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### **An Introduction to the Law and Judicial System of Myanmar**

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# **An Introduction to the Law and Judicial System of Myanmar**

**By Nang Yin Kham<sup>1</sup>**

The intention of this paper is to provide an introduction to the law and legal system of the Republic of the Union of Myanmar (Myanmar). Based on common legal texts, the paper highlights the main sources of law and legal institutions, in particular the judiciary and the legal profession. The paper also reviews the structure of the judicial system through different time periods, describes judicial appointments in the highest courts, and summarises key processes in civil and criminal practice and procedure. A brief bibliography is provided at the end of the paper.

## **1. Sources of Law & Law Reports**

The principal sources of law in Myanmar are:

- i) customary law dealing with personal law issues, such as marriage and divorce, adoption, succession, wills, intestacy, transfer of property, religious usage or institution;
- ii) English common law;
- iii) legislation; and
- iv) judicial decisions.<sup>2</sup>

The principles of the English common law and statute law were transplanted to Myanmar in the late nineteenth and early twentieth centuries. During that period, Myanmar (then known as Burma) was part of the British Empire, first as a province of India and administered as a separate colony starting in 1937. Independence was achieved in 1948.

In pre-colonial, ancient Myanmar, law was made up of legal texts, orders, and judicial decisions known as Dammathats, Yazathats and Phyahntons<sup>3</sup>:

- Dammathats compiled collections and records of social customs. Similar to the customary laws of the land, they codified legal rules and principles for civil matters. They were written by famous monks and scholars. Under the kings of

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<sup>1</sup> Dr. Nang Yin Kham holds a B.A from Yangon University and a Ph.D. in Law (2007) from Chuo University in Tokyo, Japan. Her doctoral dissertation was entitled “The Search for Rule of Law: The Constitutional Developments in Burma.” Based in Singapore, she is a citizen of Myanmar.

<sup>2</sup> *History of State and Law* (Yangon University, Department of Law, University of Distance Education, University Translation and Publication Department, 1992) 83-89; Alec Christie, *Myanmar's legal System and Contract Law* (2006) <<http://www.mondaq.com/australia/article.asp?articleid=42668>> accessed 10 December 2013. Some basic laws were changed, either abrogated or amended, after the Revolutionary Council of Burma abrogated the 1948 Constitution. The Revolutionary Council governed Burma from 2 March 1962 until 3 March 1973.

<sup>3</sup> For a more detailed description of these texts, see Mya Sein, U, *Myanmar Customary Law* (Yangon: Gonhtoo Sarpay, 2010) 2-12 (in Burmese).

Myanmar, civil jurisdiction was mainly based upon the Dammathats. Today the Dammathats are still relied upon in personal and family disputes of a civil nature. Manu Dammathat, Manukye Dammathat, Shwe Myin Dammathat are often cited in the court judgments concerning family law for Buddhists.

- Yazathats were the orders of the king and resembled legislation.
- Phyathtons were the records of judicial decisions rendered by various monarchs and judges. Under the monarchical system, criminal and civil jurisdictions were distinct. Criminal Justice was dispensed by administrative officials of the State. Civil Justice, on the other hand, was administered by judges appointed by the King, and by arbitrators chosen by the parties.

Because Buddhism played an important role in social and cultural life, the religion had a significant influence on the vitality of the Myanmar legal system in this era.<sup>4</sup> A law-making process or legislation was not properly instituted until the Konboug dynasty (1752-1900). The law was derived from judges' decisions and from customs of the people, which Buddhist monks and scholars compiled in various Dammathats.

On January 1, 1886, Myanmar became one of the provinces of British India. The statutory laws, which were designed in the English common law model for use in India, were extended to Myanmar (then known as Burma) as well. These statutory laws included the Contract Act, the Negotiable Instruments Act, the Sale of Goods Act, the Companies Act, the Arbitration Act, and the Civil and Criminal Procedure Codes. The Indian Penal Code, drafted and adopted in 1860, was also imported from India. By the early 1920s, when judicial administration had become well organised in the country, the wholesale adoption of codes made for India on British common law principles was just about completed. However, Myanmar has enacted numerous laws amending pre-independence laws, such as the Code of Civil Procedure (Amendment) Act in 1956, the Criminal Law Amending Law in 1963, the Code of Criminal Procedure Amending Law in 1973, the Law Amending the Myanmar Companies Act in 1989 and 1991, the Law Amending the Civil Procedure Code in 2000 and 2008.

Absent a statute regulating a certain matter, courts must apply Myanmar's general law. Based on English common law and shaped by Myanmar case law, the general law reflects principles of equity, justice and good conscience.<sup>5</sup>

In present-day Myanmar, the corporate, commercial and economic laws of the pre-independence period (from before 1948) have been revived as the pillars of Myanmar's market economy. In addition, new laws have been promulgated to encourage foreign and local investment and develop the market economy. There are 1395 enacted laws, 577

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<sup>4</sup> Ba Han, *A Legal History of India and Burma* (Yangon: A.M.A.K Press, 1952) 76.

<sup>5</sup> Burma Laws Act 1898, art. 13(3). See also *History of State and Law* (n 2) 61; Christie (n 2) 1.

repealed laws, and 818 existing laws in Myanmar as of December 31, 2012.<sup>6</sup> Under the current Constitution of 2008, the Union Parliament (Pyidaungsu Hluttaw), composed of two houses (the Pyithu Hluttaw and the Amyotha Hluttaw), has the right to enact laws for the whole or any part of the Union related to matters prescribed in the Union Legislative List.<sup>7</sup> The Pyidaungsu Hluttaw also has legislative power relating to other matters not enumerated in the list of the Union, of the Regions, or of State and Self-Administered Division Leading Bodies or Self-Administered Zone Leading Bodies.<sup>8</sup> This process is currently the source of statute law in Myanmar.

The common law in Myanmar would not have developed without the publication of cases and laws. Before independence in 1948, the Lower Burma Rulings (1900-1922), the Upper Burma Rulings (1892-1922), and the Rangoon Law Reports (from 1937-1942 and 1946-1947) were prominent law reports.<sup>9</sup> Since 1948, the Burma Law Reports constitute the major publication of Myanmar court decisions, though these reports do not include all cases. Local law books and legal commentaries have also contributed to the common law in Myanmar.<sup>10</sup> Several of these sources are referred to in the bibliography.

