The Republic of The Union of Myanmar
TABLE 1
SNAPSHOT

<table>
<thead>
<tr>
<th>Formal Name</th>
<th>Republic of the Union of Myanmar¹</th>
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</thead>
<tbody>
<tr>
<td>Capital City</td>
<td>Nay Pyi Taw</td>
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<tr>
<td>Independence</td>
<td>4 January 1948</td>
</tr>
</tbody>
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**Historical Background**

Parts of Myanmar became a British colony after the 1824-26 first Anglo-Burmese war and the second Anglo-Burmese war of 1852. The whole country was annexed into the British Indian Empire on 1 January 1886. The country was under military and one-party rule from 1962 to 1988 under General Ne Win. There was a massive uprising against the one-party government in 1988 and the military regime (then called the State Law and Order Restoration Council, later changed to State Peace and Development Council) took over power after crushing the uprising.

In the elections held in 1990, the main opposition party, the National League for Democracy (NLD), won a landslide victory. However, the military council refused to hand over power and continued to govern the country.

In 2008, the Constitution was adopted by referendum and elections were held on 7 November 2010 in which the Union Solidarity and Development Party supported by the military council won over 75 per cent of the seats in both houses of the legislature. U Thein Sein, former military General and Prime Minister, was appointed as President in 2011. NLD won in the by-election in 2012 and took seats in parliament.

The second general elections were held on 8 November 2015 and NLD won a landslide victory, securing 79 per cent of elected seats (59 per cent of all seats, including military representatives).² The NLD took over from the previous administration on 30 March 2016.

<table>
<thead>
<tr>
<th>Size</th>
<th>676,578 sq km²</th>
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<tbody>
<tr>
<td>Land Boundaries</td>
<td>Total: 6,522km</td>
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<tr>
<td></td>
<td>Border countries: Bangladesh 271 km, China 2,129 km, India 1,468 km, Laos 238 km, Thailand 2,416km⁴</td>
</tr>
<tr>
<td>Population</td>
<td>51.5million (2014 census)</td>
</tr>
</tbody>
</table>

¹ The name of the country was changed from “Burma” to “Myanmar” in 1989 by the State Law and Order Restoration Council (“SLORC”). This report will interchangeably use both Burma and Myanmar, since publications prior to 1989 used “Burma,” and some governments and authors still prefer to use “Burma” to this day.

² International Crisis Group, ’The Myanmar Elections: Results and Implications,’ Crisis Group Asia Briefing, No. 147, 9 December 2015.


⁴ Ibid.

### Demography
- 0-14 years: 26.07% (male 7,485,419/female 7,194,500)
- 15-64 years: 68.57% (male 19,190,212/female 19,429,009)
- 65 years and over: 5.36% (male 1,313,711/female 1,707,355)

### Ethnic Groups
- Burman 68%, Shan 9%, Karen 7%, Rakhine 4%, Chinese 3%, Indian 2%, Mon 2%, other 5%

### Languages
- Burmese (official); minority ethnic groups have their own languages

### Religion
- Buddhist 89%, Christian 4% (Baptist 3%, Roman Catholic 1%), Muslim 4%, Animist 1%, other 2%

### Adult Literacy
- Education Expenditure: 0.8% of GDP (2011)
- Literacy rate (age 15 and over, can read and write):
  - Total population: 93.1%
  - Male: 95.2%
  - Female: 91.2% (2015 estimates)

### Gross Domestic Product
- US$65.78 billion (2015 est)

### Government Overview
- Myanmar has a parliamentary government with a President indirectly elected by simple majority vote by the legislature’s Presidential Electoral College from among three vice presidential nominees (one each from the House of Nationalities, the House of Representatives, and military members of the legislature). The President is both chief of state and head of government.

- Executive Branch: On 10 March 2016, NLD nominated U Henry Van Thio as Vice President for Amyotha Hluttaw (House of Nationalities) and U Htin Kyaw as Vice President for Pyithu Hluttaw (House of Representatives). Representatives of the Defence Service nominated U Myint Swe as Vice President on 11 March 2016.

- On 15 March 2016, Myanmar’s parliament elected Htin Kyaw as the country’s next president, and he was sworn in with the members of his government on 30 March 2016.

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6 Supra note 3.
7 Ibid.
8 Ibid.
9 Ibid.
10 Ibid.
11 Ibid.
**Government Overview**

| Legislative Branch: The legislature is bicameral and consists of the Amyotha Hluttaw or the House of Nationalities (with 224 seats, 168 directly elected and 56 appointed by the military) and Pyithu Hluttaw or the House of Representatives (with 440 seats, 330 directly elected and 110 appointed by the military). |

| Judicial Branch: The President appoints and the Pyidaungsu Hluttaw (the joint houses of the legislature) approves the Chief Justice and six other Judges of the Supreme Court. There are also courts in the states, regions, self-administered zones, district courts and other courts. The Constitutional Tribunal and the Courts of Martial are established separately from the Supreme Court and vested with separate powers. |

**Human Rights Issues**

Myanmar is subject to the Special Procedures of the Human Rights Council, with a Special Rapporteur tasked to examine the situation of human rights in the country.

Identified human rights issues include arbitrary detention, freedom of expression, freedom of assembly, freedom of movement, access to justice, racial discrimination, discrimination against women, child labour, human trafficking, and land rights.

**Membership in International Organizations**

| Asian Development Bank (ADB), Association of Southeast Asian Nations (ASEAN), Association of Southeast Asian Nations Regional Forum (ARF), Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), Colombo Plan (CP), East Asia Summit (EAS), Extractive Industries Transparency Initiative (EITI) (candidate country), Food and Agriculture Organization (FAO), Group of 77 (G77), International Atomic Energy Agency (IAEA), International Bank for Reconstruction and Development (IBRD), International Civil Aviation Organization (ICAO), International Criminal Police Organization (Interpol), International Development Association (IDA), International Federation of Red Cross and Red Crescent Societies (IFRCS), International Finance Corporation (IFC), International Fund for Agricultural Development (IFAD), International Hydrographic Organization (IHO), International Labour Organization (ILO), International Maritime Organization (IMO), International Monetary Fund (IMF), International Olympic Committee (IOC), International Organization for Standardization (ISO) (correspondent), International Red Cross and Red Crescent Movement (ICRM), International Telecommunication Union (ITU), Nonaligned Movement (NAM), Organization for the Prohibition of Chemical Weapons (OPCW) (signatory), South Asian Association for Regional Cooperation (SAARC) (observer), United Nations (UN), United Nations Conference on Trade and Development (UNCTAD), United Nations Educational, Scientific, and Cultural Organization (UNESCO), United Nations Industrial Development Organization (UNIDO), Universal Postal Union (UPU), World Customs Organization (WCO), World Health Organization (WHO), World Intellectual Property Organization (WIPO), World Meteorological Organization (WMO), World Trade Organization (WTO) |

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14 Supra note 3.
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<tbody>
<tr>
<td></td>
<td>Convention on the Rights of Persons with Disabilities (accession: 7 December 2012)</td>
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<td></td>
<td>Worst Forms of Child Labour Convention (No.182) (ratification: 18 December 2013)</td>
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<tr>
<td></td>
<td>Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (accession: 30 March 2004)</td>
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<tr>
<td></td>
<td>Protocol against Smuggling of Migrants by Land, Sea and Air (accession: 30 March 2004)</td>
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<tr>
<td></td>
<td>Convention on Freedom of Association and Protection of the Right to Organize (ratification: 4 March 1955)</td>
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<td></td>
<td>Convention on Forced and Compulsory Labour (ratification: 4 March 1955)</td>
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<td></td>
<td>Treaty on Mutual Legal Assistance in Criminal Matters (ratification: 22 January 2009)</td>
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<td></td>
<td>ASEAN Convention on Counter Terrorism (ratification: 21 February 2012)</td>
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<td></td>
<td>ASEAN Convention against Trafficking in Persons (signature: 21 November 2015)</td>
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I. INTRODUCTION

Many unprecedented changes have taken place in Myanmar since 2011. After the Constitution was adopted in 2008, a new government was sworn in on the 31st of March 2011, ending the 50-year rule of an authoritarian government. The legislative power has been separated from the executive, although 25 per cent of parliament seats are occupied by representatives of the Defence Services.

Former President Thein Sein’s constructive engagement with Aung San Suu Kyi, opposition leader of National League for Democracy (NLD), led her party to contest 44 of the 45 available seats in the by-elections held in April 2012. NLD won 43 seats—almost all of the vacant seats in both House of Nationalities (alternatively referred to as Upper House) and House of Representatives (alternatively referred to as Lower House). Aung San Suu Kyi won a seat and became a member of the House of Representatives; she was eventually appointed to chair the Rule of Law and Tranquillity Committee of the House of Representatives in 2012. President Thein Sein also set a historic milestone and began peace negotiations with ethnic armed groups in August 2011, after more than six decades of internal armed conflict.15 His initiative resulted in the conclusion of 14 new bilateral ceasefire agreements from September 2011 to August 2013, followed by the signing of a Nationwide Ceasefire Agreement with eight ethnic armed groups on 15 October 2015.16

President Thein Sein’s government showed its willingness and readiness to engage with the international community in pursuit of democracy and federalism for the political and socioeconomic development of Myanmar. These tremendous positive changes were recognized by the international community, which resulted in the lifting of sanctions imposed by ILO in June 2013 and the reinstatement by the EU of trade preferences to Myanmar. In addition, President Thein Sein’s government repeatedly vowed to undertake four waves of reform in Myanmar. The legislative chambers also actively drafted bills, with the First Hluttaw enacting 229 laws during its five-year term, which ended on 29 January 2016.17 During this time, the parliament is seen to have matured in that it increasingly held members of the government accountable, and power rivalry between the executive department and legislators became stronger than ever despite the fact that majority of lawmakers were from the same ruling party. In 2012, for example, the Minister for Agriculture and Irrigation was forced to apologize in parliament for being quoted in the press as calling the members of parliament uneducated and ill-informed after they significantly cut the annual budget.

In November 2015, NLD won a landslide victory in the general elections and secured 59 per cent of the parliamentary seats in both legislative chambers, giving the NLD the majority that would allow it to control law-making and choose the next president.18 Among the first tasks of the new parliament was to approve a bill creating the position of “State Counsellor.” The role was designed for Daw Aung San Suu Kyi, who is prohibited from running for presidency by the Constitution because her children are foreign citizens, and grants her powers that commentators note are akin to those of a prime minister. The position allows her to coordinate the activities of Parliament and the executive branch. The law makes the State Counsellor accountable to the Parliament, with a term that coincides with that of the president “who has taken office for the term of the current second parliament.” During debates in each house of parliament,

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military representatives opposed the bill, claiming it violated the separation of powers as outlined in the Constitution. The bill was signed into law by President U Htin Kyaw on 6 April 2016. Aung San Suu Kyi also holds the positions of Minister of the President’s Office and Minister of Foreign Affairs.

