

# HOW FAR HAVE WE COME AND WHERE DO WE GO FROM HERE? A CULTURALLY SENSITIVE STRATEGY FOR JUDICIAL INDEPENDENCE IN MYANMAR

JOHN M. EPLING\*

I. INTRODUCTION .....	108
II. JUDICIAL INDEPENDENCE BACKGROUND.....	110
III. JUDICIAL INDEPENDENCE IN MYANMAR.....	114
A. Structural Factors of Judicial Independence in Myanmar at the Time of the 2012 Report.....	115
B. Public Perception of Judicial Independence in Myanmar at the Time of the 2012 Report.....	120
IV. THE COMMISSION’S RECOMMENDATIONS .....	121
V. DEVELOPMENTS IN MYANMAR’S JUDICIAL INDEPENDENCE SINCE THE COMMISSION’S REPORT.....	122
A. Structural Changes Affecting Judicial Independence in Myanmar Since the Report.....	122
B. Public Perception of Judicial Independence in Myanmar Since the Report.....	123
VI. DIALECTIC ANALYSIS AS AN EFFECTIVE MEANS OF ENGAGING LEGAL PROBLEMS IN MYANMAR .....	127
VII. A DIALECTIC ANALYSIS OF THE COMMISSION’S REPORT.....	129
VIII. CONCLUSION.....	137

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## I. INTRODUCTION

Judicial independence in Myanmar has a long and diverse history.<sup>1</sup> There are indications that there may have even been elements of judicial independence in pre-colonial Burma.<sup>2</sup> Moreover, some Burmese legal commentators believed that British Colonization of Burma left a legacy of judicial independence.<sup>3</sup> After Burma achieved its independence in 1947,<sup>4</sup> British trained Burmese lawyers, who were exposed to British concepts of judicial independence, had a hand in writing Burma's 1947 Constitution,<sup>5</sup> and included several judicial independence principles in this document—including principles affecting the appointment and payment of judges.<sup>6</sup> However, after overthrowing the democratically elected government, the new Burmese military government undercut judicial independence by, among other things, abolishing the country's high courts.<sup>7</sup> During this period of military control, the ruling government exercised significant power over the judiciary.<sup>8</sup>

In 2008, after decades of military rule, Myanmar established a new civilian government by drafting and ratifying a new constitution.<sup>9</sup> The

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1. There is currently a debate whether to refer to the country in question as “Burma” or “Myanmar”. Without making any political statements and simply in the interest of clarity and following the naming convention of a large portion of sources used, this paper will generally refer to the country in question as “Burma” for periods until 1988 and “Myanmar” for periods of 1989 and after. *See* Lowell Dittmer, *Burma v. Myanmar: What's in a Name*, 48 *ASIAN SURVEY* 6 885, 885 (Nov.-Dec. 2008) (noting that the State Law and Order Protection Council (SLORC) changed the name of the country known as “Burma” to “Myanmar” in 1989 and reviewing the various positions in regards to the appropriate name).

2. *See* Myint Zan, *Judicial Independence in Burma: No March Backwards Towards the Past*, *ASIAN-PAC. L. & POL'Y J.* 4–5 (2000) (noting evidence that outside of the three areas expressly restricted to the king's authority (personal injury, property and death), the standards expressed in the legal principles and laws of the Dhammathats (similar to legal treatises), were the supreme law of the land).

3. *Id.* at 7 (quoting MAUNG MAUNG, *LAW AND CUSTOM IN BURMA AND THE BURMESE FAMILY* 23–24 (1963)) (noting that Dr. Maung Maung claimed that the British legacy consisted of “equality before the law, fair play, uniformity of laws for all—private citizen and public official alike.”).

4. David I. Steinberg, Maung Htin Aung, & Michael Arthur Aung-Thwin, *Myanmar: History – The Emergence of Nationalism*, *ENCYCLOPEDIA BRITANNICA* (Apr. 7, 2016) <https://www.britannica.com/place/Myanmar/The-emergence-of-nationalism> [<https://perma.cc/P3WU-QSJX>].

5. *See* Zan, *supra* note 2, at 11.

6. David I. Steinberg, Maung Htin Aung, & Michael Arthur Aung-Thwin, *Myanmar: History – World War II and After*, *ENCYCLOPEDIA BRITANNICA* (Apr. 7, 2016), <http://www.britannica.com/place/Myanmar/The-emergence-of-nationalism> [<https://perma.cc/P3WU-QSJX>] (noting that the Chief Justice of the Union would be appointed by the President with the approval of both bodies of Parliament); Zan, *supra* note 2, at 13 (noting that the salaries of judges of the Supreme and High Courts could not be amended without the judges' consent).

7. *See* Zan, *supra* note 2, at 17.

8. *Id.* at 21–22 (noting that non-independence of the judiciary in fact became formalized in the 1974 Constitution which unified the executive, legislative and judiciary branches, subjecting them all to the control of the Party, and requiring all of them to support the Party's objectives).

9. Michael Arthur Aung-Thwin, David I. Steinberg & Maung Htin Aung, *Myanmar: History –*

civilian government began its term in 2011.<sup>10</sup> In December of 2012, the International Bar Association's Human Rights Institute (the "Commission" or the "IBAHRI Commission") released a report in which it attempted to provide an assessment and recommendations for the new government with regards to the rule of law in Myanmar.<sup>11</sup> One of the key challenges the Commission identified was Myanmar's lack of judicial independence.<sup>12</sup> In early 2016, over three years after the Commission's initial report, a new government under the National League for Democracy party took power in Myanmar.<sup>13</sup> This political transition provided a good opportunity to assess the effectiveness of the 2012 recommendations and refine recommendations for the way forward. As such, this paper examines the effectiveness of the Commission's 2012 recommendations for achieving judicial independence, the potential causes for any lack of progress and the potential for culturally nuanced recommendations to guide the way forward.

First, this paper examines the meaning of judicial independence and the purposes it fulfills. Among the various facets of judicial independence, this paper focuses on the judiciary's independence from coordinate branches of government in Myanmar as an analytical lens. The paper then discusses the status of judicial independence in Myanmar at the time the Commission conducted its report, *The Rule of Law in Myanmar: Challenges and Prospects*<sup>14</sup> ("the Report"), as well as the recommendations the Commission provided with the Report. Although literature reflecting developments in judicial independence within Myanmar from December of 2012 to March of 2016 is somewhat limited, this paper draws upon available sources to identify developments in judicial independence during this timeframe. The paper then evaluates the Commission's recommendations in light of Myanmar's culture and background using a dialectic approach that aims intentionally to avoid the pitfalls of ethnocentrism and cultural relativism.

Finally, this paper suggests several culturally relevant recommendations for judicial independence in Myanmar. In conclusion, this paper argues that significant structural reform in Myanmar is only possible insofar as it engages with the country's existing power and incentive

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*Myanmar since 1988*, <http://www.britannica.com/place/Myanmar/History> [<https://perma.cc/2TS7-NUGN>].

10. *Id.*

11. *See generally* INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE, REPORT OF THE INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE : THE RULE OF LAW IN MYANMAR: CHALLENGES AND PROSPECTS (2012) [hereinafter REPORT OF IBAHRI].

12. *Id.* at 7 ("The judiciary is currently subject to inordinate influence by the executive and military.").

13. Aung-Thwin, Steinberg & Aung, *supra* note 9.

14. REPORT OF IBAHRI, *supra* note 11.

structures, and engages constructively with Myanmar citizens' understanding of judicial independence.

## II. JUDICIAL INDEPENDENCE BACKGROUND

The international community, through its endorsement of the treatise, *Basic Principles on the Independence of the Judiciary* (“*Basic Principles*”), has identified judicial independence as instrumental in achieving conditions “under which justice can be maintained,” and an important mechanism to “encourage respect for human rights and fundamental freedoms without any discrimination.”<sup>15</sup> Among the human rights and fundamental freedoms the treatise seeks to safeguard, it lists “principles of equality before the law, . . . and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>16</sup> The application of these principles to Myanmar is complicated by the fact that the country has not ratified or acceded to several covenants forming the basis of certain fundamental freedoms.<sup>17</sup> However, even assuming that the human rights and fundamental freedoms that the *Basic Principles* identify are universally desirable,<sup>18</sup> the question nonetheless remains whether the international legal community has discovered a magic elixir for attaining them. The answer to this question rests on three related questions: what do we mean by judicial independence?; to what degree are universal methods available to achieve judicial independence?; and to what degree must any pursuit of judicial independence reflect the unique cultural environment of the target country?

As to the first question, the international community has yet to recognize a universally accepted definition of judicial independence.<sup>19</sup>

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15. General Assembly Resolution 40/32, *Basic Principles on the Independence of the Judiciary*, 7th Cong. on the Prevention of Crime and the Treatment of Offenders, G.A. Res. 40/32 and 40/146, U.N. GAOR, U.N. Doc. A/RES/40/32 and A/RES/40/146 (1985) [hereinafter *Basic Principles*].

16. *Basic Principles*, *supra* note 15, at pmb1.

17. See generally *Ratification Status for Myanmar*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=119&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=119&Lang=EN) [https://perma.cc/2S8D-7PFR] (last visited Oct. 22, 2016) (showing that the International Covenant on Civil and Political Rights has not been signed or ratified by Myanmar and the International Covenant on Economic, Social and Cultural Rights has not been ratified by Myanmar).

18. See *Human Rights Explained: Fact Sheet 5: The International Bill of Rights*, AUSTRALIAN HUMAN RIGHTS COMMISSION, <https://www.humanrights.gov.au/human-rights-explained-fact-sheet-5the-international-bill-rights#fnB2> [https://perma.cc/J8CH-NECX] (last visited Oct. 22, 2016) (citing HENRY J. STEINER AND PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (2nd ed. 2000) for the proposition that the Universal Declaration of Human Rights has become customary international law).