## 2. Judicial System

The judicial systems during the colonial period, post-independence, Revolutionary Council period, and present-day Myanmar are distinct.

### *Colonial Period*

Under British colonial rule, Myanmar was administered from Bengal. A Special Court composed of the Judicial Commissioner and the Recorder's Court of Yangon exercised most of the powers of an Indian High Court over Lower Burma. In 1900, these courts were abolished and the Chief Court of Lower Burma was established by the Lower Burma Courts Act No.VI of 1900 as the highest court. After the annexation of Upper Burma, the Upper Burma Civil Courts Regulation of 1890 established the Court of the Judicial Commissioner for Upper Burma with all the powers of a High Court and as the court of final jurisdiction throughout the area to which the Regulations applied. In 1922, the Burma Courts Act established the High Court of Judicature in Yangon. This High Court consolidated the powers and jurisdictions of the Chief Court of Lower Burma and the Judicial Commissioner of Upper Burma. Through the country, the subordinate courts were constituted by the Burma Act XI of 1922, as amended by the Burma Act III of 1926.<sup>11</sup>

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<sup>6</sup> Ba Thin, *General Index of Myanmar Laws* (Yangon: Naymyo Sarpadaythar Sarpay, South Okkalarpa Township, 2013) 1 (in Burmese).

<sup>7</sup> Constitution of the Republic of the Union of Myanmar 2008, s 95-108.

<sup>8</sup> *Ibid* s 95-108 (Schedules 2 and 3).

<sup>9</sup> Courts Manual (Yangon: Central Publishing Enterprise, Supreme Court of the Republic of the Union of Myanmar, 1970) 835.

<sup>10</sup> Kyaw Sein, U. *Criminal Special Law*, Vol. I (Yangon: Tailin Sarpay, Insein Township, 1999), Vol. II (Yangon: Htet Sarpay, Kyaukdata Township, 2004), Vol. III (Yangon: Htet Sarpay, Kyaukdata Township, 2008).

<sup>11</sup> Maung Maung, *Burma's Constitution*, First Edition (The Hague, Martinus Nijhoff, 1959) 158.

The High Court of Judicature at Yangon was the superior court for the British Burma Province. It was composed of a Chief Justice and ten puisne judges, of whom at least one third had to be barristers. It had jurisdiction as the highest court of civil appeal, criminal appeal and revision over the whole of Burma except over Shan State and other frontier areas. It was also the Court of Session and the principal civil court of original jurisdiction for the city of Yangon.

Leading Myanmar lawyers and judges were trained in England and they imbued the post-independence constitution with the concept of the rule of law, which was very strong in the English legal tradition.

### *Post-independence*

In the initial post-independence era, the courts were instituted according to the Constitution and Union Judiciary Act of 1948. The Supreme Court and the High Court replaced the former High Court of Judicature, with the changes required by the new Constitution. The Constitution provided that all judges should be independent in the exercise of their judicial functions and subject only to the constitution and the law. The Union Judiciary Act provided for the appointment of five judges for the Supreme Court, but from 1955 onwards, there were only four. It was the court of final appeal from all courts within the union, but leave to appeal had first to be obtained from the High Court. The High Court had original jurisdiction for the city of Yangon and in all matters relating to the interpretation of the Constitution, and in all disputes between the Union and one of its units, or between one unit and another. It was also the principal court of appeal in both criminal and civil cases.

There were four classes each of criminal and civil courts. Criminal courts comprised Courts of Session, Magistrates of the First Class, Magistrates of the Second Class, and Magistrates of the Third Class. Civil courts comprised District Courts, Additional District Courts, Sub-divisional Courts, and Township Courts.<sup>12</sup>

Besides these courts, there were the City Civil Court at Yangon, the Small Causes Courts in certain places and other special civil courts constituted under special Acts. In criminal matters, besides the Sessions Courts and Magistrate Courts, there were Juvenile Courts, Special Crime Courts, and Special Crime Appellate Courts. Such courts were established under the Special Crimes Courts Act.

### *Revolutionary Council*

On March 2, 1962, the Revolutionary Council took over state power, and legislative, executive and judicial powers were vested in the hands of the Chairman of the Revolutionary Council. The Council declared socialism as the aim of the state. In July 1971, a decision was

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<sup>12</sup> Ibid 157-158.

made by the first Convention of the Burma Socialist Programme Party to draw a new Constitution. In October 1973, a new draft of the Constitution of the Socialist Republic of the Union of Burma was adopted by the party Convention, and ratified by the referendum which was held in December 1973. It came into force on January 3, 1974. The Council of People's Justice was the highest organ of the judiciary. Members were nominated and appointed by the Pyithu Hluttaw. The Central Court was the final appellate court of the country. Various subordinate courts included the State and Division People's Courts, Township People's Courts, and Ward and Village Tract People's Courts.

People's Courts consisted of members of the People's Councils of various levels. People's Attorneys were responsible to assist the People's Courts, and protected the legal interest of the people.<sup>13</sup>

### *Present-day Myanmar*

In present-day Myanmar, the judicial system is established under the 2008 Constitution and the 2010 Union Judiciary Law. Under the Judiciary Law, the judicial principles underlying the administration of justice are:

- to administer justice independently according to law;
- to dispense justice in open court unless otherwise prohibited by law;
- to obtain the right of defence and the right of appeal under the law;
- to support in building of the rule of law and regional peace and tranquility by protecting and safeguarding the interests of the people;
- to educate the people to understand and abide by the law, and to nurture the habit of abiding by the law;
- to cause to compound and complete cases within the framework of the Law for the settlement of cases among the public; and
- to aim at reforming moral character in meting out punishment to offenders.<sup>14</sup>

The courts are organised into four levels. Under the Supreme Court of the Union at the top, there are 14 State and Regional Courts (also known as State or Divisional Courts), 67 District and Self-Administered Area Courts, and 342 Township Courts at the lowest level. There are also other Courts established by law, such as Juvenile Courts,<sup>15</sup> Courts to try Municipal Offences<sup>16</sup> and Courts to try Traffic Offences.<sup>17</sup>

Most cases begin in Township Courts (the lowest level) or District Courts, and decisions of these courts may be appealed to a High Court, also known as the State or

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<sup>13</sup> The Constitution of the Socialist Republic of the Union of Burma (Rangoon: Printing and Publishing Corporation, 1974) 28.

