

ACCESS TO JUSTICE AND ADMINISTRATIVE LAW IN MYANMAR

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Methodology

The primary field research for this report was conducted from 4 to 15 August 2014 in Yangon, Naypyidaw and Mandalay. It included meetings with a range of legal stakeholders, including officials from the Union Supreme Court and lower courts, the Union Attorney General's Office, local branches of the General Administration Department, advocates, legal aid organizations, and law departments at universities. The report also builds on previous legal research conducted by the author.

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Notes on Terminology This report refers to the country as 'Myanmar' for the post-1988 period and 'Burma' for the pre-1988 period. This report follows the Romanization system for Burmese script based on the BGN/PCGN 1970 agreement (available at http://earth-info.nga.mil/gns/html/Romanization/Romanization_Burmese.pdf). This report uses legal terms common to Myanmar, including 'advocates' (lawyers), 'law officers' (public prosecutors) and 'law departments' (law schools/faculties).

Executive Summary

- Administrative law is an important part of access to justice because it can operate as a check and balance on government decision-making and provide an avenue for individuals to seek review of government decisions;
- The main avenue for judicial review of administrative action in Myanmar is the constitutional writs under the 2008 Constitution;
- Since 2011, a large number of applications for the constitutional writs have been brought to the Supreme Court;
- The Writ Procedure Law 2014 was introduced to clarify the Supreme Court procedure for handling writ cases;
- As the constitutional writs are a new area of law, support needs to be provided to a wide range of legal actors in order to take hold of the opportunity this provides;
- Efforts must go beyond the constitutional writs to the broader court system in which they exist, as well as the wider legal environment that includes the legal profession and legal education;
- There is a need to consider options for independent non-judicial mechanisms for review of government decisions that could play a vital role in complementing judicial review;
- Given that the role of the government in policy-making and regulation will continue to increase, it is imperative that a broader system of administrative law is developed in order to promote a culture of good governance, accountability and the rule of law.

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1. INTRODUCTION

Prior to 2011, Myanmar was ruled by a military regime without a constitution and without any avenue for citizens to seek judicial review of administrative decisions. Since the introduction of the 2008 Constitution and the transition to a quasi-civilian government in 2011, there have been significant changes in the area of public law. While most of the attention has focused on constitutional reform, there is a need to also consider the development of administrative law. The 2008 Constitution now recognizes the right to the constitutional writs, and this has the potential to provide one check on the power of the executive and an avenue for individuals to challenge government decisions in court.

The broader opening up of the country has led to greater freedoms of expression and participation for citizens, creating a new environment in which citizens may raise their concerns and complaints about government decisions. Yet there are few legal mechanisms that provide opportunities for complaints against the decisions of government agencies. The use of the constitutional writs remains in its formative stages, and it is not yet a well-known legal process. There are also more substantive issues for administrative agencies such as the need for regulations in terms of procedural fairness in government decision-making; rights to reasons; the need for greater transparency in government decision-making; and the need to create avenues for individuals to seek review of administrative decisions that are more accessible and efficient.

As Myanmar continues to go through a period of transition and legal reform, the role of government and the provision of government services is likely to significantly increase in terms of the extent to which government policies regulate the lives of individuals. It is therefore important that a firm foundation is laid for checks and balances on executive power, and clear procedures in place to regulate the administration in a way that promotes transparency and accountability in governance. There is also opportunity now to consolidate the use of the constitutional writs, strengthen understanding of how the writs can be exercised, and the role of the courts in reviewing executive decisions.

This report therefore advocates for a focus on administrative law as a key part of access to justice and rule of law programs in Myanmar. It examines the existing legal framework on administrative law to consider how it is currently being used, and to identify ways in which it could be enhanced and developed further. The report is divided into three parts:

- Part 2 considers judicial review of administrative agencies. It explains the process of judicial review in Myanmar and how this right has been used since 2011. It then identifies how the development of judicial review of administrative decisions in other countries can provide a crucial point of comparison.
- Part 3 considers non-judicial mechanisms of review that exist in Myanmar, and then identifies recent global trends in non-judicial mechanisms of review. It makes the case for a long-term strategy to develop the system of administrative law that engages the broader justice sector, including the law departments (at universities), the legal profession and legal non-government organizations.

- Part 4 provides short and long term recommendations that could be considered by key actors in order to foster and promoting administrative justice. This includes substantive and procedural aspects of administrative law that would need to be led by local initiatives, but could potentially be supported through collaboration with international organizations.

2. ASSESSMENT OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

One characteristic of the socialist and military periods in Myanmar was the inability of individuals to challenge government decisions in court. The post-2011 era departs from this by adopting the constitutional writs, and this is similar to the prior recognition of the writs in the 1947 Constitution. This is consistent with the government's position that Myanmar is a common law system, however, the legal system has been affected by the lengthy periods of socialism and then military rule. The broader administrative justice system in Myanmar is in the early stages of development and there is now opportunity to build on this existing framework.

This section considers the state of judicial avenues of review of government decisions in Myanmar. It then examines the development of judicial avenues of review in common law jurisdictions. In considering the relevance of this area of law for access to justice and promotion of the rule of law, it identifies the opportunities, challenges and needs of the current structure of administrative law at both the Union (national) level and state/region level.

2.1 Judicial Review of Administrative Action in Myanmar

At present, the constitutional writs are the only means to seek judicial review of administrative decisions in Myanmar. There is no general statutory right to seek review of administrative action, and there appears to be no such right recognized in the common law.

The constitutional writs can be generally defined in the following way:

- *Habeas corpus* – an order for release from detention; to seek an order to release a person who has been detained illegally;
- *Mandamus* – an order that compels a government agency to do something (for example, an order that a government officer reconsider an application for a permit that was rejected. Note that it cannot require an officer to make a particular decision, but it can require them to reconsider a decision);
- *Prohibition* – an order to prevent a government agency from making a decision or taking certain action; such an order therefore prohibits an officer from exercising jurisdiction that it does not have (either by exceeding its jurisdiction, or having no jurisdiction at all);
- *Certiorari* – an order to quash, that is, an order that cancels the decision of the government agency in question;

- *Quo warranto* – an order to prevent an officer who has abused their office from continuing in that office. This remedy has generally fallen into disuse in common law jurisdictions around the world.

In other countries that identify with the common law tradition, it is also common for the remedies of injunction and declaration to be available in writ cases. However, it appears that this has never been the case in Myanmar, and this remains the situation today.

2.2 The Writs in Myanmar: 1947-1970s

The constitutional writs in Myanmar need to be understood in historical context. Myanmar adopted the British common law system of administrative law with its emphasis on the prerogative writs as originally developed in England. There were no reported cases concerning the writs under colonial rule in Burma. At independence, the 1947 Constitution specifically provided for 'rights of constitutional remedies' (section 25(2)):

Without prejudice to the powers that may be vested in this behalf in other Courts, the Supreme Court shall have power to issue directions in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari appropriate to the rights guaranteed in this Chapter.

Section 25 of the 1947 Constitution therefore clearly established the authority of the Supreme Court, the highest court in the judicial hierarchy at the time, to issue such writs. The Constitutions of other former British colonies also have similar provisions that provide for some or all of these remedies.¹ Some other Constitutions around the world also recognize the writ of habeas corpus.²

After independence in 1948, the Supreme Court was the final court of appeal in such cases. This was because Burma was one of only two British colonies that did not join the British Commonwealth upon independence and therefore, after 1948, appeals no longer went to the Privy Council (Crouch 2014b: 39).³

The enforcement of the constitutional writs was only void in exceptional circumstances, such as threats to public safety due to invasion or a state of emergency, according to section 25(3) of the Constitution.

The 1947 Constitution also allowed for other courts, such as the High Court,⁴ to hear writ applications under its jurisdiction if it was provided for by law. In 1949, however, the High Court declared that it did not have the power to issue prerogative writs. Its jurisdiction was

¹ This includes the Indian Constitution 1949; the Ghana Constitution 1992; the Gambia Constitution 1996; the Cyprus Constitution 1960; the Nepal Constitution 2006; the Philippines Constitution 1987, the Seychelles Constitution 1993; the Sierra Leone Constitution 1991; and the Sri Lankan Constitution 1978. See <https://www.constituteproject.org/>.

² The Constitute database identifies 47 constitutions that include the writ of habeas corpus, see <https://www.constituteproject.org/>.

