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Myanmar's degraded judiciary and a system of injustice

1. On 27 September 2006, the Special Rapporteur on the situation of human rights in Myanmar reported to the 2nd session of the Human Rights Council that:

"The capacity of law enforcement institutions and the independence and impartiality of the judiciary [in Myanmar] have been hampered by sustained practices of impunity. I am also very concerned by the continued misuse of the legal system, which denies the rule of law and represents a major obstacle for securing the effective and meaningful exercise of fundamental freedoms by citizens.

"Grave human rights violations are indulged not only with impunity but authorized by the sanction of laws. In that respect, I consider especially as a matter of grave concern the criminalization of the exercise of fundamental freedoms by political opponents, human rights defenders and victims of human rights abuses."

2. The Asian Legal Resource Centre wholly endorses these observations. For some years, it has documented numerous cases of persons who have attempted to complain or assert basic economic or civil rights and have instead found themselves on the receiving end of sanctions from the state, including the following:

a. Ma Su Su Nwe, the celebrated villager who was the first person to succeed in a complaint that government officers had forced her and fellow villagers to labour on a government project without pay in violation of Order 1/99 and the Supplementary Order. She was subsequently herself charged and jailed for defamation. Predictably, her appeals for release--including to the Supreme Court--were rejected. However, she was freed on "health grounds" in June 2006 after strong interventions by the International Labour Organisation (ILO), which threatened legal action in the International Court of Justice and other actions if she and a number of other prisoners jailed for complaining about forced labour were not released. In September she was given the 2006 John Humphrey Freedom Award.

b. Lawyer U Aye Myint, who was also released in July 2006 after the ILO had given until the end of the month before proceeding with international legal action against the government. His appeal was pending in the Supreme Court at the time of his release. Aye Myint had served 11 months of a seven year sentence for helping a group of farmers to lodge a complaint with the ILO in June 2005 over unfair allocation of

pastureland for their cattle. Upon his release, he said that he would continue to take up rights-related cases, but his legal capacity to appear in court remained clouded as his licence to practice law had been revoked.

c. U Tin Nyein was imprisoned in 2006 for having complained that local authorities negligently destroyed his crops in August 2005. He was jailed through the familiar tactic of a counter-complaint from the concerned authorities, to the effect that they had been defamed. A petition against that complaint from Tin Nyein was thrown out of the Bogalay Sub-township Court without a hearing. In a second petition to the divisional court a lawyer successfully argued that the case against Tin Nyein was procedurally invalid; however, instead of ordering his release, that court instructed the township authorities to devise a new case under different provisions: an instruction without any legal validity. Notwithstanding, Tin Nyein was convicted on the grounds of causing a breach of the peace and upsetting public tranquility. Again, the conviction under these provisions was without any basis whatsoever in domestic law. The fact that Tin Nyein had seven other farmers back his claims that his land was damaged and that the authorities never contested this argument, did not make an impression upon the judge. However, Tin Nyein was successful in his appeal to the Supreme Court, and was released in February 2007 after around eight months in detention.

d. U Aye Min and U Win Nyunt remain imprisoned for having made a complaint in 2005 about illegal money collections by the village authorities, which was validated by the township administrative authorities but overturned by the district administrative authorities. They too were convicted for defamation. The fact both that they were supported in their allegations by affidavits from some 28 other farmers and that local officials spoke in their defence was apparently irrelevant to the judge.

e. Farmer U Tin Kyi was sentenced to four months' jail in August for having allegedly resisted efforts to turn land neighbouring his property into a plantation under a government scheme. Sixty-five-year-old Tin Kyi, of Kyaung Gone in the western delta region, had supposedly threatened and abused a group of workers on the site. He was sued by the council chairman and found guilty despite the admission by the chairman in court that the allegation was mere hearsay and there was no evidence against the farmer. The trial was completed and verdict read within the same day, suggesting that the judgment was prepared in advance. The land is reportedly being taken over by the son of a senior military officer, and further charges are being prepared against Tin Kyi and other farmers in the area.

f. Ko Win Ko and Phyoe Zaw Latt were arrested at a train station in October after they were found in possession of signatures for a nationwide petition calling for the release of five former student leaders arrested and kept incommunicado since September. The campaign was launched by colleagues of the arrested persons, and reportedly had attracted over half a million signatures from around the country: the two men had collected around 400 signatures from villagers in their area. None of the arrest, detention or trial procedures used against them were legal under either domestic or international law. The two were falsely charged and imprisoned for 14 years: Ko Win Ko for allegedly having an illegal lottery stub in his possession; and later both he and Phyoe Zaw Latt on ordinary criminal offences of deceit and forgery, after Phyoe Zaw Latt had already been released on a good behaviour bond. The date

of Ko Win Ko's hearing was changed suddenly, apparently in order to deny him an opportunity to be represented by a lawyer. The two were moved to at least five different places of detention in the first month, apparently also to deny them access to lawyers and family members. Phyo Zaw Latt's 58-year-old mother died from grief after hearing of her son's incarceration. So far their appeals to higher courts have been flatly rejected.

