

Part I

The Legal System of Myanmar

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Introduction: Myanmar, Law Reform and Asian Legal Studies

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LEGAL SCHOLARS TOOK their eyes off Myanmar for too long. Huxley (2004: 94) once observed that ‘Myanmar law has died of neglect’ and the same might, in fact, be said of sustained legal scholarship on Myanmar, whether by local or foreign scholars. Opportunities have now emerged, however, for law reform that even five years ago was unthinkable - a resurrection of law in Myanmar seems to have begun. The current political transition has, for example, reinvigorated engagement between the legal profession and the government, including the Parliament and the Attorney General’s Office. It has also created room for connections between local actors and international law firms, non-government organisations and a range of other groups. This has led to multiple and often overlapping conversations about the possibilities for change in a shifting institutional landscape. The resulting scramble for information by legal practitioners and international development agencies is a reflection of both the practical challenges for access to information about law in Myanmar and the lack of scholarship on law in that country.

This is not to discount the important work of the handful of legal historians or political scientists who have worked on the legal system of Myanmar,¹ nor dismiss the challenges of legal research – particularly empirical research – prior to 2011. It is also not to deny that a large range of legal materials are now available online in the Burmese language (see Crouch and Cheesman, this volume). Nevertheless, there is a pressing need for more informed scholarly analysis on the legal system of Myanmar, not least by scholars from Myanmar.

This volume is a first attempt to begin this task. It aims to provide basic information about law in contemporary Myanmar and lay a foundation for further research. This chapter is intended to serve as a guide to the volume as a whole. It highlights key themes and debates in each chapter and identifies points of commonality across the chapters. Each chapter is designed to be read on its own but this introductory chapter directs the reader to larger trends and patterns in the law reform process as it was unfolding in Myanmar at the time of writing (late 2013).

We frame this introduction within a broader comparative context, one that reflects the expansion of the depth and breadth of the field of Asian legal studies in recent

¹ For example, Professor Andrew Huxley, Dr Nick Cheesman, Dr Myint Zan, Professor David Williams and Associate Professor D Christian Lammerts, among others.

decades (Steele 2010). In particular, its focus is on law both ‘in context’ and ‘in action’, as opposed to simply how it appears in legal texts such as regulations and judicial decisions.² There have been a number of legal scholars based at, or associated with, Australian universities (see Taylor 1997), who helped develop this approach by pioneering new research on the legal systems of Asian societies. One of the most well-known of these was the founder of the Asian Law Centre at the University of Melbourne, the late Professor Malcolm Smith (for more, see Steele 2010), who advocated a self-consciously pragmatic and contextual approach to understanding law in Asian societies. Another is Professor MB Hooker, now based in Canberra, who has written prolifically on the legal systems and traditions of Southeast Asia (see, for example, Hooker 1972, 1978a, 1978b, 1980, 1984). His work is based on extensive fieldwork, and focuses on explaining how legal texts are actually understood and applied in local practice. It includes some discussion of the Burmese legal system in the context of broader trends and patterns in law and legal institutions in Southeast Asia.³

Influenced by the work of these scholars and others like them, this volume is intended as a response to the ongoing need for legal research on legal systems in the Asian region that takes a socio-legal perspective and locates law beyond formal texts in its complex social and political context. As Darian-Smith (2012: 2) has pointed out, ‘studying doctrinal law alone does not tell the full story about how and under what conditions law is imagined, produced, formalised, enforced, reformed, or made meaningful’.

Miyazawa (2013: 129) would add that one of the continuing challenges for socio-legal research on Southeast Asia is to ‘be more ambitious in our theoretical quest when it is empirically justifiable’. Miyazawa recognises that scholarship informs public policy, the pace of legal reform in East Asia and the fact that public policy is ‘too important to be left to the government . . .’ (2013: 128). He also cautions, however, that legal scholarship on Asia should not sacrifice depth in theory and method to produce only policy-oriented analysis (2013: 125). In fact, in the last two decades, scholarship on Asian legal systems has begun to be more widely accepted as an area of intellectual importance in its own right. The scholars working in this area have increased in number and it is beginning to have more influence on the broader theoretical field of ‘law and society’.⁴ A 2011 study by Chua (forthcoming 2014) suggests, however, that there is still a way to go. It shows that coverage of scholarship on law and society in Southeast Asia in select journals in the field (*Law & Society Review* and *Law & Social Inquiry*) has been very limited, although this may in part be due to the omission of regionally-focused journals like as *The Australian Journal of Asian Law* from her survey. In any case, it is clearly true that scholars focusing on the legal system of Myanmar – and Southeast Asia more broadly – have the opportunity to build on wider law and society scholarship as they produce work focused on particular countries or regions. Again, we hope that this volume may make some contribution to this process.