**Human Rights Treaties**

Myanmar acceded to the Convention on the Rights of Persons with Disabilities on 7 December 2012 and signed the International Covenant on Economic, Social and Cultural Rights on 16 July 2015. In 2015, during the Universal Periodic Review process, Myanmar revealed that it is considering signing the Convention against Torture, and necessary preparatory measures have been undertaken with relevant stakeholders and organizations. Myanmar is subject to country-specific Special Procedures, which requires Myanmar to fulfil the Special Rapporteur’s recommendations as contained in the reports to the Human Rights Council and UN General Assembly.

**Foundation & Evolution of Rule of Law**

For many decades, Myanmar was ruled by a military government. Previous governments considered rule of law as rule and order through obedience by everyone in the country without protesting or criticizing the government and military. In the past, the emphasis had been on rule by law and the legal system was “mostly used as an instrument of social control.” This has led to a widespread lack of understanding of rule of law and lack of trust in the state legal system. However, as Myanmar transforms itself into a democratic country, the government and the parliament are trying to define the rule of law by reviewing functions of the judicial, administrative and legislative organs. In this light, the Rule of Law and Tranquillity Committee of the lower house prepared a paper on “Rebuilding Rule of Law in Myanmar” in 2012. A Rule of Law Coordinating Committee comprised of representatives from all three branches of government was also formed in 2013. The Coordinating Committee has been working closely with the United Nations Development Programme (UNDP) to plan a justice reform strategy and to establish Rule of Law Centres in Myanmar. At the time of writing, four Rule of Law Centres have been opened in Mandalay, Shan, Kachin and Yangon. While various international NGOs and civil society organizations together with donors are assisting to improve rule of law in Myanmar, there are still several shortcomings as discussed below.

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22 Ibid.

23 Ibid.
# TABLE 2
ADMINISTRATION OF JUSTICE GRID

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Figure</th>
</tr>
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<tbody>
<tr>
<td>No. of judges in country</td>
<td>All categories: 1,200(^{24})</td>
</tr>
<tr>
<td>No. of lawyers in country</td>
<td>High Grade Pleaders: 40,000 licensed; 15,000 in active practice. Law graduates can become a High Grade Pleader after one year in chamber. No course or examination is needed. Advocates: 9,000 licensed; 2,000 in active practice. Advocates are the highest classification for private sector lawyers. High Grade Pleaders become eligible to become Advocates after spending three years in practice and showing that they have provided representation in at least seven cases. No formal exam or course is needed.(^{25}) Advocates are authorised to practice in all courts including the Supreme Court while High Grade Pleaders can appear only in District and Township Courts.(^{26})</td>
</tr>
<tr>
<td>Annual bar intake (including costs and fees)</td>
<td>Upon approval of the application to practice as an advocate, stamp duty of 30,000 kyat (US$25) is payable to the Supreme Court and membership fee of 2,500 kyat (US$2) is payable to the Bar Council chaired by the Union Attorney General.</td>
</tr>
<tr>
<td>Standard length of time for training/qualification</td>
<td>Law school programs are for five years. Law graduates become High Grade Pleaders only after one year in chamber. To become judges and prosecutors, law graduates can take the examinations organized by the Office of the Supreme Court of the Union for township judges and by the Union Attorney General's Office for prosecutors/law officers at township level. Once they pass the written exam and interview, they will join the Attorney General's Office and the Office of the Supreme Court of the Union, and will undergo recruitment training by the Union Civil Service Board as well as basic trainings for judges and law officers by the respective recruiting authorities.</td>
</tr>
<tr>
<td>Availability of post-qualification training</td>
<td>Prosecutors and judges are provided with a short term one-month training to introduce them to their job after entry into each office. Lawyers have to find their own supervisors or mentors to learn how to practise their profession. There is no formal post qualification training.</td>
</tr>
<tr>
<td>Average length of time from arrest to trial (criminal cases)</td>
<td>Two to three months from arrest to trial depending on the attendance of witness, caseload of the court, and availability of the judge.(^{27})</td>
</tr>
</tbody>
</table>

\(^{24}\) Ibib.  
\(^{25}\) Ibid.  
\(^{27}\) Interview with practicing lawyer.
| **Average length of trials (from opening to judgment)** | **For criminal cases: From three months to a year, depending on the complexity of the case.**  
**For civil cases: One year to three years. Some cases may take longer.** |
|---|---|
| **Accessibility of individual rulings to public** | **The township, district and divisional court judges read out the judgement in the court and copy of judgment will be made available to anyone, including media, upon application with fees.**  
**Only selected Supreme Court decisions are compiled in the Myanmar Law Reports, which are published yearly.** |
| **Appeal structure** | **Judgements of township courts can be appealed to the region/state court, then to the Supreme Court of Union.** |
| **Cases before the National Human Rights Institution** | **The Myanmar National Human Rights Commission stated on 10 December 2015 that it has received over 1,200 complaints since 1 January 2015, and it has reviewed and taken actions on these complaints.** |
| **Complaints filed against the police, the military, lawyers, judges/justices, prosecutors or other institutions (per year)** | **The Myanmar National Human Rights Commission stated in its 2014 report that it received 288 complaints against police, lawyers, judges, prosecutors and other institutions in 2014.** |
| **Complaints filed against other public officers and employees** | **The Anti-Corruption Commission received 533 complaints from 10 March 2014 to 21 August 2014. The complaints involved government maladministration (238 cases), land issues (170), legal and judicial issues (95) and general issues (30).** |

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28 Interview with practicing lawyer.


II. COUNTRY PRACTICE IN APPLYING THE CENTRAL PRINCIPLES OF RULE OF LAW FOR HUMAN RIGHTS

A. On Central Principle 1
   (Government and its officials and agents are accountable under the law)

Definition and Limitation of the Powers of Government in the Fundamental Law

There are no significant changes in terms of the powers of government as defined in the 2008 Constitution and related laws. The powers of government are defined and limited by the 2008 Constitution. In additional, the Union Government Law of 21 October 2010 and the Union Judiciary Law of 2010 elaborate on the functions and composition of the executive government and of the judicial bodies. No changes and or amendments have been made to these laws since promulgation. Article 11(a) of the Constitution establishes the basic principle that “legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves.” These laws describe the powers, functions, qualifications, appointment, disqualifications or termination from duties of executive, legislative and judicial officials at the union, state and regional levels (e.g., Ministers at the union, state and regional levels; Attorney General of the Union; and Chief Justices of the Union, Region or State High Court).

Amendment or Suspension of the Fundamental Law

The Constitution and Union Government Law can be amended and suspended only in accordance with the rules and procedures prescribed therein by the Pyidaungsu Hluttaw or the joint houses of the legislature. Since the completion of the 2011 Rule of Law Baseline Study, the 2008 Constitution became fully operational on 31 January 2011 when a new two-chamber legislature convened for the first time in over two decades.33

The current and previous Special Rapporteurs have consistently recommended the amendment of the Constitution for it to be in line with international standards. Several Constitutional provisions give broad powers and responsibilities to the military and, as the current Special Rapporteur noted, ensure that “the military can never be held to account for past and present human rights violations.”34 Provisions contained in the chapter on fundamental rights contain vague and subjective limitations and are often qualified by the phrase “in accordance with law” or similar language, giving the potential to negate part or all of the right in question. Article 382 states that “the rights given in this Chapter shall be restricted or revoked through enactment to law” in order for the Defence Forces personnel or members of the armed forces “to carry out peace and security.” This, the current Special Rapporteur said, appears to allow non-derogable rights to be restricted or revoked in a state of emergency and possibly in other circumstances.35

In this regard, one study has pointed out that no other constitution in the world has an amendment procedure that requires the approval of more than 75 per cent of the members of both parliamentary chambers or allows for the military to have practical veto power over constitutional amendments, considering that 25 per cent of the members of each house of the Pyidaungsu Hluttaw in Myanmar are appointed by the Commander-

33 Article 441 of the 2008 Constitution states as follows: ‘A nation-wide referendum held for adoption of this Constitution where more than half of the eligible voters voted, of which majority of these voters adopted this Constitution, shall come into operation throughout the Union from the day the first session of the Pyidaungsu Hluttaw is convened.’
In-Chief of the Defence Services. Efforts were made to amend certain provisions of the Constitution, including the qualification of the President. They were however mostly unsuccessful as the necessary number of votes could not be secured. Only an amendment to Article 59 (d)—replacing the word “military” with “defence” among the required areas of knowledge for presidential candidates—was adopted. A referendum on the amendment is required before it can enter into force. Additionally, an amendment to the Constitution's Schedule Two (Region or State Legislative list) and Schedule Five (Taxes to be Collected by Region or States) was adopted on 22 July 2015. This amendment decentralized some powers of the government, devolving from the union to regions and states more powers with respect to legislation and taxation.

**Laws Holding Public Officers and Employees Accountable**

The reform process initiated by President Thein Sein since March 2011 focused on four waves of reform for democracy and development. The third wave addressed public administration and good governance reform with the aim of moving towards a clean, transparent, and people-centred public administration. After five years, the administrative reform measures are still many steps from accomplishing these goals.

According to the Constitution, the President, Vice Presidents, Union/Region/State Ministers, Attorney General of the Union, Advocate General of the Region or State, Auditor General of the Union/Region/State, Chief Justice and Judges of the Supreme Court or of the High Court of the Region/State, Chairperson and members of the Constitutional Tribunal, Chairperson and members of the Union Election Commission may be impeached for the following reasons: (i) high treason; (ii) breach of the provisions of the Constitution; (iii) misconduct; (iv) disqualification of qualifications prescribed in the Constitution; (v) inefficient discharge of duties assigned by law.

In the past five years, several complaints were made against Union Ministers in the media, although no one was impeached by the government or parliament. Several Ministers were reshuffled and allowed to resign. On one occasion, members of the two legislative chambers voted to impeach the nine justices of the Constitutional Tribunal after the Tribunal rendered a decision denying parliamentary committees the status of national-level organizations. Without this status the committees could not overrule the government or, for example, summon government ministers for questioning. This made the parliamentarians concerned that the members of the Tribunal were not working in a democratic manner and were eroding the system of checks and balances. The judges immediately resigned from office the same day the vote for impeachment was made. Former Religious Affairs Minister Hsan Hsint, however, was sentenced in October 2014 to three years in prison on charges of criminal breach of trust by a public servant through misuse of public funds and

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40 Ibid.
an additional 10 years for sedition.\textsuperscript{41}

There have been many changes with regard to the legislative framework on accountability of public officers. Laws on anti-corruption, on the establishment of the Myanmar National Human Rights Commission, on civil service personnel and on the procedure for writs application were enacted. However, as discussed in the following paragraphs, these endeavours have been insufficient in protecting against violations of fundamental rights. Additionally, in what is viewed as a step backward, Myanmar’s previous Parliament voted on 28 January 2016 to pass the Former Presidents Security Law, which grants former presidents immunity from prosecutions for actions committed during their time in office.\textsuperscript{42}

**Anti-Corruption Law**

The Anti-Corruption Law, promulgated on 7 August 2013, aims to eradicate bribery, develop clean and good governance, promote accountability, and develop the economy through prevalence of law, order and transparency in the administrative sectors.\textsuperscript{43} It penalises bribery, which is defined as the “promising, offering or discussing or giving to an authorized official, directly or indirectly, of an undue advantage, for the official himself or another person or entity, in order that the official acts or refrains from acting in the exercise of his official duties, in order to obtain or retain business or other undue advantage.” It also provides for the confiscation of monies and properties through illicit enrichment as well as penalises related offenses, including concealment, alteration, amendment or transfer by bank personnel of documents relating to the monies and properties that are the subject of enquiry.