<sup>14</sup> Union Judiciary Law 2010, s 3.

<sup>15</sup> Child Law 2003, s 40.

<sup>16</sup> City of Yangon Development Law 1990, s 25; City of Mandalay Development Law 2002, s 30.

<sup>17</sup> The Directives of Supreme Court, No. 90/- 14(c) 60/93.

Divisional Court, and ultimately to the Supreme Court. The Supreme Court also has original jurisdiction in certain matters as set out in Section 295 of the Myanmar Constitution. The Supreme Court is the highest court of the Union, although this does not impact upon the powers of the Constitutional Tribunal and the Courts-Martial.<sup>18</sup> It is constituted by a Chief Justice and a minimum of seven to a maximum of 10 judges. It has judicial officers who undertake research and provide assistance to the Supreme Court judges. In addition, law officers, appointed by the Attorney General's office, act as public prosecutors in all courts.<sup>19</sup>

The Supreme Court is the court of final appeal and has appellate jurisdiction to decide judgments passed by State and Regional High Courts, and judgments of the other courts in accordance with the law. It is authorized to issue five writs: Habeas Corpus, Mandamus, Prohibition, Quo Warranto, and Certiorari.<sup>20</sup> In accordance with the law, it also has the power of revision and the power to call for the record of any case decided in a subordinate court and issue a new decision.<sup>21</sup> Only the Supreme Court has original jurisdiction over:

- (i) matters arising out of bilateral treaties concluded by the Union;
- (ii) other disputes, except constitutional problems between the Union Government and the Region or State Governments; or iii) constitutional problems among the Regions, among the States,,between the Region and the State, and between the Union Territory and the Region or the State;
- (iv) other matters as prescribed by any law.<sup>22</sup>

The Supreme Court, sitting as a full bench may, if necessary, adjudicate on any case decided by the Supreme Court sitting with a single judge or with a bench of judges less than a full bench, as prescribed by the Chief Justice.

State and Regional High Courts are responsible for the supervision of subordinate courts. There are a minimum of three and a maximum of seven judges (including the Chief Justice) in a High Court of the Region or a High Court of the State. State and Regional High Courts have jurisdiction over:

- (i) original civil and criminal cases;
- (ii) appeals cases;
- (iii) revision cases;
- (iv) other cases prescribed by any law.<sup>23</sup>

The High Court of the Region or State may, in exercising its jurisdiction, adjudicate on cases by a judge or a bench consisting of more than one judge as determined by the Chief

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<sup>18</sup> Union Judiciary Law 2010, s 25; Constitution of the Republic of the Union of Myanmar 2008, s 293-294.

<sup>19</sup> Attorney-General's Law 2010, s 14.

<sup>20</sup> Constitution of the Republic of the Union of Myanmar 2008, s 296.

<sup>21</sup> Union Judiciary Law 2010, s 13 and 15.

<sup>22</sup> Constitution of the Republic of the Union of Myanmar 2008, s 295(A).

<sup>23</sup> Union Judiciary Law 2010, s 38.



Justice of the Region or State. District Courts and Courts of the Self-Administered Areas, in accordance with law, have jurisdiction over original criminal cases, original civil cases, appeals cases, revision cases or matters prescribed by any law. Township Courts deal mainly with petty criminal matters and low monetary value civil matters. District and Township Courts may, in exercising jurisdiction, adjudicate on cases with a single judge or by a bench, in accordance with the Chief Justice of the Region or State.

Other courts can be established either under special provisions in any law or in respect of those cases which occur irregularly in central areas. Separate courts especially constituted by the Supreme Court to achieve speedy and effective trial under some special laws include Juvenile Courts, Courts to try Municipal Offences, and Courts to try Traffic Offences.<sup>24</sup>

In 1993, the State Law and Order Restoration Council (SLORC) enacted the Child Law. The law was adopted to implement the rights of the child in the United Nations Convention on the Rights of the Child, which Myanmar ratified in 1991. In accordance with the Child Law, Township Courts are conferred with powers to try juvenile offences. Two Juvenile Courts were set up to try juvenile cases in Yangon and Mandalay, respectively. After consultation with the Yangon City Development Committee, seven courts were opened to try municipal offences, such as violating the provisions of City of Yangon Municipal Act, Rules, By-Laws, Orders and Directions still in force and those under Yangon City Development Law. Four courts were also established in Mandalay after consultation with the Mandalay City Development Committee to try municipal offences. Last, seven courts in Yangon and two courts in Mandalay were set up in consultation with the Traffic Rules Enforcement Supervision Committee to handle violations of vehicle rules and road discipline.<sup>25</sup>

Courts-Martial and the Constitutional Tribunal of the Union have also been constituted in accordance with the Constitution and other laws. Courts-Martial adjudicate cases involving Defence Services personnel.<sup>26</sup> The Constitutional Tribunal of the Union has nine members including the Chairperson and has the following functions:

- (i) interpreting the provisions under the Constitution;
- (ii) vetting whether the laws promulgated by the Pyidaungsu Hluttaw (Union Parliament), the Region Hluttaw, the State Hluttaw or the Self-Administered Division Leading Body and the Self-Administered Zone Leading Body are in conformity with the Constitution or not;
- (iii) vetting whether the measures of the executive authorities of the Union, the Regions, the States, and the Self-Administered Areas are in conformity with the Constitution or not;
- (iv) deciding Constitutional disputes between the Union and a Region, between the Union and a State, between a Region and a State, among the Regions, among the

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<sup>24</sup> The Judicial System and Court Proceedings in Myanmar, Japan Ministry of Justice Website, 26 <[www.moj.go.jp/content/000101543.pdf](http://www.moj.go.jp/content/000101543.pdf)> accessed 10 December 2013.

<sup>25</sup> Ibid 26-29.

<sup>26</sup> Constitution of the Republic of the Union of Myanmar 2008, s 319.