19. See Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions* 1, 3 (La Trobe Law School Legal Studies Research Paper No. 2008/11, 2008), <http://ssrn.com/abstract=1283179> [https://perma.cc/S9XP-3M8M] (claiming that the idea that judicial independence is a clear concept is a myth or at least an unfounded assumption). Compare DEMOCRACY

However, the *Basic Principles* provide a useful framework for discussing this topic since the *Principles* represent a standard endorsed by the global community.<sup>20</sup> While the *Basic Principles* do not provide an express definition of judicial independence, they offer a functional definition providing that “[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”<sup>21</sup> Impartiality and a lack of external influence outside of the applicable facts of a case represent the very heart of many authorities’ understanding of judicial independence and provide a basic framework for defining the term. However, these guidelines are still somewhat vague.<sup>22</sup>

To better understand the meaning of judicial independence, it is helpful to understand the function of judicial independence, or at least what it is intended to accomplish. Judicial independence is not an end in itself, but rather an instrument for achieving important goals and outcomes.<sup>23</sup> Some scholars believe the purpose of judicial independence is to fulfill social needs for the regulation of civil society both among citizens and between citizens and the government.<sup>24</sup> Under this view, when multiple parties with different needs and desires live together in a society, a symbiotic ordering of those desires requires “reasonably well-defined laws setting out mutual rights and duties,” where a “mutually acceptable third-party adjudicator” can resolve any disputes.<sup>25</sup> This theory holds that a third party adjudicator—uninfluenced by either of the parties involved—is essential for both parties

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REPORTING INTERNATIONAL, INTERNATIONAL STANDARDS FOR THE INDEPENDENCE OF THE JUDICIARY 1 (Sept. 2013), [http://democracy-reporting.org/newdri/wp-content/uploads/2016/03/dri-bp-41\\_en\\_international\\_standards\\_for\\_the\\_independence\\_of\\_the\\_judiciary\\_2013-09.pdf](http://democracy-reporting.org/newdri/wp-content/uploads/2016/03/dri-bp-41_en_international_standards_for_the_independence_of_the_judiciary_2013-09.pdf) [https://perma.cc/UX9K-RRPP] (providing that a working definition of judicial independence as “an independent judiciary must (a) be impartial; (b) approach cases in an unbiased manner; (c) display no prejudice; (d) be politically independent; and (e) operate without fear”) with Chief Justice Lance Finch et al., *Judicial Independence (And What Everyone Should Know About It)*, COURTS OF BRITISH COLUMBIA 2 (Mar. 15, 2012), <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2012/518687/judicial%20independence%20final%20release.pdf> [https://perma.cc/6XQ5-T62P] (“Judicial independence means that judges are not subject to pressure and influence, and are free to make impartial decisions based solely on fact and law.”).

20. See *Basic Principles*, *supra* note 15 (noting that the General Assembly endorsed the *Basic Principles* in Resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985).

21. *Basic Principles*, *supra* note 15, at ¶ 2.

22. See Peerenboom, *supra* note 19, at 4 (noting that the UN principles never explain what “inappropriate or unwarranted interference” means, which essentially restates the fundamental question of judicial independence).

23. Peter H. Russell, *Toward a General Theory of Judicial Independence*, in *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD I*, 3–4 (Peter H. Russell & David M. O’Brien eds., 2001).

24. *Id.* at 9.

25. See *id.*

to accept the adjudicator as a common judge.<sup>26</sup> Judges' independence purportedly allows them to "resolve the issues fairly, according to their understanding of the law, and not out of fear of recrimination or hope of reward."<sup>27</sup>

Other articulations of the goals of judicial independence hold that the law "reflect[s] substantive commitments to a course of action" that in democratic governments reflects at least to some degree the will of the people.<sup>28</sup> These legislative principles are in turn, for the most part, general in nature and should apply in the same manner to similarly situated parties.<sup>29</sup> Judicial independence prevents other political actors from undermining "the substantive commitments embodied in law through partial applications."<sup>30</sup> In other words, when the populace attempts to express its will through the democratic process, an independent judiciary is necessary to ensure the popular will is carried out in a comprehensive manner and not subverted by parties with inordinate influence.

The desire to insulate decision-making from factors external to the collective will is similar to the rationale for judicial independence provided by the *Basic Principles*. The *Basic Principles* base their pursuit of judicial independence in part on the securement of "international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination."<sup>31</sup> All of these explanations describe communities—international, national or local—that designate certain legislative statutes or principles as desirable for the attainment of certain goals. The realization of those goals rests on adjudicators deciding all disputes within that community in accordance with the content of the determined rules or legislation, and not in response to influences of other actors who may represent the communal will to an inferior degree. This rationale obviously rests on the assumption that judges adjudicating solely in accordance with legislation more effectively represent the common will than other actors who would seek to influence the outcome of judicial action. This assumption will prove important when examining the principle of judicial independence among cultures with authoritarian regimes.

Understanding the purpose of judicial independence does not necessarily tell us *from whom* judges should maintain independence. For

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26. *Id.* at 9–10.

27. *Id.* at 10.

28. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, 966 (2002).

29. *Id.* at 967.

30. *Id.*

31. *Basic Principles*, *supra* note 15, at pmb1.

instance, the *Basic Principles*' comprehensive goal of protecting judges' decision-making from undue influence "direct or indirect, from any quarter or for any reason,"<sup>32</sup> does not offer guidance on the primary sources of influence that the judiciary must guard against. Judges may be influenced by a variety of people and institutions. For instance, independence to adjudicate impartially may be threatened by influence or coercion from coordinate branches of government.<sup>33</sup> Alternatively, judicial independence could be challenged by public or ethnic pressures and loyalties.<sup>34</sup> Finally, judges may struggle to maintain independence from superior judges within the judicial system.<sup>35</sup>

While all these sources of influence may violate the fundamental freedoms associated with adjudication, this paper focuses on freedom from coordinate branches of the government, or *intra-governmental judicial independence*. Intra-governmental independence forms arguably one of the most central elements of judicial independence. As one scholar explains, "the most widely recognized dimension of judicial independence . . . embraces . . . the separation of powers principle."<sup>36</sup> By definition, for the judiciary to be separate from other branches, it must be independent of them to a certain degree. Second, intra-governmental independence is particularly interesting for a cultural analysis because the tri-partite division of powers, which underlies separation of the judiciary from control of other branches of government has deep roots in Western societies,<sup>37</sup> and yet promises benefits for countries in Southeast Asia—including Myanmar. Third, due to Myanmar's historically strong and influential executive, as described in other sections of this paper, judicial independence from other branches of government represents a significant departure from past practices.

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32. *Basic Principles*, *supra* note 15, at ¶ 2.

33. See Peerenboom, *supra* note 19, at 3 (noting decisional independence from the government as an element of "external independence" and the ability of the judiciary as a whole to function without influence by other entities as a component of "collective independence"); see also UNITED STATES INSTITUTE OF PEACE, JUDICIAL APPOINTMENTS AND JUDICIAL INDEPENDENCE 1 (Jan. 2009), <http://www.usip.org/sites/default/files/Judicial-Appointments-EN.pdf> [<https://perma.cc/S6D2-CHRJ>].

34. See Peerenboom, *supra* note 19, at 3 (noting decisional independence from members of society as an element of external independence); UNITED STATES INSTITUTE FOR PEACE, *supra* note 33, at 1.

35. See Peerenboom, *supra* note 19, at 3 (noting decision independence from "administrative hierarchies within the court" and higher judges as an element of "internal independence"); UNITED STATES INSTITUTE FOR PEACE, *supra* note 33, at 1.

36. Russell, *supra* note 23, at 11.

37. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 23, 98 (2d. ed. 1998) (noting that the modern views of the executive, legislative and judicial functions of government began to develop in 17<sup>th</sup> century England in response to "particular problems in Western societies"); see also Ferejohn & Kramer, *supra* note 28, at 967 (referencing Montesquieu as the origin of the traditional concept and rationale for judicial independence).

Although corruption appears to have been commonplace within Myanmar's judiciary in recent history,<sup>38</sup> judicial independence from the other governmental branches provides a fruitful opportunity for legal analysis given the exceptionally strong executive powers created by Myanmar's Constitution.<sup>39</sup>

### III. JUDICIAL INDEPENDENCE IN MYANMAR

The IBAHRI Commission's Report provided a thorough analysis of many elements of the rule of law in Myanmar in 2012.<sup>40</sup> The Commission itself consisted of jurists with extensive judicial and academic experience, including the first President of the International Criminal Court,<sup>41</sup> and the inaugural co-chair of the IBAHRI.<sup>42</sup> The Commission conducted eight days of field research in Myanmar in August of 2012, involving interactions with "senior politicians, civil society activists, judges, lawyers, diplomats, and representatives of a number of international NGOs."<sup>43</sup>

The Report begins with a summary of Myanmar's background and history, focusing primarily on the country's political and economic development.<sup>44</sup> The Commission then examined factors affecting rule of law in various spheres of Myanmar society, including the Civil Sphere, the Political Sphere, the Legislative Sphere, the Myanmar National Human Rights Commission, the Military Sphere, the Judicial Sphere (I): Courts and Judges, and the Judicial Sphere (II): the Legal Profession.<sup>45</sup> While thematic overlap exists between many sections on any given topic, several sections, including "The Political Sphere: Branches of Government" the "Judicial Sphere: Courts and Judges" and the "Judicial Sphere: the Legal Profession" directly addressed issues pertinent to intra-governmental judicial independence in the country.<sup>46</sup> Within each of these sections, the

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38. See NICK CHEESMAN, *OPPOSING THE RULE OF LAW: HOW MYANMAR'S COURTS MAKE LAW AND ORDER* 182–86 (2015) (discussing the thriving business of bribery that surrounded court proceedings in Myanmar).

39. See *infra* Section III.a (noting the significant influence that the executive has over the appointment and financing of the judiciary).

40. See generally REPORT OF IBAHRI, *supra* note 11.

41. Philippe Kirsch OC, QC, a Canadian lawyer and diplomat who was the first president of the International Criminal Court. *Id.* at 9.

42. Professor Nicholas Cowdery AM, QC, the inaugural Co-Chair of the IBAHRI and a former Director of Public Prosecutions of New South Wales. *Id.* at 10.

43. *Id.* at 6, 12.

44. *Id.* at 16–24.

45. *Id.* at Table of Contents.

46. While the Myanmar National Human Rights Commission (MNHRC) seeks to vindicate fundamental rights, just as courts do, the author does not consider the dynamics between the MNHRC and the courts that affect judicial independence to be pronounced enough to warrant separate analysis in



Commission's analysis of judicial independence examined (a) structural elements affecting the judiciary—for example, how effectively the constitutionally-prescribed system of government separates political powers among various political institutions—and (b) the population's perception of the level of judicial independence in its country.

#### A. Structural Factors of Judicial Independence in Myanmar at the Time of the 2012 Report

The Report describes the civilian court structure in Myanmar, with the Supreme Court at the apex of its four levels of civilian courts.<sup>47</sup> The Supreme Court oversees the state and regional High Court, the District and Self-Administered Area Courts, and the township courts.<sup>48</sup> The Report also notes the quasi-judicial powers for investigation, arrest and punishment that the village chiefs possess. The Report further describes a separate Constitutional Tribunal and a court martial system.<sup>49</sup> The Constitutional Tribunal is responsible for interpreting and applying Myanmar's Constitution.<sup>50</sup> The courts martial system is available for soldiers,<sup>51</sup> operates independent of the civilian judiciary, and is directly appealable to the Commander-in-Chief.<sup>52</sup>

The Report notes that Myanmar's courts are formally independent from other branches of government.<sup>53</sup> Myanmar's 2008 Constitution,<sup>54</sup> and the Union Judiciary law protect the principle of judicial independence.<sup>55</sup> Moreover, Myanmar's legal system empowers the judiciary to “check” other branches by issuing writs—including orders for *habeas corpus*—and *quo warranto* orders, which in principle represent checks on the executive.<sup>56</sup>

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this paper.

47. REPORT OF IBAHRI, *supra* note 11, at 56.

48. *Id.*

49. *Id.*

50. *Id.* at 21.