The law covers a wide range of people who can be held liable for bribery, with punishment the most severe for “Political Post Holder,”\textsuperscript{44} followed by “any other Authorized Person,”\textsuperscript{45} then “any person.”\textsuperscript{46} It provides penalties of imprisonment as well as a fine. Notably, the law provides for extraterritorial application, stating that it “shall relate to any person committing any offence which requires action to be taken in the country, or any citizen or any person residing in Myanmar permanently, committing any offence under this law in Myanmar or abroad.”\textsuperscript{47}


\textsuperscript{42} See e.g. Amnesty International, ’Myanmar: Scrap or Amend New Law that Could Grant Immunity to Former Presidents,’ 28 January 2016; and ’Groups slam bill giving immunity to Myanmar’s former leaders,’ *Asia Times*, 23 December 2015.


\textsuperscript{44} Section 3(g) states: “Political Post Holder” means a person who is declared by the commission as a political post holder by relevant notifications issued from time to time with the consent of Pyidaungsu Hluttaw.

\textsuperscript{45} Section 3(i) states: “Authorized Person” means a person who is an authorized public service man by virtue of designation or a person who has the right to administer or manage, a Foreign Public Official, a Political Post Holder, a High Ranking Official or a person who has the right to manage in a public organization or a representative.

\textsuperscript{46} Anti-Corruption Law, Sections 55, 56 and 57.

\textsuperscript{47} Ibid, Section 2.
President’s Office Guidelines on Accepting Gifts

In a very recent development, the new government issued in April 2016 guidelines prohibiting civil servants from accepting gifts from any person or organization that would “benefit from their [civil servants’ positions of] responsibility.” The “President’s Office Guidelines on Accepting Gifts” however provided for exceptions and allows civil servants to accept any gift not worth more than 25,000 kyats (US$21)—an amount more than 10 times lower than the threshold allowed by the previous government. Former President Thein Sein had told government officials in 2014 that they could accept gifts worth up to 300,000 kyats (US$249) without it being considered corruption. The new guidelines also specify that the total value of gifts received annually should not exceed 100,000 kyat (US$83). Additionally, civil servants are allowed to accept gifts valued at less than 100,000 kyat on religious holidays such as the Buddhist celebration Thadingyut or Christmas, when gift-giving is common. Officials can also accept gifts worth up to 400,000 kyat (US$332) as well as travel, scholarships, and medical expenses from foreign governments. The guidelines require public servants to report to their departmental heads any gifts they accept or decline.

While efforts to fight corruption are welcome considering Myanmar’s very low ranking in Transparency International’s 2014 Corruption Perceptions Index (where it was ranked 156th out of 175 nations surveyed), some worried that the exceptions listed could offer loopholes that would undermine the anti-graft drive. “Instead, it should only say any civil servant must not accept or take anything. Any violation can be bribery,” a member of the Myanmar Lawyers’ Network said.

Myanmar National Human Rights Commission Law

Another development is the establishment and reconstitution of the Myanmar National Human Rights Commission. President Thein Sein first established it as a 15-person Commission through a Union Government’s Notification in September 2011. In order for it to operate on a statutory basis and in compliance with the Paris Principles, the Myanmar National Human Rights Commission Law was enacted in March 2014. The law provides for a Commission comprised of 7 to 15 members selected by the President and Speakers of both houses of the parliament from 30 nominees submitted by the selection board. The Commission was thus reconstituted with 11 members.

Among others, the powers and duties of the Commission include promoting awareness of human rights and combatting discrimination through information and education; monitoring and promoting compliance with international and domestic human rights laws; investigating complaints and allegations in respect of human rights violations; and inspecting the scene of human rights violations and, after notification, prisons, jails, detention centres and public or private places of confinement.

48 Kyaw Phyo Tha, ‘NLD Issues “Guidelines” on Gifts for Civil Servants,’ The Irrawaddy, 4 April 2016.
49 Ibid.
52 The Selection Board consists of the Chief Justice, Minister of Home Affairs, Minister of Social Welfare, Union Attorney General, a representative from the Bar Council, two Pyidaungsu Hluttaw representatives, a Myanmar Women’s Affairs Federation representative, and two representatives from registered NGOs. Bill O’Toole and Lun Min Maing, ‘Rights body shake-up in line with law, insists government,’ Myanmar Times, 3 October 2014.
53 National Human Rights Commission Law, Section 22.
In performing its duties, the Commission will take the initiative to investigate widespread and systematic violation of human rights. 54 Anyone could lodge a complaint in respect of any human rights violation against himself, or herself or for other persons or group of people. 55 The Commission has the power to summon a person for questioning or to provide necessary documents (except those relating to the security and defence of state and documents marked with security status by government departments). 56 The Commission however, does not have the authority to investigate pending or on-going cases before the courts and cases for which final judgment have been rendered. 57 The Commission shall send its findings and recommendations to relevant departments, agencies and related organizations for them to take further action. The relevant entity, in accordance with Section 38 of the Law, is required to inform the Commission of the action taken within 30 days.

Civil Service Law

The Civil Service Law enacted in March 2013 regulates the code of conduct of civil service personnel. 58 The law leaves it open for each government ministry to interpret whether the action of a civil servant in question constitutes misconduct or failure to comply with the law. There has as yet been no report on the effectiveness of the law.

Law on the Application for Writs

The 2008 Constitution introduced the writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari. The Constitution and 2010 Union Judiciary Law however failed to explain how and when to apply for these remedies. 59 The Law on the Application for Writs was thus promulgated in June 2014 to regulate how the court handles these cases. The Constitution vested the power to issue writs in the Supreme Court and it is the only judicial forum with the authority to consider writ applications brought from the whole country. 60 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.

The Law on the Application for Writs requires applications for certiorari and quo warranto to be brought within a two-year time limit; the other remedies are not subject to this restriction. 61 The Law also clarifies the procedure for hearing applications. 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.

As these constitutional remedies 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.” 62

54 Ibid, Section 28.
55 Ibid, Section 30.
56 Ibid, Section 34 and 36.
57 Ibid, Section 37.
58 Pyidaungsu Hluttaw Law No. 5/2013, 8 March 2013 (Myanmar).
60 Constitution, Article 296.
61 Law on the Application for Writs, Section 16.
Special Courts and Prosecutors of Public Officers and Employees

There are no dedicated courts and prosecutors to handle cases against public officers and employees.

The legality of actions of the courts or government agencies may however be challenged before the Supreme Court through the writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari.63 The Chief Justice of the Union stated on 8 August 2013 that 432 writs were filed with the Supreme Court from 31 March 2011 to 30 June 2013; of these, 286 writs were rejected and 84 writs remained to be heard.64 Over 500 applications have reportedly been lodged since 2011. It is however difficult to estimate how many of these applications were successful as the annual Myanmar Law Reports only publish a small number of cases per year. A 2014 publication noted that of several hundred writ cases lodged since 2011, only six writ cases were reported in the 2011 Myanmar Law Reports and all of them were unsuccessful.65 No writs applications were reported in the 2012 Myanmar Law Report. One successful application that was published in the media involved an economic professor from Yangon Eastern University who had been unfairly dismissed.66

In general, it has been noted that the Supreme Court is reluctant to take action against decisions made by government departments and ministries, focusing mainly instead on supervising decisions of lower courts.67 All six cases reported in the Myanmar Law Reports concerned applications for writs of certiorari and/or prohibition against judgments of lower courts. (See Part II.B. on Appeal.)

Complaints involving human rights violations may be brought before the Myanmar National Human Rights Commission. However, since the members of the Commission are retired government officials with good relations with executive officers, their independence might be questioned. The Commission’s ability to investigate effectively has also been hampered by the lack of or delay in the feedback or response of the government ministries concerned.68 So far, the Commission has issued several press statements that, for example, call the government to release political prisoners, draw attention to humanitarian situations in Rakhine and Kachin, report on visits to labour camps and detention centers, and express apprehension for student demonstrators.69

The Commission’s 2014 Annual Report details the activities of its different divisions. It states that, aside from 432 cases carried over from 2013, a total of 1,855 cases were received in 2014 and for which 138 meetings to hear the complaints were held. Of the 2014 cases, 916 did not fully meet the criteria for complaints, 543 were forwarded to the appropriate government agency for their action and response, and 162 had replies issued to complainants informing them of the result of the inquiries conducted by the appropriate government agency. The rest, 299 complaints, were yet to be investigated. The report showed that most of the cases, 944 out of 1,839, involved land issues. One hundred sixty-six cases concerned the judiciary, 147 involved “pension + government staff,” and 96 were administrative cases. Four were “cases within the prison” and two concerned the military. While the Commission has said that it received more than 1,200 letters of complaint

63 Law on the Application for Writs, Sections 2(d), (g), (f), and (e).
64 Chief Justice of the Union stresses important role of courts in ensuring rule of law, New Light of Myanmar, Vol. XXI, No. 115, 9 August 2013, 8.
65 Supra note 62, at 7.
67 Ibid.
from 1 January 2015 to early December 2015, no detailed information on the nature of these complaints is currently readily available.\(^\text{70}\)

The Anti-Corruption Law provides for the establishment of an anti-corruption commission, tasked with, among others, implementing the Law, receiving letters of complaints, and forming and supervising preliminary scrutinising and investigating teams.\(^\text{71}\) The Commission can direct money and property to be confiscated as evidence relating to the bribery. It also has the authority to issue a list of personnel who shall be required to annually declare family-owned money, properties, assets and liabilities. Sections 21 and 43(a) state that enquiries can be made upon a complaint sent by the President, speaker of either Lower and Upper House, or the victim. Nothing is said with regard to the authority of the Commission to institute investigations on its own initiative.

The Commission was formed on 25 February 2014. In its first six months alone, from 10 March 2014 until 21 August 2014, it received 533 complaints: 170 concerned land disputes, 95 involved the judiciary, 238 related to governance, and 30 to general matters.\(^\text{72}\) The Commission had investigated only three complaints by 23 September 2014.\(^\text{73}\) More recently, in November 2015, Chairman U Mya Win informed Parliament that the Commission has filed lawsuits against nine people, punished 125 others under the civil service code, and transferred 31 others for infractions.\(^\text{74}\) The Commission has recovered K20.685 million (US$15,945) in compensation payments. Three more cases are under investigation.