- States, between a Region or a State and a Self-Administered Area and among the Self-Administered Areas;
- (v) deciding disputes arising out of the rights and duties of the Union and a Region, a State, or a Self-Administered Area in implementing the union law by a Region, State or Self-Administered Area;
  - (vi) vetting and deciding matters intimated by the President relating to the Union Territory;
  - (vii) functions and duties conferred by laws enacted by the Pyidaungsu Hluttaw.<sup>27</sup>

### **3. Appointment and Qualification of Judges**

#### *Supreme Court*

In order to appoint the Chief Justice of the Union, the President submits his nomination to the Pyidaungsu Hluttaw and seeks its approval. Then, he appoints the person who has been approved by the Pyidaungsu Hluttaw as the Chief Justice of the Union. In co-ordination with the Chief Justice of the Union, the President submits his nominations of persons to be appointed as Judges of the Supreme Court of the Union to the Pyidaungsu Hluttaw for approval. The President then appoints the persons approved by Pyidaungsu Hluttaw as Judges of the Supreme Court of the Union.<sup>28</sup> A person appointed as Chief Justice of the Union or Judge of the Supreme Court of the Union must not be younger than 50 years and not older than 70 years of age; have served as a Judge of the High Court of the Region or State for at least five years; or have served as a Judicial Officer or a Law Officer for at least 10 years not lower than the level of the Region or State level; or have practiced as an Advocate for at least 20 years; or who is, in the opinion of the President, an eminent jurist. The Chief Justice of the Union or Judge of the Supreme Court of the Union shall not be a member of a political party nor a Hluttaw representative. The Term of the Chief Justice of the Union and Judges of the Supreme Court of the Union is up to the age of 70 years.<sup>29</sup>

#### *High Court*

The President, in co-ordination with the Chief Justice of the Union and the Chief Minister of the Region or State concerned, prepares the nomination for the appointment of the Chief Justice of the High Court of that Region or State. In coordination with the Chief Justice of the Union, the Chief Minister of that Region or State prepares the nomination for the appointment of the Judges of the High Court of the Region or State and the nomination is sent to the respective Region or State Hluttaw. The President appoints persons approved by the Region or State Hluttaw as the Chief Justice of the High Court of the relevant Region or State and Judges of the High Court of that Region or State.<sup>30</sup>

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<sup>27</sup> Ibid s 322.

<sup>28</sup> Ibid s 299(c)-(d).

<sup>29</sup> Ibid ss 301 and 303.

<sup>30</sup> Ibid s 308.

The Chief Justice or Judge of the High Court of the Region or State must be a person who is not younger than 45 years and not older than 65 years of age. Professional requirements include service as a Judicial Officer or Law Officer for at least five years at a level not lower than that of the Region or State level or as a Judicial Officer or Law Officer for at least ten years at a level not lower than that of the District level; or who has practiced as an Advocate for at least 15 years; or who is, in the opinion of the President, an eminent jurist. The Chief Justice and Judges of the High Court of the Region or State cannot be members of a political party nor Hluttaw representatives.<sup>31</sup> The term of the Chief Justice and Judges of the High Court of the Region or State is up to the age of 65 years, unless the Justice or Judges resign, are impeached, or are otherwise mentally or physically unable to continue their service.<sup>32</sup> Judges of the District Courts, Township Courts, and Courts of the Self-administered Areas are appointed in accordance with the law under the supervision of the High Court of the Region or State concerned.<sup>33</sup>

### *Constitutional Tribunal*

The President, the Speaker of the Pyithu Hluttaw, and the Speaker of the Amyotha Hluttaw each select three members for the Constitutional Tribunal, either from those who are nominated Hluttaw representatives or from non-Hluttaw representatives.<sup>34</sup> The President appoints the Chairperson and members of the Constitutional Tribunal of the Union approved by the Pyidaungsu Hluttaw.<sup>35</sup> Once a judge is appointed to the Constitutional Tribunal, he ceases to be a representative of the Hluttaw, or the Civil Service, or a member of a political party.<sup>36</sup> A member of the Constitutional Tribunal must have attained the age of 50 years. He or she must have served as a Judge of the High Court of the Region or State for at least five years, or have served as a Judicial Officer or a Law Officer for at least ten years at a level not lower than that of the Region or State level, or have practiced as an Advocate for at least 20 years, or must, in the opinion of the President, be an eminent jurist.<sup>37</sup> The term of the Constitutional Tribunal is five years. However, on expiry of its term, the Tribunal shall continue its functions until the President forms a new Tribunal under the Constitution.<sup>38</sup>

## **4. Civil Practice and Procedure**

Myanmar's legal system is an adversarial system. Matters are heard before a judge or bench of judges and argued by advocates or pleaders. The Code of Civil Procedure provides the main source of Myanmar's procedural rules regarding civil litigation. Advocates and pleaders also refer to the Courts Manual of 1960 and the Evidence Act of 1872. The practices

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<sup>31</sup> Ibid s 310.

<sup>32</sup> Ibid s 312.

<sup>33</sup> Ibid s 318.

<sup>34</sup> Ibid s 321.

<sup>35</sup> Ibid s 327.

<sup>36</sup> Ibid s 330.

<sup>37</sup> Ibid s 333.

<sup>38</sup> Ibid s 335.

and procedures of Myanmar courts were significantly influenced by English practices and procedures. Currently, Myanmar does not have a developed dispute resolution mechanism, though courts do conduct arbitration.<sup>39</sup> In general, Myanmar courts have jurisdiction to try all civil suits, except certain matters barred by law. The appropriate court in which to commence proceedings in Myanmar is dependent upon the type and value of the claim and the location of the parties or the place the business is in or act in question was carried out.