51. This paper will only discuss the judicial independence implications of the courts martial system to a limited degree, since the military seems to influence the judiciary more significantly in other ways.

52. REPORT OF IBAHRI, *supra* note 11, at 21–22.

53. *Id.* at 57.

54. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, art. 19 (prescribing as a judicial principle that the High Court of regions and states must “administer justice independently according to law”).

55. Jud. Law, Chapter § 2(a) (“The administration of justice shall be based upon the following principles: to administer justice independently according to law.”).

56. REPORT OF IBAHRI, *supra* note 11, at 57 (noting that for instance *quo warranto* orders “require state officials to prove that they are authorised [sic] to conduct a contested activity”); *see also* BLACK'S LAW DICTIONARY 824 (10th ed. 2014) (defining “*habeas corpus*” as “[a] writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal . . . .” and *quo warranto* as “[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed.”).

As of August 8th, 2012, the Myanmar Supreme Court had received 133 applications for writs, but granted only seven.<sup>57</sup> One group credited the low success rate of writ applications to “the [Myanmar] Court’s ‘fear [and] subservience.’”<sup>58</sup> Although it is possible that the large disparity between the writ applications submitted and those actually granted may stem from the fact that many lacked merit, the disparity may suggest that the court is hesitant to “check” its coordinate branches of government to the fullest of its authority.<sup>59</sup>

Furthermore, the Constitution provides courts with the institutional machinery to perform judicial review of legislative and executive actions.<sup>60</sup> However, the Report also notes that the executive undermines many protections of the judiciary’s independence through various constitutional dynamics.<sup>61</sup> For instance, although the President must seek approval from the legislature for the appointment of the Chief Justice of the Union and other members of the Supreme Court,<sup>62</sup> the legislature may only refuse a nominated candidate if it can demonstrate they fail to meet certain qualifications.<sup>63</sup> This situation rarely arises, because one of the competency qualifications under §301 is that the President considers the candidate to be “an eminent jurist.”<sup>64</sup> While the Report does not expressly say so, this nomination process threatens judicial independence. Allowing the President to select candidates based solely on the President’s personal esteem for the jurist (who is not required be a judge) effectively allows a bypass of any minimum qualification standards the judiciary may have developed. The lack of transparency with regard to the President’s discretion in selecting candidates creates the risk that jurists could be selected due to their political allegiance rather than their judicial qualifications.<sup>65</sup> The Report hints at this

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57. REPORT OF IBAHRI, *supra* note 11, at 59.

58. *Id.* at 59 n. 185.

59. *Id.* at 59 (“The IBAHRI delegates were unable to assess that view, not least because it presumes on the merits of applications about which they have no information, but they would nevertheless invite the Court to consider whether its current approach to [the constitutional provision governing the granting of writs] might be unduly cautious.”).

60. *Id.* at 38.

61. *Id.* at 57.

62. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, art. 299; REPORT OF IBAHRI, *supra* note 11, at 57.

63. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, art. 299(c).

64. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, art. 301(d)(iv); *see also* REPORT OF IBAHRI, *supra* note 11, at 57 (“[Q]ualifications are alternatives and one of them is simply that the president considers his candidate to be ‘an eminent jurist’.”) (citation omitted).

65. *See* OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS & INTERNATIONAL BAR ASSOCIATION, PROFESSIONAL TRAINING SERIES NO. 9: HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 123 (2003) (“[I]rrespective of the method of selection of judges, candidates’ professional qualifications and their

problem by noting that Thein Sein, himself a retired member of the military,<sup>66</sup> appointed a retired Lieutenant Colonel to be Supreme Court Chief Justice in 2012.<sup>67</sup>

Likewise, the President, in coordination with the Chief Justice of the Union, appoints the Chief Justices of the respective States or Regions who then, in collaboration with the President and Union Chief Justice, appoint justices for their regions and states.<sup>68</sup> The regional legislatures—much like the national legislature—may only refuse candidates for failure to meet constitutional qualifications, which include being considered “an eminent jurist” by the President.<sup>69</sup> Finally, the President nominates three of the Constitutional Tribunal’s nine members (the two houses of the legislature also nominate three members each).<sup>70</sup> The first Chair of the Constitutional Tribunal was a retired major-general and only three of the nine members were former judges.<sup>71</sup> The Supreme Court appoints all other judges, but according to the report, an ex-Chief Justice selects the High Court judges, while a Public Service Selection and Training Board select the lower level judges.<sup>72</sup>

According to the report, lower level judges are not protected from dismissal.<sup>73</sup> The Supreme Court and High Court judges enjoy tenure until age seventy and sixty-five respectively, while the Constitutional Tribunal judges have fixed terms of five years.<sup>74</sup> Each of these groups of jurists can voluntarily resign or risk impeachment.<sup>75</sup> The President or representatives of the national legislature can impeach judges of the Supreme Court, judges of the regional and state High Courts, and Members of the Constitutional Tribunal for various offenses including “misconduct”<sup>76</sup> and “inefficient

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personal integrity must constitute the sole criteria for selection. Consequently, judges cannot lawfully be appointed or elected because of the political views they hold. . . .”).

66. REPORT OF IBAHRI, *supra* note 11, at 22.

67. *Id.* at 57.

68. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, art. 308(b)(i) (“The President, in co-ordination with the Chief Justice of the Union and the Chief Minister of the Region or State concerned, shall prepare the nomination for the appointment of the Chief Justice of the High Court of the Region or State concerned and the Chief Minister of the Region or State concerned, in coordination with the Chief Justice of the Union, shall prepare the nomination for the appointment of the Judges of the High Court of the Region or State concerned . . .”).

69. *Id.* at arts. 308(b)(ii), 310.

70. REPORT OF IBAHRI, *supra* note 11, at 57.

71. *Id.* at 38.

72. *Id.* at 57.

73. *Id.*

74. *Id.*

75. *Id.*

76. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, arts. 302(a)(iii); 311(a)(iii) & (b); 334(a)(iii) & (b).

discharge of duties assigned by law.”<sup>77</sup> The Commission sought clarification on the content of the “misconduct” offense,<sup>78</sup> and learned from one source that it meant “something that a judge ought not to do.”<sup>79</sup>

In arguably the most serious constitutional crisis the new civilian government had faced to date, President Thein Sein asked the Constitutional Tribunal in 2012 to rule that certain committees established by the legislature did not qualify as union-level organizations—a status that would guarantee them certain legislative and budgetary privileges.<sup>80</sup> The Tribunal supported the President’s position.<sup>81</sup> In response, the Legislature moved to impeach all nine members of the Tribunal for allegedly breaching the Constitution by “fail[ing] to discharge their legal duties.”<sup>82</sup> All nine members of the Constitutional Tribunal resigned before the Legislature took final action.<sup>83</sup> According to the Commission’s assessment, “[t]he impeachment threat was formally permissible under the Constitution.”<sup>84</sup>

The executive also wields considerable power over the financing of the nation’s courts. Although the Supreme Court assesses the courts’ annual budget in advance, the executive is authorized to present the budget to the Legislature, where it can be “discussed . . . but not refused or curtailed.”<sup>85</sup> While the Commission does not explore this dynamic in detail, other sources indicate that there may be sufficient ambiguity in the Constitution to allow the executive to amend the judiciary’s budget proposal before it submits it to the legislature for review.<sup>86</sup> This in turn creates a risk of undue financial pressure of the executive over members of the judiciary.

The Report notes an additional example of the extensive executive power *vis-à-vis* the judiciary in that under the State Protection Act 1975, the President’s Cabinet can allow detentions of an individual for as long as “three years without trial or independent judicial review.”<sup>87</sup> This suggests that

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77. *Id.* at arts. 302(a)(v); 311(a)(v); 334(a)(v).

78. The offense is not defined in the Constitution of Myanmar’s Judicial Law. *See generally* CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008 and Jud. Law.

79. REPORT OF IBAHRI, *supra* note 11, at 58.

80. *Id.* at 38.

81. *Id.*

82. *Id.*

83. *See id.*

84. *Id.*

85. *Id.* at 57 (quoting CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, arts. 297, 103(b)) (internal quotation marks omitted).

86. *See* Kyaw Min San, *Critical Issues for the Rule of Law in Myanmar*, in MYANMAR’S TRANSITION: OPENINGS, OBSTACLES AND OPPORTUNITIES 221 (Nick Cheesman et al. eds., 2012) (“[B]ecause the Union Government can decide on the question of the judicial budget, it means that the executive can potentially restrict the amount of money going to the judiciary.”).

87. REPORT OF IBAHRI, *supra* note 11, at 37.

due process—an issue that would otherwise be for the judiciary to decide—can be subsumed into the executive’s powers at the executive’s discretion. This undermines the judiciary’s ability to provide an independent check on executive action. It may also create subliminal pressure on the judiciary to decide cases in accordance with the executive’s expectations, based on the fear that the executive will conduct more extra-judicial detainments, if the judiciary does not provide the executive with the outcomes that the executive wants.

In a similar dynamic of executive extrajudicial prerogatives, the Commission notes that the President may declare a state of emergency after coordination with the National Defense and Security Council.<sup>88</sup> During such an emergency situation, the President can promulgate an administrative order transferring the powers of the judiciary to the Commander-in-Chief of the Defense Services.<sup>89</sup>

Beyond the power that the Commander-in-Chief exercises in states of emergency, the Report indicates that many people believe the army exhibits significant control over the courts.<sup>90</sup> This may result in part from historical trends and dynamics. The Report shows that under martial law the judges were not keepers and defenders of the law, but on the contrary “[j]udges came to take a role as consultants. Martial law took no notice of law at all.”<sup>91</sup> As of 2012, several constitutional and practical dynamics appeared to allow the military to exercise significant influence over the entire country—including the judiciary—while the judiciary was significantly limited in its ability to provide an independent check on past and present military activity. For instance, under the 2008 Constitution, the Commander-in-Chief is responsible for appointing twenty-five percent of the members of the country’s Union, state and regional legislatures.<sup>92</sup> This provision also creates a constitutional veto for constitutional amendments which must be passed by more than seventy-five percent of the legislature.<sup>93</sup> The Constitution also

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88. *Id.*; see also CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, art. 410 (noting that this state of emergency is permitted in response to a report that “administrative functions cannot be carried out in accord with the Constitution in a Region or a State . . .”).

89. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, 2008, art. 413(b); see also REPORT OF IBAHRI, *supra* note 11, at 37 (“Chapter XI of the Constitution allows [the President] to declare a regional or national state of emergency – in which case, the powers of all three branches of government pass to the Commander-in-Chief of the army.”).

90. REPORT OF IBAHRI, *supra* note 11, at 58 (noting that judges feared pressure from the military and citing the perception by a journalist and many community activists that the judiciary “was inactive and subordinate to the military.”).

91. See *id.* (internal citation omitted) (noting also that “[Myanmar’s courts] are short of persons with sufficient knowledge, especially where legislation is concerned”).

