

Title	Current developments of judicial system in Myanmar
Sub Title	
Author	H.E. U Htun Htun Oo
Publisher	慶應義塾大学大学院法務研究科
Publication year	2013
Jtitle	慶應法学 (Keio law journal). No.27 (2013. 10) ,p.17- 28
JaLC DOI	
Abstract	
Notes	特集：ミャンマーにおける法・司法制度改革の現状と展望
Genre	Departmental Bulletin Paper
URL	https://koara.lib.keio.ac.jp/xoonips/modules/xoonips/detail.php?koara_id=AA1203413X-20131025-0017

慶應義塾大学学術情報リポジトリ(KOARA)に掲載されているコンテンツの著作権は、それぞれの著作者、学会または出版社/発行者に帰属し、その権利は著作権法によって保護されています。引用にあたっては、著作権法を遵守してご利用ください。

The copyrights of content available on the KeiO Associated Repository of Academic resources (KOARA) belong to the respective authors, academic societies, or publishers/issuers, and these rights are protected by the Japanese Copyright Act. When quoting the content, please follow the Japanese copyright act.

CURRENT DEVELOPMENTS OF JUDICIAL SYSTEM IN MYANMAR

H.E. U Htun Htun Oo

Introduction

The topic I have chosen for this address is ‘current developments’ of our judicial system. There are some changes brought about by our new Constitution, 2008. It lays down the democratic foundation for the separation of state powers and the doctrine of check and balance. The legislative power of the Union is vested in the Pyidaungsu Hluttaw (the Parliament), which consists of Pyithu Hluttaw and Amyothar Hluttaw. The President is the head of the executive and exercises the executive power, sharing among the Union (Pyidaungsu), the Regions and the States. Judicial power is shared among the Supreme Court of the Union and its subordinate Courts. The three branches of sovereign power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves.

Judicial Principles

I am going to talk on judicial principles briefly as these are the framework for this speech.

Judicial power is mainly vested in the Supreme Court and its subordinate Courts, namely High Courts of the Region or High Courts of the State, Courts of the Self-Administered Division, Courts of the Self-Administered Zone, District Courts, Township Courts and other Courts constituted by law. The Supreme Court is the highest Court of

the Union save the powers of the Constitutional Tribunal and the Court Martial.

Justice throughout the Union is administered in Courts in accordance with the judicial principles that can be expressed in the following terms:

“to administer justice independently according to law,
to dispense justice in open Court unless otherwise prohibited by law, and
to guarantee in all cases the right of defence and the right of appeal
under law.”

Moreover, Courts carry out justice in the light of such principles as follows:

to support in building of rule of law and regional peace and tranquility by protecting
and safeguarding the interests of the people,
to educate the people to understand and abide by the law and nurture the habit of
abiding by the law,
to settle disputes among the people within the framework of the law, and
to aim at reforming morals of the criminal in sentencing him.

Some principles of criminal justice can be summarized as follows:

- (a) no criminal law shall be enacted to provide retrospective effect;
- (b) any person who committed a crime, shall be convicted only in accord with the relevant law then in operation. Moreover, he shall not be punished to a penalty greater than that is applicable under that law;
- (c) any person convicted or acquitted by a competent Court for an offence shall not be retried except that a superior Court annuls the judgment and orders a retrial;
- (d) an accused shall have the right of defence in accord with the law;
- (e) no penalty that violates human dignity shall be prescribed.

Structure of the Courts

Now, I would like to introduce the hierarchy of our Courts. Generally speaking, Township Courts and other Courts constituted by law (e.g. Juvenile Courts, Motor Vehicle Courts, or Municipal Courts) are Courts of origin or Courts of first instance. District Courts, Courts of Self-Administered Division, and Courts of Self-Administered

Zone are Courts of first appeal. As far as judicial functions are concerned, they are of the same level. High Courts of the Regions and High Courts of the States are Courts of second appeal. The Supreme Court of the Union is the highest Court of the Union and the Court of final Appeal.

The Supreme Court supervises all Courts in the Union. It is entitled to submit the bills relating to the judiciary to the Pyidaungsu Hluttaw (the Parliament). It has to submit judiciary budget to the Union Government.

The Supreme Court appoints judicial officers for subordinate Courts. They are career judges serving at different levels of Courts except the Supreme Court and High Courts in which Chief Justices and Judges are appointed by the President in coordination with the Chief Justice of the Union and with the approval of the Hluttaws (parliaments of the Union, the Regions or States, respectively).

What I would like to do in this address is to give analysis on the developments and challenges of judicial system in Myanmar focusing on a number of areas of significance to judicial capacity.

But before turning to these, I must say something about the Supreme Court in terms of judicial independence.