³ This was similar to India, although other countries that were formerly under colonial rule abolished this practice much later (for example, Sri Lanka ended appeals to the Privy Council in 1972, while Australia did so in 1986).

⁴ The High Court was established under Sections 134 and 135 of the Constitution and s 2 of the Union Judiciary Act 1948. Note that the High Court existed from 1948 to 1962; today there is a 'High Court' in each state and region, but it has a different jurisdiction to the previous court of the same name in English.

limited to the power to issue the writ of habeas corpus in cases of illegal detention under section 491 of the Code of Criminal Procedure 1898.

2.2.1 The Historical Role of the Supreme Court

In terms of the development of the principles of writs applications, the Supreme Court of Burma explicitly recognised that the requirements that needed to be satisfied for it to issue the writs had been ‘borrowed from English law’.⁵

In late 1940s and 1950s, the Court placed emphasis on the constitutional writs as ‘means of which this court is empowered to protect and safeguard the person and property of the citizens of the Union’.⁶ The writs were therefore depicted as central to accountability and the protection of individual rights against government interference. In terms of comparative jurisprudence, the Supreme Court did consider whether section 16 of the 1947 Constitution (which guaranteed that no person shall be deprived of his/her personal liberty), could be interpreted with reference to jurisprudence on the due process clause of section 14(1) of the United States Constitution. The Court ultimately rejected reference to section 14(1) as irrelevant to the interpretation of the 1947 Constitution.⁷

From 1948 until the coup in 1962, when the Supreme Court was regarded as free from executive or military influence, over 250 writs cases were heard. The writ of certiorari was the most common remedy sought by applicants during this period. Many cases also concerned the writ of habeas corpus and allegations of illegal detention (U Hla Aung 1968). A significant proportion of cases concerned property and town planning issues under the Public Property Protection Act 1947, the Urban Rent Control Act 1948 and the City of Rangoon Municipal Act 1922; labor law disputes under the Trade Disputes Act 1929; and taxation matters under the Income Tax Act 1922. On average, about 18 cases were brought to court each year.

The common theme running through these court decisions is the close affiliation with common law principles, as understood at the time, and an emphasis on individual rights. These two elements remain a key part of the legal consciousness of many senior advocates in Myanmar today, although its history is less familiar to the judiciary and law officers of the Attorney General’s Office.

Although cases continued to be brought to court after General Ne Win’s coup of 1962, these cases began to decline in number. The Chief Court, which replaced the Supreme Court, heard some writ cases up until 1971 when the last case is recorded. In 1972 the court system was dramatically restructured along socialist lines. The 1974 socialist Constitution no longer provided for the writs, and the power to conduct constitutional review of legislation was also taken away from the courts.

In 1988, when the State Law and Order Restoration Council (SLORC)⁸ took power, the new regime continued a pattern of interfering with the structure of the courts and the appointment and term of the judiciary. It did establish a new court system with a Supreme

⁵ *U Htwe (alias) A E Madari v U Tun Ohn and One* [1948] BLR (SC) 541, at 547.

⁶ *Ibid.*

⁷ *Tinsa Maw Naing v The Commissioner of Police Rangoon and others* [1950] SC 17, at 23-26.

⁸ In November 1997 SLORC renamed itself the State Peace and Development Council (SPDC).

Court, although it did not grant the Supreme Court the power to hear writs cases. Further, there was no recognised system of administrative law up until 2011.

2.2.2 The 2008 Constitution on the Writs

Since 2011, the right to issue writs under the 2008 Constitution is conferred on the Union Supreme Court. The Constitution therefore allows for access to the writs to challenge the legality of decisions of the lower courts and of government agencies. There is currently no opportunity for individuals to bring writ cases to the State and Region High Courts; this right is only available in the Supreme Court.

The jurisdiction of the Supreme Court to issue writs (*sachundaw*) is contained in section 296.⁹

The Supreme Court of the Union:

(a) has the power to issue the following writs:

- (i) Writ of Habeas Corpus (*Shedawthwin Sachundaw Amein*)
- (ii) Writ of Mandamus (*Anape Sachundaw Amein*)
- (iii) Writ of Prohibition (*Tamyinse Sachundaw Amein*)
- (iv) Writ of Quo Warranto (*Anapaingme Sachundaw Amein*)
- (v) Writ of Certiorari (*Ahmukaw Sachundaw Amein*)

This provision is similar in effect to section 25 of the former 1947 Constitution. Legal practitioners in Myanmar understand this provision as essentially reviving the right to the writs that was formerly provided for under the 1947 Constitution. While many aspects of the 2008 Constitution have been criticised, Section 296 on the writs is regarded by many in Myanmar as an important and democratic aspect of the Constitution.

2.2.3 Limits on the Application of the Writs

The right to bring writs applications is qualified by section 296(b), which provides that the writs do not apply in the event of a declaration of emergency. This exception departs from international practice, which requires that at a minimum the right to bring an application for habeas corpus should be available.

There have already been situations that have potentially compromised the right of detained individuals to seek review. For example, during the state of emergency that was declared after the conflict in Rakhine State in August 2012 and Meiktila District in March 2013, writ applications could not have been brought on behalf of the many Rohingya who were illegally detained (Crouch 2013b).

⁹ The reference to the writs is duplicated in s 378(a) of the 2008 Constitution. The constitutional provisions on the power of the Supreme Court to issue writs are replicated in the Judiciary Law No 20/2010.

While the right to habeas corpus is extremely important, it is not the primary focus of this report (but see Cheesman 2010). There have been very few cases of habeas corpus brought to the courts since 2011, and none have been successful to date.

2.2.4 Legislative Attempts to Limit the Jurisdiction of the Court

In some common law jurisdictions, such as England, Australia and India, the courts have held that the parliament cannot seek to restrict the power of the judiciary to review executive action. However, this stands in tension with another common feature of law-making, which is the use of privative clauses, also known as ouster clauses or finality clauses. A privative clause is basically any provision in legislation that seeks to restrict, limit or oust the jurisdiction of the court (Cane and McDonald 2009: 199). In some countries where the writs are included as a right in the constitution, the courts have held that the parliament cannot override this right through legislation.¹⁰

In Myanmar, there are early cases from the 1940s and 1950s that could be considered as precedent to support the general view that parliament cannot curtail the constitutional writs. For example, section 9(1) of the Public Order (Preservation) Act 1947 stated that an order to detain a person under the Act could not be reviewed by a court. The Supreme Court had to consider this section in light of section 25 of the Constitution. It held that section 25 is 'indefeasible' and that section 9(1) of the Act was void to the extent that it attempted to restrict the jurisdiction of the Supreme Court under section 25.¹¹ This ruling reinforced the view that the right to the constitutional writs could not be overruled by an act of parliament.

Since 2011, there has been a flurry of legislative activity in Myanmar and one clear pattern that has emerged in legislative drafting has been the tendency to include finality clauses. These finality clauses typically provide that a committee, which has powers of review over a certain application process, has the authority to make final decisions that cannot be reviewed by a court. One example is the use of farmland, which is managed by the Farmland Management Body at the village, district and state/region level. According to the Farmland Law No 11/2012, the decision of the Region/State Farmland Management Body is 'final' (s 25). On one reading, this could mean that an applicant who does not agree with the decision of the Management Body cannot go to court. However, the constitutional writs could be interpreted by the courts as a fundamental right that cannot be restricted by the legislature. If this interpretation was accepted by the courts, there is potential for such cases to receive a hearing through the writ procedure in the future.

There are a wide range of other laws where examples of similar kinds of finality clauses can be found, from the Farmland Law No 11/2012 which states that a decision made by the Region or State Farmland Management Body is final (s 25); to the Foreign Investment Law No 21/2012, which states that the decisions of the Myanmar Investment Commission are 'final and conclusive' (s 49). Such provisions are an attempt to remove the jurisdiction of the court to hear these cases. At this stage, there has been no reported case that has addressed this

¹⁰ Note that this does not mean that the section is unconstitutional, but rather that it does not apply to cases concerning the writs.

¹¹ See *Bo San Lin v The Commissioner of Police and one* [1948] BLR (SC) 372.

issue. This is one possible area in which the Union Supreme Court could legitimately expand its jurisdiction to review executive action in the future.

2.2.5 Court Reporting in Myanmar

The writ applications that have been submitted to the Supreme Court in recent years highlight many of the broader challenges facing the judicial system in Myanmar, such as the process of court reporting. While many of the restrictions on the media and publications have been lifted, the process of reporting and publishing court decisions has not changed. Of several hundred writ cases lodged since 2011, only six writ cases have been reported in the 2011 Myanmar Law Reports.

