A Wolf in Sheep's Clothing

"Post-Junta" Judicial Reform in Myanmar (2010 – 2015)

Ashley Pritchard

Abstract

Recent years have seen the emergence of Myanmar from a dark period of her history under nearly fifty years of military rule, tyranny and dictatorship. With the new 2008 constitution, the release of Daw Aung San Suu Kyi, parliamentary elections and reports of greater press freedoms within the state and the recent instalment of the National League for Democracy (NLD) government in early 2016, Myanmar has initiated a path away from dictatorship towards democracy – scrutinised with great expectations by the international community. Within this context, it is appropriate and timely to assess ongoing and substantive developments towards rule of law and access to justice within the first 'post-junta' period (2010-2015) in Myanmar.

This paper finds that while there have been some areas of increased freedoms in the country, the judicial system has largely persisted unaltered, remaining poisoned with impunity and lacking true independence. The failure of the first post-junta government to reform the legal system has left the country morally bankrupt and institutionally insolvent.

It is evident that Myanmar's first post-junta legal framework reinforces both individual and systemic impunity, reduces legal accessibility and fair procedure, and cripples the judiciary. The resounding reforms that have taken place in the country in other freedoms do not appear to have broken any chains in the subservience of the judicial wing. Finally, the paper postulates the military's calculated intent regarding ethnic and political conflict, in that, perhaps the new 'freedom' is a ruse to repress systemic change given that the judicial system is still strongly controlled by the military. Can or will the newly seated National League for Democracy (NLD) government of 2016 truly reform the rule of law in Myanmar?

About the publication

This publication is one of the case studies on Myanmar in the course of the project 'Governance and Insider Peacebuilders in Societies in Transition from War to Peace', implemented jointly by the University of Windsor, Canada, Universiti Sains Malaysia and Berghof Foundation. The three-year project (2013–2015) involved empirical research on four transition contexts in South and Southeast Asia – Aceh (Indonesia), Nepal, Sri Lanka, and Myanmar/Burma. It interrogated the characteristics, impact and efficacy of alternative forms of governance and of insider peacebuilders in the context of authoritarian, illiberal, and weak forms of states. In particular, the project analysed whether and how these forms of governance and the insider peacebuilders have pursued accountability, and challenged impunity, war crimes, and sexual and gender based violence.

About the author

Ashley Pritchard is an independent expert on Myanmar, based in Yangon. She graduated with a Masters in International Development from Chulalongkorn University (Thailand) and has co-authored and co-edited several books, including *Politics of Autonomy and Sustainability in Myanmar*, and *Corporate Accountability in ASEAN: A Human-Rights Based Approach.* Pritchard possesses over ten years of hands-on experience in developing and implementing innovative programs and projects targeting underserved populations in the field of improving human rights, good governance and transparency, rule of law, and corporate accountability. Recently, she led the largest nationwide voter education program for the 2015 general elections in Myanmar.

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"The most difficult time in any transition is when we think that success is in sight. We have to be very careful that we're not lured by the mirage of success."

– Daw Aung San Suu Kyi

1 Access to Justice? Myanmar's 'Post-Junta' Legal Framework in Context

In November 2010 Myanmar held its first "democratic"[1] general election since 1990, at which time the military had refused to hand over power to the then-democratically elected government. The international community assessed the 2010 election as neither free nor fair due to an array of poorly implemented and sub-standard rules and regulations (McGuinness, 2010). Nevertheless, the military-backed Union Solidarity and Development Party (USDP) officially won over 75% of the eligible seats and a nominally civilian government, mainly made up of former generals, took office in March 2011. A former general, U Thein Sein, was elected President.

Since the new government has taken power, Myanmar has witnessed an unprecedented extent of encouraging changes, including a number of ceasefire agreements with ethnic opposition armies, easing of media censorship and restrictions, enacting of laws on forming trade and labour unions, and increased freedom of assembly. After years of domestic and international pressure, a number of prominent political prisoners were released from late 2011 (Harvey, 2011). The April 2012 by-elections in Myanmar brought further hope for systematic change, as former Nobel Peace Prize Laureate Daw Aung San Suu Kyi and her National League for Democracy (NLD) party won 43 out of the 44 seats they contested in the Parliament.[2]

This paper seeks to analyse the extent to which Myanmar's post-junta judicial system has experienced reform, in comparison to what is being proclaimed as a significant movement towards democracy in other areas of governance. Despite positive developments in other spheres, this paper finds that the post-junta judicial system in Myanmar has remained relatively unchanged, is poisoned by impunity, crippled by a weak mandate and manipulated by the political agendas of the Executive branch and military. The paper first reveals the persistence of judicial dysfunction and its impunity through analysing the country's main legal texts. The second part of the paper analyses the implementation of law by actors within and surrounding the judicial system that ensures the former system of favours is upheld. Myanmar's first post-junta government has failed to reform the legal system, reverting to a morally bankrupt and institutionally insolvent judicial system. Can or will the newly instated NLD government reform the legal system to provide further accountability in governance in Myanmar?

[1] Many argue that the term 'democratic' cannot be used to describe the 2010 elections in Myanmar given that they were not perceived as accessible, inclusive or transparent, and the largest opposition group at the time – the National League for Democracy (NLD) – did not participate.

[2] There were a total of 45 open seats for Parliament in the 2012 by-elections, however, the NLD only contested a total of 44 out of these 45 seats.

2 Historical Injustice in Myanmar

Human rights conditions under Myanmar's military regime of nearly fifty years were considered to be among the worst in the world (Freedom House, 2011). In search of absolute power and ways to maintain control, the regime suppressed all basic rights and condemned, jailed, tortured and killed those who dared to speak about rights, democracy or freedoms (Bureau of Democracy, 2011).[3] The 1988 crackdown on student protests was one such example. At the peak of the protest on 8 August, 1988, the military government silenced all opposition, killing an estimated 3,000 people and imprisoning hundreds more. In 1990, there was hope for reform when the military government called the first election in 30 years. Turnout was 72%, which at the time was the highest in Myanmar's history. Although the NLD opposition party won by a landslide, securing 392 out of the 485 contested seats in Parliament, the military government refused to hand over power. In 2007, in response to the regime's ongoing repression (HRW, 2008), Myanmar's religious monks began to protest against the military government, staging protests that drew 150,000 people. In late September that year, the military again cracked down – shooting protestors, imprisoning activists, and imposing curfew (HRW 2008).

Surprisingly, given the above history, on January 4, 2010, General Than Shwe announced that Myanmar's first general elections for almost two decades would be held later that year. However, a number of controversial electoral laws were enacted in the subsequent months, including ones that excluded opposition leader Daw Aung San Suu Kyi from participating in the election. As a result, many parties, including her National League for Democracy (NLD), did not participate in the elections. Following the polls, on November 7, 2010 it was announced that the military-backed Union and Solidarity Party (USDP) had won 58% of the total votes cast (CPCS, 2011). Along with the 25% reserved for military in the Parliament, the ruling party had in essence, acquired approximately four-fifths of the seats in Parliament.

Many believed nothing would change with this 'quasi-civilian' government. Yet, President Thein Sein's inaugural address to the Parliament promised not only reform, but liberalisation. With specific mention towards rule of law, the President noted, "we guarantee that all citizens will enjoy equal rights in terms of law, and we will reinforce the judicial pillar. We will fight corruption in cooperation with the people…So, we will amend and revoke the existing laws and adopt new laws as necessary to implement the provisions on fundamental rights of citizens or human rights" (IBA, 2012).

In the next years, with the lifting of certain media censorship laws, the release of political prisoners, and the opening of markets, it appeared that President Thein Sein was keeping his political promises. On 1 April 2012, by-elections were held, where the opposition party, the NLD, won all but one seat they contested, taking a total of 43 of the total 45 vacated seats in Parliament (Golluoglu, 2012).[4] International donors, governments and communities were quick to pick up on this movement, praising Myanmar and its leaders for this unprecedented transformation.

[3] The 1988 crackdown on student protests was one such example, where at their peak on 8 August, 1988, the military government silenced all opposition, killing an estimated 3,000 and imprisoning hundreds more (HRW, 2013).

[4] Three additional seats remained vacated as polling in three Kachin constituencies was postponed (BBC, 2012).

3 Systematic Review of Myanmar's Rule of Law Reform

From the time when President Thein Sein and his government took office in 2011, Myanmar's transition has unfolded at a pace that has surprised many and earned the acclaim of foreign governments, financial institutions, and private-sector investment analysts. There are few prominent angles taken by both international and domestic voices in analysing the topic of the ongoing judicial reform within existing literature. In particular, while there have been a handful of critical studies conducted on the overall framework of Myanmar's judiciary's lack of independence, these are loudly drowned out by the overwhelming accolades in response to progress in other areas of governance. Likewise, while there are notable issue-specific or minority-group focus reports that draw attention to the lack of access to justice in Myanmar for certain marginalised groups, they fail to reveal the entrenched framework of impunity which prevents *any* group or individual from obtaining justice. This short systematic review summarises the lavish praise that most international governments, donors and institutions have given Myanmar's 'democratic transition', with accompanying reward of removing sanctions and re-establishing financial relationships.