Although the Anti-Corruption Law and the Commission are important in countering corruption within the government, some have pointed out possible challenges to the Commission’s independence. For example, Pyithu Hluttaw (Lower House) MP U Ye Tun said, “[T]he Commission may have difficulty in taking actions against bribery and corruption because of the old members of former government. Since the Commission members are appointed by the President and the two Houses, they may have influence on them.”\(^\text{75}\) Additionally, in order to fully implement the law, by-laws and regulations will have to be approved by the Parliament. Such by-laws and regulations were submitted late by the commission and were still pending approval as of December 2015.\(^\text{76}\)

The 2013 Civil Service Personnel Law contains provisions concerning departmental action, inquiry and trial for civil servants who fail to observe and comply with the code of conduct and discipline.\(^\text{77}\) However, information on the extent of its effectiveness is not available.


\(^{71}\) Anti-Corruption Law, Law No. 23/2013 (Myanmar), Section 16.


\(^{73}\) Ibid.


\(^{77}\) Pyidaungsu Hluttaw Law No. 5/2013, 8 March 2013 (Myanmar).
B. On Central Principle 2
(Laws and procedures for arrest, detention and punishment are publicly available, lawful, and not arbitrary)

Publication of and Access to Criminal Laws and Procedures

Myanmar’s Penal Code and Code of Criminal Procedure were first published in the late 1800s and have remained the same since the 2011 Rule of Law Baseline Study, except for an amendment in January 2016 adjusting the amount of fines and terms of imprisonment in some articles of the Penal Code.78

With regard to publication of laws, Article 107 of the Constitution states, “The laws signed by the President or the laws deemed to have been signed by him shall be promulgated by publication in the official gazette. The Law shall come into operation on the day of such promulgation unless the contrary intention is expressed.” The Gazette is published weekly in Burmese and contains the text of new legislation, as well as executive orders and instructions, details of the establishment and composition of committees, and other relevant matters.79 The Gazette is available on the Ministry of Information’s website, which also publishes copies of some draft laws. Draft laws and enacted laws have also been published in newspapers, usually in Burmese and sometimes in the English.

Accessibility, Intelligibility, Non-reactivity, Consistency, and Predictability of Criminal Laws

As indicated in the 2011 Rule of Law Baseline Study, the Penal Code and Code of Criminal Procedure are publicly available as they are included in statute books and in the 12-volume Burma Code. National laws and regulations are also available online in different places, however “no comprehensive or central resource of legislation currently exists for researchers or practitioners.”80 There have been no changes in the procedure to be followed by law enforcement officials, prosecutors, and judicial officers in enforcing criminal laws. Enforcement of the laws continued to be questioned by various quarters, including the UN Special Rapporteur on human rights situation in Myanmar and the media. The US Department of State said that “Security forces continued to exert a pervasive influence on the lives of inhabitants through the fear of arbitrary arrest and detention and through threats to individual livelihoods.”81

The Union Judiciary Law provides that “no penal law shall have retrospective effect.”82 Section 5 also states that “Any person who committed an offence shall be convicted only under the relevant existing law at the time of its commission. Moreover, he shall not be sentenced with a penalty more than that which is applicable under the said law.”

With regard to consistency of criminal laws, the Penal Code has not been recently amended. However, since 2011, Myanmar has issued special laws that penalise certain acts, such as the Counter-Terrorism Law, 78 Law Amending the Penal Code, Pyidaungsu Hluttaw Law No. 6/2016, 7 January 2016 (Myanmar).
80 Ibid, 21.
82 Union Judiciary Law, Law No. 20/2010, 28 October 2010 (Myanmar), Section 4.
Pyidaungsu Hluttaw Law No. 23/2014; Money Laundering Eradication Law, Pyidaungsu Hluttaw Law No. 11/2014; and Anti-Corruption Law, Pyidaungsu Hluttaw Law No. 23/2013. No information indicating that these new laws are inconsistent with other laws was found. In general, information on how stringently all new legislations are reviewed for consistency with the existing legal framework and Myanmar’s institutional capacity is not readily available. As was noted, “It is presumably the job of Parliament and the UAGO to keep a grip on this process to ensure that emerging law of Myanmar is at least consistent and coherent.… Although the legislative process has become more open, it seems that still more openness is needed.”

Another issue on consistency and accessibility is that more than 400 laws precede independence and have not been republished. Many of these laws are out-dated but have not been amended or repealed. Not all newer laws are available online and there is no central database for all published laws. “Many of the country’s laws are, therefore, neither known nor accessible to many judges and lawyers.” Under these circumstances, rendering decisions that are consistent with other laws would be difficult.

**Detention Without Charge Outside or During an Emergency**

There have been no changes with regard to laws authorizing administrative or preventive suspension. As a general rule, Article 376 of the Constitution states that “no person… shall be held in custody for more than 24 hours without the remand of a competent magistrate.” However, the same provision provides the following exceptions: “except matters on precautionary measures taken for the security of the Union or prevalence of law and order, peace and tranquillity in accord with the law in the interest of the public, or the matters permitted according to an existing law.”

Further, as mentioned in the 2011 Rule of Law Baseline Study, the Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts authorises detention for up to five years. This law allows “[t]he Cabinet… to pass an order, as may be necessary, restricting any fundamental right of any person suspected of having committed or believed to be about to commit, any act which endangers the sovereignty and security of the state or public peace and tranquillity.”

Chapter VIII (on Citizen, Fundamental Rights and Duties of the Citizens) of the Constitution contains provisions that allow fundamental rights to be restricted. Particularly, applications to issue writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari shall be suspended in the areas where the state of emergency is declared. Thus, when a state of emergency was declared in Rakhine state in 2012 in relation to inter-communal violence between the Buddhist and Muslim communities, writs of habeas corpus could not be applied for. Article 381 allows citizens to be “denied redress by due process of law for grievances entitled under law: (a) in time of foreign invasion; (b) in time of insurrection; (c) in time of emergency.” Article 382 also states, “In order to carry out their duties fully and to maintain the discipline by the Defence Forces personnel or members of the armed forces responsible to carry out peace and security, the rights given in this Chapter shall be restricted or revoked through enactment to law.”

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86 Constitution, Article 296 (b).
Suspension of fundamental rights during a state of emergency is reiterated in Chapter XI on Provisions of State of Emergency. For instance, Article 414 states that the President, in declaring a state of emergency “may, if necessary, restrict or suspend as required, one or more fundamental rights of the citizens residing in the areas where the state of emergency is in operation.” When a state of emergency arises from causes that may disintegrate the Union or disintegrate national solidarity or that may cause the loss of sovereignty, the President shall declare the transferring of legislative, executive and judicial powers of the Union to the Commander-in-Chief of the Defence Services. The Commander-in-Chief, according to Article 420, “may, during the duration of the declaration of a state of emergency, restrict or suspend as required, one or more fundamental rights of the citizens in the required area.”

Rights of the Accused

*Freedom from Arbitrary Arrest, Detention without Charge or Trial, Extra-legal Treatment or Punishment, and Extra-Judicial Killing*

As mentioned above, a Law on the Application for Writs has been issued to clarify the procedure to avail remedies of habeas corpus, mandamus, prohibition, quo warranto, and certiorari. Besides this, there have not been notable changes in the law.

The legal framework protecting the rights of the accused needs to be improved, with the Special Rapporteur saying that “Parliament should amend the Constitution to ensure that human rights are appropriately accorded to all persons in Myanmar, provide for the prohibition of torture, inhuman or degrading treatment or punishment and the presumption of innocence until proven guilty, and ensure that the military is subject to civilian rule and to the rule of law.”

Article 353 of the Constitution provides that “Nothing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person.” There is no specific prohibition in the Constitution against arbitrary arrest, although Section 61 of the Criminal Procedure Code requires permission of a court for detention of more than 24 hours. In this regard, Section 167 allows a magistrate to authorise detention for 30 days when a person is accused of an offence punishable with imprisonment of at least seven years or 15 days if a person is accused of an offence punishable with imprisonment of less than seven years.

There has been controversy in recent years over arrests of those accused of violating the Law of Peaceful Assembly and Peaceful Procession, which was promulgated on 2 December 2011 and amended on 24 June 2014. The law requires prior permission from local police before peaceful procession and assembly is conducted. A 15 October 2014 report stated that, “So far in 2014, Amnesty International has received reports that at least 60 individuals have been charged under Article 18 of the Peaceful Assembly Law…. These individuals include political activists; land rights and environmental activists; human rights defenders; farmers; and other peaceful protesters.” This Law was also used in March 2015 to arrest eight students who protested the education law.

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87 Ibid, Articles 417, 418, and 419.
Despite improvements, arbitrary detentions of political prisoners under various laws continued to occur during President Thein Sein’s administration. On 22 January 2016, the administration released 101 prisoners, including 52 political prisoners. This brings the total of political prisoners released by President Thein Sein’s administration since 2011 to 1,235; however, 409 political prisoners were still on trial and 84 remained behind bars.91 The government formed a political prisoner review committee in May 2013 as part of democratic transition. Four hundred twenty political prisoners were released in 2014 with the assistance of the committee.92 In this regard, the Special Rapporteur encouraged the government to continue working with the political prisoner review committee in order to release all remaining political prisoners and, to this end, to closely cooperate with civil society to develop a definition of “political prisoner.”93

In 2014, “nearly 40 people jailed under various laws have been labelled political prisoners, including activists charged under Article 18 of the Peaceful Assembly Law, journalists, and farmers protesting against land confiscations.”94 On 22 January 2016, as the government released 52 political prisoners, Kachin activist Patrick Khum Jaa Lee was sentenced to six months imprisonment for sharing a photo on Facebook depicting a man stepping on a photo of the military chief. Chaw Sandi Tun was also sentenced to six months in late December 2015 for a post on Facebook in which she pointed out that opposition leader Aung San Suu Kyi was wearing clothes of a colour similar to those of the army, saying “If you love her [Aung San Suu Kyi] so much, put a piece of her longyi [sarong] on your head.”95

On a positive note, since assuming the reigns of government, the new administration has released 199 political prisoners by 10 April 2016.96 More prisoners are expected to be released, with Aung San Suu Kyi having stated that the release of political prisoners, activists and students is an urgent priority for the government.97

Torture is penalised in Section 330 of the Penal Code. Further, under Section 24 of the Evidence Act, “A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise.” Section 343 of the Code of Criminal Procedure also prohibits the use of influence, promise or threat on an accused to induce him to disclose or withhold information, except when the disclosure is given as a condition for pardon.

Commentators have raised concerns on the use of torture by the police, with the Asian Legal Resource Centre stating in September 2014 that “The practice of torture is systemic. Officials at all levels of the police hierarchy, courts, administration, and hospitals are aware of its occurrence; are involved actively; and are either tacitly complicit or condone it.”98 Torture is reportedly committed with impunity because police

91 Hnin Yadana Zaw and Timothy McLaughlin, ‘Myanmar Falls Short of Releasing all Political Prisoners,’ Reuters, 26 January 2016.
92 Nan Lwin Hnin Pwint, ‘Political Prisoners Committee Criticizes Govt Inaction,’ The Irrawaddy, 16 December 2014.
94 Supra note 92.
97 San Yamin Aung, ‘Suu Kyi Outlines Strategies To Free Political Prisoners,’ The Irrawaddy, 7 April 2016.
commanders shield their men from criminal liability:

“Even if victims succeed in filing a direct complaint, the police commanders routinely request judges to remove the names of the policemen in the criminal complaint…. Not only do court judges obey police instructions, but the newly established Myanmar National Human Rights Commission (MNHRC), also thinks that once the accused policemen are imposed with administrative sanctions, no further actions are required.”