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 (see Appendix 6.2). 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. Unreported cases 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.

The Law Reporting Board meets once per year to review the cases and decide which cases should be included for publication in the Myanmar Law Reports.¹² The criteria considered by the Board includes whether there are any former rulings on the topic; whether the ruling is in the public interest, and whether the ruling is one that is useful for the guidance of the lower courts.

There were no cases on the constitutional writs in the 2012 Myanmar Law Report, and the 2013 Myanmar Law Report has not been published. According to some senior advocates, one of the reasons for the delay in reporting the 2013 cases is because the Board had initially sought the approval of some senior advocates on the cases it had selected for the 2013 volume. These senior advocates raised concerns with the Board that many of the cases they were asked to review had, in their opinion, been 'wrongly decided'. At the time of writing this report, the 2013 Myanmar Law Reports had not yet been published or made publicly available.

Some members of the legal profession are therefore concerned by the process of law reporting in Myanmar, as well as the substance of court decisions.¹³ Over the past few decades, the Law Reporting Board appears to have omitted from the Law Reports cases of a politically sensitive nature, such as the trials of many political prisoners. Concern over the reporting process is exacerbated by the fact that several judges, and the Chief Justice, of the Supreme Court are former members of the military and/or the Courts Martial. This means that any judicial experience these judges do have primarily been with criminal law cases in the Courts Martial, and not civil law cases more broadly.

It must also be kept in mind that since the 1970s, the 1974 Constitution required the courts to use Burmese language, rather than English. Court decisions in Myanmar are therefore focused

¹² Interview with Director General of the Supreme Court, August 2014.

¹³ Reflected in interviews with advocates in Mandalay and Yangon, August 2014.

on a local audience and have effectively been isolated from the common law world and comparative jurisprudence. This presents particular challenges and, unlike other former British colonies, since the 1970s the courts have rarely cited new cases from other jurisdictions.

There is now a new willingness and openness for various actors in the justice sector to learn from other models and comparative examples to develop their own local jurisprudence. Yet most legal institutions do not have access to current comparative legal materials. For example, the Union Supreme Court library is meticulously kept and has an extensive range of old law reports (such as the All Indian Law Reports) and Burmese language materials, but it has very few contemporary resources, and little on administrative law.

2.2.6 Writ Applications in Myanmar since 2011

A large number of writs cases have been filed with the Supreme Court since 2011. In August 2013, it was reported that 432 writs cases had been filed in just under two years. Of these, 286 cases were said to be rejected, while another 84 cases remained to be heard (NLM 9 August 2013). Another indication of the large number of writs cases is the Supreme Court's list of future court hearings, available online since June 2013. The lists are available in Burmese, but only indicate the remedy sought, and do not give any indication of the issue involved or the merits of the case. These hearing lists suggest that most writ applications seek the remedy of certiorari, that is, to quash a decision of a government agency or lower court. Very few cases have been successful, but it is more important to consider how the Court has addressed the substance of the cases.

It is unclear how many of these applications listed received a hearing, partly because the hearings of the Supreme Court are not necessarily open to the public. It appears that some of these cases were rejected at the preliminary stage, although it is difficult to determine whether the substance of the application was given fair consideration. There are reports that some advocates who represented applicants in these cases have had their practising licence cancelled as a result of their attempts to bring the case to court (Soe Than Lynn 2013). Other cases have been rejected because the applications do not fulfil the procedural requirements, partly due to a lack of experience among the legal profession in bringing such cases. While some senior legal advocates have a clear understand of some of the landmark precedents set in the 1940s and 1950s concerning writ cases, there is a need for opportunities to be created so that the legal profession can update their skills and knowledge in this area.

Of the 2011 cases, all six reported cases were brought under section 16 of Judiciary Law No 20/2010, in accordance with section 296 of the Constitution. All of the cases were unsuccessful, but the decisions indicate three common features of these cases.

First, all the cases concern review of decisions of a lower court. While this is one possible function of the writs applications, it does suggest that one of the main roles of the Supreme Court at present is to supervise decisions of lower courts, rather than decisions of the executive. One of the implications of this is that the writs are of direct relevance to the lower courts. For example, in visits to several courts in Yangon, judges and court officials explained that if a case they have heard is later the subject of a writ application in the Supreme Court,

they may be required to travel to Naypyidaw to explain their decision to the Supreme Court.¹⁴ There was therefore a sense of need for the judges and staff of the lower courts, particularly the State and Region High Courts, and the District Courts, to receive training in this area of law. This is also important in the event that the jurisdiction of the State and Region High Courts is extended to include the right to hear writ applications.

Second, all cases concerned general procedural issues unrelated to substantive administrative law issues. For example, in the case of *U Kyaw Myint v Daw Tin Hla*¹⁵ the applicant requested that the court allow the application for the writs against a decision of a lower court. Although there is a two-year limitation period, the Court has power to grant an exception to the time limit under section 5 of the Limitation Act 1909. The judgments were made prior to 2011, however, and the Supreme Court held that it could not hear the case because section 16 of the Judiciary Law No 20/2010 does not apply retrospectively.

Other cases raised basic issues of court procedure such as correct forms and affidavits. For example, the case of *Daw Baby Than & 9 others; U Nyi Nyi Tun & 11 others; Dr Hla Maung Din v U Tint Lwin*,¹⁶ was brought in relation to three civil cases against the Ministry of Industry heard in 2011. The application for the writ of certiorari sought to quash the decisions of the previous court cases. The attached affidavit had been incorrectly signed, and so the Supreme Court held that the affidavit was therefore not reliable.

The third feature of these cases is that they do exhibit a general understanding of the constitutional writs as common law remedies. For example, in *Daw Mya Shwe v District Court Judge of Hintada District, Hintada City & 3 others*,¹⁷ the applicant sought the writs of certiorari and prohibition against a 2010 judgment of a Township Court concerning an order to demolish a building. While the applicant was unsuccessful, the Supreme Court took the opportunity to define the writ of prohibition as an order 'to bar the judgment of an inferior court that does not have the jurisdiction to pass such judgment', which echoes a basic definition similar to other common law jurisdictions.

In a separate case, *Daw Than Than Te & 2 others v Regional High Court Judge Magwe Regional High Court, Magwe City & 7 others*¹⁸ the Supreme Court held that it could not overturn a lower court decision unless it was beyond the jurisdiction of that court according to the law. While it did not use the term *ultra vires* (beyond power), it clearly expressed understanding of this concept. Again in *U Myin Than & 5 others v President of the Republic of the Union of Myanmar & 2 others* the Court was firm in its insistence that 'The Union Supreme Court will not interfere in the judgment of a subordinate court if the judgment is passed within its power of jurisdiction'.¹⁹

¹⁴ Interviews with judges and court officials conducted at several courts in and around Yangon in August 2014, facilitated by the Union Supreme Court.

¹⁵ (2011) MLR (Civil Case) 1.

¹⁶ (2011) MLR (Civil Case) 78.

¹⁷ (2011) MLR (Civil Case) 103.

¹⁸ (2011) MLR (Civil Case) 127.

¹⁹ (2011) MLR (Criminal Case) 79.

In *Shin Nyana (aka) Shin Moe Pya v President of the Republic of the Union of Myanmar*,²⁰ the Supreme Court held that it could not hear writs applications in relation to its own judgments, only in relation to inferior courts.²¹

The purpose of conferring the power to issue a writ is to supervise the inferior courts (1) when they adjudicate a case that is not within its jurisdiction, (2) when they exercise power beyond its given jurisdiction, (3) when they do not exercise their jurisdiction appropriately.

An understanding of the concept of jurisdiction and whether a decision maker has acted beyond its jurisdiction is clearly evidenced here. Overall, these six cases display a general common law understanding of the role of the courts in writs cases, with emphasis on the legality of the decision, that is, whether the courts had exercised power beyond their jurisdiction, rather than considering the merits or substance of the decision that was made.²² There is awareness that the courts must not step into the shoes of the administrative decision-maker, but only consider whether a decision has been made within its power.

Aside from these three key features, the cases are silent on many other common elements of writs cases. For example, none discuss the question of *standing*, that is, who has the right to apply because they can establish that they have a special interest in the administrative decision in question. It therefore appears to be untested whether, for example, an environmental group could bring a case against a government decision that raises environmental concerns, such as the granting of a licence for the construction of a dam. Nor is there any discussion of the *grounds* on which the case can be argued, that is, for what reason the administrative decision is being challenged.