In the last two decades, there has been a proliferation of ‘law and society’ edited volumes on Southeast Asia. There is, for example, Poh-Ling Tan’s volume on law and

² The contrast between law in the books and law in action has been thoroughly discussed by ‘law and society’ scholars. For a recent reiteration of this field and its evolution, see Darian-Smith (2012) and Gould and Barclay (2012).

³ On Islamic law in Burma see Hooker 1984: 44–84; on Burmese law texts, see Hooker 1978a: 17–25, 143–47; and Hooker 1975: 85–94.

⁴ The field of ‘law and society’ is generally perceived to be embodied by the establishment of the Law and Society Association (US), and the ‘socio-legal’ movement in the United Kingdom, see Darian-Smith 2013: 1–12.

society in East Asia generally (1997), and more recent and wide-ranging collections spanning East Asia have been published since then, including by Tomasic and Antons (2013). There are also numerous volumes that concentrate on the legal systems of specific countries in Southeast Asia. Some of these are of a general nature, such as the two volumes on the legal system of Indonesia edited by Lindsey (1999; 2008), while others focus on more specific issues from a law and society perspective, such as Sidel's monograph on law and society in Vietnam (2008) and another on property rights in Vietnam (Sidel and Hue-Tam 2012). These volumes all emphasise the dynamic nature of legal systems in Asia, the explosion of state-centred reforms in recent years, and new developments in legal pluralism. They build on, and in some cases contend with, the earlier literature, which often focused more on traditional religious and cultural legal structures.⁵ There have also been collections specifically examining socialist and communist regimes in Asia. These, however, deal with China and Vietnam (Gillespie and Chen 2010; Gillespie and Nicholson 2005), and do not consider Myanmar's socialist era or its legacy for that country's legal system today.⁶

There have also been a number of collections devoted to transition dynamics and the development of the legal system, such as those by Nicholson and Gillespie (2012) on law and development; Antons and Gessner (2007) on the effects of globalisation in the Asian developmental state; Lindsey on developing and transitional states (2007); Nicholson and Harding on new courts in Asia (2009); and Biddulph and Nicholson on comparative legal studies in Asia (2008). These volumes raise issues that are relevant to Myanmar's current reform process, such as the nature of legal transplants and the effect of 'borrowing' laws and legal institutions. Again, however, Myanmar does not feature as a case study in any of them.

This book seeks to fill some of these gaps, and is based on the belief that any attempt to understand the current transition process and the future of Myanmar's legal system must be grounded in its social, political and cultural context, past and present. We seek to promote deep and engaged intellectual understanding of Myanmar's legal history and development. The aim of this book is not only to provide critical information about Myanmar's transforming legal system as it stood in 2013 and early 2014, but also, as mentioned, to provide an introductory text that can serve as a foundation for future research and teaching on the legal system in Myanmar. The focus is therefore on the legal framework and institutions of Myanmar in their social context, with a particular emphasis on comparative perspectives on the reform process. While some chapters are policy oriented, others are more concerned with 'thick description' (Geertz 1973), comparative analysis, or finding ways in which Myanmar's experience can inform broader theoretical discussions. This volume is not intended to be definitive or exhaustive. We see it rather as a first contribution to a growing area of scholarly activity.

⁵ See for example Hooker 1972, 1975, 1978, 1980.

⁶ One of the few volumes that focuses on Myanmar during the socialist era is Steinberg (1982).

INTRODUCTORY CHAPTERS

We structure the book around several key themes: the judiciary; the constitution; commercial law; law enforcement and conflict; and regional and comparative analysis. We use these themes to highlight gaps and offer suggestions for future research. Each chapter can be read as a snapshot of a particular area of law or legal issue, capturing the literature that is available in this area at the time of writing, as well as highlighting emerging legal issues.

Chapter 2, *A Short Research Guide to the Legal System of Myanmar*, is designed for students, scholars and practitioners interested in conducting further research on the legal system of Myanmar. Melissa Crouch and Nick Cheesman provide a guide to primary sources available in English and Burmese at the time of writing, including court decisions, digests, laws and journals.⁷ They demonstrate that there is a wealth of legal resources on Myanmar now in circulation both online and in print, although they acknowledge that the latter can be difficult to access.

In Chapter 3, *The Layers of Legal Development in Myanmar*, Melissa Crouch delivers an overview of the development of the legal system in Myanmar. This is intended as an introductory resource for the reader not familiar with the interlinked trajectories of legal and social change in Myanmar. It aims to provide a broad summary that readers can use to contextualise individual chapters.

