Melissa Crouch (forthcoming 2016) 'The Judiciary in Myanmar' in N Farrelly, I Holliday and A Simpson (eds) *Routledge Handbook of Contemporary Myanmar*. New York: Routledge

UNSW Working Paper series

The Judiciary in Myanmar: Beyond Reform?

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Introduction

The courts in Myanmar have been a topic of heated discussion in the post-2011 environment. Yet in contrast to many other areas of governance and administration, the courts are one sector where reform has been less evident or obvious. In fact, while many have been calling for greater judicial independence, the current framework in effect pulls in the opposite direction towards centralisation and executive-military control over the courts.

This raises the broader question: what is the role of the courts in Myanmar post-2011? The three top parallel courts in Myanmar are the Constitutional Tribunal, the Courts Martial and the Union Supreme Court. The Constitutional Tribunal is a new institution introduced in 2011, but has heard only about 11 cases, has been marginalised and therefore lacking in political influence. The Courts Martial are a black hole in terms of academic research, given the difficulties of obtaining access to information on these courts. The Supreme Court is therefore the most active, dealing with hundreds of cases per year, and is perhaps the most politically influential court of the three.

This chapter therefore focuses on the role and function of the Supreme Court, and the courts below it, under the quasi-civilian regime. The literature around the role and politics of courts, and of courts in authoritarian regimes, is vast and complex (see for example Ginsburg and Moustafa 2008). In this chapter I unpack the role of the courts in Myanmar and its relationship to the other institutions of governance. First, I show how the composition of the Supreme Court points to the influence of the executive over the courts. Second, the authority of the Supreme Court in terms of its original and appellate jurisdiction, and its reporting, law-

making and supervisory functions are focused on keeping the lower courts in-line. Third, the new authority the Supreme Court has to hear cases concerning complaints against government decisions is a form of procedural authoritarianism to keep lower courts in check. Finally, I show how the court's jurisdiction is subject to change by parliament, and recent legislation affecting family law will raise new and difficult social and legal questions for the courts in the future.

Centralisation of the Courts through Regulation

The Union Supreme Court is the most powerful court in Myanmar, having supervisory jurisdiction over all lower courts. Located on the outskirts of Naypyidaw, the new capital city, the Supreme Court's geographic remoteness is one symbol of its inaccessibility and its removal from everyday life. As the backbone of the judicial system in Myanmar, the Supreme Court has several unique characteristics in terms of its composition, selection, tenure and removal that demonstrate the explicit hold the executive retains over the Court and its leadership. I demonstrate this by contrasting the current overt limitations on courts against the implicit, highly discretionary judicial system under the military regime prior to 2011.

Myanmar has a history of drastic change to its court system, most notably during General Ne Win's socialist regime (1962-1988) when a system of specialist tribunals and People's Courts replaced the existing common law judiciary (Cheesman 2012a). The Supreme Court as it exists today was formed in 1988, in the wake of the takeover by the former military regime and the abolition of the socialist-era People's Councils. At that time, five judges were appointed to the Supreme Court by military order. Law No 2/1988 on the judiciary was introduced, and it set out some of the basic judicial principles that today are found in the 2008 Constitution. The Supreme Court's jurisdiction was wide-ranging and included the power to transfer cases to itself. It had full supervisory jurisdiction over the lower courts and had the power to regulate the jurisdiction of the State and Region Courts (then known as Divisions), and Township Courts. The Supreme Court also had full power to select and appoint judges to the lower courts, with no public selection criteria or process. From 1988 to 2010, all details regarding the appointment, removal and tenure of judges were left ambiguous. Judges therefore had no security of tenure. At times there were even overt campaigns against

individual judges under the banner of combating corruption (Cheesman 2015: 165-166; Cheesman 2012b).