All the reported cases have been unsuccessful. However the media has recently highlighted a successful writ application in 2013 in which an economics professor from East Yangon University brought a case for certiorari. The professor had been fired from her position by the former Minister of Education. In this case it was argued that the decision of the Minister of Education to fire her should be cancelled because it was beyond the power of the Minister under regulations of the civil service.²³

The applicant was successful in this case, and it is the first major case in which the Supreme Court has declared the decision of a government minister to be beyond 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. The timing of this case was unusual, however, because the Minister for Education who made the decision was deceased at the time the court decision was handed down, so it did not have any political implications for the late Minister.

²⁰ (2011) MLR (Criminal Case) 126.

²¹ This case concerned a monk who had been accused of various criminal offences for rejecting the supervision of the State Sangha Council. Although several international non-government organizations raised legitimate concerns of religious freedom, I am only concerned here with the administrative law element of the case.

²² The distinction between 'legality' and 'merits' is common in administrative law, although the extent to which courts stress this distinction varies among common law countries. For one explanation, see Cane (2011: 35–40).

²³ Interview with the lawyer who represented the professor in this case, August 2014. See *Pamaungka Daukta Daw Kyin Te v Pyidaungsu Wungyi, Panyaye Wungyi Tana (2013), Pyidaungsu Taya Hluttaw Chôk*, Union Supreme Court.

This does illustrate that there are many areas of law, regulation and policy – such as the employment conditions of civil servants – which require processes to be put in place for procedural fairness. This is particularly the case because of the employment conditions for civil servants, who are often subject to rotation to regional offices. Some civil servants have also faced challenges since 2011 and the merging of some former government departments, because the staff of departments that were shut down have not always had their previous years of service recognised for the purpose of promotion.

2.2.7 The Supreme Court and the Law relating to Writ Applications 2014

Myanmar does not have any form of administrative procedure law, that is, a general law that sets out the obligations of government agencies in terms of duties such as the need to provide reasons for decisions, access to information and procedural fairness in decision-making. This means that government departments are not under any general statutory obligations in terms of administrative procedure.

However, in June 2014 a law was enacted on the procedure for writ applications of the Supreme Court to regulate how the court handles these cases, although it also anticipates that further regulations will be issued by the court. While it is narrow in its focus, the Law relating to Writ Applications No 24/2014 is important because it provides an indication of current understandings of the separation of powers and the role of the courts.

The debate over the writ procedure, as previously set out in the Supreme Court Rules, began in 2011 in the Pyithu Hluttaw (People’s Assembly). A member of parliament officially asked the Supreme Court to provide evidence of how many writs cases had been filed under section 296 of the Constitution. The Chief Justice reported in a hearing before the Hluttaw that 16 applications had been lodged as at April 2011 and, of these, 10 sought the writ of certiorari. This may be seen as an unusual request and may elsewhere be viewed as a breach of the separation of powers. From the perspective of the Hluttaw, however, this may have been justified on the basis that, at the time, the Supreme Court did not make any of its court decisions publically available online and did not publish information about its caseload, apart from the annual Myanmar Law Report. Further, according to the 2008 Constitution, the Pyidaungsu Hluttaw has the power to summon any Union level organisation for ‘clarification’.²⁴ The Constitutional Tribunal has defined ‘Union Level Organisations’ to include the Supreme Court (although arguably this encroaches on the separation of powers). Moreover, Section 298 of the Constitution suggests that the Chief Justice of the Supreme Court does have the power to make a submission to the Hluttaw concerning judicial affairs.

But it needs to be kept in mind that 25 percent of seats in the Hluttaw are reserved for the military. By calling the judiciary to a normal session of parliament, this implies that the judiciary is subordinate to the military and the legislature. Given that there have been calls from many sides for greater judicial independence, there is a need to avoid calling the judiciary ad hoc into parliament. Instead, alternatives such as establishing clear statutory obligations on the courts to make decisions and court data publicly available could be considered.

²⁴ 2008 Constitution, Section 77(c).

Discussion arose again in parliament in August 2012 when another member of the Pyithu Hluttaw submitted a proposal to revise the court's writ procedure on the grounds that it was perceived to be too restrictive. In particular, it was submitted that the writs applications should apply to decisions of the Supreme Court (in its ordinary jurisdiction), the Constitutional Tribunal and the Union Election Commission. It would be usual for a Supreme Court to have writ jurisdiction over decisions of a Constitutional Tribunal, and section 324 of the 2008 Constitution notes that decisions of the Constitutional Tribunal are final. The decisions of the Union Election Commission are also said to be final under s 402 of the 2008 Constitution. It is unclear how these sections are to be reconciled with the section on the writs in the Constitution.

On 31 August 2012 this was debated in the Pyithu Hluttaw. One of the justices of the Supreme Court was summoned to attend the parliamentary session and explained that while writs applications can be brought to challenge decisions of a lower court, writs applications cannot be used to challenge decisions of the Supreme Court, because its decisions, as well as those of the Constitutional Tribunal and the Union Election Commission, are final.²⁵

This is another instance of judges being called into parliament, and this may weaken the separation of powers. It potentially reinforces suspicions that the judiciary is neither independent nor separate from the executive and the military. It also raises questions about whether the legislature was overstepping its role, even if it was in an attempt to obtain information that would promote greater transparency on the caseload of the court and its procedure. Yet many of the court officials, legal practitioners and professors who were consulted for this report felt that it was appropriate for the Union parliament to be able to call the Supreme Court to account in this way. This suggests that among some legal actors the understanding of the separation of powers allows for the legislature to call the judiciary to account for its decisions. This could be achieved in a more regulated way, such as by passing law that places an obligation on the courts to provide annual reports on their activities and to make court decisions available to the public. This also highlights the importance of engaging a wide range of actors, including members of parliament and relevant parliamentary committees, in addition to the courts and the Attorney General's Office, on the substance and procedure of administrative law.

The debates in 2012 prompted a drafting process for a new law. In July 2013 a proposal for a Law relating to Writ Applications was submitted to the Pyithu Hluttaw by a member of the Judicial and Legal Affairs Committee.

The Law relating to Writ Applications was finally enacted in June 2014. It requires writs applications for certiorari and quo warranto to be brought within a two year time limit, although the other remedies are not subject to this restriction. The Court has no discretion to consider applications after this time period. The Law also clarifies the procedure for hearing a case in the Supreme Court. It establishes an 'Applications Review Board' within the Supreme Court, which consists of three judges including the Chief Justice or, if the Chief Justice was not available, a person appointed by him may fill his place.

Finally, the Attorney General also has the right to submit an application to the Court, a process which has a long tradition in the common law yet is rarely exercised, and this is also

²⁵ Constitution 2008, Sections 295(c), 324 and 402 respectively.

likely to be the case in Myanmar.²⁶ The Union Attorney General's Office also usually represents the defendant where the defendant is a government agency. The Union Attorney General's Office and its writs department is therefore a key actor in these cases, particularly because it acts as a de-facto Ministry of Law in the absence of such a department in Myanmar.

2.2.8 Amendments to the Civil Procedure Code

While the focus of this report is on administrative law and the ways individuals can seek review of government decisions, an important change in civil procedure has occurred that may affect writ cases. Under the Civil Procedure Code, the High Court had revisional jurisdiction to review decisions of a lower court to consider whether it has acted beyond its jurisdiction.²⁷ This is considered to be a more restricted avenue of review than the writs applications (as it does not apply to the executive), but it does function in a similar way to supervise decisions of lower courts.

The relevant provision is contained in the Civil Procedure Code²⁸ section 115:

The High Court may call for the record of any case which has been decided by any Court subordinate to the High Court and in which no appeal lies thereto, and if such subordinate Court appears-

- (a) To have exercised a jurisdiction not vested in it by law, or*
- (b) To have failed to exercise a jurisdiction so vested, or*
- (c) To have acted in the exercise of its jurisdiction illegally or with material irregularity*

The High Court may make such order in the case as it thinks fit provided that nothing in this provision shall affect the power of the Supreme Court in the exercise of its revisional jurisdiction.