THE JUDICIARY

Part II, *The Courts: Past and Present*, begins with a chapter by Andrew Huxley on the Burmese Buddhist legal tradition based around a case study of theft, *Is Burmese Law Buddhist? Transition and Tradition*. The author is an eminent scholar in his field who has spent a large part of his academic career expanding our understanding of Burmese Buddhist law, locating it in the context of broader literature on Buddhist law in Southeast Asia.⁸ His chapter is a mixture of thoughtful reflections on the broader socio-political and legal changes that took place after independence and are now taking place at the 65th anniversary of the country's foundation, combined with detailed discussion of the *dhammathats*, Burmese law texts. He argues that prior to 1885, Burmese law was distinctly Buddhist. This year, however, marked not only the end of Burmese rule and the beginning of colonialism across the entire country but also the replacement of codified Burmese law with case law. He demonstrates that colonial authorities with effectively no knowledge of the local culture and language imported legal codes from India into Burma virtually wholesale, ignoring the protests of more informed and knowledgeable local colonial authorities.

⁷ For an extended guide to the secondary literature, see Crouch (2014).

⁸ Huxley's work on the legal system of Burma and on Burmese Buddhist law includes (but is not limited to) an analysis of sixteenth-century Burmese law (2012); the Unocal case (2008); Burmese Buddhist law (2001, 1995, 1988–89) and the *dhammathats*, written law texts (1997); the development of the legal system of Myanmar through the careers of two prominent Burmese lawyers (1998); and an edited collection on Thai law that includes discussion of Burmese Buddhist law (1996).

Huxley captures the dynamics of legal development since then in three phases: a transition from tradition since 1885, from imperial legal models since 1972, and from socialism since 1990. His trenchant criticism of the post-1962 period and Ne Win's 'deplorable' takeover shows that the military lacked both the legal expertise and resources (and, it could be added, the motivation) to completely remodel the legal system according to socialist ideals of codification. He also spares no sympathy for one of the architects of the modern legal system in Myanmar, Dr Maung Maung, and the destruction he wrought on 'Burmese legal hermeneutics'. Huxley deftly speaks across legal cultures and families, drawing parallels and contrasts with common and civil law contexts, as well as both Western and Asian legal traditions, including those of Sri Lanka, Thailand and India. He focuses specifically on the right to testate and explains the socio-political forces behind this right, including that a king or ruler is unlikely to favour a right to testate in a Buddhist society because such a right inevitably favours monks. His chapter is full of insights that indicate the extent of the legal challenges today, including that there is still no legal power to testate in Myanmar. He concludes with a more personalised reflection that draws on parallels between his own life and that of the nation of Burma.

Huxley's chapter goes far beyond a rereading of ancient Burmese legal texts and offers multiple suggestions for future research. His references to the tensions between the case law approach of the common law and the codification more typical of civil law systems raises the need for more detailed research on how the legal system in Myanmar actually functions and in what direction it is headed, a theme taken up by other authors in later chapters. His brief mention of the style of legal education also suggests the need for research on how restrictions on legal education (Myint Zan 2008) have distorted the development of the legal profession, and to what extent legal education can become a catalyst for change in the transitional era.

In the next chapter, *Bodies on the Line in Burma's Law Reports 1892–1922*, Nick Cheesman considers the role of the human body and the related themes of race and gender through a historical analysis of colonial criminal cases before 1922 as found in the Burma Law Reports. His chapter provides insight into the rich accounts of social, cultural and political life contained in these texts, which historians of Burma have largely neglected. He captures the way in which the Burma Law Reports feature bodies that have been offended and assaulted and the way bodies disrupt public order. In terms of gender, he highlights the fact that there was only one reported case of rape for the entire period from 1872 to 1937. He goes on to canvass various reasons for this, including that evidence given by a Burmese woman was considered somehow 'less reliable' than a man's evidence. He also focuses on 'obscured bodies' to demonstrate the differences between the role of the police, who contain such bodies, and the role of the courts, which exposes these bodies to the public. He concludes his discussion with a note on the way that the Burma Law Reports demonstrate the inability of colonial authorities to control the bodies of the colonised.

The final chapter in this section, by Dominic Nardi and Lwin Moe, is titled *Understanding the Myanmar Supreme Court's Docket: An Analysis of Case Topics from 2007 to 2011*. It begins with an overview and history of the Supreme Court, and then offers an innovative quantitative analysis of the caseload of the Supreme Court from 2007 to 2011, covering all 99 cases reported during this period. The authors provide an explanation of the 'latent topic model' approach they adopt, the adjustments necessary because the reports are in Burmese language, and why they used this particular

method. Their approach opens a new area of inquiry, since some volumes of the Myanmar Law Reports were only made electronically available by the Supreme Court in June 2013.