Small changes were made to the structure of the judiciary during this era. In 2000, a new Judiciary Law No 5/2000 amended the number of court personnel by expanding the bench to a minimum of 7 and a maximum of 12 judges. The law introduced a process of special appeal from decisions of the Supreme Court. It also established District Courts as another level in the judicial hierarchy between Township Courts and State/Region Courts. Minor amendments were made through Law No 2/2003 to expand the number of Deputy Chief Justices from 2 to 3. But again there was no mention of the selection process or tenure for judges. This has now changed post-2011 with provisions in the Constitution and the Union Judiciary Law No 20/2010 setting out the process for the selection, tenure and removal of judges of the Supreme Court and of judges of the State and Region High Courts. Yet rather than use regulation to enhance the independence of the courts, instead this legal framework allows for overt executive control over the courts.

This new legal structure grants the President significant powers over the courts. The President nominates the Chief Justice of the Supreme Court and the Union Parliament cannot object to the nomination unless the candidate does not meet the selection criteria. The current Chief Justice, U Tun Tun Oo, was nominated in February 2011, having previously served as Deputy Chief Justice. In this regard, there has been no change in the leadership of the court. Judges of the Supreme Court are appointed by the President and the Chief Justice, and seven judges currently sit on the bench, although there can be up to 11 appointed. Among these, several judges are known to have military backgrounds, including the Chief Justice. For legal practitioners in Myanmar, this knowledge alone is one indication of the close relationship between the courts and the military, as well as evidence of continuity in terms of interference with judicial independence. In a similar way, the President also has power to appoint the Chief Justices of the 14 State and Region High Courts in collaboration with the Chief Minister of the State and Region (who is also appointed by the President). Nominations for judges of the High Court are made by the Chief Minister and the Chief Justice, and the State or Region Hluttaw must approve the nomination, unless the nominee does not meet the criteria. A presidential order is usually issued as notification of the appointment of judges. In this way, the President has complete power to determine the composition of the bench of the

Supreme Court and all 14 State/Region High Courts, providing candidates meet the selection criteria. This structural advantage in favour of executive control over the courts leaves little room for judicial independence.

Further, the President's decision in terms of the selection of judges is open to significant discretion as the selection requirements for Supreme Court judges and High Court judges are broad. Nominees must be between 50 and 70 years old. The requirements for judges are also linked to the requirements for legislative candidates. They must be loyal to the Union and cannot be members of the Hluttaw or of a political party. They must be a lawyer or judge with years of experience depending on their position, or an 'eminent jurist' in the opinion of the President.

Although most government actors would acknowledge that the courts are not independent, there have not yet been efforts to remove judges of the Supreme Court or State/Region High Courts through the new constitutional process. The process for removal can be initiated by the President, or the Pyithu Hluttaw or Amyotha Hluttaw. The grounds for removal include high treason, misconduct, breach of the Constitution or inefficiency in office, a broad catch all concept. The process requires an investigation body to be established with members of parliament at either the national or State/Region level, and therefore amounts to exclusive legislative/executive oversight of the judiciary. The President or the Chief Minister of the Region/State essentially has the power to act as the prosecutor against the accused judge by bringing evidence and witnesses before the investigation body. If the motion relates to a judge of the High Court of the State/Region, the process requires one quarter of the support of the members of the State/Region Hluttaw, which essentially means that military officers who occupy 25 percent of seats in parliament have enough support to effect an impeachment motion.

Although the composition of the court is set in the Constitution, this has been subject to discussion as part of the broader process of constitutional amendment. In 2015, two bills on constitutional amendment were discussed and voted on in parliament. Part of the proposal was to limit the terms of the judges of the Supreme Court to five years so that they were tied to the term of the government, although the proposal was ultimately unsuccessful. Nevertheless this suggestion for reform is one indication of the fact that while many people in

Myanmar are talking about the need for judicial independence, in fact parliament has attempted to take measures to further limit the capacity of the court. Ironically, the current measures that keep the courts captive to the executive – from the selection criteria to the nomination process – are perceived by the parliament to be sufficient. This is because Parliament sees itself as a 'check' on the power of the courts, rather than the courts as a legitimate check on the power of the executive and legislature.