In 2008, an amendment was passed to replace the word 'High Court' (which referred to the old High Court prior to 1962) with 'Supreme Court'. Then in 2014, another amendment was passed to expand the courts that could hear revisional cases to include: 'the Supreme Court of the Union, or the High Court of the Region or the High Court of the State, or the Court of the Self-administered Division or the Court of the Self-administered Zone or the District Court'. During the field trip for this research, legal practitioners repeatedly expressed the view that this amendment was aimed to provide parties with greater opportunities to bring revisional jurisdiction cases, and that this was intended to have the effect of *reducing* the number of writ cases. That is, it was felt that many cases that have been brought as writ cases should actually have been heard as revisional cases. This suggests that some writ cases have

²⁶ For example, Aronson et al (2009: 748) highlight that historically, the Attorney General has had the right to seek judicial review in 'the public interest', although they note that citizens cannot not necessarily rely on the Attorney General to act in this regard.

²⁷ This appears to be similar to revisional jurisdiction in India: see Basu 1994; Sathe 1996: 458.

²⁸ Recently amendment by the Law amending the Code of Civil Procedure No 6/2008.

been brought due to dissatisfaction with decisions of a lower court, and that this is one of the reasons for the perceived need for greater supervision of the lower courts.

This also suggests the need to clarify the distinction between writ cases and revisional cases, particularly in relation to the fact that the writ applications apply beyond the courts to the supervision of decisions and actions of the executive. This, for example, includes the role played by the General Administration Department,²⁹ which could also be the subject of writ applications.

2.3 Judicial Review of Administrative Law in Comparative Perspective

Given that Myanmar has effectively been cut off from the world and legal developments since the 1970s, there has been little opportunity for legal actors to learn about or consider the relevance of administrative justice systems around the world and how these systems have changed since this time. Myanmar has essentially missed a crucial period in the development of the doctrines and principles of substantive and procedural administrative law.

Broadly, administrative law raises key issues of the rule of law, which requires that the way in which public administration is carried out is regulated by law and that there are clear avenues that act as a check and balance on the exercise of this power. It also raises issues of the separation of powers, and related principles such as responsible government and parliamentary sovereignty. There is a need for greater clarity and consensus on how these principles are understood and operate in the legal system of Myanmar.

Across the common law world, there has been significant reform and renewal in the area of administrative law, particularly since the 1950s and 1960s. This has been due to the increase in government activities and regulation, and therefore the perceived need to keep a check on government decisions. Administrative law is a highly technical and specialized area of law, and a diverse range of legal approaches have been taken across the world. At a broader level, the main distinction is between judicial review in common law and civil law countries: civil law countries usually have a separate system of administrative courts (such as in France), while common law countries generally deal with administrative law cases *within* the general court system (although they may develop a separate division of the court to specialize in these cases). Yet at the same time, despite the structural differences in judicial review in common law and civil law countries, there are broader patterns in institutional and legislative changes, and common underlying foundational principles, related to administrative law systems.

This section will briefly highlight some of the key changes and challenges in administrative law in other countries, starting with England given its former influence on the legal system of colonial Burma. Administrative law in England is based on the idea of *ultra vires*, that is, that administrative authorities cannot act outside their powers and that the general courts should be the arbiters of administrative legality (Harlow and Rawlings 2009). The writs, also known as prerogative writs, originated in the King's prerogative power over the observance of law by officers and tribunals.

²⁹ The General Administration Department is a key government department in relation to administrative law. For more detailed research on its role and function see Asia Foundation 2013; 2014.

The great jurist, Professor AV Dicey, however, had a dismissive attitude towards administrative law (Dicey 1958), and his influence was one factor that inhibited the modern development of administrative law. It was not until the 1960s that judges began to actively recognize a right to a fair hearing in relation to government decisions that affected rights. In the 1970s as whole industries –such as gas, water and electricity – underwent a process of privatization, independent regulators began to assume a more prominent role in British government arrangements. This also saw a trend in contracting out of government services, which challenged the traditional public-private divide made by administrative law. There were also important doctrinal developments by the courts, such as the famous case of *GCHQ*, which set out the three principle grounds of review of administrative decisions: illegality, irrationality, and procedural impropriety.³⁰ Reforms on remedies in administrative law were introduced in the late 1970s, and the scope for review has continued to developed, particularly since the introduction of the *Human Rights Act 1998*.

In many post-colonial states that were formerly part of the British Empire, the writs were included as rights in written constitutions. For example, in Australia, s 75(v) provides for the writs of mandamus and habeas corpus, and these have been interpreted as entrenched rights that the legislature cannot limit (Sofronoff 2007; see generally Aronson et al 2009). Yet this procedure is essentially an avenue of last resort, and since the 1970s there have been significant changes to and expansion of the system of administrative law (Groves 2014). At the federal level, there is both a right to the writs at common law, in the *Administrative Decisions (Judicial Review) Act 1978*, and in the Constitution. In addition to the courts, a system of Administrative Appeals Tribunals were established (1975), as was a national Ombudsman (1976) and a Freedom of Information Act (1982), with further reforms to freedom of information in 2010 (Cane and McDonald 2013).

While other common law countries in the region, such as Malaysia (Harding 1996) and Singapore (Jain 2011), have not developed as extensive a system of administrative law, they still look to England and have regard to developments in the writ principles there.

For Burma, the administrative system that was most similar to its own at independence was that of India. This is primarily because Burma was part of British India up until 1935, and during the drafting of the 1947 Constitution, Burma was influenced by the drafting of the Indian Constitution that was taking place at a similar time. The constitutional writs in India have taken on a very high profile and have been consistently used since independence to protect individuals against arbitrary government decisions (Singh 2008; Basu 1994). The jurisprudence as developed by the courts in India are therefore one potential source of comparative analysis.

In addition to common law countries, there are a range of civil law countries in the region that have significantly reformed and expanded their system of administrative law. For example, Indonesia introduced a system of administrative courts in 1986, modelled along the lines of the Dutch civil law system (which is derived from the French civil law model). Despite the fact that Indonesia was still ruled by Suharto until 1998, the Administrative Courts did prove a crucial check on the power of administrative decision-makers. The most prominent example of this occurred in 1996, when a case was brought to the courts by Tempo magazine, which sought to challenge the government's decision to cancel its license because

³⁰ *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6, known as 'GCHQ case'.

it was accused of publishing politically sensitive material (see generally Bedner 2001). In an unexpected judgment, the Administrative Court held in favor of the applicants (although the case was later appealed to the Supreme Court, and the government was ultimately successful) (Fenwick 2009).

Other civil law systems in the region that have undergone significant reform include Thailand in 1997 (Leyland 2009), and Cambodia, which introduced a system of administrative courts along the lines of the French civil law system (Hauerstein and Menzel 2014; Theng 2012; see generally Harding and Nicholson 2010). These systems provide examples of the creation of specialized courts, yet the broader challenges these institutions have faced and the principles they have sought to promote are in many ways analogous to the common law and provide a relevant point of comparison.

Although brief, this review points to several common trends in judicial review of administrative action. First, the constitutional writs at the national level are usually a measure of last resort and a small part of a broader system of administrative review. Countries such as England, Australia and the United States have a well-developed system of administrative review in courts and tribunals at both the national and state or provincial level, as well as recognition of the right to judicial review in statute or codified form (Cane 2010).

Second, it is common for governments to develop a law or principles that regulate government agencies and the exercise of discretion, including rights to reasons, access to information, procedural fairness, and rights to review. While there are many different models – from an explicit Administrative Procedure Act in the United States and most countries in Europe or influenced by the European legal traditions to the development of common law principles in England or Australia – there is an explicit recognition of the need for a broader approach, because judicial review by writs alone in the courts is no longer considered a sufficient check on executive action on its own.

Third, given that judicial review of administrative decisions is no longer recognized as adequate, there has been growing recognition and proliferation of independent commissions – such as Freedom of Information Commissioners, Ombudsman, Specialist Tribunals, or Anti-Corruption Commissions. Such institutions have been adopted in a wide range of countries as part of broader strategies to ensure government transparency and accountability, good governance and anti-corruption reform in particular. These are addressed in the following section.

3. ASSESSMENT OF NON-JUDICIAL REVIEW MECHANISMS

The re-emergence of the writ applications in Myanmar has occurred at the same time as the establishment of several non-judicial mechanisms of accountability. This section considers several different approaches that could be developed or enhanced to expand the concept of good governance and accountability in Myanmar. This includes developing mechanism that

will enhance access to information and provide for a right to reasons; and the need for independent and impartial accountability institutions such as an Ombudsperson.