Their survey is not without its limitations, of course, and the authors acknowledge, for example, that during the period surveyed, the Supreme Court was not independent of the executive. They also recognise that most of the Court's caseload is unreported, and that people are unlikely to use the courts at all for everyday disputes, such as traffic offences. The Myanmar Law Reports are therefore largely concerned with criminal cases, and it is generally understood that politically sensitive cases are not reported (see also Cheesman, this volume; Crouch, this volume). Despite these constraints, their innovative analysis offers scholars of Myanmar law valuable insights and identifies important possibilities for future research.

Nardi and Moe find, for example, that key matters heard by the Supreme Court during this period include inheritance, contracts and criminal procedure. The large body of criminal cases is, they note, not particularly surprising. They observe, however, that inheritance issues appear to have declined since 2008, although they acknowledge that drawing conclusions from this is difficult given the limited five-year window analysed and the small number of reported cases. They point out the potential for research of this kind to inform legal practice and education in Myanmar, observing that case law is, unfortunately, still rarely used in law teaching. This chapter provides an important basis for further statistical studies on the caseload of the Supreme Court, and could be used in a comparative quantitative analysis of court caseloads in other authoritarian regimes.

These chapters remind us of how little has so far been written about the courts and the judiciary in Myanmar, beyond analysis of the Burma/Myanmar Law Reports. While these are, on one hand, a rich source of data (Cheesman, this volume), on the other the Myanmar Law Reports only report a small number of cases, and have been restricted since 1988 to the Supreme Court. They are therefore limited in scope and there is almost no legal scholarship on the practices and decisions of the lower courts, aside from Cheesman's (2012) comprehensive and insightful analysis of criminal cases. More importantly, there is little substantive analysis of judicial backgrounds, reasons why individuals might go to court, or public perceptions of courts. This is a potential area for future research if more reported cases become publicly available. The newest addition to Myanmar's court system, the Constitutional Tribunal, also points to the need for research on understandings of constitutionalism, to which we now turn.

THE CONSTITUTION

Part III, *Constitutionalism*, remains a pressing topic for debate as Myanmar's transition process continues. This section should be read in light of Huxley's caution (this volume) that, in any major transition, 'constitution-drafting is less than half of the job to be done'. David Williams provides an insightful and thorough analysis of the shortcomings of the 2008 Constitution in his chapter, *What's So Bad About Burma's 2008 Constitution? A Guide for the Perplexed*. Informed by his long-standing experiences with ethnic nationalities of Burma and their exercises in state Constitution drafting, he provides an accessible overview of a complex and controversial area. His central message is of the

importance of constitutional law in the transitional period. As he says, reform is taking place in Burma ‘not because of the Constitution, but in spite of it’. His chapter draws attention to a key issue that has not received sufficient attention to date – that military rule in Myanmar has effectively resulted in the ‘rule of men’. Other reports support his assessment. For example, there are only four female cabinet ministers in the entire country, across both state and region governments, that is, about 2.5 per cent of the total (MDRI-The Asia Foundation 2013: 55–56). Of the 664 members in the Union Parliament, just 30 are women (International Bar Association 2012: 41).

Williams adds nuance to the debate on military involvement in Parliament, and he demonstrates that under the current arrangement the military cannot block ordinary legislation, only constitutional amendment. Nevertheless, he likens the military to a ‘self-perpetuating, wholly independent fiefdom with unlimited powers’. His chapter goes on to investigate the mechanics of the existing power structure. He also explains the rights provisions in the Constitution, pointing out that such provisions are only effective to the extent that there is also a parallel enforcement mechanism in place. Overall, Williams addresses a wide range of key issues relating to the constitutional text and demonstrates the risks inherent in the current arrangements in light of Myanmar’s history of oppressive military rule.

In the second chapter in this section, *The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar*, Melissa Crouch investigates the constitutional provisions dealing with writs that provide an avenue for citizens to apply to the Supreme Court for review of a government decision. Focusing on the low number of reported cases by comparison to the actual number of cases lodged, Crouch explores the socio-political dynamics of constitutional writ cases and their potential for development. She begins with a history of the development of the constitutional writs from 1948 to the 1960s, and then describes the period up until 2011, when there was no right to bring writ applications to the Supreme Court (and, indeed, until 1988, no Supreme Court). This is necessary to appreciate the significance of the ‘re-introduction’ of the writs in the 2008 Constitution.

Crouch then analyses the six reported cases in the 2011 Myanmar Law Reports, showing the highly procedural and technical approach taken by the Supreme Court in supervising the jurisdiction of lower courts. She contrasts this with unreported cases of habeas corpus lodged with the Supreme Court that were unsuccessful. Finally, she critically examines the 2012–13 debates over the draft writ bills. Despite the structural lack of judicial independence in the post-2011 era, the revival of this avenue of rights has given lawyers renewed confidence in their ability to challenge the exercise of government power in courts, and in the relevance of common law precedent. Crouch concludes from the reported writ cases and from the draft writ bill discussions that the relationship between the executive and the judiciary blurs any line between the branches of government established by the formal separation of powers, limiting the potential for accountability of executive action.