92. *Id.* at 53.

93. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, art. 436(a);

created blanket amnesty for members of previous military regimes—for any act done in the “execution of their respective duties.”<sup>94</sup> Furthermore, while some reports have indicated that soldiers have been persecuted for criminal activity, reports have also noted that many cases involving criminal activity by military personnel have been dismissed.<sup>95</sup>

One of the most significant constitutional provisions regarding judicial independence and the military is Article 40(c), which allows the Commander-in-Chief to declare a state of emergency and assume power without consent by the executive, if an emergency situation arises “that could cause . . . disintegration of national solidarity and loss of sovereign power.”<sup>96</sup> While this provision is somewhat vague, the mere possibility of such a move allows the military to exert a degree of intimidation over all branches of civilian government.<sup>97</sup>

#### B. Public Perception of Judicial Independence in Myanmar at the Time of the 2012 Report

The report’s concerns about threats to judicial independence are mirrored in the Myanmar population’s perception of the judiciary. Some individuals in the population believed that “the government could always rely on support from the judiciary, which was inactive and subordinate to the military.”<sup>98</sup> Other groups claimed that “all judges feared complaints from clients, reprimands from superior judicial officials, and pressure from the government or military.”<sup>99</sup> The Commission found the judiciary to be “currently subject to inordinate influence by the executive and military[,] . . . held in low esteem by the population at large, and widely considered to be under-educated and corrupt.”<sup>100</sup> Yet the Commission simultaneously

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REPORT OF IBAHRI, *supra* note 11, at 53.

94. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, art. 445; REPORT OF IBAHRI, *supra* note 11, at 53.

95. REPORT OF IBAHRI, *supra* note 11, at 55 (“It is notable in this regard that at the time of the delegation’s visit, members of the army were reportedly being prosecuted in a case arising out of an interrogation in the Kachin village of Tawlawgyi in January 2012. Earlier in 2012, the Supreme Court entertained (though then dismissed) a lawsuit from the husband of Sumlut Roi Ja, a Kachin woman allegedly abducted and killed by soldiers in October 2011.”).

96. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, MAY 29, 2008, art. 40(c); *see also* REPORT OF IBAHRI, *supra* note 11, at 53.

97. *See* LAWYERS’ COUNCIL, LIST OF THE MOST PROBLEMATIC PROVISIONS IN THE 2008 CONSTITUTION AND BURMESE LAWS 3 (June 2012), [http://www.burmalibrary.org/docs13/Unjust\\_and\\_unfair\\_laws\\_of\\_Burma-BLC-red.pdf](http://www.burmalibrary.org/docs13/Unjust_and_unfair_laws_of_Burma-BLC-red.pdf) [<https://perma.cc/C695-8WTZ>] (noting that the emergency provisions in Section 40 of the Constitution of Myanmar are too vague in their definitions, thereby giving the Commander in Chief too much discretion).

98. REPORT OF IBAHRI, *supra* note 11, at 58.

99. *Id.*

100. *Id.* at 7.

received reports that “ordinary people were ignorant about their legal rights and poorly equipped to enforce them.”<sup>101</sup>

In short, although the constitution formally protects judicial independence, structural, historic and practical realities create grave concerns with regards to the potential for undue influence upon the courts—particularly from the executive and the military in Myanmar.

#### IV. THE COMMISSION’S RECOMMENDATIONS

In light of its findings, the Commission offered several recommendations to improve and maintain intra-governmental judicial independence. The Commission recommended country-wide improvements to judicial independence, including “clearer terms [on] how judges are to be appointed, promoted, paid, and (where justified) removed,”<sup>102</sup> as well as the creation of a Judicial Appointments Board<sup>103</sup> and a Ministry of Justice that would be responsible for administering the courts system.<sup>104</sup> The Report also emphasized that the five-year terms currently held by members of the Constitutional Tribunal were too short to ensure judicial independence, particularly since the terms expired contemporaneously with the President’s term of office.<sup>105</sup> The Report recommended staggering the appointments of Constitutional Tribunal members and extending their terms to prevent them from expiring contemporaneously with the President’s term. The Report specifically recommended ten-year or staggered terms.<sup>106</sup> Finally, the Report recommended increased training of adjudicators in informal dispute resolution mechanisms, including training for village chiefs on the content of Myanmar’s Constitution.<sup>107</sup> The Report further recommended considering the interdependence of institutions alongside their independence to prevent one branch from wielding its power without accountability.<sup>108</sup> The Commission also highlighted the need for “training programmes for judges, paying particular attention to the UN’s *Basic Principles*, and the particular importance of ethical training.”<sup>109</sup>

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101. *Id.* at 63.

102. *Id.* at 7.

103. *Id.* at 7–8.

104. *Id.* at 72.

105. *Id.* at 40.

106. *Id.*

107. *Id.* at 8.

108. *Id.* at 39.

109. *Id.* at 74.

## V. DEVELOPMENTS IN MYANMAR'S JUDICIAL INDEPENDENCE SINCE THE COMMISSION'S REPORT

Unfortunately, English language information and official reports about the state of judicial independence in Myanmar's courts since the Commission's 2012 Report remain sparse. Nevertheless, enough information is available to determine a general correlation and pinpoint disparities between the report's recommendations and current practices at a constitutional and institutional level, as well as current perceptions of judicial independence by various members of the populace, the executive, the legislature, and the judiciary.

### A. Structural Changes Affecting Judicial Independence in Myanmar Since the Report

Developments in judicial independence that require structural reform either through legislation or constitutional amendment are easily identifiable due to the availability of English versions of Myanmar's Constitution and English translations of several pieces of legislation.<sup>110</sup> Since the Commission's 2012 report, there have been no constitutional amendments, with a 2015 package of proposed constitutional amendments failing to attain the seventy-five percent super-majority vote required for an amendment.<sup>111</sup> Thus, the Commission's recommendations involving constitutional amendments—including appointment procedures for the highest members of the judiciary, terms for members of the Constitutional Tribunal and certain provisions regarding the structures surrounding payment and removal of judges—are constrained by the limits established by the Constitution.

The absence of constitutional reform to mitigate these dynamics is likely due to constitutional provisions which effectively allow the military contingent to veto any constitutional amendment.<sup>112</sup> According to the Constitution, any changes to the constitutional amendment provision would

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110. See, e.g., Myanmar Constitutional Tribunal website, <http://www.myanmarconstitutionaltribunal.org.mm/en/content/2008-constitution-0> [<https://perma.cc/T7T5-NJAP>] (last visited Oct. 22, 2016) (providing an English version of Myanmar's Constitution); *Parliament Watch List of New Laws*, ALTSEAN-BURMA, <http://www.altsean.org/Research/Parliament%20Watch/Laws.php> [<https://perma.cc/LZH2-8JAL>] (last visited Oct. 22, 2016) (providing a list of approved and unapproved laws, including a few English translations of the legislation, up through July of 2013).

111. Letter from Human Rights Watch to President U Htin Kyaw, (May 4, 2016), <https://www.hrw.org/news/2016/05/04/hrw-letter-president-u-htin-kyaw> [<https://perma.cc/BKU4-QLBJ>].

112. See CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, art. 436(a) (requiring more than seventy-five percent of the legislature to approve any constitutional amendment); arts. 109(b) & 141(b) (prescribing that the Commander-in-Chief shall nominate one quarter of both houses of the legislature from the Defense Services).



itself require the consent of these military gatekeepers. As an illustration of the power of this provision, five million individuals signed a petition in support of reforming the constitution's amendment provision and removing the military's veto power, but nothing changed.<sup>113</sup> It is worth noting that while the military has effectively blocked major constitutional reform, its economic interests have continued to prosper.<sup>114</sup> Finally, despite lawyers and activists calling for the formation of a Ministry of Justice by the National League of Democracy ("NLD"),<sup>115</sup> the new government has thus far not done so.<sup>116</sup>

In March 2016, the then-President-elect, Htin Kyaw, nominated nine members to the Constitutional Tribunal, three of whom he had appointed.<sup>117</sup> The proposed chairman, Myo Nyunt, a legislative appointee, was previously a judge for a regional High Court.<sup>118</sup> Two of the tribunal members were members of the preceding tribunal and only one member was a member of the executive's party, the NLD.<sup>119</sup> At the time of this paper,<sup>120</sup> it remains unclear what effect this new tribunal will have on constitutional developments in Myanmar.

## B. Public Perception of Judicial Independence in Myanmar Since the Report

Beyond a lack of structural reform, evidence suggests, as a practical matter, that various actors in the government and the populace consider judicial independence to be an ongoing problem more than three years after the recommendations. For example, research by the International Bar Association since the 2012 Report identified trust in the judiciary as one of

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113. See REBECCA LOWE, INTERNATIONAL BAR ASSOCIATION, BEYOND YANGON (Feb. 26, 2015), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a317d5b8-f1e6-4977-8111-b0ff3d49ca15> [<https://perma.cc/7NCQ-2MYN>].

114. Shibani Mahtani, *Myanmar Government Speeds Through Contracts, Legislation*, WALL ST. J. (Jan. 10, 2016), <http://www.wsj.com/articles/myanmar-government-speeds-through-contracts-legislation-1452458947> [<https://perma.cc/E74S-T7Y5>] (noting the military-linked regime's transfer of several factories to the military before leaving office, possibly indicating that "the military intends to continue to exert influence over the country's economic assets").

115. Ye Mon, *Lawyers, Activists Press for Justice Ministry*, MYANMAR TIMES (Mar. 17, 2016), <http://www.mmtimes.com/index.php/national-news/nay-pyi-taw/19498-lawyers-activists-press-for-justice-ministry.html> [<https://perma.cc/S72C-RN76>].

116. *Id.*

117. Ksmaw, *Constitutional Tribunal Nominated*, ELEVEN (Mar. 25, 2016), <http://www.elevenmyanmar.com/politics/constitutional-tribunal-nominated> [<https://perma.cc/F6YQ-B6DX>] (last visited Oct. 22, 2016).

118. *Id.*

119. *Id.*

120. Early May 2016.

the biggest problems facing Myanmar's judiciary.<sup>121</sup> There continue to be reports from the populace indicating a lack of confidence in the judiciary's ability to promote justice, particularly against abuses committed by the executive or the military.<sup>122</sup>

Furthermore, during the 2015 elections, the NLD—which would go on to win the election<sup>123</sup> and to select Myanmar's new President<sup>124</sup>—specifically identified judicial independence as one of their top party priorities.<sup>125</sup> The NLD's election manifesto claimed that “[t]he judiciary must stand independently and on an equal footing with the legislative and executive branches. The judiciary must be free of the influence and control of the executive branch.”<sup>126</sup> The NLD's emphasis on the importance of judicial independence from the executive indicates that the content of the Commission's recommendations resonated with key players, but there remains significant work to be done.