3. Unfortunately, none of the persons in prison are able to be visited by the International Committee of the Red Cross as the group has been blocked from visiting prisoners since December 2005. In October the government also ordered five of its field offices to close, apparently without explanation.

4. While it is widely accepted that Myanmar's courts are subject to the dictates of its armed forces in cases freighted with political importance, what has not yet been studied properly is the extent of their compliance in virtually all cases where a private citizen stands against a state agent, of whatever rank, in whatever matter, and the consequences of this. Tin Nyein was first sued by a lowly member of the local waterworks team. When his case failed, it was taken up by the neighbourhood police chief. In the same township, in December 2005 U Aye Win and U Win Nyunt were jailed for reporting extortion by junior administrators. Although the local authorities disciplined the accused, a higher office ordered that the villagers be prosecuted, again for giving false information. Last August, U Aung Pe was handed three years jail by a court ostensibly for giving "illegal tuition", due to grudges held against him by local officials. His subsequent appeals have been thrown out without hearing. These cases, among many others, speak to the disgraceful condition of Myanmar's judiciary.

5. The effective and independent functioning of Myanmar's courts has been steadily eroded for decades. The assumption of power by General Ne Win in 1962 inevitably ended the possibility of the courts operating impartially. In 1974 they were dealt a death blow, when the new constitution literally merged the country's judicial and legislative arms. Under its article 95, the senior-most judges were chosen from among the members of parliament. They in turn appointed other judges down through the hierarchy: most were handpicked from the socialist party. The entire system was ultimately answerable to the executive. The regime that brought in the 1974 constitution--together with the constitution itself--is long gone, but its mutilated legal system remains. In fact, Myanmar's judiciary is today a far more degraded creature than it was a decade or two ago. Constant meddling and interference from authorities, coupled with rampant corruption, have ruined judicial institutions and personnel. To win a private dispute is a matter of paying enough money. To win a dispute with the state is all but impossible.

6. The demoralising effect on society of courts willing to do the bidding of these authoritarian governments is far worse than that caused by other institutions. The police or military may breed resentment and spread fear when they assault an innocent person, but it comes as little surprise that police and soldiers are violent. The courts and related institutions exist to monitor and punish their excesses and abuses. They are essential weapons in the struggle against brutality and oppression. If the courts instead serve as tools for the agents of brutality and oppression, then this has a terrible draining effect on national spirit. Over a prolonged period--in Myanmar's case, some four decades--the effects may be all but irreversible.

7. The government in Myanmar routinely iterates its intentions to build a modern and developed state, but without functioning courts where persons with legitimate grievances can bring complaints, this is an absurd notion. It is a commercial impossibility, as investors will not commit to a place where the courts are the playthings of executive councils, which are in turn the playthings of military officers. It is also, most importantly, a psychological impossibility, as the lack of positive thinking among people in Myanmar is directly linked to its debased courts. If a farmer cannot make a complaint that his crops are awash because of incompetent local officials without risking jail, irrespective of other factors, how can any progress be expected?

8. Myanmar's judges are as culpable as its generals for the demoralised state of the country today. But while no one looks to the latter for relief, even in their perverted and reduced form, the former are still sought out by persons with some hope for redress. Rarely do they give any cause for hope. Yet rarely too are they the subject of sustained criticism or sanction by persons and institutions concerned with human rights in Myanmar.

9. The Asian Legal Resource Centre calls upon all United Nations agencies, international bodies and others concerned about the situation of human rights and related concerns in Myanmar to pay far greater attention to its judicial institutions. While it is easy to say that the judiciary in Myanmar is not independent, this is not enough. It does not get us any closer to an understanding of what it really means for the people of Myanmar, and for their fundamental rights. Compromised or not, the judiciary occupies a special place in any system of government as, in principle, a defender of rights. Despite the decrepit condition of the courts in Myanmar, still there are victims and lawyers arguing human rights cases before them; there are still persons with some hope of a favourable decision in such cases. These demand far greater attention and scrutiny.