The final chapter in this section by Anna Dziedzic and Cheryl Saunders, *Constitution-making in Myanmar: Insights from World Experience*, provides a comparative analysis of the challenges of Constitution making and the role of the regional and international community in this process. They address the theoretical and practical challenges raised by the prospect of constitutional reform, including whether a Constitution should be amended or replaced, and the most appropriate process to facilitate this.

In the first part of the chapter they deal with the importance of constitutional reform during transitional periods, referring to the experiences of Indonesia, Chile and South Africa. They then consider various issues that commonly arise as part of a Constitution-making process, such as the need for a clearly defined agenda, how changes should be approved as fundamental law, how any disagreements that arise should be resolved, and the form and extent of public participation. They then consider the possibilities for international engagement and regional influence, and the tensions these can create, stressing the importance of local control and ownership over the process.

Overall, Saunders and Dziedzic demonstrate that the constitutional reform challenges Myanmar is facing are ones that have been faced by many other countries over the past few decades. While this does not diminish the magnitude of the problems Myanmar must overcome if it is to make a full transition to democracy and substantive constitutionalism, it does serve as a reminder that there is a wealth of comparative experience on which its leaders could draw.

Constitutional law remains an important area of inquiry, and the chapters in this part clearly demonstrate its potential to shape the boundaries of the transition process. This is particularly true for Myanmar given its chequered constitutional history. The likelihood of constitutional amendment in the future means constitutional law may well become critical in determining the path of reform. This means future research must go beyond the constitutional text to consider how it is actually negotiated, enforced and perceived in practice in Myanmar.

REGULATING ECONOMIC ACTIVITY

In Part IV, *Economic, Political and Business Reforms*, contributors analyse a range of legislative reforms that have taken place since 2011, putting them in historical and social context. In the first chapter in this section, *Legislative Foundations of Myanmar's Economic Reforms*, Sean Turnell, a leading scholar of Myanmar's economy, addresses the legal building blocks of the reform process in relation to the economy, including the Foreign Investment Law, the Central Bank of Myanmar Law, the Microfinance Law and the Special Economic Zone Law. He provides a concise analysis of these central legal reforms and indicates areas where further reforms are necessary for the growth and stabilisation of the economy. In discussing the shift made by the introduction of these new economic policies, he emphasises the difficulty of economic recovery from the devastating impact of several decades of military rule, as well as the labyrinth of 'domestic crony and quasi-monopoly businesses'.

Turnell's chapter raises a key issue relevant to many other areas of legal reform – the problems of implementation and the role played by enabling regulations, so often vital for fleshing out the details of how legislation actually works in practice. He also identifies the issue of 'personalised authority', which, in the case of economic reforms, is embodied in the Chairs of the Myanmar Investment Commission, and the way it has contributed to Myanmar's 'most significant policy problems'. Like other contributors, Turnell highlights the 'unilateral and unchallengeable' power of the President (see, for example, Williams, this volume), here in relation to the independence of the Central Bank of Myanmar. On the Microfinance Law No 13/2011, Turnell emphasises that the scope of activities that are covered are extensive, even if law only permits activities that have already taken place.

Turnell's chapter is an accessible overview of key economic reforms. While he gives credit for the steps that have been taken so far, he leaves the reader under no illusion that a fully functioning and viable market economy is likely any time soon.

In the next chapter, *Elections and the Reform Agenda*, Michael Lidauer and Gilles Saphy turn our attention to electoral reforms and situate them within broader discussions of 'democratisation by election' as a mechanism for regime transition. Their experiences as observers with the European Union greatly enrich this chapter. They begin with an overview of Myanmar's electoral history since the early 1900s, emphasising that the 1990 election was the first multi-party election held since 1960, and that no form of political party activism was permitted after the 1990 elections. They then carefully explore the dynamics of the 2010 general election and the 2012 by-elections, demonstrating that the former was surrounded by allegations of 'massive manipulation', making a sham of the USDP's 'victory'. They capture the intensity of the debate leading up to these elections, when political parties that did contest the election were seen as letting go of the 1990 results (in which the NLD was successful). They also emphasise the dramatic and unexpected unfolding of the 2012 by-elections, in which the NLD not only took part but won every seat it contested. They persuasively argue that the difference in the processes and outcomes of the 2010 and 2012 elections had almost nothing to do with the legal framework, and everything to do with the 'good will' of the country's leaders.