The Supreme Court

The Supreme Court is composed of a minimum of seven Judges and a maximum of 11 Judges, including the Chief Justice of the Union. The President with the approval of the Pyidaungsu Hluttaw (the parliament) appoints the Chief Justice. The President in co-ordination with the Chief Justice nominates and appoints Judges of the Supreme Court with the approval of the Pyidaungsu Hluttaw (the parliament). At present, there are 7 Judges including the Chief Justice in the Supreme Court.

A person is qualified for the appointment as a Chief Justice or Judges of the Supreme Court if he or she:

- (a) has served as a Judge of the High Court for at least five years; or
- (b) has served as Judicial Officer or a Law Officer at least ten years at the Region or

State Level; or

- (c) has practiced as an Advocate for at least 20 years; or
- (d) is an eminent jurist in the opinion of the President.

None of the Chief Justice and Judges of the Supreme Court are members of a political party, representatives of the Parliament and civil services personnel. They must also be free from party politics.

The impeachment procedures are clearly provided in the Constitution. The President or one-fourth of the total number of representatives of either Hluttaw can impeach the Chief Justice and Judges of the Supreme Court for high treason, breach of the Constitution, misconduct, disqualification or inefficient discharge of duties assigned by law.

The Constitution guarantees the tenure of the Chief Justice and Judges of the Supreme Court. They can hold the office up to the age of 70 unless he or she resigns the office; or is impeached in accordance with the Constitution and removed from office; or is unable to continue to serve due to permanent disability caused by either physical or mental defeat; or dies in office.

As the Supreme Court is the highest Court of the Union and the Court of final appeal, its judgments are final and conclusive. There is no revision upon the judgment of the Supreme Court outside the appeals process. As far as jurisdictions are concerned, the Supreme Court has appellate, revisional, and original jurisdictions in accord with the law. Moreover, it has the power to issue writs appropriate to the Fundamental Rights

guaranteed in the Constitution.

Developments

The new Constitution brings some developments in the judiciary.

New High Courts

In terms of the structure, new High Courts are formed. In the past, there was no High Court but only the Supreme Court which exercised the powers of High Court. At that

time, the Supreme Court sat in Nay Pyi Taw, Yangon and Mandalay and tried cases appealed from everywhere of the Union.

Nowadays, 14 High Courts for the respective Regions and States are newly formed under the new Constitution. While the Supreme Court supervises all Courts in the Union, High Courts supervise the judicial matters of subordinate Courts within their respective jurisdictions of the Regions and the States in accord with the guidance of the Supreme Court. In terms of formation of new High Courts, the people can ask for decisions of the High Courts in their areas so that they can reduce the costs of litigation.

As our country is constituted by the Union System, state powers are shared among the Union, Regions and States. The extension of Court structure is done to meet this end.

Awareness of the Rule of Law

Our country is a place where multi-national races collectively reside. The new Constitution guarantees every citizen to enjoy the right of equality, the right of liberty and the right of justice as prescribed in it. Only when the

eternal principles of justice, liberty and equality are enhanced will the perpetuation of peace and prosperity of the national people achieve. These values can only be secured by an application of the rule of law. The rule of law is essential for materializing the democratic system effectively, and it is the bedrock of a democratic society as well.

We are of course aware that the rule of law is a pre-necessary condition for the national development. Therefore the principle of the rule of law is guaranteed by the new Constitution as fundamental rights of citizens.

Article 347 of the Constitution provides that -

“the Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection.”

Article 353 reads “nothing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person.”

The rule of law is the only basis upon which everybody including public bodies and the executive can order their lives and activities. The functions of Union Government,

Hluttaws (Parliament) and Courts are subject to the Constitution and the law so that the rule of law will improve. Article 219 of the Constitution provides that ‘the Union Government preserves stability of the Union, community peace and tranquility and prevalence of law and order’.

From the point of the judiciary, only the independent judiciary makes sure to uphold the rule of law. All judges implement their judicial functions independently and subject only to the Constitution and the law. Justice must be administered in accord with law. No person shall be convicted of crime except for violation of a law in force at the time of the commission of the act charged as an offence. An accused have the right of defence and the right to independent and fair trial in accord with the law. The judgments or decisions of all levels of Courts have final character and other bodies of State cannot review and amend those judgments or decisions except filing them to superior Courts for appeal. An independent, impartial, honest and competent judiciary is integral to upholding the rule of law.

Guarantee of Fundamental Rights

Even though there is no Human Rights Law in Myanmar; it is a primary duty of Courts for populace to enjoy their fundamental rights in accord with the Constitution. In order to obtain a fundamental right, any person can apply to the Supreme Court. The Supreme Court has the power to issue such writs as suitable as Writ of Habeas Corpus, Writ of Mandamus, Writ of Prohibition, Writ of Quo Warranto and Writ of Certiorari. The Supreme Court entertains the application of writs under Writs Procedures and safeguards the fundamental rights of the citizens.