3.1 **Myanmar's Lauded Political, Social, and Economic Progress**

Following the 2011 instalment of what the former military junta labelled as a new 'civilian government', the grip of Myanmar's former military regime loosened slightly, for example, allowing the release of some political prisoners, and what appeared to be the easing of public assembly laws. Following the success of the NLD in the 2012 by-elections, the international community was quick to respond, with Heads of State, the United Nations and activists praising the government's 'achievements' (Watt, 2012).

In the following year, the European Union, United States, Canada and Australia all lifted the majority of their sanctions against Myanmar, citing this as reward for change led by Myanmar's ruling government.[5] However, this lifting of sanctions sent a strong message to Myanmar's leaders, as the initial conditions western governments placed on the removal of the sanctions were never met; instead, the initial signs of progress proved sufficient to end the sanctions.[6] Even opposition leader Daw Aung San Suu Kyi, who for years supported the sanctions against the military regime, backed their lifting, agreeing that Myanmar's progress to date merited the move (Morris, 2013; Quinn, 2011).

The complacency and notable lack of protest from many domestic stakeholders, who formerly were outspoken against the military government's conduct, further contributed towards the belief that Myanmar was plunging ahead on a path towards democracy. Daw Aung San Suu Kyi, who once begged foreign governments to avoid any contact or business with Burma, on being elected into the Parliament, enthusiastically agreed with the removal of sanctions and the new engagement by western states. Similarly, international agencies and organisations such as the United Nations Development Programme (UNDP), which was eager to work in Myanmar and establish relations with the new government, relinquished their previous calls for change and justice, praising the infant democracy and focusing efforts on existing institution capacity building (UNDP, 2013). Even outspoken and long-time critics such as Amnesty International were quoted applauding Myanmar's "significant economic, political and social reforms" (AI, 2015, Nov.).

[5] The US government, upon lifting their 1996 visa-ban sanctions against former Myanmar military rulers noted that, "Since 2011, the civilian-led Government of Burma has taken important steps toward significant social, political, and economic reform that demonstrate substantial progress on areas of concern" (Eckert, 2013).

[6] One such example was the EU lifting the last of its trade, economic and individual person sanctions against Myanmar in 2012, pointing to the political reform progress as justification (Morris, 2013).

Thus the most common response from both domestic and international actors was to neglect the burning question on the unchanged status of the rule of law and instead, applaud the unprecedented political and economic changes initiated by the quasi-civilian government. It is striking, given all the emphasis on democratic transition, how the rule of law has never been a priority.

3.2 Human Rights Atrocities and Minority Groups Lack of Access to Justice

Most recent criticism regarding Myanmar's reform has centred on two historical human rights abuses: political prisoners and the plight of the Rohingya. In relation to political prisoners, both the international community and several groups and political parties in Myanmar - including the 88 Student Generation, the NLD, and the Assistance Association for Political Prisoners (AAPP) -- have reported on the continuing arrests of political prisoners, demanding for their release. In relation to the Rohingya, the international community has been very vocal in voicing concern and the need for an immediate solution.

Yet in both of these instances, the need for systematic reform towards the rule of law has been neglected. This could be due to the urgency of immediate solutions for individuals whose lives are in danger, such as tortured political prisoners or detained and stateless Rohingya. However, in most discussions that attempt to muster solutions, the topic of the rule of law is rarely mentioned. For example, reports from the UN Special Rapporteur on the human rights situation in Myanmar focused more on describing the inhumane treatment of the Rohingya and political prisoners, and called for immediate solutions and release, but notably fell short of suggesting that the rule of law is contributing towards or exacerbating the situation (Quintana, 2014). President Obama's much anticipated second visit to Myanmar in November of 2014 resulted in discussions about Rakhine State, political prisoners, and the need for elections to be free and fair, but, yet again, rule of law was not prominent on the agenda (Obama, 2014). Speaking on the Rohingya issue, U.S. Deputy Secretary of State Antony J. Blinken claimed that, "even as we address the immediate crisis, we also must confront its root causes in order to achieve a sustainable solution… at the root of the problem for those leaving from Myanmar [Rohingya and Muslim minorities on boats] is the political and social situation on the ground in Rakhine State" (Blinken, 2015). In this emphasis on addressing 'root' causes and problems, rule of law was again not mentioned, even though the present law and legal system are fundamental enablers for most of the military and authorities in Rakhine State to further undertake violence against the Rohingya without penalty (HRW, 2013).

Thus, even in the effort to improve the treatment of specific marginalised groups and persons in Myanmar, international and domestic organisations have pointedly failed to include reforming rule of law as an essential step. Furthermore, the attention directed to specific groups, while essential, has at the same time moved the spotlight away from general reform of the rule of law to focus specifically on issues such as torture and citizenship law. While these are critical for the individuals described above, the consequence is that the focus is shifted away from a general assessment of, and urgency in the need for reforming rule of law as a whole.

3.3 Lack of Adequate Reporting on Reforming the Rule of Law in Myanmar

Few studies have been conducted on how the ongoing reform has impacted rule of law in Myanmar. The first and most comprehensive was the International Bar Association's (IBA) December 2012 report on *The Rule of Law in Myanmar: Challenges and Prospects* (IBA, 2012), although their mandate mainly stressed analysing the independence of the judiciary and relevant international legal norms applicable

in Myanmar. The study concluded that while progress has been made with the Parliament's drafting of new laws, the legal system is overworked, under-resourced and still secretive. Importantly, as the IBA report also noted, the judiciary is subject to inordinate influence by the executive and military and, as such, the future role of the military in this regard is crucial to the success of Myanmar's transition (ibid.).

In June 2014 the International Center for Transitional Justice (ICTJ) published *Navigating Paths to Justice in Myanmar's Transition*. This study primarily reported on the ongoing impunity in the country, deriving from the 2008 Constitution, and the lack of redress for past atrocities which remained well outside current reform discussions. The report's main findings concluded that, despite rapid political and social change, key political actors in Myanmar, both national and international, have not made accountability and non-repetition of past human rights atrocities a priority (Pierce and Reiger, 2014). The report also noted the significance of Western donor involvement in the reforms, stating that, "While this shift [reform] has the potential to provide much-needed resources to address past human rights violations, none [Western donors] is explicit about this aspect of rule of law and reconciliation" (Pierce and Reiger, 2014).

In March 2015, the International Commission of Jurists (ICJ) *Submission to the Universal Periodic Review of the Republic of the Union of Myanmar* noted that many promises made by the incoming 2010 government were not met with regards towards the rule of law, and that the rule of law in Myanmar still fell short of international legal norms and standards (ICJ, 2015).

In conclusion, while a handful of organisations continued to point out the flaws in Myanmar's rule of law system following the quasi-government establishment in 2010, they were drowned out by the overwhelming praise from foreign governments, international organisations, and even Myanmar's own opposition party. Many continued to point out ongoing human rights abuses in Myanmar but fall short of calling for widespread reform in Myanmar's rule of law.

4 Access to Justice Framework for Analysis

Access to justice is most commonly defined as to whether citizens are able to use judicial institutions to solve their common justice problems, what factors affect whether they can do so, and what reforms and programs can make justice institutions more responsive to citizens' needs (USIP, n.d.). The United Nations Development Programme (UNDP) goes further, defining access to justice as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, in conformity with human rights standards" (UNDP, 2012). Furthermore, the World Bank defines access to justice, in addition to the points made just above, as the ability to seek and exercise influence on law-making and law-implementing processes and institutions (J4P, 2007). It is the extension of this definition of access to justice that provides an important theoretical question for this paper, which seeks to analyse the extent of the impact that non-state actors have had on the law-making and law-implementing processes (the judicial system) in post-junta Myanmar.

For the purpose of this paper, to assess access to justice in Myanmar's post-junta judicial system, an analytical framework of human rights-based access to justice has been designed. It is primarily a hybrid of two well-developed strategies in analysing access to justice, namely, the American Bar Association's (ABA) Access to Justice Assessment Tool (2012) and the UNDP's *Access to Justice Assessments in the Asia Pacific: A Review of Experiences and Tools from the Region* (2012), focusing primarily on UNDP's inclusion of a human rights-based approach (HHRBA) in mapping access to justice.

A human rights-based assessment of access to justice differs from conventional tools and methods in that it not only considers human rights and legal concerns, but focuses on the empowerment of the people the system seeks to serve (UNDP, 2012). The main differentiations in the HHRBA are that it:

A. Situates access to justice in the context of a human rights/legal framework.
B. Divides relevant stakeholders into claim-holders and duty-bearers, assessing the capacities of both to address the problem.[7]
C. Focuses on enhancing the empowerment of people with legitimate claims and accountability of those who are mandated or able to respond.