3.1 Access to Information

Citizens are only fully informed and able to participate in a democratic society if they have access to information held about them and on their behalf by government. Freedom of information is a mechanism for facilitating public access to documents owned by or in possession of the government. At the global level, there has been a rapid expansion of freedom of information legislation over the last 40 years, which has been well-documented (Ackerman and Sandoval-Ballesteros 2006). This not only includes reform in Western developed countries such as Australia (Creyke and McMillan 2012) or England (Birkinshaw 2010), but in a wide range of developing contexts.

Freedom of information is not strictly a mechanism of accountability or review, but is often a necessary precondition to such action. This is because large government organizations can be secretive and there is a need for individuals, as well as the media and opposition political parties, to be able to access information about administrative decisions. Freedom of information laws are designed to create a presumption in favor of disclosure of information.

There is currently no freedom of information legislation in Myanmar nor any general legislative obligation on government departments to provide access to information. While many government departments have already shown willingness to promote greater access to legal information by establishing websites and uploading some laws to their websites, this is haphazard and depends on individual initiatives within such departments. For example, since 2013, websites have been established by the Supreme Court, the Constitutional Tribunal, the Amyotha Hluttaw, the Pyithu Hluttaw, the Pyidaungsu Hluttaw, the President's Office and the Ministry of Information, among others. The role of the Ministry of Information is relevant to issues of access to information because, for example, it is responsible for printing all official versions of laws that are published in hardcopy. This is important because although many laws are now available online, there are occasionally different versions of the same law in circulation (in Burmese).

This is a clear area in need of reform, as many complaints against the government at present often relate to the inability of citizens or NGOs to access basic legal information or specific information about the reasons for particular government decisions.

One useful regional example that Myanmar could learn from in this regard is Indonesia. The Indonesian Parliament first discussed Freedom of Information legislation in 2001, and its contents were subsequently debated in the following years. The aim of the law was to challenge the previous culture of state secrecy and to create greater openness and transparency in government decision-making. A law on freedom of information was passed in 2008 and came into effect in 2010. The law applies to all public agencies at the national, regional and municipal level (including state-owned enterprises), as well as political parties and non-governmental organizations. The law places an obligation on an agency to provide a response to a request for information within a short period of time, just 10 working days. Like all such laws, there are exemptions to the kinds of information that can be accessed, such as

if it relates to criminal investigations or personal privacy. It also establishes an independent Information Commission to oversee implementation of the law and the resolution of any disputes.

This reform in Indonesia aims to secure strong procedural guarantees to make information accessible in a timely and low cost manner, and it places certain obligations on government agencies to do so, as well as setting out sanctions if government officials fail to comply. Several NGOs have been particularly active in educating the community and bringing requests on behalf of citizens. The need to educate and fund local, provincial and national agencies to ensure awareness of this law and the capacity to respond remains an ongoing issue. While some NGOs have been critical of the slow pace of implementation of the freedom of information legislation (Centre for Law and Democracy 2012), others have highlighted the shift to a culture of greater openness and transparency that it has slowly brought about, and the fact that many applications for requests for information have been processed according to the new procedure (Butt 2013).

3.2 Right to Reasons

The provision of reasons for administrative decisions is an important part of an effective system of administrative review and can help to promote transparency and accountability. The soundness of a decision cannot be properly gauged unless the basis for the decision is known. Accordingly, an obligation to provide reasons provides a useful means by which a person affected by a decision can gather information to challenge that decision. This obligation has been affirmed in some common law countries, particularly after the 1970s, in an attempt to overcome the challenges of government secrecy. In civil law countries, giving reasons is also generally a formal requirement for the validity of administrative decisions. In recent years, even in the absence of any administrative procedure code that would so require, English courts have recognized a limited common law right to reasons for decisions. English courts have accepted that, where a decision has a significant impact on an individual, the decision-maker may be obliged to provide the person affected with an explanation for the decision.

A right to reasons may also be provided for under statute as is most often the case in civil law countries, and increasingly also in common law systems. For example, in Australia a right to reasons is included in the *Administrative Decisions (Judicial Review) Act 1977* and the *Administrative Appeals Tribunal Act 1975*. In such a case, the issue is not whether reasons should be given, but how far such an obligation to provide reasons extends, what constitutes an adequate statement of reasons, who defines the limits and what approach a reviewing court should adopt when scrutinizing reasons for decisions.

There is no right to reasons recognized in existing common law precedent in Myanmar and, given that there is no general administrative procedure act, there is no general right to reasons. There may be some specific areas of regulation where reasons for a decision are required by statute, but overall there is a greater need for transparency in government decision-making in this way.

3.3 Ombudsperson

In addition to general access to information and reasons for decisions, it has become increasingly common for independent accountability institutions to be established with the mandate of investigating administrative decisions. One such institution that has developed in countries around the world in response to the perceived shortcomings of judicial review is an office of the Ombudsperson. Originating from Sweden, the office of an Ombudsperson today generally has several core characteristics (Reif 2004). This includes the power to investigate complaints of maladministration and in doing so to call witnesses and to inspect government offices and files. He/she usually has the power to investigate complaints that are brought to it, as well as to initiate their own investigations.

An Ombudsperson can play a key role in curbing arbitrary administrative action in its role as a watchdog over government administration. This can be a cheaper, faster and more effective avenue for individuals to resolve grievances. The main limitation is that decisions of the Ombudsperson are usually not legally binding, although he/she does usually have the power to make recommendations to government agencies and/or to parliament, and these recommendations are considered to be highly persuasive. In this way, the Ombudsperson can encourage agencies to establish fair and effective internal governance procedures.

There is currently no Ombudsperson or institution that fulfils the role of an Ombudsperson in Myanmar. There are many comparative examples Myanmar could learn from, including from the region such as the office of the Ombudsman in Indonesia (Crouch 2007). The National Indonesian Ombudsman was first established as part of the process of democratic reforms in 1999. It was later officially regulated by Law 37/2008 on the Ombudsman and was given a central role in investigating complaints concerning the public service under Law 25/2009 on the Public Service.

The Indonesian Ombudsman has powers to receive complaints and conduct investigations into allegations of maladministration. In order to ensure that government agencies comply with investigations, the law makes it a crime to obstruct the investigations of the Ombudsman, which carries a penalty of two years jail. If the recommendations from its investigations are not followed, it can report government agencies to the legislature and the President. The office of the Ombudsman has proved particularly effective at the provincial level, where it is able to generate the support of local government institutions and work to promote a culture of good governance and openness with local government stakeholders.

3.4 Accountability Institutions

There are two main institutions that could broadly be seen as part of the administrative law system, although they do not have the same level of independence or impartiality that would usually be necessary for such an institution to play an effective accountability role. The first is the Myanmar National Human Rights Commission, which was established by Presidential Decree in 2011, and later by a national law in 2013. The concept of a human rights commission is not new in Myanmar, with efforts in the early 2000s in this direction (Kinley and Wilson 2007). The MNHRC, however, is not currently compliant with the *Principles relating to the Status of National Institutions* (known as the Paris Principles), which is the recognized

international standard for Human Rights Commissions (Goodman and Pegram 2012; Koo and Ramirez 2008-2009). The MNHRC is part of the regional Southeast Asian National Human Rights network, as well as the Asia Pacific Forum.

The second initiative is the establishment of the Anti-Corruption Committee, which is part of the President's stated agenda of taking a firm approach against corruption in government office. The Anti-Corruption Committee was initially established by Presidential Notification, and this was followed by the Anti-Corruption Law 2013 which came into force in September 2013. Further information is needed on the extent to which this law is being implemented but it provides one possible opening for partnerships on anti-corruption efforts in the future.

There are a range of countries in the region that have a National Human Rights Commission and/or Anti-Corruption Commission. Indonesia is again another obvious example from which lessons could be learned, as the Indonesian Human Rights Commission (known as 'Komnas HAM') was established in the 1990s while Indonesia was still under Suharto's authoritarian regime (Crouch 2013a). Since the transition to democracy, Indonesia has also established an Anti-Corruption Commission (known as the 'KPK'), which is one of the most successful independent accountability institutions in Indonesia (Butt 2012; Butt and Lindsey 2012).