Challenges

Under new political system, we now face challenges which mainly include harmonization of the judiciary with democratic culture, absence of corruption in every courtroom and reinforcement of the judicial system.

Harmonization with Democracy

Long time ago, disputes have been settled by traditional judicial system in Myanmar, but during the late 19th century, common law legal system was introduced by British colonialist. The essence of Myanmar traditional judiciary was settlement of disputes through negotiation between the two parties. In contrary, the judicial function of English common law system rested on the decision of win and loss rather than fairness and harmony in the society.

After independence in 1948, different political systems have been dramatically changed, but in the judicial branch the traditional strict appliance of 'law and order' approach has been preferred. Judicial functions were conducted by Courts of law under the influence of the executive authority.

A theme that is popular with some of the media in Myanmar is that the judiciary does not change together with the democratic movement. The judiciary should exercise the 'rule of law' centered approach preferentially in doing its functions to be in line with the democratic values.

We accept that it is the most important duty of the judiciary to protect people's rights through a fair and equitable trial within the limits of domestic legal framework. There must be clear laws under which people can ask protection of their rights and remedies for their grievances before the Court. If the Court carries out a quick, effective and fair response to protect their rights and to redress their grievance proportionally, the judiciary could maintain the public confidence.

Absent of Corruption

To prevent corruption is a big challenge for all institutions including the judiciary. Absent of corruption is necessary for sustainable development and for maintenance of the rule of law. While the clean government and good governance are carried out by the executive, actions against corruption are being taken strictly by the Supreme Court. All judges should administer justice "without fear or favour, affection or ill-will". The presence of bias, favour, or corruption in a Court System denies justice and undermines the rule of law.

However, actions against bribery and corruption must be coincident with the actual causes. In Myanmar society, people have the conception that taking bribe is a sin. Therefore, the increase of remuneration and general welfare programs are supposed to be advisable solutions. Salary of judges is as same as salary of other ordinary civil services personnel and they get low income.

Reinforcement of the Judiciary

Another challenge is reinforcement of the judiciary to bring about the upright judiciary and to achieve public trust and reliance on it. If the judicial pillar is upright, it can foster public confidence in the fairness and objectivity of the judicial system.

In this address, I would like to highlight four aspects of judicial performance, namely judicial independence, accountability, efficiency and well-functioning of the judiciary. These areas need to be reinforced to become an independent, impartial, honest and competent judiciary which is fundamental to upholding the rule of law, engendering public confidence and dispensing justice.

Judicial Independence

Judicial independence is a State Principle and a judicial principle as well. It is essential that there should be an independent judiciary to uphold the rule of law.

The Constitution provides exact procedures for appointment and removal of Chief Justices and Judges of the Supreme Court and High Courts. All judges of the Supreme Court and High Courts shall have a guaranteed tenure until a mandatory retirement age, except on such limited grounds as I mentioned before. While the term of office for the President and Hluttaw is five years, the Chief Justice and Judges of the Supreme Court can hold office up to the age of 70 years and of High Courts up to 65 years.

As Myanmar is a Union State, the judicial power is shared among the Supreme Court, High Courts, and different levels of other Courts; justice throughout the Union is governed and supervised by the Supreme Court.

There is no ministry of justice formulated in Myanmar. The Chief Justice of the Union is Head of the Judiciary. The judiciary has its own structure of governance to en-

sure the proper governance of the system.

Judiciary budget is proposed by the Supreme Court, to the Union Government in order to include and present in the Annual Budget Bill in accordance with the Constitution. In practice, High Courts of Regions and High Courts of States have to propose the budget of them and their subordinate Courts to the relevant Region or State Budget Programs.

Appointment of judges in subordinate Courts is based on a career and promotion track. As far as appointment of junior judges is concerned, the Supreme Court is of very high accountability, as appointments are made on merit with appropriate independent process. We are confident that there is no misconduct relating to appointment, posting, transfer, promotion and removal of junior judges in subordinate Courts. The Supreme Court disciplines judicial officers and judges for their misconduct, with no influence of the executive.

In fact, there is structural independence in judiciary but operational independence will result only if the executive and legislature refrain from any interference in judicial functions. Judicial independence depends upon the government respecting the principle of judicial independence. If the judiciary achieves the confidence and respect of the populace, they help dispel the risk of significant inroads to judicial independence.

On the other hand, safeguard provisions for judges should be firmly provided by law. There are some safeguard provisions under common law practice. Judges are bound by professional secrecy and enjoy personal immunity from civil and criminal liability in judicial matters.

Accountability

Judicial independence should be coupled with accountability. Each judge is accountable for the decisions he makes; the decisions are made in public and so they are open to public scrutiny and they can be reviewed on appeal.