In this, the HHRBA seeks to establish participatory processes where those who are impacted as a result of the problems are freely and meaningfully involved in addressing it (UNDP, 2012). Given that the second part of this study emphasises the role of non-state actors in influencing judicial reform, it is important to consider the areas where further empowerment and improved accountability needs to and may take place, for all claim-holders and duty-bearers.

This paper takes into account six criteria of the HHRBA framework to analyse access to justice in Myanmar's 'post-junta' judicial system. There are two parts to the analysis in this section: the first measures Myanmar's post-junta (1) Legal framework[8] and (2) Self Agency/Autonomy[9], while the second addresses the remaining criteria including (3) Legal Knowledge[10]; (4) Accessibility[11]; (5) Fair Procedure[12] and; (6) Effective Application[13]. It must be noted that this assessment is not comprehensive, nor does it examine in depth public perceptions of justice. Rather, it assesses Myanmar's present judicial structures and their ability to meet the demands of the people they serve, using the method described above.

4.1 Myanmar's Post-junta Legal Framework and the Issue of Autonomy

This section scrutinises Myanmar's post-junta legal framework and the institutional autonomy of the judicial branch, in essence, the processes and duty-bearers who write, interpret and enforce law in relation to their ability to be independent of the previous military junta and its remnants. It examines the 2008 Constitution, which sets the country's framework for post-junta jurisprudence, and the three branches of power that write, interpret and enforce this system.

[7] When something is defined as a right, it means that someone ("claim-holder") has a claim, or a legal entitlement, and someone else ("duty-bearer") holds a corresponding duty or legal obligation to fulfil that entitlement. Duty-bearers are primarily State actors and institutions at various levels of the governance structure and non-state actors who are in a position to influence the rights of other actors. Duty-bearers should be identified against specific claims holders (Sabatini, 2004).

[8] Legal Framework, examines the extent to which there is a legal framework that establishes claim-holder's rights and duties and provides them with the legal mechanisms (executed by duty-bearers) to solve their common justice problems.

[9] Self-Agency/Autonomy analyses existing legal mechanisms and their level of independence – initiating, executing and controlling itself, without influence from any external pressures.

[10] Legal Knowledge examines whether claim-holders are aware of their rights and duties, and aware of the mechanisms available to solve their common justice problems.

[11] Accessibility studies the degree to which the justice institution or mechanism is affordable; is accessible; and is processed in a timely manner.

[12] Fair Procedure determines the extent to which claim-holders have an opportunity to effectively present their case and duty-bearers resolve disputes impartially.

[13] Effective Application seeks to understand the extent to which resolutions in judicial mechanisms are upheld and enforced.

4.1.1 Basis for Legal Framework: 2008 Constitution

Myanmar's current 2008 Constitution has been controversial since its inception. Drafted by Myanmar's military, it was put to a vote on 10 May, 2008 – just eight days after the country was hit with "the worst cyclone in its history" (UNEP, 2009). Despite reporting over 140,000 dead and missing persons for over a month after the event (OBA, 2010),[14] the government declared that it was able to pass the draft Constitution with more than 98% voter turnout, whereby 92.4% approved the draft (BBC, 2008). Myanmar's 2008 Constitution, the third since independence in 1948, was put into effect just nineteen days after the nationwide vote – a move deemed suspicious at best.

From a reading of the current 2008 Constitution, it is evident that the judicial branch is anything but autonomous. Enormous power is given to both the President and the Parliament over the judicial branch, making the judiciary far from independent. The twenty-five percent of seats in Parliament reserved for the military, in conjunction with the requirement of the more than seventy-five percent required vote to pass a Constitutional amendment (Sec. 436, 2008 Constitution) already makes law-making and constitutional amendments difficult at best. In terms of assessing access to justice in the 'post-junta' era, a simple delve into the Constitution demonstrates the limited mandate and autonomy permitted for the judicial system.

On the 28th of October 2010, the Union Judiciary Law was enacted for the adoption of the present judicial system in accordance with the 2008 Constitution. Separate from the township, district and state/regional courts are two additional courts – the Courts-Martial and the Constitutional Tribunal of the Union. The functions and duties of the Courts-Martial are not explicitly mentioned in the 2008 Constitution, nor in other legislation, other than a clause stating that the Courts-Martial is responsible for the adjudication of Defence Services Personnel in accordance with the Constitution and other laws (Sec. 319, 2008 Constitution). The Constitutional Tribunal however, has a more specified mandate to 'interpret', 'vet' and 'measure' whether or not actions and laws passed by the Executive, Union and state or regional Hluttaws[15] and Self-Administered areas are in conformity with the Constitution (Sec. 322 a-c, 2008 Constitution). This framework of courts – including the Courts-Martial and Constitutional Tribunal - outlines the skeleton of Myanmar's post-junta judicial system and the mandates with which the system operates.

4.1.2 Mandate of the Judiciary: Who Really Has the Final Say?

While the judicial principles outlined in the Union Judiciary Law (Ch. II, 2010) clearly state that the judicial institutions must "(a) administer justice independently according to law; (b) dispense justice in open court unless otherwise prohibited by law; and, (c) guarantee in all cases the right of defence and the right of appeal under law", the present judicial system is weak, dependent on the Executive and Legislative branches, and prevented by these powers from the full execution of its mandate.

The most obvious clause limiting the scope of the judiciary in the Constitution is Section 445, which grants amnesty to all previous military and government personnel in the execution of their respective duties in government. This includes former or current military generals who committed war crimes, intelligence chiefs who arrested and tortured political dissidents, and army commanders who used forced labour for construction projects. They all have protection under Section 445, which constitutionally prevents any court from bringing them or allegations against them, to trial.

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[14] The total number of deaths recorded is highly disputed. The government finally reported a total of roughly 138,000 deaths whilst many NGOs and UN agencies report numbers in the 200-300,000's (OBI, 2010).

[15] Myanmar's Parliament, directly named the Assembly of the Union or Pyidaungsu Hluttaw, is made up of two houses. The Amyotha Hluttaw is the Upper House, and the Pyithu Hluttaw is the Lower House.

The Supreme Court of the Union, labelled the "highest Court of the Union" (Sec. 294) likewise has pernicious limitations – in that it cannot affect powers of the Constitutional Tribunal nor the Courts-Martial.[16] Section 319 further clarifies stating that the Courts-Martial "shall adjudicate Defence Services personnel". Under these provisions, members of the military never have to appear before civilian courts, and furthermore, explicitly fall outside the jurisdiction of the "highest court in the land". As also stated in the two brief clauses of Section 343, the final authority for military justice is the Commander-in-Chief of the military. There are no further guidelines on how the military justice system is to operate, leaving this to the arbitrary discretion of the Commander-in-Chief and individuals appointed by him to conduct the Courts-Martial. In effect then, the Commander-in-Chief is the highest judicial authority in the country, having neither restraint nor checks and balances.

Lastly, according to Section 296 (b), the Supreme Court's ability to issue writs is suspended when a state of emergency is declared. Under Section 413 (b) the President may declare a state of emergency whereby the "judicial powers and duties concerning community peace and tranquillity and prevalence of law and order shall be conferred on the Commander-in-Chief of the Defence Services". Additionally, the President is given broad powers to suspend 'all fundamental rights' during indefinite and undefined states of emergency (2008 Const., Sect. 414(b)). Essentially, in a state of emergency declared by the President, all fundamental rights can be suspended and the Supreme Court's duties transferred to the Commander in Chief of the military – rendering the Supreme Court defunct.

4.1.3 Myanmar National Human Rights Commission

Established by an executive order of President Thein Sein on 5 September 2011, the Myanmar National Human Rights Commission (MNHRC) was plagued by dependency on the president from the moment it was created – by an executive order of the President. The MNHRC was formed with the mission to safeguard the fundamental rights of citizens (2008 Const., Ch. II, Obj. (b)), while working to promote and protect the human rights contained in international conventions, decisions, regional agreements and declarations accepted by the State (2008 Const., Ch. II, Obj. (c)). Yet, the commissioners are ultimately appointed by the President,[17] can be terminated by the President, and are dependent on Parliament to determine their annual budget (Myanmar Rule of Law Assessment, 2013). These factors are in violation of the Paris Principles,[18] which is why Myanmar's human rights commission has generally not been accepted by the international community as a truly independent one (Burma Partnership, 2014). From the time when the commission announced it would accept complaints, it has received on average between 40-50 complaints per day (Myanmar Rule of Law Assessment, 2013).