### *Powers of Courts and Jurisdiction*

The Supreme Court and the High Courts of the Region or State have unlimited pecuniary jurisdiction in an original civil suit. Other judges have jurisdiction as follows:

- (i) District Judge - Pecuniary Jurisdiction to try an original civil suit for a maximum value of 500 million Kyats (approximately USD 500,000);
- (ii) Deputy District Judge - Pecuniary Jurisdiction to try an original civil suit for a Maximum value of 100 million Kyats (approximately USD 100,000);
- (iii) Township Judge - Pecuniary Jurisdiction to try an original civil suit for a maximum value of ten million Kyats (approximately USD 10,000);
- (iv) Additional Township Judge - Pecuniary Jurisdiction to try an original civil suit for a maximum value of seven million Kyats (approximately USD 7,000);
- (v) Deputy Township Judge - Pecuniary Jurisdiction to try an original civil suit for a maximum value of three million Kyats (approximately USD 3,000).<sup>40</sup>

Suits for reacquisition of immovable property; for the partition of immovable property; for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property; for the determination of any other right to or interest in immovable property; for compensation for destroying immovable property; for reacquisition of immovable property actually under restraint or attachment must be instituted in the court within the local limits of whose jurisdiction the property is located. However, where relief can be entirely obtained through the defendant's compliance, a suit may be instituted either in the court within the local limits of whose jurisdiction the property is situated or in the court within the local limits of whose jurisdiction the defendant actually resides or carries on business or works.<sup>41</sup>

In case of other suits, including claiming compensation for a wrong act to the person or to moveable property, where such an act was done within the local limits of the jurisdiction of one court, and the defendant resides, or carries on business or works within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the

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<sup>39</sup> Alec Christie, *The Rule of Law and Commercial Litigation in Myanmar* (2000) 54  
<<http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/777/10PacRimLPolyJ047.pdf>> accessed 6 January 2014.

<sup>40</sup> Supreme Court's Order No. 100/2011 and 101/2011.

<sup>41</sup> The Code of Civil Procedure 1909 (amended in 1956, 2000, and 2008), s 16.

plaintiff in either of the relevant courts.<sup>42</sup> Where a suit is instituted in any one of two or more courts, any defendant, after notice to the other parties, can apply to have the suit transferred to another court at the earliest possible opportunity. The court to which such an application is made will determine in which court the suit will proceed.<sup>43</sup>

### *Transfer of Cases*

When the several courts having jurisdiction are subordinate to the same appellate court, an application shall be made to the appellate court. Where such courts are subordinate to different appellate courts, the application shall be made to the High Court.<sup>44</sup> The Supreme Court, or the State or Divisional Court (High Court) may at any stage transfer any suit, appeal, or other pending proceeding to any court subordinate to it to try or dispose of the case. Also, the Supreme Court, or the State or Divisional Court (High Court) may withdraw any suit, appeal, or other pending proceeding in any court subordinate to it, and try or dispose of the case itself, or transfer the case for trial or disposal to any court subordinate to it to try or dispose the case. It may also retransfer the same case for trial or disposal to the court from which it was withdrawn.<sup>45</sup>

### *Appeals*

An appeal can be made from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decision of such court passed *ex parte*. No appeal shall lie from a decree passed by the court with the consent of parties.<sup>46</sup> An appeal shall lie with the Supreme Court from every decree passed in appeal by the State or Divisional Court (High Court), on any of the following grounds:

- (i) the decision being contrary to law or to some usage having the binding force of law;
- (ii) the decision having failed to determine some important issue of law or usage having the binding force of law;
- (iii) a substantial error or defect in the procedure provided by law, which may possibly have produced error or defect in the decision of the case;
- (iv) in a suit where the amount of claim or value of the subject-matter of the original suit exceeds 2 million kyats (approximately USD 2,000);
- (v) an appeal may lie under this section from an appellate decree passed *ex parte*.<sup>47</sup>

An appeal can also arise from the orders made under rules from which appeal is expressly allowed by rules.<sup>48</sup> An appeal can lie in the court to which an appeal could lie from the decree, or where such order is made by the District Court or the State or Divisional Court

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<sup>42</sup> Ibid s 19.

<sup>43</sup> Ibid s 22.

<sup>44</sup> Ibid s 23.

<sup>45</sup> Ibid s 24.

<sup>46</sup> Ibid s 96.

<sup>47</sup> Ibid s 100.

<sup>48</sup> Ibid s 104(1)

(High Court) in the exercise of appellate jurisdiction, then to the immediately higher court. An appellate court has the power to determine a case finally; to remand a case; to frame and make reference to the issues for trial; to take additional evidence or to require additional evidence to be taken. It also has the same powers and performs the same duties imposed on courts of original jurisdiction in respect of suits instituted therein.<sup>49</sup>

An appeal can be made to the Supreme Court from any decree or final order passed by the High Court or by any other court of final appellate jurisdiction; from any decree or final order passed by the High Court in the exercise of its original civil jurisdiction; and from any decree or order when the case is certified to be fit for appeal to the Supreme Court. An appeal to the Supreme Court, against a decree or final order which has been affirmed by a lower court, must involve a substantial legal question.<sup>50</sup>

No appeal can lie in the Supreme Court from the decree or order of one judge or of two or more judges of the High Court or any other Courts constituted by more than two judges, where such judges are equally divided in opinion and do not amount in number to a majority of the whole of the judges. Also, no appeal can lie in the Supreme Court from any decree from which no second appeal is allowed by law.<sup>51</sup>

#### *Execution of Decrees*

The execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders. A decree may be executed either by the court which passed it or by the court to which it is sent for execution. The court which passed a decree may, on the application of the decree-holder, send it for execution to another court. The court executing a decree sent to it shall have the same power in executing such decree as if it had been passed itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal.<sup>52</sup> The court may order to execute the decree in the following manner, subject to the rules and regulations as may be prescribed:

- (i) by delivery of any property especially decreed;
- (ii) by sale with attachment or without attachment of any property;
- (iii) by arrest and detention in prison;
- (iv) by appointing a receiver or;
- (v) in other manners as the nature of its relief may require.

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<sup>49</sup> Ibid ss 106-107.

<sup>50</sup> Ibid ss 109-110.

<sup>51</sup> Ibid s 111.

<sup>52</sup> Ibid ss 6, 38, 39, and 42.