Furthermore, Myanmar's legislature continues to signal concern over the judiciary's lack of independence. According to one source, an investigation by a parliamentary committee reported that in addition to the existence of a “chain of bribery” throughout the judicial system, there continued to be inappropriate intra-governmental control.<sup>127</sup> The source indicated that under the constitutional system where the President appoints the Chief Justice who then appoints all other judges, “a patronage network is unofficially activated with each appointment and judges at every level are under the influence of senior judges and the administration.”<sup>128</sup> The source

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121. LOWE, *supra* note 113.

122. See, e.g., *New Call Issued for Justice for Murdered Myanmar Teachers*, ASSOCIATED PRESS (Jan 19, 2016), <http://www.dailymail.co.uk/wires/ap/article-3406579/New-call-issued-justice-murdered-Myanmar-teachers.html> [<https://perma.cc/49W9-5CP2>] (reporting that local villagers indicate that they know that two teachers were raped and murdered by government soldiers, but that the villagers do not have the power to investigate the crime and bring the perpetrators to justice).

123. See Jonah Fisher, *Myanmar's 2015 Landmark Elections Explained*, BBC NEWS (Dec. 3, 2015), <http://www.bbc.com/news/world-asia-33547036> [<https://perma.cc/693M-NFXJ>] (“Aung San Suu Kyi's National League for Democracy (NLD) has won a landslide victory in Myanmar after general elections on 8 November.”).

124. *Myanmar Elects Htin Kyaw as First Civilian President in Decades*, BBC NEWS (Mar. 15, 2016), <http://www.bbc.com/news/world-asia-35808921> [<https://perma.cc/QE2S-PJ2R>].

125. National League for Democracy, *2015 Election Manifesto*, art. 2(5), 3(b)(2) (2015), <https://drive.google.com/file/d/0B-Tuf9DZaVm9ZmFLdm9wUjh1TzA/view> [<https://perma.cc/MM5Z-NYEX>].

126. *Id.*

127. Aung Din, *Myanmar's Old Judiciary a Challenge to the New Era of Governance*, COGITASIA BLOG (Jan. 5, 2016), <http://cogitasia.com/myanmars-old-judiciary-a-challenge-to-the-new-era-of-governance/> [<https://perma.cc/7YMZ-MUTP>].

128. *Id.*

further opined that the only way to combat these deep seated dynamics would be to replace old judges with new ones.<sup>129</sup>

Interestingly, Myanmar's Supreme Court's 2015–2017 Judiciary Strategic Plan identified judicial independence as one of its strategic action areas, but focused on different aspects of independence.<sup>130</sup> Rather than focusing on increasing independence from coordinate branches of government, the Judiciary Strategic Plan emphasized greater collaboration with the other branches.<sup>131</sup> The Plan focused on creating accountable and transparent judicial budgets and increasing capabilities for the administration of the courts, such as “IT Training” and a new “Public Information/IT” department.<sup>132</sup> While this financial focus appears consistent with the Commission's exhortations to clarify terms of judges' remuneration,<sup>133</sup> and arguably incorporates the Commission's recommendation to promote institutional interdependence,<sup>134</sup> it largely fails to address the judiciary's independence from the executive. This failure ultimately reinforces claims that certain aspects of Myanmar's judiciary are perpetuating traditional norms of a judiciary subjugated to the executive.

One of the areas mentioned by the Commission that appears to have undergone significant development is that of judicial training. The Commission's recommendations included increasing judicial training for judges and quasi-judges at the village level and judicial training has been a focus of international collaboration with Myanmar.<sup>135</sup> Additionally, Myanmar's Supreme Court has prioritized the training of judges and court

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129. *Id.* (“[T]he NLD government will not be able to implement these recommendations if it cannot overhaul the current judiciary system by replacing old judges with the new ones.”).

130. THE SUPREME COURT OF THE UNION, THE REPUBLIC OF THE UNION OF MYANMAR, *ADVANCING JUSTICE TOGETHER: JUDICIARY STRATEGIC PLAN (2015–2017)* 6 (2014).

131. *Id.* at 11 (noting the need for “the Judiciary [to] work[] closely with the executive and the legislative branches to ensure justice for all.”).

132. *Id.*

133. REPORT OF IBAHRI, *supra* note 11, at 7.

134. *Id.* at 39.

135. See THE SUPREME COURT OF THE UNION, THE REPUBLIC OF THE UNION OF MYANMAR, *Chief Justice of the Union Attends the 3<sup>rd</sup> ASEAN Chief Justices' Meeting which was Held at Boracay Philippines* (Feb. 15, 2016), <http://www.unionsupremecourt.gov.mm/?q=news/118> [<https://perma.cc/U6WF-Z94J>] (“At the opening ceremony of the Meeting, Chief Justice of the Union delivered an opening address like other Chief Justices and made his discussion at the consecutive meeting on the matters of . . . cooperating in judicial education training with other countries.”); see also USAID, *DEMOCRATIC GOVERNANCE: INCLUSIVE, ACCOUNTABLE, TRANSPARENT 2* (2016), [https://www.usaid.gov/sites/default/files/documents/1861/2016%20USAID%20Burma\\_Democratic%20Governance\\_Fact%20Sheet.pdf](https://www.usaid.gov/sites/default/files/documents/1861/2016%20USAID%20Burma_Democratic%20Governance_Fact%20Sheet.pdf) [<https://perma.cc/N6CJ-K4H5>] (noting that USAID has taught more than “600 judges and 200 state law officers on due process, case analysis, judicial ethics, legal drafting, and public outreach.”).

staff on communications, customer service,<sup>136</sup> and media relations.<sup>137</sup> Moreover, there is a specific strategic initiative in 2016 to “enhance training for judges to achieve equality, fairness and integrity.”<sup>138</sup> Specific steps for achieving this goal included training for judges on “administration and supervisory skills, case management, Code of Conduct, Legal English, Child Right [sic],” as well as “scholarship programs for young judges.”<sup>139</sup> There is also an initiative to “[e]nhance capacity of the [Union Supreme Court] Training Department and Judicial Training Center,” including “[a]nnual study tours to Japan to observe how to implement effective trainings.”<sup>140</sup> Whether these training initiatives will improve judicial independence in Myanmar remains to be seen.

Finally, it is worth noting that although not strictly a component of an independent judiciary, Myanmar has experienced significant progress in organizing an independent bar association.<sup>141</sup> The bar association has proven a vehicle for engaging with the international legal community and may help expose Myanmar’s legal and judicial community to international legal norms.<sup>142</sup> Furthermore, even though there will often be lawyers on opposing sides of any given case, all lawyers have a vested interest in ensuring that judges decide cases according to legal merit—where lawyers add value—rather than according to political influence. For this reason, lawyers have been strong advocates for judicial reform.<sup>143</sup>

In summary, the most significant progress *vis-à-vis* the Commission’s recommendations has occurred in the realm of judicial training. Less progress has been made in structural reform and in pursuing adjustments to historic power dynamics that enable political actors to influence the courts.

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136. THE SUPREME COURT OF THE UNION, THE REPUBLIC OF THE UNION OF MYANMAR, ADVANCING JUSTICE TOGETHER: JUDICIARY STRATEGIC PLAN (2015–2017): YEAR 2 ACTION PLAN 5 (2016).

137. *Id.* at 7.

138. *Id.* at 9.

139. *Id.* at 9.

140. *Id.* at 10.

141. Press Release, International Bar Association, IBA President and Aung San Suu Kyi Open Inaugural Meeting of Myanmar’s First National Independent Lawyers’ Association (Jan. 20, 2016), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=67923557-0f67-403c-ad67-ff04adc4ac52> [<https://perma.cc/N9N4-UGQE>].

142. *See id.* (noting that the International Bar Association was present at the first meeting of the Myanmar Bar Association).

143. *See Ye Mon, Lawyers, Activists Press for Justice Ministry*, MYANMAR TIMES (Mar. 17, 2016), <http://www.mmtimes.com/index.php/national-news/nay-pyi-taw/19498-lawyers-activists-press-for-justice-ministry.html> [<https://perma.cc/FZ9Q-5KQF>] (noting that lawyers were calling for judicial reform including the creation of a ministry of justice).

On a general level, significant issues regarding the independence of the judiciary appear to persist.

## VI. DIALECTIC ANALYSIS AS AN EFFECTIVE MEANS OF ENGAGING LEGAL PROBLEMS IN MYANMAR

Analyzing the propriety of the Commission's recommendations in light of Myanmar's current struggles with regards to intra-governmental judicial independence is a difficult task. Which recommendations were correct, but have not yet had time to come to fruition? It seems unrealistic to expect Myanmar's complete transformation from an authoritarian military dictatorship to a country marked by complete judicial independence in a span of three years. The Commission acknowledged as much.<sup>144</sup> However, is it possible after three years to determine which recommendations will never lead to the desired results because they seek to transplant Western legal dynamics and concepts into an inhospitable target culture?<sup>145</sup>

On the other hand, is it possible that the recommendations will never lead to the desired levels of judicial independence because they sacrificed sound internationally recognized judicial practices from the *Basic Principles* in deference to Myanmar's historic judicial dynamics?

In short, is achieving judicial independence in Myanmar simply a matter of patience, or should the recommendations change to introduce more internationally recognized practices at the risk of being ethnocentric, or be more accommodating of the judicial practices already at work in Myanmar, risking the problems of cultural relativism?

In an article discussing the pitfalls of ethnocentrism and cultural relativism,<sup>146</sup> Judith Schacherreiter explains that when institutions or scholars attempt to evaluate the strengths, weaknesses and appropriate courses of action for any foreign legal system there is an ever-present danger

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144. REPORT OF IBAHRI, *supra* note 11, at 15–24, 59 (noting that when it considered Myanmar's history, it concluded that "it would be unrealistic to expect overnight transformations [in regards to judicial independence].").

145. See John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 40 N.Y.U. J. INT'L. L. & POL. 657, 706 (2008) (explaining that complicated internal management provisions in the draft business law were poorly suited for the norms that regulated most of the Vietnamese entrepreneurs who were used to family-based management hierarchies).