The judiciary is the branch of the State responsible for providing the fair and impartial resolution of disputes between citizens and between citizens and the state or state entities in accordance with the prevailing rules of statute and case law.

Judges are responsible for judicial corruption and miscarriage of justice.

Moreover, they should be accountable for their honesty and capacity in doing judicial functions. The Supreme Court makes efforts to ensure honesty and capacity of judges using disciplinary action and due process of supervision. The Supreme Court conducts the appointment of judges on merit-based examination and assures the transparency of appointing process. It also carries out random assignment of cases, full publication and dissemination of judicial decisions, and peer evaluation on judicial, administrative and disciplined activities of judges. The Supreme Court Administration Committee including the Chief Justice of the Union and all judges of the Supreme Court supervises promotion of judges, judicial complaints and disciplinary actions if necessary.

Efficiency

The third aspect to promote confidence of the citizens is efficiency. The ability to adjudicate disputes in an efficient and timely manner helps achieve public confidence on the judiciary. It has always been the responsibility of the judiciary to ensure that the cases that come before the courts are dealt with as quickly and cheaply as possible, consistent with the maintenance of high standards of judicial determination. The judiciary must earn and maintain the public trust in its ability to deliver justice on a daily, case by case basis.

From 30th March 2011 on that day the new Constitution came into operation to 30th September 2012, 84791 civil cases are accepted, 60753 cases decided and 24038 cases pending. At the same period, 464501 criminal cases are accepted, 433013 cases decided and 31488 cases pending in the Supreme Court and all other Courts. The clearance rate of civil adjudication is 71.65 percent compared with 93.22 percent in criminal adjudication.

If we are to have a judiciary that has the confidence of the citizens, it is essential to improve judicial efficiency; trying cases speedily and correctly, removing unreasonable delays and backlogs, and enforcing the decisions of Courts effectively. Moreover, the backlog and speed with which Courts can dispose of such a dispute as commercial cas-

es, company cases and torts directly affect investor's trust in our judicial system and market economy system.

Here I would like to make two comments on judicial efficiency: judicial training and enough resources.

We need to build up capacity of judges urgently. The Supreme Court launches different training programs to extend the horizon of our judges; especially in these areas: current developments of the Constitution and laws; changing legal and judicial concepts; information technology and language skill to study them.

Furthermore, the judiciary must have the required financial, logistical and human resources to perform its functions adequately. Sufficient resources are required to maintain court buildings and office facilities, attract and retain well trained and capable staff. To improve judicial efficiency correlates sufficient and adequate allocation of budget and public expenditure to the Courts.

Well-Function

The last aspect of reinforced judiciary is well-functioning of it. Judicial function cannot be performed only by the Courts. Relevant institutions, and prosecutors, lawyers, parties and witnesses must go hand-in-hand to ensure well-functioning of the judiciary. The whole judicial process which involve giving information or reporting of a crime, investigation, litigation, examination of witnesses, interrogation of document or evidence, deciding the case based on the merits of it, and enforcement of Courts' decisions will be functioning if relevant institutions and persons cooperate dutifully and with good intention. If the judiciary functions well it does not impose burden and difficulties upon the parties so that it will regain the public trust and reliance.

The management of Courts must be efficient. Effective case flow management and proper structuring of the jurisdiction of Courts are a means to a well-run Court System that functions according to judicial standards and norms, protecting the rights of the accused, as well as victims and witnesses. A Court must treat each of litigants, witnesses, victims or defendants with dignity and provide accurate information in a helpful, timely, and open manner.

Now we are seriously considering making judicial reform efforts focusing on some critical areas such as:

- (a) enhancing access to justice;
- (b) improving timeliness and quality of justice delivery;
- (c) strengthening integrity, independence, and impartiality of the Courts;
- (d) facilitating coordination across the criminal justice system; and
- (e) increasing public trust in the justice system.

We need to enhance access to justice for prisoners waiting for trial and being in remand. Adjournments are to be reduced. We also need to improve the quality of record-keeping. We need to set up clear mechanism in order to reduce vulnerability of the system to corruption. We need to encourage people to use alternative dispute resolution ADR and informal justice instead of litigation. Improvements in these areas will result in increased public trust in our judiciary.

In conclusion, I would like to say few remarks on the topic of current developments of our judicial system. The core responsibility of the judiciary is to provide the fair and impartial resolution of disputes between citizens and between citizens and the state or state entities in accordance with the laws. Nowadays, under the changing constitutional landscape, the primary duties of the judiciary become to maintain social order peaceful and tranquil, to have all people to secure justice, liberty and equality and to uphold the rule of law. Doing this task, the judiciary collaborates with the executive and the legislature, rationally and within the framework of constitutional structure. Let me end by saying that constructive and balanced relationships between the three branches of the State are essential to the effective maintenance of the Constitution and the rule of law.