However, where the decree is for the payment of money, execution by detention in prison cannot be ordered without giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison.<sup>53</sup>

### *Processes for Review*

Any court can state and refer a case to the Supreme Court to get an opinion. Any person considering himself aggrieved can apply for a review of judgment to the court which passed the decree or made the order. The Supreme Court, or the State or Divisional Court (High Court), or the District Court may call for the record of any case which has been decided by any court subordinate to them and in which no appeal is pending. However, this rule is inapplicable to the record of any case which has been decided by any court in the exercise of its revision power or appellate jurisdiction. Moreover, these requirements do not affect the power of the Supreme Court in the exercise of its revision power.<sup>54</sup>

## **5. Criminal Practice and Procedure**

### *Basic Principles*

For trial of criminal cases, judges at all levels must comply with existing laws, including the Code of Criminal Procedure and the Law of Evidence. All criminal courts in Myanmar must adhere to the established procedure and practice of admitting documentary and material evidence and examining witnesses, complainants, and the accused. The Public Prosecutors may be appointed generally or for any specified cases in any local area by the President of the Union or Attorney-General.<sup>55</sup> Any person who committed an offence can be convicted only under the relevant existing law at the time of its commission. In addition, the accused cannot be sentenced with a penalty more than that which is applicable under the relevant law. No penal law shall have retroactive effect.<sup>56</sup> If a person is convicted or acquitted by a competent court for an offence, he cannot be retried for such offence unless a superior court sets aside such convicting or acquitting judgment and passes an order for retrial.

### *Powers of the Criminal Courts*

The Supreme Court, High Courts of the Region and the State, Courts of Self-Administered Areas, District Courts, and Township Courts possess distinct powers to adjudicate the criminal cases. Judges of the Self-Administered Areas and District Judges have the power of Sessions Judges, those who preside in the Session Courts.<sup>57</sup> Furthermore,

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<sup>53</sup> Ibid s 51.

<sup>54</sup> Ibid ss 113, 114 and 115. Section 115 concerning the power of the Supreme Court was amended in 2000 and 2008.

<sup>55</sup> Attorney General's Law 2010, s 14 and Code of Criminal Procedure 1898, s 492.

<sup>56</sup> Attorney General's Law 2010, s 14.

<sup>57</sup> Supreme Court's Order No. 128/2011, cl 1, in *Orders, Directives, and Requisition Orders of Supreme Court* (Yangon: Supreme Court of the Republic of the Union of Myanmar, 2012) (in Burmese).

Township Judges, Additional Township Judges, and Assistant Township Judges are conferred with the power of Magistrate.<sup>58</sup>

In accordance with the Code of Criminal Procedure, a Supreme Court Judge may pass any sentence authorised by law. A High Court Judge, District Judge or Judge of Self - Administered Area (Sessions Judge or Additional Sessions Judge) may pass any sentence authorised by law, but any sentence of death is subject to confirmation by the Supreme Court. The Deputy District Judge may pass any sentence authorized by law, except a sentence of death or of transportation (banishment to a penal colony) for a term exceeding seven years. A Township Judge may pass sentence of up to seven years imprisonment whereas an Additional Township Judge, if he is especially empowered with such special magisterial powers, may pass sentences not exceeding seven years. Deputy Township Judges can impose sentences according to their magisterial powers.<sup>59</sup>

### *Jurisdiction*

An offence is ordinarily tried by a Court within the local limits of whose jurisdiction the offence or its consequences took place.<sup>60</sup> However, the President of the Union may direct that any cases committed for trial in any district to be tried in any Sessions Division, provided that such direction is not counter to any direction previously issued by the Supreme Court under section 526 of the Code of Criminal Procedure. Places of trial are distinct depending on the types of offences: such as thuggery, committing murder, dacoit, having escaped from custody, theft, having committed an offence on a journey, kidnapping and abduction, criminal misappropriation, and criminal breach of trust. Whenever a question arises as to which of two or more courts subordinate to the High Court ought to inquire into or try an offence, it shall be decided by the High Court.<sup>61</sup>

### *Summons, Warrants, Bail*

The Township Judge, Additional Township Judge or Deputy Township Judge (District Magistrate, Sub-divisional Magistrate, or Magistrate) especially empowered by the President of the Union has the power to issue summons or warrants for offences committed beyond local jurisdiction. He or she may also inquire into the offence as if it had been committed within local limits, or send the accused to the Magistrate having jurisdiction to inquire into or try the offence. If the offence is bailable, a bond with or without sureties for his appearance may be allowed before such Magistrate. If the person has been arrested under a warrant issued by a Magistrate who does not have the jurisdiction to try the case, the Magistrate must send the arrested person to the District or Sub-divisional Magistrate to whom he is subordinate. However, if the Magistrate having jurisdiction to inquire into or try the case issues a warrant for the arrest of such person, the arrested person shall be delivered to

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<sup>58</sup> Ibid, Supreme Court's Notification No. 388/---/2011, cl 1-2.

<sup>59</sup> Code of Criminal Procedure 1898, ss 31-32.

<sup>60</sup> Ibid ss 177-179.

<sup>61</sup> Code of Criminal Procedure 1898, s 185.



the police officer who executes such warrant, or shall be sent to the Magistrate by whom such warrant was issued. If the offence is one which may be inquired into or tried by any criminal court in the same district other than that of the Magistrate who issues the warrant, the Magistrate shall send the person to that criminal court.<sup>62</sup>

Any District Magistrate or Sub-divisional Magistrate, and any other Magistrate especially empowered may take cognizance of any offence upon receiving a complaint that includes the facts constituting the offence, or upon a report of the relevant facts written by any police officer, or upon information received from any person other than a police officer, or upon the Magistrate's own suspicion that an offence has been committed.<sup>63</sup>

### *Cognizance and Transfer of Cases*

The President of the Union, or the District Magistrate subject to the general or special orders of the President, may empower any Magistrate to take cognizance of offences which he may try or commit for trial. The accused may apply for transfer of cases that are brought by information from non-police officers or based on the Magistrate's own suspicion. Such cases will be transferred to another Magistrate or be committed to the Court of Session.<sup>64</sup>

Any District Magistrate may empower any Magistrate of the first class who has taken cognizance of any case to transfer the case to any other specified Magistrate in his district who is competent to try the accused. The High Court or Court of Session shall take cognizance of any offence as a court of original jurisdiction when the accused has been committed to it by a Magistrate whose power of jurisdiction is provided by law. Additional Sessions Judges and Assistant Sessions Judges will try these cases based on a general or special order by the President of the Union, or as the Sessions Judge of the division, by general or special order, may make over to them for trial.<sup>65</sup>

The Supreme Court may take cognizance of any offence where the Attorney-General, with the sanction of the President, provides information to the Supreme Court against an accused subject to the Court's jurisdiction. Proceedings may be taken upon all such information so far as the circumstances of the case and the practice and procedure of the Supreme Court will admit. All fines, penalties, forfeitures, debts and sums of money recovered by virtue of the information belong to the Union.<sup>66</sup>

### *Judgments and Sentencing*

The judgment in every trial in any criminal court of original jurisdiction must be pronounced or the substance of the judgment must be explained in open court. It must be

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<sup>62</sup> Ibid ss 186-187.