This reasoning has been questioned by human rights organisations who argue that disciplinary sanctions cannot erase criminal actions.

Finally, Myanmar is currently considering a draft law on the treatment of prisoners. The draft has been criticized for, among others, allowing solitary confinement for over 14 days if directed by the Director General of the Prison Department and for failing to provide proper safeguards against abuse as provided by the revised Minimum Rules on the Treatment of Prisoners.

**Presumption of Innocence**

The Constitution does not explicitly provide for the presumption of innocence. The Handbook for Media Access to the Courts issued by the Supreme Court does however state that “It is the principle of the judiciary that any persons prosecuted for the criminal offences shall be deemed to be innocent until they are clearly found guilty by the evidence.” However, considering that concerns have been raised over access to justice, interference in judicial decision-making by the Executive or senior judicial authorities, and high level of corruption in the judiciary, there is grave concern that the presumption of innocence may not be regularly observed—especially for politically motivated charges.

**Legal Counsel and Assistance**

There have been no substantial changes in the policy pertaining to access to counsel. Section 375 of the Constitution states that “An accused shall have the right of defence in accord with the law.” Section 19 prescribes the judicial principles, among which is “to guarantee in all cases the right of defence and the right of appeal under law.” Section 40 of Myanmar’s Prisons Act requires that provision be made for the visitation, “at proper times and under proper restrictions,” of accused persons in prisons by various people, including “qualified legal advisers.”

Lawyers’ access to clients has vastly improved since military rule. Nevertheless, a report of the International Commission of Jurists said that some difficulties remain owing to inability of lawyers to consult with detained clients confidentially in police custody or prison due to a lack of adequate facilities or the presence of an official within hearing during lawyer-client meetings. Several lawyers also indicated that they needed


101 Supra note 34, at par 67.

to pay bribes to gain initial access to clients detained in prison or at police stations. At times, prison officials
denied lawyers access on their first visit to a detained client, until such time as the client has signed a “power
of attorney letter” provided by the prison official and paid an additional “fee.” The report also noted that,
unfortunately, some people refrain from engaging a lawyer because they believe that a lawyer will have
negative consequences on the outcome of the case in the courts.

Students who were arrested for protesting the new education law in March 2015 were reportedly not allowed
access to their lawyers or to family members until they appeared in court for their first hearings.103

**Knowing the Nature and Cause of the Accusation**

The law pertaining to the right of the accused to be informed of precise charges and to prepare his or her
defence has not been changed. The Constitution generally states that “An accused shall have the right of
defence in accord with the law.”

The US Department of State reported that defendants do not enjoy the right to be informed promptly and in
detail of the charges, the right to consult an attorney or to have one provided at government expense. It also
noted that, although there is no right to adequate time and facilities to prepare a defence, defence attorneys
in criminal cases generally had 15 days to prepare for trial.104

**Guarantees during Trial**

The law relative to the right of the accused to speedy trial, to defend himself or herself in person, and
examine witnesses has not been amended. The Code of Criminal Procedure provides for the right of an
accused before a criminal court to be defended by a pleader (Section 340), to offer evidence in his own
behalf (Sections 298, 290, 342), and to examine witnesses against him (Section 252).105

Several sources indicate that accused persons are not regularly accorded the right to be tried without
undue delay.106 For example, the slow pace of justice was apparent relative to the case of students who were
arrested in March 2015 for protesting the National Education Law. Only four out of around 40 listed plaintiff
witnesses, three police officers, and one administrative officer had been examined in the span of one year.
Thus, it was remarked that “not speedy trial but tortuous trial is being facilitated.”107

**Appeal**

No changes have been made relative to the right to appeal. The Constitution includes “guarantee in all
cases the right of defence and the right of appeal under law” as a prescribed judicial principle. The Code of

105 Code of Criminal Procedure, pleader (Section 340), to offer evidence in his own behalf (Sections 298, 290, 342), and to examine
witnesses against him (Section 252
106 See e.g., UN General Assembly, Situation of human rights in Myanmar, A/70/412, 6 October 2015, par 24.
107 Supra note 103.
Criminal Procedure provides for the manner appeal is to be made as well as the circumstances under which appeal cannot be made (such as when the sentence passed by a Court of Session consists of not more than three months imprisonment, or of fine not exceeding two hundred rupees, or of whipping). Section 374 also provides that “When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not executed unless it is confirmed by the High Court.”

It should be noted that writs of prohibition and/or certiorari may be applied for to question the jurisdiction of lower courts; in fact all six writ applications reported in the 2011 Myanmar Law Reports were applications for writs of certiorari and/or prohibition against lower court judgments. In four of these cases, the Supreme Court explained that the writs are only available to bar or overturn the judgment of an inferior court that does not have the jurisdiction to pass such judgment. If applicants want the merits of the case to be reviewed, an appeal should be filed instead. In defining its powers to issue writs, the Court stated in Shin Nyana (aka) Shin Mo Pya v Republic of the Union of Myanmar that:

“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.”

_Freedom from Double Jeopardy_

There have been no changes in the law regarding double jeopardy. Section 374 of the Constitution states, “Any person convicted or acquitted by a competent court for an offence shall not be retried unless a superior court annuls the judgment and orders the retrial.” A similar provision can be found in Section 6 of Union Judiciary Law.

However, the Special Rapporteur expressed concern over the practice of bringing multiple charges against individuals, who are often already in detention, in different townships for the same offence. For example, Phyoe Phyoe Aung, a student protestor against whom multiple charges were filed for her involvement in the demonstration against the National Education Law in Letpadan in March 2015, was brought before different township courts to face several trials.

_Remedy before a Court for Violations of Fundamental Rights_

Article 377 of the Constitution states that, in order to obtain a right given by Chapter VIII on Citizen, Fundamental Rights and Duties of the Citizens, application shall be made to the Supreme Court. It thereafter, in Article 378, grants the Supreme Court the power to issue writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari. Persons may avail of these remedies to challenge the legality of decisions of the lower courts and of government agencies, and correct government actions that infringe on their fundamental rights. A crucial change introduced by the 2014 Law on the Application for Writs is that decisions are made by a board consisting of three judges instead of a single judge.

109 Ibid, 149, citing (2011) MLR (Criminal Case) 126.
In the past, applications for writs were unsuccessful not because of lack of evidence or legal basis, but because the Supreme Court was unwilling to intervene when government departments and ministries abuse or act beyond their powers. In 2013, one lawyer said most writs filed with the Supreme Court were rejected almost immediately, some within two hours, and in some cases lawyers were deregistered within hours of filing them. More data is needed to fairly assess the success rate of writ applications made under the new law.

Another development is the establishment (in 2011) and reconstitution (in 2014) of the Myanmar National Human Rights Commission. Among other powers and duties, the Commission is authorised to investigate complaints and allegations in respect of human rights violations. (See II.A.)

C. **On Central Principle 3:**
   
   **(The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied)**

### Law Enactment

**Openness and Timeliness of Release of Record of Legislative Proceedings**

Legislative proceedings are not open to public. It was noted that the lack of transparency and systematic public consultation on draft laws have resulted in laws that do not meet the needs of the people and that fall below international standards.

On a positive note, draft laws have been announced in the daily government newspaper since 2012. Civil society has also been demanding for a more consultative drafting process. For example, after the National Education Law was promulgated in September 2014, students demanded that the law be amended to, among others, decentralize decision making powers from the government to educational institutions, allow the formation of student unions, and increase the state budget for education. The government eventually proposed to discuss the outstanding issues and talks among representatives from the executive government, parliament, students and civil society organizations were organized in 2015. After several rounds of discussion, the joint houses of parliament approved the final version of the amended National Education Law. While some amendments reflected the demands of the students, the term “union” was rejected by the parliament. The amended law will allow students to apply for their university and program of choice, and universities are empowered to decide whom to admit without necessarily considering the results of final high school exams—which are widely criticized for their rigidity and promotion of rote learning.

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111 Soe Than Lynn, ‘MP’s tackle judicial reform with writs’, *Myanmar Times*, 1 September 2013.

112 National Human Rights Commission Law, Section 22.

113 Supra note 37, at par 11.


116 Ibid
The enactments of both the News Media Law and the Printing and Publishing Enterprise Law in 2014 were also met with criticisms. The News Media Law was criticized because all types of media remain under unrestricted control of the government through the Media Council. The Printing and Publishing Enterprise Law requires all media enterprises to register with the government or risk fines, suggesting that power of censorship still lies with the country’s authorities. There have been consultations with media representatives, but so far it is not clear to what extent their concerns will be taken into account.

The draft child law currently being reviewed by the Office of the Attorney General was developed with the engagement of civil society.

Timeliness of Release and Availability of Legislative Materials

The Ministry of Information’s website has published copies of some draft laws. Draft laws have also been published in newspapers, usually in Burmese and sometimes in the English. Official drafts of laws and transcripts of minutes of legislative proceedings are however not regularly made available to the public on a timely basis. For example, during the drafting of the education law, students criticized the bill for lacking transparency as it moved through parliament, with information about it in state-run newspapers not matching what was passed by the lower house.

Equality before the Law

Several provisions of the 2008 Constitution provide for equality of persons before the law and these provisions have not been amended since 2011. For example, it declares “enhancing the eternal principles of Justice, Liberty and Equality in the Union” as one of the country’s basic principles. Article 21 states that, “Every citizen shall enjoy the right of equality, the right of liberty and the right of justice, as prescribed in this Constitution,” while Article 347 provides that “The Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection.” Despite these guarantees, the Special Rapporteur has recommended the reform of some legislation for failing to treat people equally. Examples of such are as follows:

(1) Buddhist Women’s Special Marriage Law (2015), which, for instance, accords Buddhist women married to men of other faiths protections against some forms of domestic violence but does not extend these protections to all women. Also, in cases of separation, dissolution of marriage or divorce, non-Buddhist fathers are denied custody of children in all circumstances. It also requires Buddhist women above 18 and under age 20 to seek parental consent to enter into marriage with non-Buddhist men; this requirement is not imposed on Buddhist men.
This Law was part of a package of four “Race and Religion Protection Laws,” championed by the Committee for the Protection of Race and Religion known as Ma Ba Tha and signed by President Thein Sein between May and August 2015. During its drafting, the international community issued several warnings that the proposed laws could violate Myanmar’s treaty commitments, in particular the Convention on the Elimination of Discrimination against Women and the Convention of the Rights of the Child. The four laws were criticized as they are perceived to target Muslims, because they restrict interfaith marriage, polygamy, religious conversion and address population growth.

(2) Citizenship Law (1982), which gives full citizenship only to those ethnic groups which settled in Myanmar prior to 1823 AD, and allows the revocation of associate citizenship or naturalized citizenship on vague grounds of “disaffection or disloyalty” to the state or offences “involving moral turpitude.”

(3) Penal Code (1861), which imposes penalties of up to 10 years’ imprisonment for sexual intercourse “against the order of nature,” including consensual same sex conduct.