The MNHRC is currently limited in its powers as mandated by the MNHRC Law, which only permits the commission to report on abuses and educate the public and raise awareness about human rights. Furthermore, the scope of investigation is limited – as the MNHRC cannot report on a complaint that is currently a case under trial or has been finally determined by any court (2008 Const., Ch. VI, Sect. 37 (a and b)). MNHRC Chairman U Win Mra further limited the scope of the MNHRC by stating that investigating abuses in conflict areas, "is not appropriate at this present point in time" (Winn, 2012).

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[16] Section 294: "In the Union, there shall be a Supreme Court of the Union. Without affecting the powers of the Constitutional Tribunal and the Courts-Martial, the Supreme Court of the Union is the highest Court of the Union".

[17] While there is a Selection Board that is set to nominate candidates for the positions of Human Rights Commissioners, the process, as outlined in the MNHRC Law Chapter III point 9 states that the President will select and appoint suitable members of the Commission from the prospective member list submitted by the Selection Board.

[18] The Paris Principles, defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris on 7-9 October 1991 and subsequently adopted by the United Nations Human Rights Council and UN General Assembly in 1992 and 1993 respectively, detail the key elements of the composition of a national institution, citing independence and pluralism, through the appointment of commissioners or other kinds of key personnel are given effect by an official Act.

This rules out the Commission's consideration of thousands of complaints concerning human rights violations in conflict areas. Thus, both in mandate and practice, the MNHRC has been kept at a level of dependency with a weak mandate, ensuring it cannot challenge Myanmar's systematic abuses and related impunities.

4.1.4 Tenure of Judges

It is clear when analysing the judiciary, that judges are critically dependent on the Executive and Legislative branches of authority. The judges in Myanmar's judicial system are appointed directly by the President, or through a presidentially-appointed representative, and have no secure tenure as both the President and the Parliament have the power to impeach any of them. This very power to impeach the *entire* nine-justice Constitutional Tribunal was exercised by the Parliament most recently in 2012 (Nardi, 2014).

In fact, all 'higher level' court judges, whether they be Supreme Court judges, Constitutional Tribunal judges, or High Court of the Region or State judges are appointed by the President (2008 Const., Sect. 327). Likewise, the appointment of judges under the High Court of the Region or State level is conducted under the "supervision of the High Court of the Region or State" (2008 Const., Sect. 318 (a)) making the entire process of appointing any judge in Myanmar dependent on the President.

Section 302 (a), 311 (b) and 334 (b) in the Constitution grants the President the ability to impeach a judge and Section 302(c)(i) states that the Parliament can impeach Supreme Court and Constitutional Tribunal judges according to Section 71 (b), requiring a minimum of one-fourth of the total number of representatives of either Hluttaw. As one-fourth of the Parliament is reserved for military according to Section 109 (b) and 141 (b), it is not difficult to reach this threshold for impeachment. The criteria for impeachment are vague and subjective, ranging from 'misconduct' to 'inefficient discharge of duties' (2008 Const., Sect. 302 (iii and v)). Both the Supreme Court and the Constitutional Tribunal have five-year terms, as all judges on these bodies are replaced and appointed by the new President with the creation of the successoral government.[19] As the judicial appointments coincide with the same five-year terms of the president and parliament, there is no incumbent judicial structure or continuity during this volatile transition period (2008 Const., Sect. 335).

Under such controlled appointments, elusive standards and fixed term assignments, judges have no independence as judicial entities either in judicial action or judicial thought, as any adverse decision not in favour of the government could result in dismissal.

The above examination of the 2008 Constitution details the extent to which Myanmar's post-junta legal framework is riven with impunity, conflicts of interest and judicial dependency on self-serving bodies. The inability to try government or military officials from previous regimes, the inaccessibility and lack of transparency in the Courts-Martial, and the appointment and easy impeachment of judges by the President and Parliament that makes tenure impossible, collectively engender a judicial atmosphere of fear and compliance with the ruling authorities. The failure of Myanmar to amend the 2008 military-drafted Constitution raises questions about the credibility of its reforms.

This section briefly analyses the remaining four criteria of the HHRBA access-to-justice framework: legal knowledge, accessibility, fair procedures, and effective application.

[19] In Myanmar, national general elections are held every five years to appoint a new Parliamentary system that in turn, elects a new President.

4.2 Accessibility, Awareness, Application

4.2.1 Legal Knowledge

Legal Knowledge in the country is weak due to previous decades of junta shut downs of public education and stunted academic debate. Both legal practitioners' and public knowledge of Myanmar's legal system is limited and restricted due to the political context of the country as well as the lack of judicial information made public. As a result, renowned international academics lament that Burmese law is one of the least studied Asian legal systems (Huxley, 2008).

Since the 1960s, the quality of legal education in Myanmar has suffered seriously, in parallel with the entire education system, due to the political instability and military rule of the country (Crouch, 2014). From the military coup of 1962 until 1999, Myanmar closed its universities on numerous occasions. The military and related government propaganda discouraged students from demonstrating, and when unsuccessful, the government closed schools entirely to prevent protests. Between 1988 and 2000, universities were only open for a combined period of three years out of the total twelve (Crouch, 2014).

During this period, further restrictions on curriculum and content were enacted and there was a strong push to restrict academic freedom and independence. Legal historians disappeared in the 1970s as their research was considered too sensitive to continue (Crouch, 2014). Many notable academics fled the country and those who remained had no outlet for academic creativity or discussion, with publications heavily censored.

Up until 1995, the law department at Yangon University was the only law department in the entire country. Today in Myanmar, there are a total of 18 law departments around the country. This has had the effect of greatly increasing the number of law students who graduate per year, while at the same time ironically devaluing the quality and prestige of a law degree (Crouch, 2014). In addition to previous limitations and restrictions on the content and analysis of the legal field, there are limitations and a lack of resources to fund the advancement of education in the legal practice (ICJ, 2015).

Notwithstanding the educational challenges within Myanmar's legal system, there is the larger question of sharing legal information with the public and outside world. Notably, while many of the restrictions on print media were lifted in 2012, the process of reporting and publishing court decisions has *not* changed. Of the several hundred writ cases lodged since 2011 with the Supreme Court, only six writ cases were reported in the 2011 Myanmar Law Reports.[20] Unless picked up by the media, neither High Courts of the Region or State nor lower court reports are made available to the wider public.

Lastly, lawyers lack an independent, self-governing professional body that can defend the profession's integrity and interests. The Myanmar Bar Council remains a government controlled body that, as a result of this control, cannot adequately protect the interest of lawyers and promote their role in the fair and effective administration of justice (ICJ, 2015). While there has been a decrease in the governmental harassment of lawyers in recent years (ICJ, 2013), lawyers are still faced with substantial challenges to their independence, especially in politically sensitive cases. More than 1,000 of Myanmar's estimated 48,000 lawyers have been disciplined over the past 20 years, with many having their licenses revoked or suspended (ICJ, 2015).

[20] The Myanmar Law Reports are published annually by a committee that consists of staff of the Union Supreme Court and the Union Attorney General's Office. The reports only publish cases of the Supreme Court (not any lower courts), and they only publish a small number of case per year. The Myanmar Law Report is published annually in one volume. Cases not reported in The Myanmar Law Report are generally not made available to the public, although the parties to these cases and some senior advocates who frequently go to court may have access to unreported cases (Crouch, 2014).

This impediment to Myanmar's legal education coupled with a lack of information sharing results in a dearth of competent and quality legal understanding by both those who act to uphold it and those who aim to protect it.

4.2.2 Accessibility, Fair Procedure and Effective Application

Accessibility to Myanmar's legal system is marred by extensive corruption. Many state that they are not able to afford the process because it requires high bribes at each step in the process. As noted in a 2015 New York Times article, "Lawyers say bribes are required at nearly every step of the judicial process: to clerks, record-keepers, stenographers and judges. The payments go by a variety of euphemisms: "tea money for a court stenographer, unlocking fees for court records and tributes for judges" (ICJ, 2015). Myanmar headlines caught the outlandish story of a judge's wife demanding a bribe of 150,000 USD for a favourable decision by her husband (Fuller, 2014). Between 2012 and 2014, a judicial affairs committee in Myanmar's Parliament received more than 10,000 complaints, with the majority of them related to alleged corruption (Fuller, 2014). Many of Myanmar's legal professionals have also drawn attention to how the current legal system is not fair in its proceedings, due to the fact that most judges, including the Chief Justice of the Supreme Court, are former members of the military and/or Courts-Martial and cases of a politically sensitive nature are omitted from records (Crouch, 2014).

Finally, crucial fair trial safeguards are missing in Myanmar's current law. Presently, as Amnesty International noted in their 2015 Submission to the Universal Periodic Review, there are "no provisions for the rights of persons being arrested to be informed promptly of the nature and cause of the charge against them or to a fair and public hearing" (2015, Nov.). Without proper notification of charges during arrest, a fair and public hearing, and the right to a speedy trial, there is no question that the trial procedures and processes in Myanmar are inaccessible and unfair.

