the administration. A number of judges as well as court officials regularly take bribes and rule in favor of those who can bribe them. The concept and practice of independence of the judiciary alone may not be beneficial for the individual citizens as well as for the whole society if a checks and balances system for the judiciary is not in place. As a negative result, the judiciary will be independently corrupt. When the judiciary itself is corrupt, taking legal action against public officials for corruption is pointless. Lawyers should initiate a fight against corruption, participate in the reformation of the judiciary and revitalize the role of the Bar Council and Lawyers' Associations, in addition to the existence of an independent media.

### **Anticipated Difficulties**

Currently, in Burma, common practices of corruption largely impact the whole judicial system, particularly in the investigation processes performed by the police and in all trial processes administered by the courts. A number of lawyers who are earning high salaries themselves are involved in corrupt practices with judges, public prosecutors, police and other court officials.

### **Anticipated Difficulties**

(1) If the military regime remains in power, it will certainly attempt to place the judiciary under the control of the executive, ignoring the concept and practices of independence of the judiciary.

(2) Even if the military regime falls, the reformation of the judicial system will still encounter hardships as corrupt practices within the judiciary will continue to exist. In addition to creating structural changes within the judiciary, fostering the betterment of the economic status of people must coincide with injecting a new value system into society.

## **J. Judicial Reform Commission**

During the transition period from the rule of dictatorship to democracy in Burma, a Judicial Reform Commission is to be created to advise the Legislature on the reformation of the existing judiciary. It should be comprised of legal academicians, former judges, leading lawyers and those who are experienced in judicial service. The term of the commission should be terminated after the Legislature has adopted its recommendations with necessary revisions.

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### **(Footnotes)**

<sup>1</sup> Aung Htoo: General Secretary, Burma Lawyers' Council

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