Lidauer and Saphy then examine in detail the existing legal framework for electoral reform, identifying key areas of concern. As they bluntly point out, under the 2008 Constitution, 'the entire governance structure of the country is at stake in one single election event every five years' (a point also made by Williams, this volume). Further the Union Election Commission has broad and largely unchecked discretionary powers, and its members' terms are unclear, with no guarantee of independence. The absence in regulation of time frames, provision for election observation or details of election campaigns leaves many crucial practical issues unclear. The Political Parties Registration Law No 2/2010 also stipulates what they describe as 'unusual' limitations on the right to form a political party. Perhaps most problematic of all, however, they argue, is the fact that the losing party in any dispute brought before the Election Commission may face criminal penalties – surely a very significant disincentive to dispute any election outcome. Many of their other concerns relate more directly to the Constitution, and it is on this issue that Lidauer and Saphy – again like many other contributors – underscore the vital importance of the constitutional amendment process for reform more broadly.

While Lidauer and Saphy relate their discussion to international standards in this area, they acknowledge that even at the international level there is little consensus on election management structures and procedure. They examine the engagement of the international community in the 2010 and 2012 elections, noting that international organisations were reluctant to engage prior to 2010 but that there has been a flood of activity in this area since the 2012 by-elections. They also show that despite the basic lack of political experience in Myanmar, Members of Parliament have been surprisingly vigorous and assertive, not always voting along party lines. Given the steps taken since 2010, Myanmar's elections appear to be a vital part of the 'mode of transition'. This chapter stands as a snapshot of electoral reform changes and challenges in Myanmar at the time of publication, but we believe it also offers insights relevant to the impending 2015 elections.

The final two chapters in this section deal with specific areas of business law. In *A Principled Approach to Company Law Reform in Myanmar*, Melinda Tun focuses on the Company Act 1914 and places the potential for reform in comparative perspective. She recognises the legacy of British law in Myanmar but emphasises that the Company Act has been ‘frozen in time’, with no amendments for the past 22 years and only four minor amendments prior to that. Further, some written provisions in the Company Act have simply ‘fallen into disuse’, she says. Although she finds reassurance in the many features Myanmar law in this area shares with its common law neighbours, she makes a compelling case for reforming the Company Act as a matter of priority. Tun suggests lessons to be learnt from the wealth of experience in reforming company law available in other jurisdictions. She also seeks to normalise the process of reform of company law as well as affirm the basic existing structure of the Company Act, but is very aware of the complexities this would involve.

Tun discusses misunderstandings that have arisen regarding the interaction between the Company Act and the Foreign Investment Law No 21/2012, arguing that far from the latter trumping the former, the Company Act applies to all companies incorporated in Myanmar – regardless of whether or not they have foreign investment approval. She also notes the importance of institutional capacity, particularly that of the Directorate of Investment and Company Administration, for the successful implementation of any reforms that do take place. She concludes with a plea for a reform process that is both guided by transparent principles and inclusive, while remaining under the control of local actors.

Overall Tun makes a case for an approach to reform that puts principles and clear goals first. She emphasises the way in which many good practice reforms, such as the ‘think small first’ principle, could be used in Myanmar, where they are not entirely unknown. She does note, however, that the virtual vacuum of existing case law creates considerable uncertainty for those involved in corporate law reform. Many of the questions she raises are also pertinent to a wide range of other fields of law, such as whether a particular law should be redrafted ‘in whole or part’.

In the final chapter in this part, *The Securities Exchange Law and Prospectus Regulation: Early Sketches of Equity Capital Market Law and Regulation in Myanmar*, Tun Zaw Mra analyses equity capital markets and prospectus regulation in light of plans to establish a stock exchange in Myanmar in 2015. He considers the ways in which the introduction of the new Securities Exchanges Law No 20/2013 relates to, and overlaps with, existing legislation, such as the Company Act and the Contracts Act. Outlining the process by which an issuing company is required to both register a prospectus under the Company Act and receive approval from the Securities Exchange Supervisory Commission, he questions whether a merit- or disclosure-based approach will be taken, although he acknowledges that most jurisdictions use a combination of both.

He also points out that the Supervisory Commission has been given wide discretion to approve applications, and that this is a concerning feature of many other such commissions established by the raft of national laws passed since 2011. He further notes that because the Myanmar Securities Exchange Centre allows only over-the-counter trading, and does not yet have any form of settlement system, it is somewhat misleading to refer to it as a ‘stock exchange’, at this stage at least.

Tun Zaw Mra observes that public companies are vastly outnumbered by private companies in Myanmar. Yet considering the legal framework, which these companies

operate, he cautions that the general rhetoric that Myanmar is part of the ‘common law family’ could engender a ‘false sense of comfort’. He insists that it is equally, if not more, important to pay attention to local practices and the historical development of the legal system in its social and political context. He also makes the crucial point that it is not so much legislation and case law but, rather, government regulations and ministerial policies and procedures that have the greatest influence on equity capital markets – and this is true also of many other areas of legal practice in Myanmar. The detail of how a particular area of law actually works is often defined in government regulations and policies.