146. Judith Schacherreiter, *Das Verhängnis von Ethnozentrismus und Kulturrelativismus in der Rechtsvergleichung: Ursachen, Ausprägungsformen und Strategien zur Überwindung (The Fate of Ethnocentrism and Cultural Relativism in Comparative Law – Causes, Manifestations and Effective Strategies)*, 77 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 272, 273 (2013), [http://www.academia.edu/10453099/The\\_Fate\\_of\\_Ethnocentrism\\_and\\_Cultural\\_Relativism\\_in\\_Comparative\\_Law\\_Causes\\_Manifestations\\_and\\_Effective\\_Strategies](http://www.academia.edu/10453099/The_Fate_of_Ethnocentrism_and_Cultural_Relativism_in_Comparative_Law_Causes_Manifestations_and_Effective_Strategies) [https://perma.cc/6KJA-WDCG] ) [or, can link to untranslated version at <http://www.ingentaconnect.com/content/mohr/rabelsz/2013/00000077/00000002/art00004?crawler=true>].

that evaluators will be misguided by the heuristic pitfalls of ethnocentrism and cultural relativism.<sup>147</sup> Ethnocentrism uses evaluators' domestic criteria and values as universal standards.<sup>148</sup> At the same time, there is a danger that evaluators will categorically over-adjust in the opposite direction, namely towards cultural relativism.<sup>149</sup> Cultural relativism relies exclusively on the foreign culture's criteria and values as standards for evaluation, and precludes any evaluation that originates in a different culture.<sup>150</sup> Both approaches fail to foster a constructive dialogue between different legal cultures.<sup>151</sup>

According to Schacherreiter, ethnocentrism attempts to transform foreign legal structures into systems that the evaluator is accustomed to, while cultural relativism eschews constructive engagement with different cultural worldviews and labels them inherently foreign.<sup>152</sup> Creating a conceptual dichotomy between the familiar and the foreign fails to appreciate the existence of numerous similarities between cultures.<sup>153</sup> In fact, there exists a wide spectrum of perspectives between ethnocentrism and cultural relativism. Along this spectrum are analytical perspectives that, by employing a dialectic approach capitalizing on the tension between the extremes of ethnocentrism and cultural relativism, can create a conceptual space for understanding the various roots, influences, and internal differences that differentiate the two systems.<sup>154</sup>

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147. See Schacherreiter, *supra* note 146, at 273 (describing the dangers of “Ethnozentrismus” and “Kulturrelativismus”).

148. *Id.*

149. See *id.* at 275 (explaining that critiques of “Ethnozentrismus” often fall into “Kulturrelativismus” instead).

150. *Id.* at 273.

151. See *id.* at 276 (“Letztlich sind beide Zugänge, ethnozentristischer Universalismus und radikaler (Kultur-) Relativismus, unbefriedigend, weil sie beide polarisieren, anstatt differenzierte rechtsvergleichende Auseinandersetzung, Kommunikation und Kritik zu fördern.”) (Translation: “Finally, both approaches, ethnocentric universalism and radical (cultural) relativism, are unsatisfactory, because they polarize instead of encouraging differentiated comparative legal engagement, communication and critique.”).

152. See *id.* at 280 (“Diese Zuordnungen europäisieren einerseits, exotisieren andererseits, und stärken damit jene Zugänge, die entweder versuchen, das Fremde zu assimilieren (Ethnozentrismus) oder aber es als grundlegend Anderes ganz sich selbst zu überlassen (Kulturrelativismus).”) (Translation: “These assignments make things more European on the one hand and more exotic on the other; and they encourage approaches that attempt to either assimilate the foreign (Ethnocentrism) or leave it entirely to itself as inherently “other” (cultural relativism).”).

153. *Id.* at 285.

154. *Id.* at 299 (“If we reconceptualise the relationship between the Self and the Other as a dialectic relationship between heterogeneous and hybrid entities, we can generate comparative law approaches that go beyond ethnocentrism and cultural relativism.”).

## VII. A DIALECTIC ANALYSIS OF THE COMMISSION'S REPORT

Applying this dialectic approach to the Commission's Report requires determining the degree to which the recommendations represent ethnocentric ideals foreign to Myanmar's cultural framework, and the degree to which the ideals resonate with existent cultural dynamics in Myanmar. One step in this direction is to analyze regional statements on judicial independence endorsed by Myanmar. In 1995, a group of Asian and Pacific countries collectively developed regionally specific "minimum standards to be observed in order to maintain the independence and effective functioning of the judiciary" (the "*Beijing Principles*").<sup>155</sup> Chief Justices from countries as diverse as Pakistan, the Russian Federation, the People's Republic of China, Singapore and Indonesia agreed upon these basic principles of judicial independence.<sup>156</sup> The Honorable U Aung Toe, Myanmar's Chief Justice at the time, signed the agreement on behalf of Myanmar.<sup>157</sup>

Rather than marking a departure from international norms of judicial independence, the *Beijing Principles* shared many similarities with the *UN Basic Principles on the Independence of the Judiciary*. For instance, as to the relationship between the judiciary and the executive, the *Beijing Principles* state that the "[e]xecutive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges."<sup>158</sup> This explanation of judicial independence compares favorably with the *UN Basic Principles*, which state that "[t]he judiciary shall decide matters before them impartially . . . without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason,"<sup>159</sup> and that "[t]here shall not be any inappropriate or unwarranted interference with the judicial process."<sup>160</sup>

This overlap between judicial independence as articulated by the international community and the principles endorsed by Myanmar may suggest that judicial independence as articulated by the *UN Basic Principles* represents a universal value, thereby reducing fears that the Commission's

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155. See Hon. David K. Malcolm, *Independence and Accountability: An Asian Pacific Perspective*, in COMPREHENSIVE LEGAL AND JUDICIAL DEVELOPMENT: TOWARD AN AGENDA FOR A JUST AND EQUITABLE SOCIETY IN THE 21ST CENTURY 219, 221 (Rudolf V. Van Puymbroeck ed. 2001), (referencing the adoption of the *Beijing Statement of Principles of Independence of the Judiciary*).

156. See generally LAWASIA: THE LAW ASSOCIATION FOR ASIA AND THE PACIFIC, BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION (1995) [hereinafter "*Beijing Principles*"] (undersigned by the Chief Justices of the cited nations).

157. *Id.* at 8.

158. *Id.* at 7.

159. Basic Principles, art. 2.

160. Basic Principles, art. 4.

reliance on those principles could lead to ethnocentrism.<sup>161</sup> However, closer examination reveals several practical realities that call for in-depth engagement with this theory.

For instance, various shortfalls and threats to judicial independence in Myanmar, particularly with respect to undue influence by the executive and the military, stand in contrast to this ideal. Further, at the time Myanmar's Chief Justice ascribed to the *Beijing Principles*, collusion between the judiciary and the executive was quite pronounced.<sup>162</sup> One explanation for the disparity between the ideals enshrined in the *Beijing Principles* and the practical state of judicial independence in Myanmar may be that many of the ideals are in fact abstract, hortatory or tautological.<sup>163</sup> Another explanation for the variance between the professed ideals and the practical realities of judicial independence is that any country will likely fall short of such international ideals.<sup>164</sup> Yet, there may be more to the disparity than an inescapable gulf between ideal and reality.

A tension between a general allegiance to democratic principles and the acceptance of authoritarian dynamics appeared in a recent regional survey.<sup>165</sup> Myanmar demonstrated the highest support for democracy of any country in the region<sup>166</sup>—a dynamic commonly associated with the expansion of judicial power.<sup>167</sup> However, Myanmar's support for democracy is accompanied by an exceptionally low appreciation for *liberal* democratic values, such as “political freedom, pluralism, . . . and accountability” even when compared with other countries in the region.<sup>168</sup> Some scholars refer to

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161. See REPORT OF IBAHRI, *supra* note 11, at 88 (providing the *UN Basic Principles* in an annex to its report).

162. See CHEESMAN, *supra* note 38, at 140–41 (noting that in 1991 Union Chief Justice Aung Toe effectively relinquished the courts role of providing even a procedural check against confessions obtained by torture in submission to military intelligence).

163. See Peerenboom, *supra* note 19, at 4 (“[T]ake Article 3 of the Beijing Principles: ‘The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.’ So far so good, but are decisions regarding states of emergency and declarations of war justiciable in nature?”).

164. See INTERNATIONAL BAR ASSOCIATION, INTERNATIONAL BAR ASSOCIATION’S HUMAN RIGHTS INSTITUTE (IBAHRI) THEMATIC PAPERS NO 4: JUDICIAL INDEPENDENCE 6–8 (June 2014) (noting several incidences that drew the judicial independence of several courts in the United States and Australia into question).

165. See Bridget Welsh et al., *Burma Votes for Change: Clashing Attitudes toward Democracy*, 27 J. OF DEMOCRACY 132, 133 (2016) (noting Myanmar’s participation in the Asian Barometer Survey).

166. *Id.*

167. Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 73 (2004) (“Most scholars of constitutional politics agree that there is a strong correlation between the recent worldwide expansion of the ethos and practice of democracy and the contemporaneous global expansion of judicial power.”).

168. Welsh et al., *supra* note 168, at 133–34 (noting that only Vietnam had more illiberal views of democracy).



illiberal governmental arrangements as statist.<sup>169</sup> Under statist concepts, governments represent corporatist entities that attempt to cooperatively regulative and manage civil society.<sup>170</sup> There, the power of the executive and the judiciary are designed to work in concert and collaboratively, rather than in opposition to counterbalance one another.<sup>171</sup> Multiple countries in Asia, including Singapore and China, exhibit “soft-authoritarian,”<sup>172</sup> or “statist” governmental systems.<sup>173</sup> While Singapore’s common law tradition exposed it to the notion of separation of powers and judicial independence, it perpetuates a type of authoritarian arrangement.<sup>174</sup>

This type of government does not preclude the development of intra-governmental judicial independence altogether. For instance, Singapore has demonstrated an ability to limit government action in routine matters.<sup>175</sup> However, the courts refrain from using their judicial powers against the ruling party.<sup>176</sup>

Judicial independence in these types of authoritarian regimes often proves most influential in the economic sector.<sup>177</sup> If a government desires to incentivize foreign entrepreneurs to invest within its borders, the creation of an independent judiciary to guard against unlawful government expropriations in economic matters increases foreign actors’ willingness to invest.<sup>178</sup> Judges in other Asian countries, including Korea and Taiwan, maintained relative autonomy over economic matters, but surrendered a degree of judicial independence in politically sensitive matters.<sup>179</sup>

Ran Hirschl’s *hegemonic preservation thesis* may explain the asymmetric development of judicial independence—establishing

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169. Kanishka Jayasuriya, *Corporatism and Judicial Independence within Statist Legal Institutions in East Asia*, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS 173, 173 (Kanishka Jayasuriya ed., 1999).

170. *Id.*

171. *Id.* (noting “significant concertation or collaboration between the judiciary and the executive” in statist judicial independence models).

172. Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, in ASIAN DISCOURSES OF RULE OF LAW, THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE US 1, 16 (Randall Peerenboom ed. 2004).

173. Jayasuriya, *supra* note 169, at 173.

174. See Tom Ginsburg, *Judicial Independence in East Asia: Implications for China* 5 (U. of Chicago Pub. Law & Legal Theory Working Paper No. 295, 2010), [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1172&context=public\\_law\\_and\\_legal\\_theory](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1172&context=public_law_and_legal_theory) [https://perma.cc/CKE8-NPJD] (“Singapore’s judiciary has the advantage of having come from the common law tradition, in which independence is a more longstanding ideological and institutional goal.”).

175. *Id.* at 4–5.

176. *Id.* at 5.