Realms of Judicial Authority

The authority of the Supreme Court is used in turn to reinforce its control over the lower courts. The Supreme Court has exclusive authority to hear certain matters; appellate authority; a supervisory function over the State/Region High Courts, a reporting function in terms of the publication of case law, and a law-making function that brings it into interaction with parliament.

In its exclusive or original jurisdiction, it can hear matters arising from bilateral treaties, from disputes between the Union Government and State/Region Governments, or disputes among State/Region Governments that are not of a constitutional nature. It also has authority to issue the writ of habeas corpus, mandamus, prohibition, quo warranto and certiorari as remedies against unlawful government decisions. Excluded from its authority is the power to retrospectively hear penal cases, which conveniently functions to protect the military and former government from prosecutions for past crimes. The Supreme Court also cannot hear matters of constitutional law, although it can refer these matters to the new Constitutional Tribunal (Myint Zan 2012).

In its appellate jurisdiction, the Supreme Court can hear appeals from the State/Region High Courts. It also has discretion to review a court decision under its revisional jurisdiction (although unlike in an appeal, it cannot take into account new evidence). It is the final court of appeal and its decisions are said to be final, yet the Constitution allows for several possible appeal mechanisms. There is a right to appeal in all cases concerning the death penalty. There is also an avenue of special appeal for cases heard in the Supreme Court. In short, there are multiple possibilities for appeal in most cases, and this raises the question why. Shapiro has argued that 'appellate institutions are more fundamentally related to the political purposes of the central regimes than to the doing of individual justice' (Shapiro 1981: 52). This is evident

in the case of Myanmar, where multiple opportunities for appeal to a higher court channels the discontent of the losing party to bolster the legitimacy of the system. Cheesman has suggested that appeals in Myanmar are in part a result of corruption and the practice of double cropping, where judges at both the original and appellate level can take a cut of bribes (2015: 189; 2012b). I would add that corruption alone does not explain the tendency to appeal, but that the provision of multiple opportunities to appeal also operates to justify and reinforce the authority of the legal system itself.

The appellate function of the Supreme Court has some connection to its supervisory function. The Supreme Court has oversight of all 14 High Courts (one in each Region or State). Each High Court in turn overseas the District Courts and Self-Administered Zones or Divisions; Township Courts; and other specialised courts below it, such as the Children's Court. The supervisory role of the Supreme Court also extends to prisons and it can inspect prisons or prison camps in order to check that an individual's rights are being upheld while in detention. However its role in supervising prisons has existed since its inception in 1988, yet the scale of political prisoners and the concerns of multiple human rights organisations on prison conditions suggests it has not actively exercised this authority.

In its law-making function, the Supreme Court has the power to submit bills to parliament and assist in the drafting of legislation. For example, the Supreme Court was instructed to draft the Anti-conversion Law and the Monogamy Law that were passed in 2015, as well as the bill to amend the Penal Code that remains on the legislative agenda. In addition to its role in drafting legislation, the Supreme Court has the power to issue regulations on court practise and procedure. Further, because the Supreme Court is classified as a 'union-level organisation', the Pyidaungsu Hluttaw has the power to summon judges to parliament (2008 Constitution, s77(c)). This operates as a way for the overpowerful legislature to call to account judges of the Supreme Court. For example, judges of the Supreme Court have been called to Parliament to report on constitutional writ cases. This reinforces suspicions that the judiciary is neither independent nor separate from the executive and the military.

There have been several laws passed or amended by parliament in relation to court procedures and practises, such as the new Contempt of Court Law No 17/2013. While the prior Contempt of Court Act 1926 was initially used in a limited way, Cheesman has

identified that in 1992 the Supreme Court significantly widened the ambit of contempt and therefore the operation of the law (Cheesman 2015: 243). The revised law passed in 2013 is a significant deterrent for lawyers and applicants to bring cases to court, and for the media to cover court proceedings. For example, in 2015, the Ministry of Information brought a case for contempt against 17 senior figures of the Daily Eleven news group (Kyaw Phone Kyaw 2015), who were accused of defamation for alleging that the Ministry had misused government funds. This is in addition to a defamation case brought against them in relation to the coverage of the court trial of five other members of the same media outlet. The excessive use of the Contempt of Court law to target political opponents remains a real way in which the courts actively discourage applicants from bringing cases, and punish applicants who bring a 'wrong' case.