Both this and the previous chapter are written by Burmese lawyers and look comparatively at common law jurisdictions, including Australia, England, Singapore and Malaysia. Both show that dramatic changes have taken place in commercial regulation in terms of the development of new concepts and principles, and that Myanmar’s legal framework must be responsive to these. Both also raise questions about the extent to which the courts in Myanmar might refer to, or follow, foreign judgments in the future.

The transitional period has ushered in a range of economic reforms relating to business, the economy and foreign investment, and will likely continue to do so. The legal profession and law firms, encouraged by foreign investors, will continue to demand business and investment security through law, and this will require still more reform – including adopting best practice from other legal systems. This section reminds, however, that the good in the existing legal framework should not be discarded, and the reform process must remain sensitive to local practice.

ENFORCING LAW AND RESOLVING CONFLICT

Part V, *Law Enforcement, Conflict and Dispute Resolution*, contains chapters that consider central institutions in the process of being introduced or reformed. Andrew Selth, a long-standing observer of, and commentator on, Myanmar’s security forces, looks at the state of Myanmar’s police force, its history and organisation in *Police Reform and the Civilianisation of Security in Myanmar*. In particular, Selth investigates the role and function of the police force in connection with the military, both past and present. He describes the reform of the police force, which began in the early 2000s, and pinpoints areas in which further reforms are needed, including at the state and region level, if and when power is decentralised. As with Turnell’s assessment of the economic system, Selth is frank about the ‘serious problems’ ahead and the ‘reckless impunity’ with which the police and military have acted up until now. In particular, he shows how the military has infiltrated police ranks, with high-level positions in the police force being filled by former military officers.

Selth describes the expansion and strengthening of the police force that is taking place but shows that the lack of a clear delineation between the role of the military and that of the police remains a significant issue – in particular, the absence of separate public identities for these organisations. His chapter also demonstrates the need for a clean reputation, the generation of a sense of legitimacy and integrity, and a culture of professionalism. All these are, of course, issues relevant to a range of other legal institutions and law enforcement agencies, and corruption, he argues, remains the key problem. His chapter

suggests there is room for research on perceptions of corruption, the forms it takes in Myanmar, and how it interacts with, or avoids, legal structures and actors.

Selth concludes by emphasising the need for constitutional amendment to alter the current arrangements by which the police force sits under the Ministry of Home Affairs, with the Minister appointed by the Commander-in-Chief. Until such structural impediments to separation between the police force and the military are removed, ‘second generation’ substantive reforms to police operation and practice will remain limited, he argues.

Turning to conflict resolution, and, in particular, the law relating to labour, the chapter by Kyaw Soe Lwin, *Legal Perspectives on Industrial Disputes in Myanmar*, offers insights into the history and development of mechanisms for resolution of industrial disputes in Myanmar. He reviews shifts in how workers have sought to resolve industrial disputes over different political periods. Under post-independence parliamentary rule, for example, he demonstrates that the conditions for workers and employment opportunities available to them gradually deteriorated as the economic position of the country declined. Kyaw Soe Lwin emphasises the range of mechanisms that workers used strategically to resolve labour disputes, including unions, political parties, arbitration, complaints to the International Labour Organization, and, of course, protests and demonstrations. In particular, he describes the options for formal dispute resolution available through the state from 1947 until 1952, although he concludes that these did not play a significant role.

He also describes the way trade unions emerged from political parties at the time, including the All Burma Trade Union Congress (affiliated with the Burma Communist Party), and three different trade unions that developed from divisions within the Socialist Party. He then turns to the period post 1962 under Ne Win, when the army depended on the ‘working masses’ for political support and, to retain this support, established a People’s Workers Council (known after 1974 as the Workers Association). While the army did not hesitate to use violence against workers on strike, those who chose to resolve disputes through the Workers Association were often ‘favoured’ by the government. He demonstrates an increase in industrial disputes under the socialist regime, due to government policies that often encouraged workers to challenge their employers.

The subsequent State Law and Order Restoration Council/State Peace and Development Council (SLORC/SPDC) era led to a sharp decline in the formal resolution of disputes. It was, Kyaw Soe Lwin argues, perhaps the darkest era for labour rights in Myanmar – particularly because of the close relationship that developed between the military and the business community. In concluding, he notes not only significant changes that have since taken place to the legal framework in this area, both through the repeal of old laws and the introduction of new ones, but also a corresponding increase in labour strikes due to the atmosphere of greater political freedom. Kyaw Soe Lwin admits that only a small portion of workers have actually exercised their new-found rights but remains optimistic about future improvement of the system of industrial dispute resolution.