Overall, basic and pervasive corruption, the withholding of procedural information, and inadequate protections for the rights of an accused prevents fair and equal access to justice in court proceedings.

5 Post-Junta Legal Practice

While it is clear that the legal framework is riven with impunity and established influence from other authorities, what is the state of legal *practice* in post-junta Myanmar – has it followed a similar path of non-compliance to reform, or has it been altered as conditions in the country have changed?

5.1 Positive Instances of Reform?

Between 2011 and 2015, there were noteworthy attempts towards increasing and exercising the judicial mandate of the courts. These cases have the potential to set powerful precedent for further reform; however, to date, they stand alone in defying Myanmar's present military-fortified judicial framework. Four recent examples give a glimmer of hope towards reforming the judiciary.

The first example is one of sheer individual will, to defy the military in upholding fundamental judicial ethics. During a trial in June of 2013, a judge refused to accept a guilty plea of a person accused by Military Intelligence (MI), citing that he was concerned for the accused's safety given visible injuries. Noting that his injuries were consistent with torture, the judge questioned MI's methods and refused to move the case forward (Smith, 2014). This single but significant event demonstrates an individual court judge's refusal to comply with the military's unlawful tactics.

The second instance of positive practice within the post-junta judicial framework was a famous and rare successful writ application in 2013 in which an economics professor from East Yangon University brought a case for *certiorari*.[21] The professor, who had been dismissed by the former Minister of Education, challenged her dismissal arguing that the *Civil Servants Law* violated the right of defence in accord with Section 375 of the Constitution because it gave the Ministry of Education the power to dismiss teachers without a formal enquiry. The Supreme Court ruled in her favour, stating that her dismissal should be rescinded because it was beyond the power of the Minister given civil service regulations. This was the first major case in which the Supreme Court declared the decision of a government minister to exceed the ministerial office's power. This case has encouraged many other advocates to bring writ applications to the Supreme Court, as it demonstrates that it is possible to challenge executive decisions (Khin Su Wai, 2014).

Thirdly, and perhaps in the most powerful instance to date, in September 2014 a soldier from the Myanmar military was brought before a *civil* court and convicted for rape and kidnapping and was sentenced to thirteen years in prison. The victim's lawyer noted that, "the defendant was given the maximum punishment of 10 years for rape and an additional three years for kidnapping by the court" (Ferrie, 2015). This development requires a level of compliance from not only the local district court, but also the Myanmar military that allowed a soldier to be tried in civil court. However, the question very much remains as to whether there will be other cases in future where members of the Myanmar military are handed over to civil courts for trials and sentencing.

Lastly, in an unexpected development, in March 2015, five individuals were tried and found guilty of spreading fabricated allegations and inciting hate speech that led to a mob of over 300 Buddhists swarming a tea shop owned by a Muslim man in Mandalay in July 2014 (Aye Nai, 2014). The allegations were spread online and through social media – falsely claiming the rape of a Buddhist woman by two Muslim men. This conviction against hate speech is the first of its kind in Myanmar, and potentially sends a warning to others who may attempt a similar crime.

The above four examples have set a strong precedent for Myanmar's judicial system in practice. The cases of an individual judge who refused to comply with military tactics of torture and identify forced confessions in court, or a military brigade that agreed to surrender an officer wanted for raping a child, there has been a small but significant shift in the judicial morality in Myanmar. Furthermore, the above four cases have potentially set examples of good practice.

Yet, while these above cases suggest growing reform, this very much remains to be seen. In the first case of forced confession, the judge was replaced the following day and the accused again delivered to court, convicted on a coerced confession and sentenced to two years in prison (Smith, 2014). In the case of the Yangon Professor, while her case was ruled in her favour - the timing of this case seems pertinent, as the Minister for Education who had dismissed her was deceased by the time the court decision was handed down, and the ruling therefore had no political implications for him (Crouch, 2014). And while the military allowed one solider to be tried in a civil court for rape, as the Women's League of Burma and other NGOs have documented, there are thousands of similar cases that have yet to see justice (WLB, Jan. 2014).

5.2 Continuing Practice of Impunity and Inconsistency

Despite some advances, *in practice*, Myanmar's post-junta judicial system has not only avoided reform, but demonstrably remains consistent with its militaristic framework. In the five years since the country was pronounced in 'democratic transition', there have been serious actions taken against the judicial system by the President, the Parliament, and the military that evidence its lack of independence.

[21] A case of *certiorari* is when a losing party files a petition with the Supreme Court to review the decision of a lower court.

For example, the authorities' powers of impeachment enabled by the Constitution, was used in 2012 when the lower house of Parliament voted to impeach all nine Constitutional Tribunal judges, passing the motion with more than a two-thirds majority (AP, 2012). This was in direct response to the Constitutional Tribunal's issuance of several rulings declaring Parliamentary committees and commissions as unconstitutional, as stepping beyond the boundaries outlined in the Constitution (Head, 2012).[22] As such, all nine Constitutional Tribunal judges were forced to resign following the vote of impeachment (Zeldin, 2012). Despite its explicit mandate, which states that the Constitutional Tribunal has the authority of vetting whether or not the laws promulgated by the Pyidaungsu Hluttaw (both houses in Parliament) are in conformity with the Constitution (2008 Const., Sect. 322 (b)) less than two years after it was created, the Constitutional Tribunal was essentially defunct.[23] Thus, even during Myanmar's much vaunted 'democratic' transition, the Parliament demonstrated its crippling power over the courts, and ensured continuing judicial subservience to the authorities.

The military has long avoided justice through the dedicated power of a separate system of Courts-Martial. Yet, by deliberately seeking to solve instances of injustice outside the courts or impeding investigation of cases, the military continues to subvert the judicial system. The military remains uncooperative with police investigations[24], bribes victims for silence[25] and discouraging victims from seeking justice through force.[26] The military's deliberate avoidance of justice and undermining of the system prevents substantial progress of the rule of law, and also undermines the legitimacy of Myanmar's judicial system.

Meanwhile, Investigation Commissions, comprised of Parliamentarians and notable experts and convened by order of the President, are occasionally deployed to investigate reports of human rights violations outside the courts. In post-junta years, there have been several commissions established, such as those to investigate the Letpadaung protests, the Du Chee Yar Tan massacre in Rakhine State, the country's overwhelming land grab complaints, and others. In the Du Chee Yar Tan massacre, the Investigation Commission, deployed by the President, reported that it found no violence, killing, or police involvement and its report mirrored a very similar message to that which the government previously noted (McLaughlin, 2014) despite UN and MSF reports of at least 48 dead including women and children (Al Jazeera, 2014).[27] In the famous 2012 investigation to inquire into the firebombing tragedy of protestors at Letpadaung mine site chaired by then-Parliamentarian Daw Aung San Suu Kyi (Naw Noreen, 2015) (Lawyers Network 2015), the Investigation Commission concluded that villagers had been inadequately compensated by the mining company, and that chemical weapons had been used in the police raid (RFA, 2015). Yet, no action was taken to follow up this report, justice remains unanswered, and the clashes have continued.[28] While there is general speculation as to whether

[22] Speaker of the Lower House, Thura U Shwe Mann said that the decision affected the ability of Parliamentarians to carry out their work and harmed their reputations (AP, 2012).

[23] In the weeks that followed the resignation of the entire Constitutional tribunal, President U Thein Sein, Pyithu Hluttaw Speaker Thura U Shwe Mann, and Amyotha Hluttaw Speaker U Khin Aung Myint each selected three new tribunal members to form a new tribunal under their watch.

[24] In April 2014, the family of a 17-year old girl filed a claim alleging rape by two Myanmar soldiers, identifying one of the two perpetrators (AHRC, 2014) but the police later claimed that the case could not be opened because the army refused to cooperate with the police (WLB 2014 Jan).

[25] Following the attempted rape of a woman in January 2014 by military personnel in Karenni State, a Captain settled the matter by offering 300,000 kyat (approximately $300 USD) as compensation on the proviso that the incident would not be reported to the media, or any further action taken (WLB 2014 Jan).

[26] In another similar incident in 2014, a woman suffered serious injuries from an attempted rape by a military officer in Mon State. When his Commander received report of the case, he offered to cover the victim's medical costs on the condition that no charges would be pressed against the perpetrator (WLB 2014 Jan).

[27] Commission leader Dr. Tha Hla Shwe noted, "We didn't see any evidence of murder and we didn't find a place where bodies were buried so we can't say many people were brutally killed" (Wa Lone, 2014).

[28] Clashes continue at Letpadaung where in December 2014 police shot and killed protestor Daw Khin Win. Police continue to arrest and detain activists on politically motivated charges who speak out against such violence (Burma Partnership, 2015).

members of Parliament are even trained to lead investigative delegations of this nature, it is evident from both the Letpadaung and Du Chee Yar Tan commissions that the Parliamentary Investigation Commissions not only have no effect on the judicial system, but worse, undermine it.