Finally, the Supreme Court plays an important role in cooperation with the Attorney General's Office in the selection and reporting of cases for publication in the annual Myanmar Law Reports. Somewhat ironically, while many of the past restrictions on the media and publications have been lifted since 2011, the process of reporting and publishing court decisions has not changed. The Myanmar Law Reports only include cases of the Supreme Court (not any lower courts), and only a very small number of cases are published per year. Unreported cases are generally not made available to the public. On one hand, the cases are said to be selected on the basis of whether there are any former rulings on the topic; whether the ruling is in the public interest, and whether the ruling is one that is useful for the guidance of the lower courts. Yet it is noticeable that the Myanmar Law Reports have not published any high profile political cases. The accessibility and availability of court decisions may potentially change in the future, depending on the responsiveness of the court to calls for greater transparency.

Courts in the Public Realm: The Supreme Court and the Constitutional Writs

A significant part of the caseload of the Supreme Court concerns criminal cases on appeal, and the work of Nick Cheesman has significantly expanded our understanding of the history and political function of criminal law in Myanmar (Cheesman 2012a; 2015b). There are no accurate statistics on the caseload of the Supreme Court. A preliminary analysis by Nardi and

Lwin Moe of its caseload from 2007-2012 found that most decisions concerned matters of inheritance, contracts and criminal procedure (Nardi and Lwin Moe 2014), although this data was drawn from the highly selective Myanmar Law Reports. As a way of exploring the case load of the courts further, I want to focus here on two new or emerging areas for the courts: the first is the constitutional writs, and the second is legislative changes to personal law.

Since 2011, a remarkable feature of the Supreme Court's jurisdiction is its authority to hear complaints against the government by way of the constitutional writs (Crouch 2014). This is important because during the socialist and military era there were virtually no legal avenues to challenge government decisions. Between 2011 and 2015, several hundred writ cases have been filed directly with the Supreme Court. This has led to growing interest from legal practitioners in this area of law as a means to protect constitutional rights, and several new books by Burmese authors have been published on the subject (U Tin Win 2012; U Win Maung Htet 2013; U Yi Sein 2014; Mar Lar Aung 2011). The constitutional writ cases that have been taken to the Supreme Court primarily concerned issues of property ownership, tenancy, compensation, inheritance, and also some cases of fraud and divorce. Many have been rejected at the preliminary stage and not given a hearing, although it is difficult to determine whether the substance of the application was given fair consideration. Anecdotal evidence suggests cases against the military or police are rarely heard.

What can explain the purpose and operation of the Supreme Courts' writ jurisdiction? While many scholars have argued that such a system of administrative review may play a 'fire alarm' role in terms of alerting the administration to breaches of its rules by subordinates (McCubbins et al 1989), I suggest this is not the case in Myanmar. Rather, the Supreme Court uses the writs to keep a check on the lower courts (rather than the executive) as a form of procedural authoritarianism.

The picture of writs cases depends on where you look. If you look to the Myanmar Law Reports, you will find very few cases published. In fact, all reported writs cases from 2011-2013 concern the review of decisions of a lower court and all were unsuccessful. The cases concern general procedural issues unrelated to administrative law, such as time limitations, and basic issues of court procedure. The cases do display some effort to explain the role of the courts and the purpose of the writs. Yet the court decisions are silent on many other

common elements of writs cases. For example, there is no discussion of who has the right to apply for the writs. It therefore appears to be untested whether, for example, an environmental group could bring a case against a government decision that raises environmental concerns, such as a decision to grant a licence for the construction of a dam or a gas pipeline. Nor is there any discussion of the reason the administrative decision is being challenged. This suggests that one of the main roles of the Supreme Court at present is to supervise decisions of lower courts, rather than decisions of the executive.