<sup>63</sup> Ibid s 190.

<sup>64</sup> Ibid ss 190-191.

<sup>65</sup> Ibid ss 192-193.

<sup>66</sup> Ibid s 194.

made either immediately following the trial or at some subsequent time of which notice shall be given to the parties or their pleader.<sup>67</sup> No court, when it has signed its judgment, can alter or review the judgment, except to correct a clerical error or as provided by law.<sup>68</sup> When the accused is sentenced to death by a Sessions Judge, the judge must inform him of the period within which he or she can appeal.<sup>69</sup>

When the High Court or Court of Session passes the sentence of death, the sentence cannot be executed unless it is confirmed by the Supreme Court.<sup>70</sup> However, no order of confirmation shall be made until the period allowing for preferring an appeal has expired, or if an appeal is presented within such period, until the appeal is disposed of. After receiving the order of confirmation or any order of the Supreme Court regarding the case, the Court of Session must issue a warrant or take other necessary steps to enable the sentence to be carried out.<sup>71</sup> Where the accused is sentenced to transportation (transfer to a penal colony) or imprisonment, the court passing the sentence must immediately forward a warrant to the jail in which he is or is to be confined. If the accused is not already confined in such jail, the court must forward him to such jail with the warrant.<sup>72</sup>

Whenever an offender has been sentenced to pay a fine, the court passing the sentence may take action for the recovery of the fine in the following ways:

- issue a warrant for the recovery of the amount by sale with attachment of any moveable property which belongs to the offender;
- issue a warrant to the Collector of the District authorising him to seize the amount according to Civil Process against the offender's moveable or immovable property.<sup>73</sup>

When a sentence has been fully executed, the officer executing it must return the warrant to the court from which it was issued with an endorsement certifying the manner in which the sentence has been executed.<sup>74</sup>

### *Appeals*

No appeal can be made from any judgment or order of a criminal court except for those circumstances specified under the Code of Criminal Procedure or by any other law for the time being in force.<sup>75</sup> Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under section 349 or section 562, sub-section 5 of the Criminal Procedure Code by a Sub-divisional Magistrate of the second class, may appeal to the District Magistrate. The District Magistrate may direct that any appeal shall be

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<sup>67</sup> Ibid s 366.

<sup>68</sup> Ibid s 369.

<sup>69</sup> Ibid s 371(3).

<sup>70</sup> Ibid s 374.

<sup>71</sup> Ibid s 381.

<sup>72</sup> Ibid s 383.

<sup>73</sup> Ibid s 386.

<sup>74</sup> Ibid s 400.

<sup>75</sup> Ibid s 404.

heard by any Magistrate of the first class subordinate to him and, by any Magistrate empowered by the President of the Union to hear such appeal. The District Magistrate may withdraw any appeal so presented or transferred. Any person convicted on a trial held by an Assistant Sessions Judge, or a District Magistrate, or other Magistrate of the first class, and any person sentenced under section 349 or section 562, sub-section 5 by a Magistrate of the first class may appeal to the Court of Session.<sup>76</sup> Any person convicted in a trial held by a High Court, a Sessions Judge, or an Additional Sessions Judge, may appeal to the Supreme Court.<sup>77</sup> There is no appeal in certain cases when the accused pleads guilty, or in petty cases, or from certain summary convictions.<sup>78</sup>

The President of the Union may direct the Public Prosecutor to present an appeal to the Supreme Court from an original or appellate order of acquittal passed by any court other than the Supreme Court. An appeal may lie on a matter of fact as well as a matter of law. However, when the trial is held by jury, the appeal shall lie on a matter of law only. When any person is sentenced to death in the case of a trial by jury, any other person convicted in the same trial may appeal on a matter of fact as well as a matter of law.<sup>79</sup>

If the appellate court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily. No appeal can be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of such appeal. Before dismissing an appeal, the court may call for the record of the case, but it is not bound to do so. If the appellate court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the President of the Union may appoint, specifying the time and place at which such appeal will be heard. And in the case of an appeal by an accused, the appellate court shall cause a like notice to be given to the accused.<sup>80</sup> After reviewing the record and hearing both parties, besides dismissal, the court may take the following actions:

- In an appeal from an order of acquittal, the appellate court may reverse such order and may direct to make further inquiry or to send the accused to be retried. If the appellate court finds him guilty, it shall pass sentence on him according to law;
- In an appeal from a conviction, the appellate court may reverse the finding and sentence, and may discharge the accused or order him to be retried by a court of competent jurisdiction which is subordinate to such appellate court or to be committed for trial. The appellate court may alter the finding and maintain the sentence; or with or without altering the finding, it may reduce the sentence; or with or without such reduction and altering the finding, it may alter the nature of the sentence; but subject to the provisions of section 106 of the Criminal Procedure Code, it may not enhance the sentence;

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<sup>76</sup> Ibid ss 407-408.

<sup>77</sup> Ibid s 410.

<sup>78</sup> Ibid ss 412-414.

<sup>79</sup> Ibid ss 417-418.

<sup>80</sup> Ibid ss 421-422.

- In an appeal from any other order, the appellate court may alter or reverse such order;
- The appellate court may make any amendment or, any consequential or incidental order which seems to be just or proper.