Lastly, and most concerning, is the December 2014 case involving the MNHRC and its failure to protect an individual who filed a human rights complaint against the military. In response, the military launched criminal prosecution against the complainant for making 'false charges' against the military.[29] In any judicial system, protection of those who complain is paramount, as without them, there would be no cases brought forward and no justice. The inability of the Commission and other state institutions to protect individuals filing complaints of abuse and injustice intimidates anyone from coming forward to complain which in effect, makes the entire judicial system ineffective.

The four aforementioned instances of judicial practice exemplify a reality far from the overwhelmingly positive democratic reform that has been propagandised throughout the country. The same tactics from the previous military regime of non-compliance, intimidation, and undermining are all freshly utilised under the post-junta system, protecting the same actors as before, and threatening Myanmar's entire rationale for a judicial system.

5.3 Failure to Check and Balance the Legislature's Drafting of Law

Under the 2008 Constitution, the judiciary has the power to vet laws passed by the Parliament. Despite the President's powerful speeches on bringing Myanmar's governance up to international standards, there have been several recent laws enacted by the Parliament that are far short of international standards of personal freedom, and moreover, there are hundreds of laws remaining from the military regime that limit freedoms and consent to state intervention. In September 2015 at a time when religious intolerance and ethnic discriminatory attitudes were intensifying in Myanmar and leading to violence and mass displacement, the Parliament passed and President signed into law four new controversial legislations on race and religion. These various laws place severe limitations on individual's right to freedom of thought and religious practice[30], privacy[31], and reproductive rights[32] yet passed with ease through both the Parliament and President's Office.

Other examples of legislation that contravenes international human rights standards include the Penal Code, the Peaceful Assembly and Peaceful Procession Law, the Unlawful Associations Act, the Official Secrets Act, the Electronic Transactions Act, the State Protection Act, and the Emergency Provisions Act (ALTSEAN-Burma 2015). These acts offer the government broad power to criminalise communicating information – which has been used as a means of silencing oppositions and imprisoning dissidents.[33]

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[29] One individual, Brang Shawng, wrote a letter of complaint to the MNHRC alleging that Myanmar Army soldiers shot and killed his 14-year-old daughter in 2012 ("Prosecution of Shayam Brang Shawng", 2014). From this filed letter of complaint, Brang Shawng has been charged under Article 211 of the Myanmar Penal Code, accused of making 'false charges' against the Myanmar Army.

[30] The Religious Conversion Bill requires that an individual that wishes to change his/her religion must apply to a state-governed body, which will decide on whether or not to approve the conversion (AI, 2015, March).

[31] In a separate monogamy legislation that was adopted in August of that same year, it is a criminal offense to have more than one spouse or to live with an unmarried partner who is not a spouse (ibid.)

[32] A third law on population control, signed by the President in May of 2015 imposes on women in certain regions the requirement to space the birth of their children 36 months apart. Another gender discriminatory legislation passed in 2015 regulates marriages of Buddhist women to men of other religions (ibid.)

[33] For example, Section 505(b) of the Penal Code criminalises the "act of publishing or circulating information with the intent or likelihood to cause public fear or alarm" (AI, 2015, March). Likewise, under the Official Secrets Act it is an offence to possess, control, receive or communicate any document or information which, if disclosed could be "prejudicial to the safety or interests of the state".

6 Non-State Actors and Domestic Reactions to Injustice in Myanmar

Previously, under the military regime, discussing politics was forbidden – and NGOs and civil society mainly focused on supporting social services that the military government did not provide. The existence of so many organisations that concern themselves with major social problems, including landlessness and displaced populations, health and educational needs, evidences the extent to which social welfare was not provided by the government over several decades.

However, since the quasi-civilian government took office in 2011, civil society groups, activists, and media have enjoyed a new-found public space to discuss topics and activities long forbidden. Political dialogues, debates, and discussions have been quickly revived by civil society and incorporated into domestic NGO work. With this opening, a widening arena emerged to critique the current government and military, and make demands for access to justice.

Yet, the growing space for public scrutiny of Myanmar's access to justice it is also coloured by a persistent anxiety. Many of those imprisoned during the junta's rule caution that the military can always come back, and that the post-junta reforms threaten the military's prior privileges. As such, some issues with regards to seeking justice – such as around criminal accountability for state officials– are never directly addressed (Pierce and Reiger, 2014).

Yet, civil society, political parties, human rights defenders, law practitioners, media, business leaders and the general public have all in their own way tested the extent to which justice has been affected by the reforms. Accounts of military violating human rights in conflict in ethnic states has been documented and published in media, cases have been filed in the courts against government seizure of land, and protests against large-scale development projects have seen some suspension of projects. This new-found critical voice has highlighted many of the injustices the average person in Myanmar faces with the country's defunct court system. Frustrations, anger, resentments and sadness have been aired – publicly – over the dependency of the judiciary branch and its ineffectiveness. This section offers insight into those contemporary contestations that question the capacity of the judiciary to deliver justice.

6.1 Civil Society

With the new government taking office in March 2011 and the subsequent reforms, civil society has also been in transition, rising from the active underground out into the open. Previously too dangerous to discuss under the previous regime, politics, human rights violations and calls for justice have become routine demands from civil society via local media and published reports. Although it is clear that civil society does not believe the existing judicial system – by design and practice – can handle the past and ongoing injustices faced by the Myanmar people, there have been strong advances in; (1) documentation of violations, (2) utilisation of the system (filing reports, providing evidence) and (3) persistent advocacy for justice.

Civil society has published reports detailing serious human rights abuses by the military including land grabs[34] and sexual assault[35] and problems with judicial procedures. Domestic advocacy for justice by civil

[34] The Human Rights Foundation of Monland-Burma (HURFOM) has documented cases of land confiscation in Mon State, and assisted villagers through legal counsel - supporting demands for compensation for land that was wrongfully and unjustly confiscated (HURFOM, 2013). HURFOM's most recent report, *Yearning to Be Heard*, details the exhausting actions of filing and following court procedures in seeking compensation and justice in the existing judicial framework.

[35] The Women's League of Burma in their January 2014 report titled, "Same Impunity, Same Patterns" documented over 100 cases of rape alleged by the Myanmar military since the reform began post-2010. The report emphasises the need for the abolishment of

society has taken many forms and, in the eyes of the public, media, and international community, has stepped into mainstream in recent years. Peaceful demonstrations demanding the release of political prisoners and petitions sent to foreign governments[36] cautioning against unqualified engagement with the government demonstrate that domestic civil society is quite critical of the state of rule of law in Myanmar, pointing out how the judicial system is ineffective, powerless, and incapable of trying the military.[37]

While it is evident from the above analysis that judicial processes are far from international standards and advocacy for rule of law alone is not enough, the work of Myanmar's civil society towards utilising the system is both persistent and encouraging. Civil society has taken advantage of the loosening of media restrictions and pressures for change to also publicly scrutinise Myanmar's crippled rule of law system. At the same time, by filing claims, demanding explanations for arrests, and following up on charges in courts, domestic civil society is supporting and empowering the system. Yet, civil society-driven moves towards the rule of law have been *despite* the actions of the government, and not because of it.

6.2 Political Parties

Both President Thein Sein and opposition leader Aung San Suu Kyi have repeatedly highlighted rule of law and good governance as priorities alongside the development of a modern market economy and democracy (Pierce and Reiger, 2014). In 2012, Suu Kyi noted that while many people are heartened by the reforms so far, Myanmar cannot be considered on the path to democracy until its citizens are protected by a fair and independent judicial system.[38]

Unfortunately, since these remarks by Suu Kyi in 2012, the NLD has not taken as strong a position on rule of law, including in their 2015 election campaign. What is most troubling about the foregone emphasis of rule of law, is the shared commitment from Thein Sein's government, Aung San Suu Kyi's NLD opposition party, and the military not to focus on past atrocities but instead to only look 'towards the future' (Traywick, 2013). This shared position solidifies the notion that those responsible for past junta-related crimes are immune in any and all jurisdiction. This is most concerning for Myanmar's ethnic populations, many of whom have been in conflict with the military for decades and it very much remains to be seen whether or not they accept this approach of non-retribution in accountability.

6.3 Human Rights Defenders and Law Practitioners

Human Rights Defenders (HRDs) and law practitioners have been quick to test whether Myanmar's reforms have extended into the justice system by increasing reporting to media on human rights violation cases, and filing reports in the courts. Documentation vocalising human rights violations in

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Section 319 in Myanmar's 2008 Constitution which stipulates that all military personnel must be tried by martial law outside civilian ones and pointed out the impunity entrenched in the present judicial system.