Yet the reported cases clearly only reveal part of the picture and it is only by looking at unreported cases that the significance or potential of the writs can be appreciated. One unreported case stands out because it appears to be the first case in which the Supreme Court found in favour of an applicant against a government official. In 2013 an economics professor from East Yangon University brought a writ case to the Supreme Court (Court documents on file with author 2013). The professor claimed she had been forced to retire from her position by the former Minister of Education (all university staff in Myanmar are civil servants). She argued that the decision of the Minister of Education to force her to retire should be cancelled because it was beyond his power to according to the Civil Servant Law No 5/2013. The case was brought on the basis of two constitutional rights claims: equal rights before the law and equal opportunity in public employment (2008 Constitution, ss 347 and 349). The Civil Servant Law lists a wide range of punishments that can be given if a civil servant violates the regulations, including a warning letter, a reduction in salary, a demotion or being fired, among other things. Yet the list does not include the power to force a civil servant to retire. On this basis the applicant was successful in this case. This is the first major case in which the Supreme Court has declared the decision of a government minister to be unlawful and it sent ripples of excitement through the legal profession. Backlash from the government appears to have been serious, with government departments being warned to be careful about not triggering further writs cases. This demonstrates that far from using a successful writs case as a demonstration that the government is willing to be accountable and that the courts can help promote lawful decision-making, instead the government has perceived writs cases as a threat to its legitimacy and a criticism of its performance.

Courts in the Private Realm: Parliament and Personal Law

In Myanmar the courts, rather than the legislature, has historically played a crucial role in the determination of family law disputes. These cases usually begin in the lower courts and then if the parties apply the case may make its way up to the Supreme Court. The Burma Laws Act 1898 remains in force as the law that acknowledges religious personal law for Buddhist, Muslim and Hindu communities (Crouch 2016a). Myanmar is unique among Buddhist-majority countries in that it has a special system known as 'Burmese Buddhist law' that determines family law for Buddhists (Crouch 2016b). This body of knowledge is based on the *dhammathats* from the time of the Burmese kings, compiled by colonial officials and adapted and interpreted by courts. Burmese Buddhist law became important in determining inter-religious marriage claims. There is no right to testate according to Burmese Buddhist law in Myanmar (Huxley 2014, 69) and so disputes over inheritance are often brought before the courts. The case law on Islamic personal law has followed similar lines as Anglo-Muhammadan jurisprudence, typified in volumes such as *Mulla's Principles* (Crouch 2016a). Hindu law is likewise heavily influenced by the English-language compilations on Hindu law that emerged from British India.

These systems of personal law are primarily based on case law made by judges. Yet while Myint Zan once observed in relation to family law that 'legislative reform in Myanmar is unlikely to take place' (1999: 202), the opposite is now the case. Legislative reform in 2015 has arguably significantly altered family law in Myanmar, and this is likely to lead to new cases in the courts as well as new legal issues for the courts to resolve. These changes are the result of four draft laws originally proposed by *Ma-Ba-Tha*, a radical Buddhist group, which sought to restrict inter-religious marriage, prohibit polygamy, restrict conversion and put in place birth control measures (Nyi Nyi Kyaw 2016). I focus here on the two laws most likely to change the current makeup of family law for the courts in Myanmar: the Buddhist Women's Special Marriage Law No 50/2015 and the Monogamy Law No 54/2015.

In Myanmar, the assumption has been that the Monogamy Law was introduced to target Muslims, and this may be partly true. But it also appears to alter Burmese Buddhist law. That is, up until the passage of this law, Burmese Buddhist law specifically allowed polygamy (although it prohibited polyandry). There is extensive case law discussing the position of a second or so-called 'parallel' wife and her rights in terms of inheritance in particular (Myint Zan 1999). The Monogamy Law therefore appears to fundamentally amend Burmese

