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**

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 the basis that a slave can be owned and he cannot own. Time has moved on in the United States. The same is not the case in Burma.
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 its 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.

**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 committed 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.

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 sanction 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 government;
(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 civilized 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 punitive 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 scrupulously 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 unleashed. However, the SPDC is wrong if it thinks it can extinguish the fight of the valiant prisoners. In time, the sycohpanic 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 United 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 “arbitrary 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 officials 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 allegedly 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 admissible 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.

**References**

- Emergency Provision Act (1950)
- State Protection Law (1975)
- High Treason (Burma Penal Code)
- Seminar on Judiciary for the 21st Century Vigil Lanka & Asian Legal Resource centre, Hong Kong