[36] One such example of advocacy was the October 2013 letter signed by over 100 ethnic civil society organisations to the governments of the UK, Australia and the US which raised concerns about their planned engagement with the Tamadaw (Myanmar military). The letter included several recommendations related to transitional justice, including leveraging military-to-military engagement with preconditions of public acknowledgement by the military of human rights violations and the establishment of legitimate justice and accountability mechanisms that apply to the military (Pierce and Reiger, 2014).

[37] In Chin State, following a case where a 55-year old woman was raped by a military officer, over 600 women took to the streets to protest the inability of the system [the police and civilian court] in following up on the allegations and trial of the military officer (Naw Noreen, 2014).

[38] Aung San Suu Kyi noted that she and other representatives of the NLD adopted a three-part platform that calls, in order of priority, for the establishment of rule of law, an end to ethnic conflict, and amendments to the Constitution (Gonzalez, 2012). Suu Kyi defended this platform, noting that, "some have questioned whether it was right to put rule of law before an end to ethnic conflict. But we can't put an end to ethnic conflict unless there is rule of law…We [NLD] think rule of law is the first step toward genuine democratic society in Burma because rule of law is what rules our lives from day to day, and if it is the rule of unjust laws, then we are ruled unjustly from day to day" (Gonzalez, 2012).

Myanmar was channelled through HRDs to media and international NGOs and formulated into reports that served as systematic record-keeping of violations. Although new laws and reforms promised an end to unlawful imprisonment, in fact there has been a surge in the number of political prisoners –primarily HRDs – throughout 2015 (HRW, 2015, Aug.).[39] Some HDRs have said that for some prison is a lucky outcome, as many of their colleagues have been extrajudicially killed (AAPP, 2015).[40] Burma Partnership's 2015 report *How to Defend the Defenders?* concluded that 98% of those HRDs interviewed said they had little to no faith in the justice system (AAPP, 2015). The report noted that HRDs interviewed viewed the complete lack of an independent judiciary as a huge factor in the repression of their basic human rights and as a threat to their personal security when carrying out human rights work. (AAPP, 2015).

Much like HRDs, lawyers and legal groups are also beginning to test the boundaries of the new constitutional rights regime, including by filing habeas corpus suits for cases of enforced disappearance and compiling dossiers of land-grab cases (Pierce and Reiger, 2014). Given entrenched corruption and judicial dependence, it is not expected that progress will be forthcoming in the near future, but it is an important way in which the system is being challenged and also utilised. Through filing suits and dossiers, the importance of the judicial sector is being implicitly acknowledged, which is the first step on a long road towards the establishment of trust in the system.

In conclusion, Myanmar's domestic civil society organisations, working alongside human rights defenders and legal practitioners, are investing more into the processes of the judiciary, documenting cases of abuse, and advocating for reforms within the legal framework. For non-state actors, this heightened investment in the judicial system despite wide recognition of its crippling limits, marks a new step towards change. In recognising the *symbolic* power of law, they file and practice law to further divulge the system's shortcomings, while at the same time, document the willingness of the public for change (Pierce and Reiger, 2014). In filing abuses through the legal system, non-state actors are indeed scrutinising the degrees of effectiveness, transparency, and equality of the present judicial system.

Yet at the same time, the hesitation, or outright refusal by those wielding political power, including the NLD, to address past violations solidifies a history of impunity and re-enforcing a cycle of injustice. It can only be inferred that this failure for a call to redress is due to the still-existing fear and power of Myanmar's military.

7 Addressing the Root Causes of Injustice in Myanmar

Why did the recent reforms in Myanmar not reach the judicial sector? Why were there not widespread calls for change targeted towards rule of law?

The answer is quite clear, and deeply entrenched in Myanmar's history. Rule of law has not thrived in the post-junta period because many do not feel included or are simply excluded from the legal process. Reform was avoided because those in power – the military and business elites – prosper from the flawed system. In order to have effective, substantial and long-lasting reform, the root causes of Myanmar's past must be brought to fore and confronted. The histories and inequalities of ethnic conflicts, the dominance and entrenchment of the military in politics, law, and the economy, and the shocking scale of corruption at all levels of society must be addressed.

[39] Phil Robertson, Deputy Asia Director at Human Rights Watch noted that "land activists are increasingly becoming Burma's new political prisoners" (HRW, 2015, Aug.).

[40] These killings are intended to strike fear into HRDs so as to lead them to suspend or abandon their human rights work, or imposing self-censorship and silence.

7.1 Ethnic Conflict and Inequality

The current ethnic conflict in Myanmar, labelled the longest civil conflict in the world has been ongoing since 1958, shortly after the country gained independence (Peace Direct, 2015). Despite numerous ceasefire agreements and peace negotiations, violent clashes between the Myanmar military and various ethnic armies continue to the present day.[41] Meanwhile, worsening anti-Muslim invective and the violence of militant Buddhist nationalists has now spread from Rakhine State to other parts of the country. The authorities have, at best, failed to prevent or contain the violence, and at worse, permitted violence, with next to no judicial action being taken.

Although some analyses have suggested these conflicts are inevitable by-products of authoritarianism and the country's religious and ethnic diversity, these are much more accurately understood as a continuation of negative past patterns (Pierce and Reiger, 2014). This chapter in no way seeks to summarise or adequately assess the ongoing ethnic conflicts in Myanmar, as that in and of itself requires a book. Rather, it seeks to understand the underlying root causes of injustice in Myanmar – to which fighting and conflict between Myanmar's ethnic groups and the military and which originates in the British administration's differentiated treatment of people during colonial rule. The divisions caused by the British administration's differentiated governance of "Ministerial Burma" [central Burma] and the "Frontier Areas" [ethnic states and outlier territories], and the privileging of certain ethnic minority groups in the army as a means of countering a Burman-led anti-colonial rebellion remained entrenched in many facets of Myanmar's present-day system (Pierce and Reiger, 2014). Indeed, a key aspect of British strategy while colonising Myanmar was to divide and conquer – pitting ethnic groups against one another so that the British were seen as the protectors and never a common enemy. This ethnic division between Bamar versus non-Bamar has remained engrained in Myanmar's society and governance, most visibly through the unevenness in access to justice and repressive laws.

7.2 Military Saturation and Calculation

The continued involvement and dominance of the military in all spheres of influence – political, judicial, and economic, is one of the main reasons reforms have not been as successful as initially anticipated. The military has made calculated decisions in unfolding its reforms, with safeguards for itself entrenched in and behind every aspect of power. In accordance with the Constitution, the military directly appoints certain Ministers[42], and many appointed high-level civil servants are former military officers (Chêne, 2012). It cannot be forgotten that the reforms are governed by a document constructed by the military, the first executive of the post-junta 'democracy' was a former military General, the legislature by design holds a minimum of one-fourth military representatives (but in practice is higher), and many of the country's business executives are former military and linked to those in power.

The instigators of human rights violations in Kachin and Shan conflict areas involving land disputes, and in the anti-Muslim violence are operating with a degree of impunity enjoyed by those connected with the previous military regimes (Pierce and Reiger, 2014). The privatisation process which took place in 2009-2010 demonstrated the close relationships between the government, the military, and their friends. Numerous state assets were sold to the military, their families, and associates of senior government officials at fire sale prices (Chêne, 2012). Myanmar's rich natural resources have seen their depletion through large-scale development government contracts, typically awarded to those close to the

[41] The 15 October, 2015 Nationwide Ceasefire Agreement (NCA) aimed to be the first inclusive step towards a nationwide peace agreement. Yet, only 8 of the 15 ethnic armed organisations (EAOs) signed the agreement, and fighting continued in northern Shan State in the immediate days following the signing.

[42] The Military directly appoints the Ministers of Home Affairs, Defense and Border Affairs.

military (Middleton and Pritchard, 2013). With the existing immunity provided by the Constitution, all this allows for members of the military to be exempt from laws that govern the rest of the country.

Given the above, it is questionable to what extent the 2015 elections can be representative of a truly democratic state. The election law was written by the previous military regime, the Election Commission was nominated by the executive and led by a former Lieutenant General, and the military reserves twenty-five percent of the legislature. While some argue that former military personnel now embedded in the government have reformed, it is clear that strong allegiances to their previous institution remain (Egreteau, 2014).[43] Given these carefully conceded reforms and scripted laws, it is evident that the military has withstood demands for substantial reforms and remains at the centre of governance, rule of law, and economics.

7.3 Widespread Corruption

Despite recent reforms, Myanmar's experience with corruption has remained unaltered and substantial, plaguing economic and political growth and undermining the judicial system. While little is known on the specific forms or patterns of corruption, the scale of the informal and illicit economy suggests strong links between the ruling elite and organised crime activities (Chêne, 2012). Available sources, surveys and observers agree that rampant corruption saturates all levels of the political and administrative systems.[44]

Foreign businesspersons and economists cite corruption as one of the most serious barriers to entry in Myanmar's market, noting that very little can be accomplished without resorting to illegal payments (Chêne, 2012). Personal relationships play an important role in both the public and business sectors. Given that there are no competitive selection processes undertaken for employee selection in the government sector, personal connections and bribery are often seen as more important than qualifications (Bertelsmann Foundation, 2012). Furthermore, there is no right to information, and public procurement procedures are opaque (Bertelsmann Foundation, 2012). Transparency and accountability in government are further hindered by the fact that there has been no independent auditing of state spending (Chêne, 2012). This lack of information and lack of ability to enforce renders anti-corruption measures useless.