In Myanmar, both the Human Rights Commission and the Anti-Corruption Commission do not yet have a reputation or the powers as independent and effective accountability institutions. Nevertheless, these steps forward do create a potential opening for further developments and a strengthening of the need for accountability in these areas. In addition to this, it should also be noted that one of the main forums for complaint is not these new institutions, but rather members of parliament and parliamentary committees. These committees receive a very large number of complaints, and one reason for strengthening other institutions in the future would be to find ways to redirect complaints that are sent to members of parliament where they could more effectively and appropriately be addressed by other institutions such as an Ombudsperson or the National Human Rights Commission.

3.5 Legal Education and Legal Practice

In order to build on the existing system of administrative law, there is also a need to consider the role of legal education institutions, legal practitioners and non-government legal aid organisations. These institutions have the potential to play a significant part in the promotion of administrative justice and good governance, and are responsible for laying the foundations of the knowledge for law students and higher grade pleaders.

There is now greater opportunity and openness than ever before for international organisations to partner with law departments to strengthen legal education. But this does come after decades of restrictions on the tertiary education system, which has also severely affected legal education. In brief, since the 1960s, the quality of legal education in Myanmar has suffered seriously (Myint Zan 2008). From the military coup of 1962 until 1999, Myanmar closed its universities on numerous occasions (Selth 2010). The longest period of closure was after the 1988 democracy uprising, when the universities were only open for the equivalent of three out of twelve years up until 2000 (Selth 2012: 12).

Aside from the closure of universities, a wide range of other factors have inhibited local academics, including restrictions on the university departments and curriculum content; lack of academic freedom generally; rotation of lecturers to regional campuses; and a lack of basic funding and resources (Crouch 2014a). In addition, the political climate led to the decline of whole areas of scholarship that were considered too sensitive. Many academics left the country or academia, while local academics who remained have had few obligations, outlets, or incentives to publish, and censorship of publications in general has been a significant deterrent.

Up until 1995, the law department at Yangon University was the only law department in the entire country. Since then, the military pursued a strategy of significantly expanding legal education with the establishment of 17 other law departments (see Appendix 6.1). Yet these departments receive very little government support or funding. This has had the effect of greatly increasing the number of law students who graduate per year, while devaluing the quality and prestige of a law degree. Law professors have worked under difficult conditions and have done the best with the resources they have been given.

Law departments remain a crucial part of the legal system because it provides foundational training for students who may later go on work as chambers students and then higher grade pleaders and advocates, or who apply for a career as a judge or public prosecutor. Law professors also play an important role as they are frequently called upon to assist the government in the drafting of legislation, to mark the entrance examination for the judiciary or the Union Attorney General's Office, as well as a range of other consulting roles including teaching law in military colleagues.

Yet there is a gap between law professors and legal practitioners, which is a result of the approach of the previous military government. Many law professors have never had the opportunity to practice law. Advocates are only allowed to serve as guest lecturers rather than hold part-time appointments at university, which was common at least during the parliamentary period from 1948 to 1960s. This limits the opportunities that students may have to learn from legal practitioners and experts in their area of law.

While this report is unable to survey legal education and the state of the legal profession in detail, two main points will be mentioned that affect the capacity of the legal profession in relation to administrative law. The first is that because of the introduction of the 2008 Constitution, and the raft of law reforms that have taken place, the law departments face significant challenges in terms of time and resources to incorporate changes in the law and emerging areas of the law into their curriculum. This is also because on topics such as administrative law, although there are now many new court cases, there is uncertainty as to relevant court precedent because most of these cases are unreported. This is compounded by a basic lack of access to contemporary comparative resources on administrative law, and a lack of textbooks in Burmese or English (although the Yangon University Distance Education course textbooks include a brief section on administrative law). Further, legal education is required to be in English, yet most legal commentaries, laws and case law are in Burmese. There is a need to create professional development opportunities for law professors who may seek to expand their expertise in emerging areas of law such as administrative law.

While some international NGOs and universities have been involved in providing guest lectures and support for curriculum review to date, there is a need for these efforts to be

coordinated into a longer term plan. There is also a need to ensure guest lectures or workshops complement the existing curriculum, rather than adding an extra burden to the program. Efforts and partnerships by international NGOs and law faculties have also focused primarily on Yangon University, but there is a real need to expand assistance to other universities, particularly to Mandalay University, which like Yangon University also now has 50 LLB students who are selected from among the top students in the country.

The second brief point to note is that there is a dearth of critical legal scholarship, although there are many commentaries, practical law handbooks and compilations of laws. There is currently no law journal published by any university in the country. In the past there have been no incentives for promotion purposes for scholars to publish, and distinct disincentives to publish generally, given the previous level of censorship. At present, the only academic journals law professors may also publish articles in are inter-disciplinary journals such as the *Mandalay University Journal*, and the *Myanmar Academy of Arts and Science Journal* (published in English). Some other universities also have their own journal, such *Myitkyina University Journal*. In the 1980s, there was a *University Law Journal [Tetkatho Ubade Gyanè]*, which was published in both English and Burmese language, but after 1985 it was discontinued. There is a *Supreme Court Judicial Journal* and a *Law Journal* of the Attorney General's Office [some articles in English, some in Burmese], and occasionally some law professors are required to publish in these journals.³¹ Articles in these journals are more descriptive than analytical, and they are not widely distributed.

Given that the constitutional writs are now operative in Myanmar again, there is a clear need and desire for relevant reference material and academic analysis that can inform the development of this area of law. Myanmar has a rich heritage of writ cases from the 1940s to 1960s, but many of these cases were published in English and are therefore less accessible to the current generation of practitioners, scholars and students than cases in Burmese language.

Finally, in addition to legal education, there is also a need to provide opportunities for the wider legal profession and those active in legal non-government organizations to undertake professional legal training on emerging areas of law such as administrative law.

4. RECOMMENDATIONS

This section contains suggestions relevant to the key institutions and actors in administrative law and ways they could support access to justice initiatives, promote the rule of law and ultimately foster greater public confidence in the administration of justice, based on the assessment above. This includes both short and long term recommendations specific to administrative law, and recommendations that relate to the legal system more broadly.

Significant steps forward have already been made in the area of administrative law and the re-introduction of the constitutional writs, and none of these recommendations should

³¹ For a more complete list of law journals, see Crouch and Cheesman, 2014.

detract from this progress, but are rather intended as considerations that may promote the development of this important area of law.

4.1 The Role of the Courts

The Union Supreme Court will play an important role in shaping the development of the principles of administrative review and the scope of the constitutional writs. In order to promote understanding about the principles of judicial review of administrative action within the judiciary, the Union Supreme Court could consider options such as:

- To provide a multi-day workshop on administrative law, with a focus on both the core principles and comparative examples, as a short term measure for all existing judges and officers of the Supreme Court, the State and Region High Courts and the lower courts;
- To provide opportunities and support for trainers at the Judicial Training Institute and Central Institute of Civil Service, with the aim of incorporating a module on the constitutional writs into the existing judicial training program for all new judges; As only judges up to the level of District Court judges are included in these courses, special courses for senior judges of the State and Region High Courts and the Supreme Court would also need to be provided.
- To provide opportunities and support for officers who work in the newly-established writs department to further their expertise and knowledge in this area of law, particularly through opportunities to learn from comparative examples;
- To provide opportunities and support for the Law Reporting Board to consider 'best practice' in law reporting techniques, with an emphasis on the importance of making court decisions accessible and available to the public in a timely manner. This could include building on the already existing initiatives of the Supreme Court in terms of its website and an integrated IT system.
- To provide opportunities and technical support for the Law Reporting Board to increase its scope of reporting cases to include the reporting of court decisions of cases heard by the State and Region High Courts, and the District and Township Courts. This could also include making publicly available unreported court decisions. One step in this direction would be to equip lower courts with modern communication and recording technology, and train judges and court clerks in the use thereof, in coordination with existing initiatives of the Supreme Court.