Buddhist law in this regard, although it remains to be seen how the courts will interpret this. The Monogamy Law 2015 makes it an offence to take a second husband or wife, or to commit adultery. If either of these offences are committed, the wronged partner has the right to divorce. In a twist that I call the 'revenge clause', the guilty partner who has committed the offence must forfeit all their matrimonial property rights to their partner. Further, the law appears to punish a second wife in the sense that she no longer has any rights to inherit from her husband, which she had previously under certain circumstances according to Burmese Buddhist Law. A person found guilty under this law may be convicted of polygamy or of deceiving their partner about their marital status under the Penal Code (ss 494-495). Polygamy is still practiced by some Buddhists in Myanmar (though there is a need for contemporary empirical research), for example, in 2012 the Supreme Court heard the case of *Daw Mi Mi Tun v U Maung Maung Lwin* concerning whether a first wife in a Buddhist marriage had the right to divorce her husband given that he had married a second wife without her consent. This law is likely to lead to new prosecutions in the lower courts. But it is also likely to cause disputes that will require the courts to interpret and consider to what extent the Monogamy Law affects existing family law, and perhaps even to what extent the Monogamy Law is constitutional.

The second law that has altered the role of the courts and may create more work for the courts is the Buddhist Women's Special Marriage Act 2015. This law is largely based on the Buddhist Women's Special Marriage and Inheritance Act 1954, although confusingly the 2015 law does not replace the 1954 law but states that it continues to operate where its provisions do not conflict with the 2015 law. The essence of the 2015 law is not new in its focus on regulating the procedure if a non-Buddhist man and a Buddhist woman intend to marry (see Crouch 2016a). The law requires a man and woman to be 18 years old, although if the woman is less than 20 years old she must also obtain the consent of her parents. The process allows time for any objections to be filed concerning the proposed marriage, which are to be dealt with by a court. The final decision whether to allow the inter-religious marriage or not rests with the court. A couple married and registered according to this law are required to be governed by Buddhist law in terms of possession and property, guardianship, and divorce. This means that if a Muslim man married a Buddhist woman and they had a dispute over inheritance or divorce, he cannot bring a case under Islamic law. If the husband later seeks a divorce, the woman has the right to have custody of the children and the husband

must still provide financial support. The law contains numerous stipulations on what the husband can or cannot do, such as that he must allow his Buddhist wife to keep statutes of the Buddha at home and he must not insult Buddhist.

These legislative changes to family law are an example of how the new Union Parliament is playing a role in shaping the agenda and jurisdiction of the court. It will potentially lead to criminal cases being brought to the lower courts under these laws. Given that Monogamy Law and Buddhist Women's Special Marriage Law contain ambiguities, these legal questions may make their way in cases on appeal to the Supreme Court. These cases will require the court to consider the extent to which these laws affect Burmese Buddhist law, and by implication ideas about the role and freedoms of women.

Conclusion

This chapter has demonstrated how the Union Supreme Court remains under the centralised control of the executive in the post-2011 era, yet plays a key role in supervising and keeping the lower courts in line. This reinforces a culture of procedural authoritarianism, where there is little room for substantive justice in individual cases. To conclude I want to end with a reflection on some of the broader implications of the current state of the courts. While current scholarship on courts often focus on the trends in the globalised or comparative nature of judicial discourse, Myanmar's legal system has been shaped by decades of isolation. In addition, since 1974 the courts were required to operate in Burmese language, rather than English. Court decisions in Myanmar are therefore focused on a local audience and have effectively been isolated from the common law world of comparative jurisprudence. Courts rarely cite cases from other jurisdictions, although this may be one area of change in the future, particularly for the Supreme Court in its new-found authority to hear writ cases against the government, because this power bears similarities to other common law countries like India.

The post-2011 environment has also generated new debates over key issues such as how judges should be appointed, whether the Supreme Court should have the power to hear cases for constitutional review, how to create greater judicial independence and how the courts relate to the parliament. These ongoing discussions have been frustrated by the hostile

attitude of parliament towards the courts, rather than the practical difficulty of constitutional amendment. The current transition to a quasi-civilian government in Myanmar has generated significant uncertainty for the apex courts, and may potentially lead to major efforts at court reform in the years to come.

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