Reparation for Crimes and Human Rights Violations’ Victims/Survivors

Article 377 of the Constitution states that, in order to obtain a right given by Chapter VIII on Citizen, Fundamental Rights and Duties of the Citizens, application shall be made to the Supreme Court. The Constitution also grants the Supreme Court with the power to issue writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari. (See II.A.)

The Special Rapporteur has emphasized that truth-seeking, accountability and reparations processes for current and historic conflict-related violations are critical for building a sustainable and inclusive peace. She has thus recommended that the government consider broad and public consultations on possible frameworks and forms for such processes.

Law Enforcement

Effective, Fair and Equal Enforcement of Laws

Issues regarding fair, equal and effective enforcement of laws have been noted. For instance, Myanmar enacted two land laws, the Vacant, Fallow and Virgin Land Law and the Farm Land Law in 2012. Despite these laws, grievances and conflicts over land remain widespread. “The farmers want an end to arrests of

124 Population Control and Health Law, Law No. 28/2015, 19 May 2015; The Religious Conversion Law, Law No. 48/2015, 26 August 2015; The Interfaith Marriage Law, Law No.50/2015, 26 August 2015; and Monogamy Law, Law No.54/2015, 31 August 2015 (Myanmar).
128 Supra note 37, par 60.
129 Law No.10/2012, 30 March 2012 (Myanmar).
130 Law No.11/2012, 30 March 2012 (Myanmar).
farmers protesting forceful expropriation of or eviction from their land, as well as fair compensation for any land takings.”\textsuperscript{131} It is reportedly difficult to resolve land disputes in court, “because farmers are treated like criminals when businessmen or developers sue them. They feel that they are being discriminated against.”\textsuperscript{132} Farmers who protest for the land rights are arrested under peaceful assembly and procession law.

Another example involves the situation in northern Rakhine State. The Special Rapporteur has drawn attention “to the highly discriminatory policies and practices against the Rohingya and other Muslim communities in Rakhine.” Movement of the Rohingya population is restricted within and between townships, and people must obtain specific authorization to travel outside Rakhine State. She also reported that local orders in northern Rakhine State require Rohingya to obtain permission to marry, and attempt to limit couples to two children; any child born beyond that limit risks not being included in the family household list and remaining unregistered. She also received reports of cases of preventable deaths due to lack of access to emergency medical treatment.\textsuperscript{133}

D. On Central Principle 4: (Justice is administered by competent, impartial, and independent judiciary and justice institutions)

Appointment and Other Personnel Actions in the Judiciary and among Prosecutors

No changes have been made relative to the appointment and discipline of prosecutors, judges, and judicial officers. While the Constitution provides for a judiciary that is independent, separate and of equal status with the executive and legislative branches of government,\textsuperscript{134} these provisions are undermined by the control currently exercised by the executive over the judiciary.

The Chief Justice is nominated by the President, and members of the Supreme Court are selected by the President in consultation with the Chief Justice. They are appointed with the approval of Parliament, who cannot refuse to approve the appointment unless it can clearly be proven that the person does not meet the required qualifications.\textsuperscript{135} The President also nominates the Chief Justices of the High Courts of the Regions and States, in coordination with the Chief Justice of the Union and the pertinent Region or State Chief Minister. The Chief Minister of the Region or State concerned, in coordination with the Chief Justice of the Union, nominates other judges of the High Courts. The Chief Justices and Judges of the High Courts are appointed with the approval of the Region or State Parliament, who cannot refuse to approve the appointment unless it can clearly be proven that the nominee does not meet the required qualifications.\textsuperscript{136}

\begin{footnotes}
\footnotetext[133]{Supra note 37, at pars 36-44.}
\footnotetext[134]{Constitution, Article 11(a).}
\footnotetext[135]{Constitution, Article 299; Union Judiciary Law, Sections 26-27.}
\footnotetext[136]{Constitution, Article 308(b); Judiciary Law, Sections 44-45.}
\end{footnotes}
and the Parliament jointly appoint the members of the Constitutional Tribunal.\textsuperscript{137} Notably, with regard to professional qualification and experience, the President can nominate a person “who is, in the opinion of the President, an eminent jurist.”\textsuperscript{138}

The Special Rapporteur has said that measures are needed to guarantee the independence of the judiciary, including reforming the judicial appointment process by creating a judicial appointments committee; increasing the salaries and pensions for judges to make them commensurate with the status and responsibility of their office; creating a specialized, independent body to investigate allegations of judicial corruption; and improving continuing education and training for the judiciary.

It should be noted that, in 2012, a publication said that it “heard no evidence to suggest that the current president and Supreme Court are actually misusing their extensive powers of appointment, but the possibility of future abuse should be forestalled by the more robust safeguards.”\textsuperscript{139}

According to the Constitution, the Chief Justice and Judges of the Supreme Court or of the High Court of the Region/State, as well as the Chairperson and members of the Constitutional Tribunal, may be impeached for the following reasons: (i) high treason; (ii) breach of the provisions of the Constitution; (iii) misconduct; (iv) disqualification of qualifications prescribed in the Constitution; (v) inefficient discharge of duties assigned by law

Prosecutors, judges holding offices in lower courts and judicial officers are regarded as civil service personnel and are recruited, appointed, promoted, assigned, disciplined and dismissed like other civil service personnel. The recruitment of judges of lower courts and prosecutors is respectively tasked to the Supreme Court and the Attorney General’s Office.

The Supreme Court of the Union, in collaboration with international partners and donors, developed the Judiciary Strategic Plan (2015-17), which was launched on 17 December 2014. The plan has five strategic areas, as follows: Protect Public Access to Justice; Promote Public Awareness; Enhance Judicial Independence and Accountability; Maintain Commitment to Ensuring Equality, Fairness and Integrity of the Judiciary; and Strengthen Efficiency and Timeliness of Case Processing. No data measuring effectiveness of programmes related to “Enhance Judicial Independence and Accountability” was found at the time of writing of the report.

**Training, Resources, and Compensation**

Prosecutors, judges and judicial officers are civil service personnel and are trained like other civil servants, with specific professional training provided by Attorney General’s Office and the Supreme Court. As they are civil servants, they are also required to attend the civil service training provided by the Union Civil Service Board. The Central Institute of Civil Service is the training institute in the Union Civil Service Board, and it provides a basic training course for entry level-judges. Training for judges of higher ranks are conducted through the Judicial Training Institute, which is a body within the Supreme Court.\textsuperscript{140} The Union Civil Service Board has been working closely with UNDP and has included trainings on rule of law.

\textsuperscript{137} Constitution, Article 321.
\textsuperscript{138} Constitution, Articles 301 and 310.
\textsuperscript{139} International Bar Association’s Human Rights Institute (IBAHRI), *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, 60.
access to justice, and public administration in their training programmes. However, these are short-term programmes that are meant only for selected officials.141

International organizations and international NGOs have been actively engaged with the judicial sector as well as the Attorney General’s Office to assist them in developing the quality of the legal profession. However, the judiciary is still lagging behind in the reform process. A report issued in late 2013 stated that many judges, particularly at the lower rungs of the judiciary, are unfamiliar with law and court procedures. Courtroom procedures are said to be inconsistent with international fair trial standards.142 The problem goes as far back as the quality of law school programmes, with law department curricula weak in teaching jurisprudential analysis or reasoning.143 For 2016, among the aims of the Judiciary Strategic Plan (2015-17) is to upgrade the curriculum of on-job training courses for judges.

Various sources agree that the judges receive low salaries. A township judge reportedly is paid around K250,000 (about US$200) a month. “Bribery is considered an almost acceptable way to bolster one’s pay. Failing to pay a bribe, which is often negotiated between a court’s clerks and the lawyers, will result in either continued adjournments or a conviction.”144

State’s Budget Allocation for the Judiciary and Other Principal Justice Institutions

According to the recent Union Budget Law for 2016, promulgated on 25 January 2016, the budget expenditure for the Judiciary or Supreme Court of the Union is 23,374.059 million kyats, which is 0.1925% of the total expenditure.145 The Union Constitutional Tribunal is allotted 816.921 million kyats, around 0.0067% of the total expenditure.

Impartiality and Independence of Judicial Proceedings

Article 19 of the Constitution prescribes the following basic judicial principles: (a) to administer justice independently according to the law; (b) to dispense justice in open court unless otherwise prohibited by the law; and (c) to guarantee in all cases the right of defence and the right of appeal under the law. However, the executive branch of government is allowed wide influence over the judiciary. Further, corruption is reportedly rampant and people lack trust in the legal system. The International Commission on Jurists (ICJ) reported that “The lawyers with whom the ICJ spoke about this issue noted that while the degree of corruption varies (being at its worst at the lower rungs of the system), it is never absent from the equation:

it is so deeply embedded into the legal system that it is essentially taken for granted."\textsuperscript{146}

On a positive note, the government has begun taking some action against judges accused of corruption. On 21 October 2014, the Sagaing Region Court sentenced Homemalin township judge Tin Sein to 10 years in prison after the Anti-Corruption Commission found him guilty of extorting bribes from convicts.\textsuperscript{147}

**Provision of Competent Lawyers or Representatives by the Court to Witnesses and Victims/Survivors**

In 2014, UNDP said, “There is a severe shortage of legally trained professionals in Myanmar.... For new legal professionals, their foundational legal education has been limited. A visit to any law faculty in Myanmar will show only the most rudimentary conditions—no modern text books in any basic legal subject and almost no library acquisitions after 1962. There are almost no computers or internet access—all making legal research or self-teaching next to impossible. Some students obtain their degrees by correspondence…. Law professors, some of whom have foreign doctorates, struggle to keep their knowledge up to date…. In Myanmar, there is only very limited continuing education within the justice sector institutions—mostly connected with recruitment and promotion. There is no formal continuing education for private lawyers.”\textsuperscript{148}

For this reason, there is a lack of genuinely qualified lawyers, prosecutors and judges

Some lawyers interviewed by the ICJ acknowledged that the public still does not hold the legal profession in high regard and lawyers continue to be generally viewed as brokers—dealmakers between client and judge. Junior lawyers are “generally seen as poorly educated and inexperienced, and unethical in their pursuit of fees.” However, on a positive note, some observed a “new, merit-based reliance” on lawyers. Among the reasons for this are the high-profile cases of farmers against government, military and big corporate interests; the efforts of lawyers’ networks to provide free legal assistance; and an increasing awareness that a good lawyer can advance one’s cause.\textsuperscript{149} Another positive development is the inauguration of a unified Independent Lawyers’ Association of Myanmar on 20 January 2016. The association aims to become the first national, independent, professional organisation of lawyers in the country.\textsuperscript{150}

**Safety and Security of the Judiciary, Prosecutors, Litigants, Witnesses, and Affected Public**

Little information is available with regard to accessibility, safety and security of court facilities. There are however news articles that indicate that security is heightened when the courts hear controversial cases. For example, court officials of the Thayawady District Court required everyone who attended the hearing held for students who protested the education law to sign a form promising to follow court regulations. Only


\textsuperscript{147} Supra note 81.