177. See *id.* at 11.

178. See *id.* at 4.

179. *Id.* at 11–12.

preeminence in the economic sphere, while submitting itself to the executive in highly politicized matters.<sup>180</sup> Under Hirschl's theory, judicial empowerment occurs in response to the dynamics between three groups:

[1] threatened political elites who seek to preserve or enhance their political hegemony by insulating policy-making processes from the vicissitudes of democratic politics . . . [2] economic elites who may view the constitutionalization of certain economic liberties as a means of promoting a neoliberal agenda of open markets, [and 3] judicial elites and national high courts that seek to enhance their political influence and international reputation.<sup>181</sup>

Under this framework, economic power players often have more to gain through the economic growth associated with increased international investment, even if the price of such investment requires surrendering control over economic matters to the judiciary. Moreover, under Hirschl's model the political elite retain their power because their countries will likely benefit from economic growth and economic matters do not affect their core political functions. On the other hand, economic elites do not necessarily benefit from the involvement of an influential judiciary in politically sensitive matters that do not affect them. In contrast, political elites have strong incentives to oppose the judiciary's encroachment into such politically sensitive areas. According to Hirschl's theory, power players in the judiciary are willing to agree to a model of limited judicial independence to the extent it will increase their own international reputation and their own power within the government.<sup>182</sup>

Many elements of these theories, as well as certain facets of other Asian authoritarian regimes, resonate with Myanmar's history and present conditions.<sup>183</sup> Myanmar has exhibited esteem for the rule of law, but has also allowed authoritarian government practices. For instance, prior to 1998, Burmese regimes carried out human rights violations while claiming to be supporting and even furthering the "rule of law."<sup>184</sup> Myanmar's historically strong and influential executive has likely shaped the nation's perception of an appropriate balance between political branches. Like Singapore,

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180. Hirschl, *supra* note 167, at 90 ("[P]olitical elites in association with economic and judicial elites who have compatible interests determine the timing, extent, and nature of constitutional reforms.").

181. *Id.*

182. *Id.*

183. While the Commission does provide an overview of Myanmar's history in its report, REPORT OF IBAHRI, *supra* note 11, at 16–24, it does not provide an in-depth analysis of historical analysis of factors that could affect current intra-governmental dynamics with respect to judicial independence.

184. See CHEESMAN, *supra* note 38, at 4–5 (noting that one Burmese government cited the rule of law to support the imposition of a military administration on the city. Later the government explained the violence associated with the violent expulsion of tens of thousands of alleged foreigner as upholding the law).

Myanmar has a common law background, in which the country was exposed to the concept of judicial independence.<sup>185</sup> Yet even during portions of the British colonial period, which later Burmese authorities claimed instilled rule of law principles in Burma,<sup>186</sup> the colonial district court was not comprised of members of a judiciary, but instead of civil servants, while a member of the executive, the Commissioner, oversaw the court of final appeal.<sup>187</sup> Even once autonomous judiciaries began operating in colonial Burma, judges were required to answer to the governor, further entrenching the executive's control over the judiciary.<sup>188</sup> Some scholars even contend that the use of a Penal Code in Burma by the British—who as a common law country did not have a domestic Penal code<sup>189</sup>—was in fact a means of “strengthen[ing] the hand of the sovereign power over the judiciary.”<sup>190</sup> After all, the British colonization was driven primarily by economic, not political, purposes and the legal structure was likely crafted to support that goal.<sup>191</sup>

Moreover, any semblance of judicial independence present in Burma after it achieved independence in 1947<sup>192</sup> was entirely overshadowed by the absolute subjugation of the judiciary to the executive under the Revolutionary period starting in 1962 with Ne Win's military coup.<sup>193</sup> After overthrowing the democratically elected government, the revolutionary council abolished the country's high courts due to the threat they posed to

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185. See Zan, *supra* note 2, at 11.

186. *Id.* at 7.

187. See CHEESMAN, *supra* note 38, at 46.

188. See *id.* at 47.

189. *Comparative Criminal Law and Enforcement: England and Wales - Law Enforcement: The Police And Prosecution, Prosecutors: Crown Prosecution Service, Criminal Courts: Pre-trial And Trial*, JRANK, <http://law.jrank.org/pages/660/Comparative-Criminal-Law-Enforcement-England-Wales.html#ixzz455k0etyr> [https://perma.cc/C57U-XKNG] (“In the United Kingdom there is no penal code. The sources and interpretation of the criminal laws are to be found in individual Acts of Parliament (statutory sources) and decisions by judicial bodies, in particular the Court of Appeal (case law).”).

190. See CHEESMAN, *supra* note 38, at 40, 42 (noting the imposition of the Indian Penal Code over Myanmar within the context of codification being used to enforce the supremacy of the ruler).

191. See *id.* at 38 (“The British colonisers used law to dominate colonized people and extract resources from their lands.”); David I. Steinberg, Maung Htin Aung & Michael Arthur Aung-Thwin, *Myanmar: History – The Colonial Economy*, ENCYCLOPEDIA BRITANNICA (Apr. 7, 2016) <http://www.britannica.com/place/Myanmar/The-initial-impact-of-colonialism> [https://perma.cc/C57U-XKNG] (“[Under the British,] Burma's economy became part of the vast export-oriented enterprise of western colonialism.”).

192. See Zan, *supra* note 2, at 14–15 (citing *Ma Thauk Kyi v. The Deputy Commissioner, Hanthawaddy and One*, 1949 BLR 30 (S.C.) where a lack of due process in detention orders was stopped and *Ah Kam v. U Shwe Phone & Others*, 1952 BLR (SC) where the court determined that the President had acted beyond his scope of authority).

193. David I. Steinberg, Michael Arthur Aung-Thwin, & Maung Htin Aung, *Myanmar: History – The Socialist State, 1962-88*, ENCYCLOPEDIA BRITANNICA (Apr. 7, 2016) <http://www.britannica.com/place/Myanmar/Myanmar-since-1988> [https://perma.cc/NKR4-J43N].

the ruling power.<sup>194</sup> The law was not meant to be a check on power, but rather an instrument to promote policy.<sup>195</sup> During this period, principles of judicial independence were further subverted by the appointment of executive and legislative officers and non-legally trained Party members to various levels of the judiciary and tribunals.<sup>196</sup> This lack of judicial independence became formalized in the 1974 Constitution, which unified in the executive, legislative and judiciary branches, subjecting them all to the Party's control, and requiring their support of the Party's objectives.<sup>197</sup>

Even in 1988, when the State Law and Order Restoration Council ("SLORC") came to power and abolished the organs of state power created by the 1974 Constitution,<sup>198</sup> judges remained subservient to the will of the controlling power and were themselves unprotected by safe-guards such as tenure.<sup>199</sup> In fact, there are reports that judges were dismissed for failing to follow the executive's orders to give rulings that would have violated the laws.<sup>200</sup> Moreover, under the SLORC's legal framework the Supreme Court was directly under the SLORC's authority,<sup>201</sup> and the President could ask the Chief Justice to resign even without legislative approval.<sup>202</sup> Judges during this period were accustomed to functioning merely as administrators of state policy, instead of judges applying the law.<sup>203</sup>

Although Burmese and Myanmar governments were never communist systems *per se*,<sup>204</sup> there are significant similarities between communism's authoritarian control of the judiciary and the practices in the nation at various points during the nation's era of military rule. Much like the authoritarian dynamics in Burma and Myanmar, Marxist legal theory did not support the concept of judicial independence, and considered the law as a means to "maintain the existing political system and quash unrest."<sup>205</sup> Under the

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194. Zan, *supra* note 2, at 17.

195. CHEESMAN, *supra* note 38, at 82 (noting that law was an instrument to affect policy, not an authority on its own right).

196. See Zan, *supra* note 2, at 19–20 (noting that members of the executive and the legislature constituted members of special courts and many Party members without legal qualifications were made judges).

197. *Id.* at 21–22.

198. *Id.* at 27.

199. *Id.* at 28.

200. *Id.* at 29.

201. CHEESMAN, *supra* note 38, at 98.

202. Zan, *supra* note 2, at 31.

203. REPORT OF IBAHRI, *supra* note 11, at 56.

204. DAVID I. STEINBERG, BURMA: THE STATE OF MYANMAR xxxii (2001) (noting that although Burma had a "highly centralized single-party dictatorship," a socialist system and Marxist ideals, it also has a relatively open economy and opposed the Burmese Communist Party).

205. Erik S. Herron & Kirk A. Randazzo, *The Relationship Between Independence and Judicial*

socialist paradigm, the state was thought to be the embodiment of the people's will and as such did not require an independent judiciary to keep it in check.<sup>206</sup>

In Burmese and Myanmar governments, the executive assumed responsibility for maintaining societal order. To explain the prevalence of these authoritarian ideals in Myanmar, Nick Cheesman contends that in Myanmar the ideal of "law and order," though often conflated with "rule of law,"<sup>207</sup> is a separate and antithetical ideal in which "the state's forces bind people's general activity, to ensure they remain decent and inoffensive, quiet and unassuming."<sup>208</sup> Cheesman's law and order political philosophy has significant implications for the independence of the judiciary because it endorses unequal political relations on grounds that a superior moral authority (the executive) must be free to assert its influence on the unruly.<sup>209</sup> In this political order, the judiciary is not intended to check the executive, but rather to support the executive's pursuit of order.<sup>210</sup>

Perhaps this societal value of order explains why Myanmar citizens who allegedly distrust their government<sup>211</sup> and oppose authoritarian regimes,<sup>212</sup> still support highly authoritarian ideals with regards to other social and political dynamics.<sup>213</sup> One scholar claims that this contrast between opposition to authoritarian government and support for authoritarian values is due in part to a lack of understanding in Myanmar culture about democracy's function.<sup>214</sup> Under this theory, the rise of a certain degree of judicial independence may be attributed citizens who oppose authoritarian regimes, but shortfalls may flow from the populace's lack of understanding of the various dynamics that could lead to well-developed judicial independence.

Furthermore, Hirschl's theory may also account for the rise of judicial independence in Myanmar despite the fact that the country's present

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*Review in Post-Communist Courts* 65 THE JOURNAL OF POLITICS 422, 427 (2003).

206. *See id.* ("According to socialist theories, the state was the embodiment of the people and a formal division of powers was unnecessary.")

207. CHEESMAN, *supra* note 38, at 9.

208. *Id.* at 30.

209. *See id.* at 31.

210. *Id.* at 169 (emphasizing judges' role in perpetuating the semblance of orderliness).

211. Welsh et al., *supra* note 165, at 136 (noting that Myanmar citizens generally have "negative views of the government and of governance").

212. *Id.* at 136 ("[A] mere [four] percent of respondents in Burma said that 'under some circumstances, an authoritarian government can be preferable to a democratic one,' whereas [thirty-one] percent of Thai respondents agreed with this statement.")

213. *Id.* at 134 ("[T]he vast majority of citizens [in Burma] still subscribe to authoritarian values and beliefs.")