4.2 The Role of the Union Attorney General's Office

The Union Attorney General's Office is also a key actor in administrative law and it can play an important role in promoting the development of the principles of judicial review and access to avenues for review of government decisions. In this regard, the Union Attorney General's Office could consider the following options:

- To provide a multi-day workshop on administrative law, with a focus on both the core principles and comparative examples, as a short term measure for all existing law officers in the central Naypyidaw office and for law officers in its regional branch offices;

- To provide opportunities and support for law officers from the writs department in particular to further their expertise and knowledge in this area of law, particularly through opportunities to learn from comparative examples;
- To incorporate a module on the constitutional writs into the existing training program for all new law officers. This could be done using a train-the-trainers model and with a view to developing materials relevant to the Myanmar context, so that law officers are equipped to teach this module in the future;

4.3 The Role of Parliament

The Union Parliament is responsible for passing new laws and therefore plays a key role in shaping the exercise of executive power and way that courts perform their review of government action, as set out in legislation. In this regard, the Parliament could consider the following options:

- To provide a multi-day workshop on administrative law, with a focus on both the core principles and comparative examples, as a short term measure for members of parliament, or for members of the parliamentary committees most relevant to administrative law;
- To review current government policies and procedures related to administrative law with the aim of expanding and updating the existing system of administrative justice. This could be the initiative of one particular parliamentary committee;
- To consider future possibilities for law reform and the introduction of legislation to consolidate and develop administrative law by providing for:
 - A statutory right to reasons in government-decision making;
 - A statutory right to access government information, which would include placing obligations on all government bodies and the courts to facilitate access to information;
 - A statutory right to review of government decisions, which may include the establishment of independent tribunals;
- To ensure that a clear implementation plan and timeframe is in place to educate the community and all relevant government agencies, particularly the General Administration Department, about the effect of these new laws.
- To consider the expansion of the right to judicial review so that citizens may seek review of administrative decisions in the State and Region High Courts. This may make the process of bringing an application more accessible, while also providing greater opportunity for citizens to bring applications about local government decisions to the respective High Court.

4.4 Textbook on the Constitutional Writs

Across all of these institutions, as well as among the legal profession and the legal education sector, there is a need to address the difficulties of accessing knowledge on contemporary developments in administrative law, as well as information relevant to the local context. To begin to address this, one option that could be considered is a project to develop and publish a textbook on constitutional writs in Myanmar. This textbook would be designed for

the Union Supreme Court and Union Attorney General's Office, as well as for advocates and law professors at universities.

The textbook could highlight principles from court decisions of the parliamentary period (1948-1960s), but also incorporate broader principles and developments in judicial review of administrative action. To maximize access to this book, it would need to be made available in both Burmese and English language. This is because while law departments in universities are required to operate in English, courts are required to operate in Burmese. The textbook should also be available in electronic format, as well as in hardcopy (given that many institutions in Myanmar do not have reliable internet access).

4.5 Resources on Administrative Law

There is a basic need across the legal sector for comparative commentaries and detailed analysis of administrative law. Accordingly, it is recommended that textbooks on administrative law and comparative administrative law could be provided to a range of legal institutions in Myanmar. This could include the Union Supreme Court, the State and Region High Courts, the Union Attorney General's Office, the law departments at universities, and legal aid organizations.

4.6 Myanmar-English Legal Dictionary

There is a need for law-makers – including law professors, law officers, members of parliament and judges – to have easy access to a reliable and comprehensive English-Myanmar legal dictionary. A project to create a reliable, thorough and comprehensive Myanmar-English Legal Dictionary could facilitate greater consistency and reliability in terminology used in law-making.³² This would also be of particular use for areas of law such as administrative law, in order to clarify technical terms.

While some legal dictionaries do exist (see Appendix 6.3), none are available in both English-Myanmar and Myanmar-English. Some are outdated or inconsistent, and do not necessarily include terms used in new legislation. These sources are limited in their scope and definitions, and none are available electronically, nor searchable electronically. Some court officials and legal professionals in Myanmar are familiar with *Black's Law Dictionary* (Thomson Reuters) (in English), and a focus on some of the key terms in this dictionary could be useful.

The focus should be on:

- Providing an extensive and consistent compilation of legal terminology;
- Providing clear explanations for legal terminology (in both English and Myanmar);
- Making the dictionary available in Myanmar-English and English-Myanmar;
- Ensuring that the dictionary is available digitally, and that the digital version is searchable (in both English and Myanmar font).

³² As this report was going to press, it was announced in the weekly Law Gazette of Myanmar that a Commission for Translation of Legislation Bill has been proposed, and that this Commission would be responsible for ensuring consistent terminology in legislation, and for producing a legal dictionary.



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PROMOTING THE RULE OF LAW PROJECT

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- Daw Mya Shwe v Kayaing Taya Thugyi Hinthada Kayaing Taya Yôn Hinthada Myo* [District Court Judge of Hinthada District, Hinthada City] & 3 others (2011) MLR 103 (Civil Case)
- Daw Than Than Te pa hnit* [Daw Than Than Te & 2 others] *v Taing Dethagyi Taya Hluttaw Taya Thugyi Makywe Taing Dethagyi Taya Hluttaw Makywe Myo pa kuhnit* [Regional High Court Judge Magwe Regional High Court, Magwe City & 7 others] (2011) MLR (Civil Case) 127
- Shin Nyana (ka) Shin Mo Pya v Pyidaungsu Thamada Myanma Naingngandaw* [Shin Nyana (aka) Shin Mo Pya v Republic of the Union of Myanmar] (2011) MLR (Criminal Case) 126
- U Htwe (alias) A E Madari v U Tun Ohn and One* [1948] BLR (SC) 541
- U Kyaw Myin v Daw Tin Hla* (2011) MLR (Civil Case) 1
- U Myint Than pa nga* [U Myint Than & 5 others] *v Pyidaungsu Thamada Myanma Naingngandaw pa hnit* [Republic of the Union of Myanmar & 2 others] (2011) MLR (Criminal Case) 73

6. APPENDICES

6.1 List of Universities with Law Departments in Myanmar

University	Location
Dagon University	Yangon Region
Dawei University	Tanintharyi Region
East Yangon University	Yangon Region
Magway University	Magway Region
Mandalay University of Distance Education	Mandalay Region
Mawlamyine University	Mon State
Monwya University	Sagaing Region
Myitkyina University	Kachin State
Sittway University	Rakhine State
Taunggyi University	Shan State
Taungoo University	Bago Region
University of Pyay	Bago Region
University of Yangon	Yangon Region
Yangon University of Distance Education	Yangon Region
Yatanarpon University	Mandalay Region
Pinlone University	Shan State
Pathein University	Ayarwaddy Region
Meiktila University	Mandalay Division

Note: There is no law department in several states/regions including Chin State and Kayin State.

6.2 List of Members of the Myanmar Law Reporting Board

The board consists of thirteen members and includes four women (Myanmar Law Report 2012). Most members are drawn from either the Supreme Court or the Union Attorney General's Office

1. U So Nyunt, Judge of the Supreme Court
2. U Aung Zaw Thein, Judge of the Supreme Court
3. U Myin Han, Judge of the Supreme Court
4. U Tun Tun U, Deputy Attorney General
5. U Myo Nyun, Bar Council
6. U Sein Than, Director General of the Supreme Court
7. U Kyaw San, Director General of the Attorney General's Office
8. U Thet So Aung, Deputy Director of the Supreme Court (Legal Affairs)
9. Daw E E Kyi Htet, Deputy Director of the Supreme Court (Management)
10. Daw Nan San Da San, Director, Criminal Division of the Supreme Court
11. Daw Khin Me Yi, Director, Civil Division of the Supreme Court
12. U Aung Kyi, Director, Supreme Court
13. Daw E E Thein, Director, Supreme Court

6.3 List of English-Myanmar Legal Dictionaries

Ingaleik-Myanma Ubade Wohara Abidan [The English-Myanmar Law Dictionary] Fourth edition, 2010. *Shene Gyôk Yôn Katôk Wethe* [Attorney General's Office].

Includes English terms with Burmese explanations

Thalun Ingaleik-Myanma Ubade Abidan [Thalun Dictionary of Law English-Myanmar] (2008) Thalun Bookstore Yangon.

Includes English terms with English and Burmese explanations

U Kyaung Ze Yu (2007) *Athôn-kyá Ubade Wohara-mya, Ingaleik-Myanma* [English-Myanmar] Yangon.

Includes English terms with Burmese explanations

Pwesipôn Pôn Akyekan Ubade, Wohara Abidan Ingaleik-Myanma [Constitutional Law Dictionary of Terms in English-Myanmar] (2011). Yangon.

Includes basic list of English terms with Burmese explanations

U Ba Kyaing (2006) *Ubade Wohara-mya Ingaleik-Myanma* [Legal Vocabulary in English-Myanmar] Yangon.

Includes English terms with Burmese explanations

U Aung Than Tun (1986) *Ingaleik-Myanma Wohara Abidan* ['Law Lexicon'], Yangon.

Includes English terms with Burmese explanations