\textsuperscript{149} Supra note 102, at 15.

two family members per defendant were allowed to enter the court and two reporters per media outlet. Security was also tightened for “fear of reprisal” when a court sentenced 15 men to death for stabbing and killing a man, an attack that caused public outrage and led to 23 arrests.

### Specific, Non-Discriminatory, and Unduly Restrictive Thresholds for Legal Standing

No reports or jurisprudence demonstrating how the courts determine legal standing were found; thus, no fair assessment could be made on this matter. The study did not find reports indicating that complaints were dismissed on the basis of the failure of parties to show sufficient connection to or harm from a law or action. It appears that barriers to instituting actions revolve more on reluctance to make official complaints because of fear of retaliation, associated cost or inconvenience of filing complaints, distrust or dissatisfaction in the justice system, or other reasons.

### Publication of and Access to Judicial Hearings and Decisions

One of the judicial principles prescribed in Article 19 of the Constitution is “to dispense justice in open court unless otherwise prohibited by law.” According to the Supreme Court’s Handbook for Media Access to the Courts, issued in October 2015, criminal proceedings are to be conducted in open court and the public may hear proceedings, depending on the space available in the courtroom. However, public access is not allowed with regard to criminal cases that are related to state secrets, as provided in the Burma Official Secrets Act. Similarly, according to the Child Law, no person other than the child’s parents or guardian, staff of the court, law officer and police officer shall be present at the trial of a juvenile case. Moreover, “public access is prohibited in the trial of the cases on which the presiding judge assumes those cases to be the special proceedings.”

The US Department of State reported that in 2014 ordinary criminal cases were open to the public. Unlike in previous years, there were no reports that families of political activists were not admitted to trials.

The Handbook also states that any person, including the media, are entitled to receive copies of judgments, orders, decrees of criminal cases and civil cases with the permission of the court. Only parties of cases are entitled to review the case files and request copies of documents included in the proceedings. Those wishing to procure copies are required to submit an application and pay for copying fees. This could be considered as a positive development since copies of judgments were previously not easily available to media. No information is yet available as to the ease and swiftness of the application process.

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154 The Supreme Court of the Union, Handbook for Media Access to the Courts, 8 October 2015, 18.

155 Supra note 81.
Reasonable Fees and Non-arbitrary Administrative Obstacles to Judicial Institutions

Proceedings, from filing of complaints with the police until they reach the court, are subject to unreasonable or arbitrary fees and obstacles. Police officers reportedly do not receive adequate budget to conduct investigations, resulting in officers seeking investigation funds from complainants. While the Myanmar Police Force has recognized this problem and announced that it would fund all investigation expenses starting from 2014, this was still not being implemented by the start of 2015.\footnote{Corruption and police reform in Myanmar, The Interpreter, 18 February 2015, http://www.lowyinterpreter.org/post/2015/02/18/corruption-police-reform-Myanmar.aspx (accessed 7 April 2016).} Although there is no cost for filing criminal complaints, filing fees for some cases of other nature are high. For instance, election candidates who want to submit complaints to the Union Election Commission will need to pay 500,000 kyats ($390) as submission fee, an amount that is viewed as much higher than the international norm.\footnote{The Carter Center, ‘Carter Center Statement on the Post-Election Environment and Complaints Resolution Process in Myanmar,’ 28 February 2016, 5.} Besides this, corruption in the judiciary is endemic and the judicial process in general was seen as expensive.\footnote{Supra note 139, at 29 and 58.} Corruption is not limited to the judiciary; in 2014 President Thein Sein said “Chronic bribery and corruption are still happening in the civil service.”\footnote{Kyaung Kha, ‘Thein Sein Admits Corruption, Bribery Are “Chronic” in Burma, The Irrawaddy, 22 August 2014.}

Assistance for Persons Seeking Access to Justice

The government does not fund a national program to provide free legal aid. Nonetheless, avenues through which complaints could be submitted have been opened. In 2012, the President’s Office announced that it was setting up a “People’s Voice” section on its website where people could send complaints, suggestions or appeals. The office would then advise the President of the feedback sent to “People’s Voice” and also forward them to the relevant ministries. In the first four days of “People’s Voice,” 50 anonymous letters were received.\footnote{May Sandy, ‘President encourages complaints, suggestions,’ Myanmar Times, 17 September 2012, http://www.mmntimes.com/index.php/national-news/nav-pyi-taw/1494-president-encourages-complaints-suggestions.html (accessed 9 April 2016).} No information as to the actions taken in regards the letters or whether the mailbox is still being maintained was found. The Parliament’s Fundamental Rights of the Citizen, Democracy and Human Rights Committee (FRCDHRC) has also been receiving complaints that it records and compiles; some complaints are sent to relevant ministries. From 2011 to 2015, it received 3,808 complaint letters. Of these, 3,273 were referred to the executive government, 108 to the Supreme Court, and 120 to relevant ministries; 307 received no action. The government responded to 478 letters and the Supreme Court to 60.\footnote{“Lower House MP urges committee to investigate human rights in prisons,’ Eleven, n.d., http://www.elevenmyanmar.com/local/lower-house-mp-urges-committee-investigate-human-rights-prisons (accessed 9 April 2016).}

There have been many changes since 2011 as Myanmar opened up its democratic space and numerous international organisations, civil society organizations and lawyers organizations are providing assistance to persons seeking access to justice. No data comprehensively mapping accessibility to such assistance was found. The International Bar Association’s Human Rights Institute (IBAHRI) reported that many people interviewed in 2012 suggested that access to justice remained poor. Civil activists typically identified institutions such as churches, industrial tribunals and local government offices as the places they would go if rights were being infringed. “None thought the Myanmar National Human Rights Commission offered satisfactory protection, while courts were almost universally discounted. Judges were considered corrupt
and too close to the executive, and the judicial process in general was seen as expensive and daunting.”

Well aware of the need to improve public trust and confidence in the courts, one Strategic Action Area of the Supreme Court’s Judiciary Strategic Plan (2015-2017) is to promote public awareness. In line with this, it intends to carry out national information programs and outreach programs. “The courts will take a proactive role in communicating the achievements in improving access to justice and improvements in timeliness and efficiency that will result from the initiatives taken in this three-year strategic plan.”

Further, the Judiciary Strategic Plan aims to improve ease of access to court services by creating public self-help information counters in courts, and designing and implementing pilot modern public intake centres. These initiatives were initiated in 2015 and are now in their second year of implementation. Pilot courts have been identified as follows: Taungoo District Court, Hlaingthayar Township Court and Hpaan Township Court. No information on the impact of the activities so far is currently available.

**Measures to Minimize Inconvenience to Litigants and Witnesses, and their Families, Protect their Privacy, and Ensure Safety from Intimidation/Retaliation**

There is no special law enacted specifically to protect victims, however, some laws contain provisions intended to protect witnesses and victims. For example, the Code of Criminal Procedure allows judges to adjudicate cases in any private room or take any other suitable protection for the best interest of witnesses and victims. Aside from these measures, the 1993 Child Law prohibits including information revealing the identity of a child who is participating as a witness in any case on radio, television, written publications, as well as making use of the photograph of the child. The 2005 Anti-Trafficking Law also prohibits publication of news at any stage of investigation, prosecution, and adjudication without the permission of the Body for the Suppression of Trafficking in Persons. It also prohibits perusal or copying of documents contained in the proceedings by any person not involved in the case.

Some improvements have been introduced in the last five years, with the National Human Rights Commission Law of 2014 providing witness protection and non-retaliatory measures against victims. However, it is still not known to what extent these provisions are fully complied with and how effective they have been. Additionally, the Supreme Court’s Judiciary Strategic Plan (2015-2017) intends to modernize pilot court facilities to provide adequate and safe access and improve public trust. To do this, the Supreme Court, with the assistance of USAID, will assess pilot court space, facilities, needs and priorities based on international court facilities standards and develop and test renovation designs for each pilot court. Additionally, to reduce inconvenience to witnesses and parties to cases, the Judiciary Strategic Plan aims to develop pilot court case management program procedures and best practices to improve timeliness of case processing.

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162 Supra note 139, at 29.


164 Ibid, 14.
Available and Fair Legal Aid to All Entitled

Article 375 of the Constitution states that “An accused shall have the right of defence in accord with the law.” A report however notes that “There is no government-funded legal aid programme and no public defender programme, except for defendants who are accused of capital crimes. For smaller disputes, such as traffic accidents, there is a strong incentive to settle quickly without involving the formal justice sector.”

Legal aid is provided by civil society and lawyers’ organizations. As there are many organizations providing legal aid, the government enacted the Legal Aid Law in January 2016. The Chief Justice of the Supreme Court will be responsible for the establishment of a union level legal aid organization, and Chief Judges of regions/states, districts and townships will be responsible for setting up the legal aid organization in their jurisdiction. These organizations will recruit legal aid providers/lawyers for defendants who are unable to afford the services of a lawyer. As the law was enacted only early this year, it is difficult to know how much this law will benefit legal aid providers and recipients.

Legal aid providers will be required to register with the local legal aid supervisory team established under the new law. Moreover, the union level legal aid provision board will determine the offences that are eligible to receive legal aid. The board will also determine the criteria for indigents who are entitled to receive assistance. Legal aid providers could face charges should they fail to conform to the prescribed procedure.

General Public Awareness of Pro Bono Initiatives and Legal Aid or Assistance

As free legal aid is being provided by several civil society and lawyers’ organisations operating throughout Myanmar and they began rendering services only in 2011, it is difficult to assess how widely they have been able to reach the public. The Legal Aid Law and the Independent Lawyers’ Association of Myanmar have the potential of ushering in a more systematic access to information regarding free legal assistance.

III. INTEGRATING INTO A RULES-BASED ASEAN

Progress towards Achieving a Rules-Based ASEAN Community

On Mutual Support and Assistance on the Rule of Law

As a member of ASEAN, Myanmar participates in the initiatives of the ASEAN Law Ministers Meeting (ALAWMM), such as the ASEAN Government Law Directory, ASEAN Legal Information Authority (ALIA), ASEAN Government Legal Officers’ Programmes (AGLOP) and Exchange of Study Visits which are designed to help promote awareness and understanding of each other’s legal system.

166 Legal Aid Law, Law No.10/2016 (Myanmar), Section 6.
167 Ibid, Section 39.
168 Joint Communique of the Ninth ASEAN Law Ministers Meeting (ALAWMM), 22 October 2015.
Myanmar has also joined the ASEAN Law Association. In August 2013, a judge from the Supreme Court of Myanmar attended an ASEAN Law Association governing council meeting with other representatives from supreme courts of ASEAN countries. The judiciaries of ASEAN have also been participating in the Court Excellence and Judicial Cooperation Forums. Inaugurated in Singapore in 2014 at a forum hosted by the Subordinate Courts of Singapore, it aims to foster judicial cooperation and provide a venue for ASEAN judiciaries to share experiences in judicial administration and the delivery of justice. A forum on “International Framework for Court Excellence” will be conducted in Yangon on 17 to 20 May 2016 by the Singapore Judicial College in conjunction with the Singapore Ministry of Foreign Affair’s Initiative for ASEAN Integration.