214. *Id.*

constitutional structure has impaired significant aspects of judicial independence. More specifically, the theory could offer an explanation for the incentive dynamics between political reform and economic development in Myanmar.<sup>215</sup> For instance, one official stated that he believed increased legal certainty was important for attracting international sources of capital—a crucial driving force behind Myanmar’s economic development.<sup>216</sup> Further, evidence suggests that the Myanmar military’s surrender of power to a civilian government promoted their own economic interests by facilitating access to open markets.<sup>217</sup> Likewise, President Thein Sein’s liberal efforts at reform in 2012 promoted judicial independence, and were part of a wave of liberalization throughout the country that led the United States and the European Union to drop most of their sanctions against Myanmar.<sup>218</sup> In combination with increased foreign investment and foreign tourism, the removal of these sanctions led to significant economic growth in the country.<sup>219</sup>

Under Hirschl’s “hegemonic preservation thesis,”<sup>220</sup> Myanmar’s executive branch, which started as a military regime, was able to preserve a significant policy making role for both the new civilian executive and the military by establishing a Constitution that ensured both groups had significant influence over other governmental actors. The military was further empowered to block any attempts to remove this control through constitutional amendments. In Myanmar, there is significant overlap between the government or military elite and the economic elite.<sup>221</sup> As such, the interests of two of three elites in Hirschl’s framework (the political elites and the economic elites) were significantly aligned, suggesting that

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215. See generally DAVID HOOK, TIN MAUNG THAN & KIM N.B. NINH, THE ASIA FOUNDATION, CONCEPTUALIZING PUBLIC SECTOR REFORM IN MYANMAR (June 2015).

216. See REPORT OF IBAHRI, *supra* note 11, at 34.

217. See Igor Blazevic, *The Challenges Ahead*, 21 J. DEMOCRACY 101, 103 (Apr. 2016) (“[Thein Sein] was a disciplined executor of the former junta’s strategic master plan, who was fully aware that his real mandate was to protect the interests of the military, Burman nationalism, and the country’s oligarchs.”).

218. See Steinberg, Aung-Thwin, & Aung, *supra* note 193. Report of IBAHRI, *supra* note 11, at 22 (noting that in his inauguration speech President Thein said “We guarantee that all citizens will enjoy equal rights in terms of law, and we will reinforce the judicial pillar.”).

219. See Steinberg, Aung-Thwin, & Aung, *supra* note 193.

220. See Hirschl, *supra* note 167, at 90 (examining the interaction of incentives among the executive, economic and judicial elites).

221. See Mahtani, *supra* note 114 (noting that Myanmar’s military was able to transfer large economic entities to its own control before it lost control of the government in 2016); Shibani Mahtani & Richard C. Paddock, ‘Cronies’ of Former Myanmar Regime Thrive Despite U.S. Blacklist, WALL ST. J. (Aug. 12, 2015) <http://www.wsj.com/articles/cronies-of-former-myanmar-regime-thrive-despite-u-s-blacklist-1439433052> [<https://perma.cc/8CXX-G3VR>] (noting that “top cron[ies]” of Myanmar’s former military regime continue to wield significant control over the nation’s economy).

surrendering a certain degree of political oversight to the judiciary was a small price to pay for economic growth that would likely benefit well-connected government and military elites. Finally, the historic political weakness of Myanmar's judiciary meant that it was not positioned to negotiate its own rights and therefore had to simply accept the powers the executive was willing to give.

The theory that authoritarian societal values led to limited judicial independence does not stand in conflict with Hirschl's hegemonic preservation explanation for the lack of comprehensive judicial independence. Moreover, neither theory suggests that judicial independence is culturally inappropriate for Myanmar. Despite a historically strong executive, the only situation in which judicial independence is inappropriate for Myanmar is if the democratically elected executive—acting in accordance with its own policy agenda—more accurately reflects Myanmar's collective societal will than an independent judiciary applying the law. Although there are indications that Myanmar's citizenry perceives the judiciary as ineffective and corrupt, it is unlikely that the populace would abandon the judiciary entirely and defer adjudicative control to the executive. To find otherwise would over emphasize and exaggerate certain aspects of Myanmar's historical political dynamics. There are no serious reports of any political actors in Myanmar calling for a dependent or subordinate judiciary. Moreover, actors throughout Myanmar have indicated a need for the judiciary to hold other branches accountable,<sup>222</sup> and they have protested its absence.<sup>223</sup> As such, arguments that judicial independence is inappropriate in Myanmar largely succumb to the pitfalls of cultural relativism. Rather, there is potential in Myanmar to support judicial independence, while at the same time acknowledging that any pursuit of judicial independence must acknowledge and respect Myanmar's current conceptual frameworks and dynamics.

## VIII. CONCLUSION

Many of the Commission's recommendations, especially those concerning increased training, increased compensation and the possibility of tenure for lower level judges, can likely be achieved under the current

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222. See REPORT OF IBAHRI, *supra* note 11, at 7 (“A senior official who told the IBAHRI delegation that ‘the new government needs not only to sue, but also to be sued.’”).

223. See Thein Than Oo, Myanmar's Lawyers' Network, *The Legacy of Dictatorship in Myanmar's Judicial System*, ASIAN HUMAN RIGHTS COMMISSION (2015), <http://www.humanrights.asia/resources/journals-magazines/article2/1402/06> [<https://perma.cc/QS66-SZF8>] (noting how both Aung San Su Kyi and the speaker of the legislature Shwe Man call for judicial independence in the country, but lamenting how the 2008 Constitution effectively prevents judicial independence).

Constitution. However, some of the Commission's most significant recommendations will likely require constitutional amendment. Under the current political climate, there is a chance that premature or improper pursuits of constitutional amendment could unravel the remarkable progress that Myanmar's judicial independence has experienced in recent years. While structural and even constitutional reform is essential to securing judicial independence, intermediary developments are likely necessary before such reform can take place.

Evidence suggests that any attempt to amend the Constitution without the military's consent could lead to another coup.<sup>224</sup> In such a situation, the Myanmar judiciary lacks sufficient prestige or legitimacy to counter unconstitutional encroachments by the military.<sup>225</sup> Therefore, efforts to promote judicial independence cannot rest on the pursuit of constitutional amendments susceptible to military opposition. The Commission considered the impeachment in 2012 of nine members of the Constitutional tribunal as evidence of how fragile and volatile the current constitutional system can be.<sup>226</sup> Whereas the legislature is authorized to impeach judges for a variety of reasons, the military has been empowered to commandeer the judiciary during states of emergency. Both of these powers over the judiciary are ill-defined and wielded with broad discretion.

Any reform efforts must therefore focus initially on interpersonal and institutional allegiances that undercut the independence of the judiciary. One immediate focus in this regard could be acknowledging and actively combatting the network of control that results from the placement of ex-military personnel into the judiciary.<sup>227</sup> A recent initiative among Myanmar lawyers to end the appointment of former military officers to the judiciary provides an example of a method to curb the military's informal influence over the judiciary.<sup>228</sup>

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224. Min Zin, *The New Configuration of Power*, 27 J. DEMOCRACY 116, 126 (Apr. 2016) (indicating that the military might respond possibly with a "state of emergency" or legal coup if political actors attempt to circumvent the current structures established in the Constitution).

225. See Erik S. Herron & Kirk A. Randazzo, *The Relationship between Independence and Judicial Review in Post-Communist Courts*, 65 THE JOURNAL OF POLITICS 422, 424 (2003) (finding that "[j]udges in post-communist courts may employ [judicial review strategies that seek to oppose unconstitutional legislation through more non-confrontational methods such as finding only a portion of the statute to be unconstitutional or striking down the legislation for procedural reasons] because they do not have the prestige and legitimacy associated with judges in established democracies.").

226. See REPORT OF IBAHRI, *supra* note 11, at 38.

227. Zin, *supra* note 224, at 113 ("A major task for the new government will be to 'reoccupy' the institutions of the state by bringing more genuine civilians—not ex-military pseudocivilians—into as many state agencies as possible.").

228. Bhone Myat & Khet Mar, *Myanmar Lawyers Launch Campaign to End Military Appointments to the Judiciary*, RADIO FREE ASIA (Khet Mar trans., Sept. 11, 2015), <http://www.rfa.org/english/>



While the correlation between judicial independence and economic investment may continue to improve Myanmar's judicial independence, this dynamic cannot be the only driver of change. The Commission's recommendations failed to appreciate that the group that will benefit the greatest from an increase of judicial independence is the people of Myanmar itself. The citizens of Myanmar likely have greater incentives to pursue an independent judiciary than the judiciary itself. There is no evidence that individual judges in Myanmar will necessarily be better off in a system where they prioritize the dictates of the law over government priorities, but the citizens of Myanmar certainly will be. While the judiciary may have to weigh the tradeoffs between a cordial relationship with the executive and international esteem, the citizens of Myanmar would gain protection from overreaches by the executive.

Yet, while the citizens of Myanmar may have the greatest incentives and possibly even hold the collective power to bring about change, there are strong indications that based on their historic experiences with an oppressive executive and subservient judiciary, they do not have a clear concept of what judicial independence really is and how political demands of the populace can increase it.<sup>229</sup>

While the Commission recommended improvements and training that may benefit citizens at the village-chief level, some of the most important reforms should be to teach citizens about their rights before all courts of the country. The citizens of Myanmar have shown their willingness to protest perceived injustice even at times when doing so was a great risk to themselves.<sup>230</sup> Judicial independence must become a grass-roots reality that a critical mass of citizens and political actors coalesce around.<sup>231</sup> While the Commission did recommend educating the populace on its rights,<sup>232</sup> this must become a central rather than an ancillary focus of reform.

Finally, reformers must adopt a long-term strategy.<sup>233</sup> The problems at the heart of the lack of judicial independence in Myanmar are based in large

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news/myanmar/lawyers-launch-campaign-to-end-military-appointments-to-the-judiciary-09112015153320.html [https://perma.cc/VVP9-V3KU].

229. See Welsh, *supra* note 165, at 138 (noting a general lack of political knowledge among Myanmar's citizens).

230. See *The Saffron Revolution*, THE ECONOMIST (Sept. 27, 2007), <http://www.economist.com/node/9867036> [https://perma.cc/6A2J-QNWF] (noting hundreds of thousands of Buddhist monks who engaged in protests demanding democracy during the Saffron Revolution, despite the brutal response to the popular revolt in 1988, which killed 3000 people).

231. See Igor Blazevic, *The Challenges Ahead*, 27 J. DEMOCRACY 101, 113–114 (stating that engagement of various stakeholders including ex-military political players and ethnic-minority stakeholders will be key in achieving genuine democratic reform).

232. See REPORT OF IBAHRI, *supra* note 11, at 6–8.

233. See Blazevic, *supra* note 231, at 113 (“[F]riends of Burma would be well-advised to keep their

part on dynamics that have been going on for generations. Institutions alone will not fix these problems.<sup>234</sup> Only a sustained effort that acknowledges the cultural framework in which these reforms must take place will allow lasting transformation to take place.

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expectations modest and to support its transition with patient long-term commitment.”).

234. Herron & Randazzo, *supra* note 205, at 435 (noting that in post-communist states “[c]onstitutional engineers generally codified an independent judiciary, but court behavior often responds to factors unrelated to its constitutionally defined authority.”).