The court cannot alter or reverse the verdict of a jury (if any) unless the verdict is erroneous owing to a mistake of the Judge or to a misunderstanding by the jury of the Judge's explanation.<sup>81</sup>

Whenever the High Court decides an appeal case, it shall certify its judgment or order, and send it to the court by which the finding, sentence or order, appealed against was recorded or passed. If the finding, sentence, or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate. The court to which the High Court certifies its judgment or order, must then make the order conformable to the judgment or order of the High Court, and if necessary, the record shall be amended.<sup>82</sup>

The appellate court, if it thinks additional evidence is necessary, must record its reasons and may either take such evidence itself or direct it to be taken by a Magistrate. When the appellate court is the High Court the appellate court may direct that the evidence be taken by a Court of Session or a Magistrate. Unless the appellate court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken, but the evidence cannot be taken in the presence of juries.<sup>83</sup>

When the judges composing the Court of Appeal are equally divided in their opinions, the case must be brought before another judge of the same court, and such judge after hearing the case must deliver his opinion, followed by a judgment or order. Judgments and orders passed by an appellate court upon appeal are final, except in cases provided for in certain laws.<sup>84</sup>

### *Reservation and Revision of Cases*

When any person has been convicted of an offence in a trial before a judge of the High Court acting in the exercise of its original criminal jurisdiction, the judge, if he thinks fit, may reserve any question of law which has arisen in the course of the trial, and refer it for decision to a court consisting of two or more judges. The High Court shall have the power to review the case and finally determine the question, and to alter the sentence and pass judgment or make an order as it thinks fit. The High Court or any Sessions Judge or District Magistrate or any sub-divisional Magistrate may call for and examine the record of any proceeding of any inferior criminal court situated within the local limits of its jurisdiction. This is for the purpose of satisfying itself as to the correctness, legality, or propriety of any

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<sup>81</sup> Ibid s 423.

<sup>82</sup> Ibid s 425.

<sup>83</sup> Ibid s 428.

<sup>84</sup> Ibid ss 429-430.

finding, sentence, or order recorded or passed by the inferior court. Moreover, this is to examine the regularity of any proceedings of such inferior court. If any sub-divisional Magistrate considers that any such finding, sentence, or order is illegal or improper, or that any such proceeding is irregular, he shall forward the record with such remarks to the District Magistrate.<sup>85</sup>

On examining any record, the High Court or the Session Judge may direct the District Magistrate to make further inquiry and the District Magistrate may direct any subordinate Magistrate to do so. However, no court shall make any such direction for inquiry into the case of any person who has been discharged unless the person has had an opportunity of showing cause why such direction should not be made.<sup>86</sup> When the Sessions Judge or District Magistrate, on examining the record of any case, considers that the case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior court, the Sessions Judge or District Magistrate may order him to be committed for trial upon the matter of which he has been improperly discharged. However, the accused has an opportunity of showing cause to the Judge or Magistrate why the commitment should not be made.<sup>87</sup> The Supreme Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal or on a court by section 338 of the Criminal Procedure Code, and may enhance the sentence. When the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in a manner provided in section 429. No order shall be made using the revision power unless the accused has had an opportunity of being heard, either personally or by pleader.<sup>88</sup>

### *Crime Prevention and Pre-Trial Detention*

For the purpose of preventing crime, every police officer may interpose and prevent the commission of any cognizable offence to the best of his ability. Without orders or a warrant from a Magistrate, he may arrest the person who is going to commit any cognizable offence if it appears to such officer that the commission of the offence cannot be otherwise prevented. A police officer making an arrest without a warrant has to take or send the arrestee before the officer in charge of the police station without unnecessary delay. In the absence of a special order of a magistrate, in no case except as indicated below may the detention period exceed 24 hours, exclusive of the time necessary to reach the magistrate's court.<sup>89</sup> The detention must not exceed 30 days when a person is accused of an offence punishable with at least seven years of imprisonment, or 15 days if the charge concerns an offence punishable with a maximum of seven years imprisonment.<sup>90</sup> In case of a confession, a magistrate must explain to the person making the statement that he is not bound to make a confession and that

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<sup>85</sup> Ibid ss 434-435.

<sup>86</sup> Ibid s 436.

<sup>87</sup> Ibid s 437.

<sup>88</sup> Ibid s 439 (1)-(2).

<sup>89</sup> Ibid ss 60-61.

<sup>90</sup> Ibid s 167.

if he does so it may be used as evidence against him. Bail, bonds, and sureties are envisioned in the Criminal Procedure Code.<sup>91</sup>

## **6. Organisation of the Legal Profession and Legal Education**

In Myanmar, there are two classes of lawyers: advocates and pleaders. Advocates are authorised to practice in all courts including the Supreme Court while pleaders appear only in District and Township Courts. They are subdivided into two further categories: ordinary pleaders, who handle criminal matters and low level civil disputes, and higher grade pleaders, who can take on all types of cases. Advocates and higher grade pleaders are graduates of law departments from several universities, historically from the public universities at Yangon and Mandalay. Criminal prosecutions are conducted by law officers based in regional offices all over the country. All are subject to the direction of the Attorney-General, whose powers and duties are described in the Attorney-General of the Union Law of 2010. The President shall appoint the Attorney-General who has the qualifications prescribed in section 237 of the 2008 Constitution, with the approval of the Pyidaungsu Hluttaw. The Attorney-General gives advice to the government on legal matters and performs other duties of a legal character, as may, from time to time, be assigned to him by the President. He must work closely with the Executive.<sup>92</sup>

The Bar Council Act of 1929 provided for all advocates in the country to be represented and regulated by a 15-person Bar Council, comprising ten elected advocates, four nominees of the High Court, and the Attorney-General. However, a 1989 amendment to the Bar Council Act reduced the Bar Council's membership to eleven and stipulated that six advocates who remained were to be nominated by the Supreme Court. The Attorney-General was promoted from an ordinary member to chairman in 1989. The Bar Council operates independently of local bar associations, through which lawyers also pursue their professional interests. The 5292-member Yangon Bar Association is the strongest local bar association and there are also other local bar associations, law firms and legal networks. The Legal Practitioners Act of 1879 is mainly concerned with entry qualifications, practice, and discipline of pleaders.

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This paper aims to provide an introduction to the law and judicial system of Myanmar from the perspective of a Burmese law graduate. Recent reforms in Myanmar suggest that another chapter in the development of the country's legal system is unfolding. The Parliament's Lower House Committee on the Rule of Law, Peace and Tranquillity was instituted on August 7, 2012. Establishing a judicial system based on the principles of rule of law will be crucial for the country's transition to a democratic regime.

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<sup>91</sup> Ibid ss 496-502.

<sup>92</sup> Attorney-General's Law 2010, s 5.



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