The country’s parliament also participates in initiatives of the ASEAN Inter-Parliamentary Assembly, which aims to encourage understanding, cooperation, and close relations among member parliaments. Aside from this, U Shwe Maung, a member of the Pyithu Hluttaw from 2011 to 2016, is a Board Member of the ASEAN Parliamentarians for Human Rights (APHR), which seeks to promote democracy and human rights in all ASEAN states by utilizing the abilities of parliamentarians and other influential persons to advocate for the protection of human rights throughout ASEAN. Among other activities, the APHR sent a fact-finding mission to Myanmar in 2015 comprised of parliamentarians from Cambodia, Indonesia, and Malaysia who met with a variety of stakeholders, including government officials and political parties, in order to learn about key political and human rights issues facing the country. The objective was to learn how ASEAN and members of parliament from around the region can support Myanmar in its political development.

**On Legislative and Substantive Changes Promoting the Rule of Law**

There have been numerous legislative and institutional changes in Myanmar since 2011. However, these developments are designed primarily to address the needs of the country as Myanmar pursues its rebirth as a democratic state and establishes ties with the international community after having been isolated for over five decades. There is no known official information on whether there have been legislative and substantive changes in Myanmar that were adopted specifically and primarily to promote the rule of law in ASEAN at a regional level.

**On Enactment of Laws relating to the ASEAN Community Blueprints and Similar Plans**

During its Universal Periodic Review process, Myanmar revealed that measures have been taken to implement the ASEAN Economic Community (AEC) Blueprint. President Thein Sein’s second wave of reform focused on socio-economic development and alleviating poverty by half by 2015; these reforms took


shape in the context of the regional move towards establishing the ASEAN Economic Community by 2015. The country adopted a managed float for its currency and unified its multiple exchange rates in April 2012, it passed the Myanmar Special Economic Zone Law in 2014, and the government approved the Mining Regulations Law in December 2015. Parliament is also reviewing a draft Myanmar Investment Law, which would combine the 2012 Foreign Investment Law and the 2013 Myanmar Citizens Investment Law, as well as a revision of the Myanmar Companies Act. While these efforts aim to make the country more attractive to foreign investors in general, they do align with the aims of ASEAN to generate economic activity and encourage freer flow of investments. In line with implementing the AEC Blueprint, the country is also working with the Asian Development Bank to establish trade facilitation indicators and review customs regulatory framework and operations.

Myanmar also enacted the Mutual Assistance in Criminal Matters Law in 2004 and the Anti-Trafficking in Persons Law in 2005. These legislations are meant to comply with the requirements of international treaties as well as regional ones.

**On Integration as Encouraging Steps toward Building the Rule of Law**

Myanmar is going through several transitions that are impacting the rule of law landscape in the country. While it is hard to precisely assess to what degree positive changes have been influenced by ASEAN Integration, commentators agree that integration serves to encourage rule of law in Myanmar. “Effective participation in ASEAN processes, especially in AEC, requires policy reforms, consistency in policy and in its application…. The main imperative is to ‘level the playing field’ for domestic firms, in order to ensure their competitiveness.” To this end, Dr. Myint, chief economic presidential advisor and chief of Myanmar Development Resource Institute, said in 2011 that measures would have to include (a) fair access to the country’s natural resources, (b) fairness in granting business-related licenses and permits, (c) equal treatment in the application of rules and procedures, (d) eliminating arbitrary and ever-changing rules and regulations, (e) reducing corruption, (f) ending payment of arbitrary dues, and (g) transparency and accountability in applying rules and procedures.

**On the Contribution of ASEAN Integration to the Building of Stronger State Institutions**

Since the country shifted from authoritarian rule, Myanmar’s institutions have seen numerous improvements and it continues to engage with the international community to strengthen rule of law institutions. In this bustle of activity, it is hard to pinpoint to what extent progress has been influenced by ASEAN integration. Examples of ASEAN integration’s influence are nonetheless apparent. For example, in the Judiciary Strategic Plan (2015-2017), among the actions to be undertaken are (i) Develop ASEAN Judiciaries Portal, (ii) 174


178 Ibid.
Conduct joint training with ASEAN judiciaries, and (iii) Develop capacity to facilitate the service of civil process within ASEAN.

At a broader level, ASEAN’s support and friendship has helped Myanmar’s standing and relations with the international community, including with ASEAN’s dialogue partners. In this regard, Myanmar’s 2014 chairmanship of the ASEAN—it’s first since becoming a member—bears emphasizing. For a long time, Myanmar was regarded as a weaker member of ASEAN due to its domestic politics, economic weaknesses and Western sanctions. Myanmar was supposed to chair the ASEAN in 2006 but was forced to forfeit its turn due to pressure from both ASEAN members and ASEAN’s dialogue partners. In 2011, Myanmar expressed the desire to chair the ASEAN in 2014, and requested a swap with Lao PDR, who was supposed to host that year. In view of the series of political and economic reform efforts Thein Sein’s government had carried out since it was inaugurated in March 2011, ASEAN decided to endorse Myanmar for ASEAN’s 2014 chairmanship.

Myanmar’s 2014 chairmanship is of great symbolic significance. It helped Myanmar gain political legitimacy, showed that Myanmar is an equal member in the ASEAN, and offered it the opportunity to be viewed as a responsible member of the international community. “The recognition and applause from… its fellow Southeast Asian neighbours and the rest of the world for successfully carrying out the chairmanship role has greatly boosted the national pride of the Myanmar people as well as the legitimacy of the Myanmar government and its reform agenda.”

Prospects and Challenges

Challenges to a Strengthened Commitment to the Rule of Law

Myanmar is still implementing several political, economic, and administrative reforms; it is in the process of reviewing, strengthening and improving its institutions. Where Indonesia, Malaysia, Thailand, Philippines and eventually Vietnam have actively engaged with the Human Rights Council as members, Myanmar is still subject to country-specific Special Procedures. The World Justice Project (WJP) 2015 rule of law index in 2015 ranked Myanmar 92nd among 102 states and lowest among fellow ASEAN Member States, demonstrating the disparity within the region.

Despite the changes in the country, Myanmar is still struggling to fulfill the recommendations contained in various UN human rights resolutions issued in line with the country-specific Special Procedures. In complying with these expectations and obligations, Myanmar will also meet the rule of law commitments set for ASEAN countries. In this regard, the Special Rapporteur’s findings and recommendations with regard to rule of law are instructive. She has highlighted the need for: (i) a comprehensive review of legislation and legal provisions that limit fundamental freedoms and contravene international standards, (ii) a process of legislative reform with clear timelines for consultations and the drafting and review of amendments to existing legislation or new draft bills, (iii) continued judicial reform and capacity-building and training of judges and lawyers to address corruption and strengthen the independence and effectiveness of the judiciary, and (iv) a process of consultation with all stakeholders on the review and amendment of the Constitution, to bring it into line with international standards.


Commitments and Plans/Initiatives in relation to ASEAN-wide Commitments and Declarations on Human Rights

As mentioned above, Myanmar has passed the Mutual Assistance in Criminal Matters Law in 2004 and the Anti-Trafficking in Persons Law in 2005. These legislations are meant to comply with the requirements of international treaties as well as regional ones. Myanmar’s Judiciary Strategic Plan also refers to planned collaboration with other ASEAN judiciaries in order to build capacity. Myanmar is undertaking numerous initiatives to develop socially, economically and politically. While the initiatives are primarily geared to address the needs of the country, some aspirations of Myanmar overlap with that of the ASEAN. So far, Myanmar has not ratified the ASEAN Convention Against Trafficking in Persons, Especially Women and Children.

IV. CONCLUSION

Nexus of the Changes to the Overall State of the Rule of Law for Human Rights

In the last five years, there have been many unprecedented changes in Myanmar which promote the regime of the rule of law for human rights. Myanmar has improved its human rights situation in the country to such a degree that in November 2015, during the 70th Session of the General Assembly, representatives of Thailand, India and the Philippines said country-specific resolutions regarding Myanmar were no longer needed, while the delegate of Japan expressed the hope that the government would address remaining challenges so that a resolution would not be necessary in 2016.181

President Thein Sein has paved the way for further reforms and the judiciary has adopted a comprehensive strategic plan to strengthen the judicial institution. Although Myanmar’s legislative process is not perfect, it has to be recognized that there have been many improvements and significant changes in the last five years. International Crisis Group noted that law-making in the country is constrained by the representatives’ lack of experience and institutional weaknesses. Lawmakers have little knowledge of democratic practice, and there is very little institutional support. Without offices or staff, with no policy and research help, and with committees lacking internal experts to report on and analyse the issues, efficient and effective law-making is impossible. Under such circumstances, and with a crowded legislative agenda, it is impressive how much has been achieved. However, as the transition proceeds, far greater investments are needed if this critical branch of government is to meet public expectations.182


Contributing Factors

The previous government’s engagement with opposition party NLD and the international community, the release of many political prisoners and opening up of the country contributed to improving the rule of law and human rights situation in Myanmar. However, much needs to be done as the military regime’s long rule and Myanmar’s isolation from the international community has resulted in a diminished understanding and sense of obligation among the people with regard to their contribution to building a rule-based society.

Role of the ASEAN Declaration on Human Rights in Strengthening Rule of Law for Human Rights

Myanmar has been undertaking massive legislative and institutional changes that impact the rule of law and human rights in Myanmar. How much of these changes are influenced by the ASEAN Human Rights Declaration is very hard to ascertain, specially considering that ASEAN works on the basis of non-interference in domestic affairs and consensus-based decision-making. Further socialization and dissemination of the ASEAN Human Rights Declaration and other international human rights instruments is needed to generate a change of mind-set in officials and citizens of the country. Nonetheless, as Myanmar strives to meet its own agenda to create a more stable and democratic government as well as create an environment that encourages foreign investments, the country also aligns itself more with the goals of the region.

Thein Sein’s government considered ASEAN as friends, good neighbours and business partners; its friendship and support has helped to reduce the strained relationship Myanmar has had with the West. Indeed when ASEAN welcomed Myanmar into the Association as a member in 1997, it was a cause of concern for the U.S, Japan and the European Union, due to Myanmar’s discouraging human rights record. ASEAN however maintained that inclusion in the organization would open up opportunities for communication with Myanmar’s military leaders.183 Before the move towards democratic governance, ASEAN was among very few venues where Myanmar’s leaders could engage with and learn from other states. The past administration’s engagement with the initiatives of ASEAN as well as those being undertaken by ASEAN’s dialogue partners to support the goals of ASEAN, have undoubtedly contributed to improving rule of law in the country.

Although many concerns remain with respect to arbitrary detention, equal enforcement of law, judicial independence, access to justice, and administrative capacity, Myanmar is on a very important pathway to democracy, justice and rule of law. As the democratically-elected new government takes over from Thein Sein’s administration, there is an expectation that all outstanding issues will be tackled, although it will take time before issues are finally resolved. As the new government has few experience in public administration, the executive, legislative and judiciary departments will continue to need external assistance from international partners to meet targets and remain on the right track.

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