Given the widespread lack of knowledge regarding corruption forms or patterns, it is clear that the legal framework against corruption is insufficient and rudimentary. Tackling corruption requires participation of authorities, the courts, and the persons accused, all of whom benefit from the present system and therefore are not keen to see it transformed.

In conclusion, although Myanmar has carried out reforms in the past five years, underlying root causes remain unaddressed, and as a result, reforms have not progressed as intended. The failure to obtain all armed groups' signatures in the recent 'nationwide' ceasefire agreement, the inability to remove the reserved twenty-five percent quota of military seats in the legislature, and the insufficient progress on tackling corruption prove that without addressing these root causes, reform, and improvements to the judicial system, will not be effective nor lasting.

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[43] On March 27, 2015 during the annual Armed Forces Day parade in Myanmar's capital Nay Pyi Daw, U Tin Aye, Chairman of the Election Commission wore his military uniform, saying, *"I would give up my life to wear my uniform. I wear it because I want to. That's why I wear it even if I have to quit [the UEC] because of that. But there is no law saying I should resign for wearing [my] uniform.*" (HRW, 2015, Nov.).

[44] Transparency International's Corruption Perceptions Index ranked Myanmar 156 out of 175 in 2015 (TI, 2015), and the World Bank's Worldwide Governance Indicators citing Myanmar's control of corruption as poor (17 out of 100) in 2014 (WB, 2015).

7.4 Considerations when Tackling Root Causes

In order to sustainably and inclusively advance the current rule of law system in Myanmar, root causes such as ethnic conflict, military impunity, and corruption must be addressed, as they largely contribute to the underlying lack of trust towards, and serious problems with Myanmar's judicial system. As long as there is military immunity and some ethnic groups receive different treatment than others from the state, a functional and effective judicial system is impossible.

To address the above root causes of injustice in Myanmar in ways that are effective and lasting, several actions must occur. First, research and learning must take place to understand existing informal and formal usages of justice structures in Myanmar. What does the average person do when they encounter a legal issue and where to they go, and what does that system look like to them? Myanmar's diversity in ethnicity, language and religion, in addition to the lack of trust and functionality of the existing judicial system, created an opportunity for alternative bodies and methods for mediation and legal assistance. These systems should be studied and, where possible, incorporated into the existing judicial framework as they are utilised and trusted systems that can improve the national judicial system's currently low acceptance by the general public. Second, past injustices must be addressed. Myanmar needs to confront and overcome the legacy of its recent past if those reforms are to make progress, and trust and recognition is to be built. Third, along those same lines, trust-building is needed between ethnic groups and government for a justice system to be accepted and effective. Fourth, the principle that the state is bound by its own laws must be normalised. Corruption by state officials and civil servants in Myanmar is rampant, and presently there is no expectation that these state officials must adhere to the same rules and laws as everyone else.

Decades of repression have resulted in a general population that is largely unaware of their rights. Given this, it is not surprising that a rights-based discourse requiring accountability for systematic abuse is not fully formed in Myanmar society (Pierce and Reiger, 2014). The general public's demand for accountability and the priority this receives on lists of reform can only be meaningfully assessed when there is a sufficient understanding of the human rights involved. In pursuing a larger human rights cognizant general public, human rights defenders, legal advocates, and activists utilising the existing justice system must be protected. As detailed above, instances where HRDs and individuals who filed complaints with the MNHRC or lawyers who defended clients against the state were not protected by the system are prevalent in Myanmar today. This deters the reporting of violations, enhancing of the legal profession, and use of the judicial system. Those working to support rule of law in Myanmar must be protected and encouraged to pursue their legitimate claims.

The above-mentioned necessary points of engagement must be conducted with the inclusion of relevant stakeholders – including the military and private sector. Indeed, reforms have threatened the power that both the former military regime and business elites once held. As they are still stakeholders in this transition, and hold enormous power, it is important to include them in the process, as their acceptance is important to ensure the successful transformation of the justice system as their ability to undermine this is currently unfettered.

8 Conclusion

The first wave of democratic reforms in post-junta Myanmar has failed to bring change in the country's judicial system. The 2008 Constitution, written by the previous military regime, continues to subordinate the courts to the military, Presidential and Parliamentary powers. While formal changes to Myanmar's laws and institutions alone will do little in themselves to improve the daily lives of the country's population, they are an essential precondition to the success of current reforms. If beneficial changes are to endure, they must be supported by a legal structure that safeguards fundamental human rights and provides effective remedies for their breach (IBA, 2012).

The post-junta implementation of the law in Myanmar has exhibited the same flaws, inefficiencies and favouritisms as under the junta. The military continues to operate with exemption from the law, and human rights defenders and advocates who attempt to use the existing system are intimidated, threatened, jailed, disappear or killed. As one Myanmar women's activist states, "The army can rape women, kill children and the country's courts do nothing. It's crystal clear the military is all powerful, the courts are weak and the judges afraid of the military" (Thornton, 2012). While there have been small advances in judicial practice, they are anomalies in the avalanche of cases that go uninvestigated and untried. Furthermore, judicial practice is systematically discredited by the overriding exercise of power from the military, Parliament and President.

In his final hours as President, U Thein Sein presented the Former President's Security Bill to Parliament, which included a clause stating the former Head of State is immune from "any prosecution for actions during his term" (HRW, Dec. 2015). Parliament approved and enacted this law in January 2016 – adding blanket immunity to the president's *retirement* package, while broadcasting Myanmar's interpretation of "all are equal under the law". In the post-junta's final hours as government, they instantaneously undermined any progress of reform to the judicial sector over the past five years.

At the time of writing, there is considerable hope and expectation that the incoming NLD government will invigorate prior weak efforts at reform and direct Myanmar towards better governance – inclusive of a legitimate and independent judicial framework. Yet if the past several years are any indication, it is not simply a change in the form of government or leadership that is needed – but rather, a systematic change in *governance* whereby there is a substantial redistribution of power to the judiciary and subsequent institutional structures. It would be folly for the new government to attempt to progress reforms without addressing the grave dependencies and ineffectiveness plaguing the judiciary, as democratic progress, peace and economic growth would continue to be stunted as has been the case in the first five years of the post-junta era. Without addressing past atrocities, it is unlikely that Suu Kyi and the NLD can finish what her father started seventy years ago.

But the NLD has a big conundrum. They have many political, social, and economic areas to reform, and the rule of law is just one of them. How do they prioritise it versus their other agendas?

In considering their priorities for reform, the NLD understands that the military have erected substantial barriers to reforming the rule of law by retaining control of the Myanmar constitution. The constitution decrees that (1) the military retain 25% of the parliament seats, the precise amount needed to veto any changes in the constitution; (2) in a state of emergency, the Commander in Chief controls all judicial powers; (3) the military is constitutionally decreed the amount of votes in Parliament needed to impeach the entire Constitutional Tribunal; and (4) the Constitution clearly prescribes that military personally are to be tried in the military courts. Henceforth, the NLD can either try to work within the existing constitution for reforms, or try to change the constitution. Changing the constitution not only would face the military's 25% veto power in Parliament, but if done incorrectly, would be perceived as a direct threat against the military. The Myanmar military has shown its willingness in the recent past to take up

arms against its own citizens, and the military coups from elsewhere in the region, such as in neighbouring Thailand, simply emboldens them. Therefore, the approach of changing the constitution should not be taken lightly, as most parliamentarians could be imprisoned, and many civilians killed.

In suggesting such judicial constitutional reform, the NLD must recognise that a judicial transference of power from the military to a quasi-civilian government will not occur overnight. Therefore, the NLD should prioritise those agendas where entry points of agreement can be found with the military, building confidence towards a more extreme reform in the rule of law. At the same time, the new government must prioritise transitional justice – without which a new reformist judiciary cannot stand.

Linked inadvertently to the NLD's reform of governance is the international community's role in influencing policy reform. The analysis in this paper details the international community's irresponsible cheering of post-junta 'transition to democracy' whilst neglecting the fundamental problem; the continued distortion of the rule of law. Therefore, the international community must too change its approach in supporting the NLD, to drive through reforming the rule of law and hold the NLD accountable, despite obstacles faced from the military. Sustainable peace and stability in governance are unattainable without a method of accountability. The international community must realise that without such accountability, any new government perpetuates the old, becoming a newly camouflaged wolf in sheep's clothing.

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