The other two chapters in this part address the politics of the conflict in Kachin State from different perspectives. In *War, Law and Politics: Reflections on Violence and the Kachin*, Nicholas Farrelly provides a sophisticated analysis of one of the most complex conflicts in Myanmar, that between the Kachin Independence Army/Organisation (KIA/O) and the government of Myanmar. The importance of resolving this conflict

cannot be overstated, if the government's hopes of finding a way to declare a nationwide ceasefire are to be realised. Farrelly outlines the history of this conflict, and the reasons for the breakdown of the ceasefire agreed in the 1990s. He shows how the unparalleled success of the KIA/O in the 1980s not only perpetuated the conflict but also expanded its power. The significant growth in its wealth that this enabled only increased after the 1994 ceasefire, as 'Kachin economic leaders' benefited from concessions granted to the logging and mining industries, the jade industry in particular. In exchange, the military gained the chance to reinforce its presence in northern Myanmar. Farrelly notes that the KIA/O should not be considered united, given its many internal divisions, a characteristic it shares with the armies of other ethnic nationalities in Myanmar.

A key point of contention in any discussion of ethnic politics in Myanmar is the Panglong Agreement. Farrelly examines both the 'mythical status' it has acquired for ethnic nationalities, and the blunt refusal of the government to recognise its connection to current negotiations. The importance of the Panglong Agreement, and questions about whether its 'spirit' will influence the transition process, are also considered by Williams (this volume), and Dziedzic and Saunders (this volume). Farrelly then turns to consider the elements of the relationship between 'law and war' in Myanmar, including the contested legal status of ethnic armies such as the KIA/O, and the absence of legal mechanisms to deal with the breakdown of a ceasefire. He captures the way in which violence and the politics of negotiation have triumphed over formal state law – at significant cost – and the difficulties this presents if law is to prevail over violence in the future.

Alistair Cook provides an analysis of the politics of humanitarian aid in Kachin State in the next chapter in this part, *Civilian Protection and the Politics of Humanitarian Action in Kachin State*. Cook emphasises the obstacles that currently obstruct the delivery of aid for the internally displaced. He contrasts the limits of international humanitarian assistance with the responsiveness of Kachin social and religious networks, in particular religious organisations addressing immediate humanitarian needs. He explains the crucial role that local actors play in negotiating the delivery of humanitarian assistance, in the absence of a more formalised response. This is partly because of tension between local Kachin actors and the Myanmar government, and the Myanmar government's ironic insistence that aid must be channelled through it.

Given the conflict in Kachin State, Cook questions how much control the President really has over the actions and behaviour of the military in such areas. He expresses some scepticism about the reform process, questioning its 'sustainability', and noting that many ethnic nationalities – including the Kachin – have yet to feel any positive effect from the transition process. He also highlights the importance of China and its role in resolving this crisis, given its geographical proximity and the fact that, as one informant claims, 'China is the husband of the Burmese military'. Cook also refers to the broader approach to refugees taken by states in Southeast Asia, where most countries, including Myanmar, have not yet signed the Refugee Convention, and, he argues, are unlikely to do so in the near future. The non-binding nature of international norms on humanitarian assistance, and the inability of the UN Special Rapporteur to even gain permission to travel to Laiza in 2013, starkly demonstrate the extent to which the Kachin conflict is beyond the reach of international actors. Cook's chapter suggests a shrinking humanitarian space for international actors but correspondingly increased scope for local actors.

A COMPARATIVE APPROACH

While many of the chapters in this volume have comparative elements, the concluding section, *Myanmar Law in Regional and Comparative Perspective*, is dedicated to looking at law in Myanmar from an expressly comparative perspective.

One example raised at several points throughout the volume as highly relevant for actors in Myanmar searching for appropriate models of law reform is Indonesia. Dziedic and Saunders (this volume), for example, refer to Indonesia as an example of constitutional reform during a period of transition from authoritarianism to democracy. Williams (this volume) similarly refers to Indonesia in the context of countries where the military was willing, over time, to accept constitutional amendments.⁹

In the next chapter, *Unlike Any Land You Know About? Myanmar, Law Reform and the Indonesia Model*, Tim Lindsey offers an analysis of the role of Indonesia as a model for Myanmar's leaders, both under the authoritarian, military-backed rule of President Soeharto's New Order regime, and more recently under the 'Reform Era' democratic governments that followed his fall in 1998. Lindsey argues that not only have the ruling elite in Myanmar seen Indonesia as a country with significant similarities to their own, but Indonesia's leaders have shared this perception, sometimes actively encouraging Myanmar to treat their state as a model. He explores why they have done so, and how relations with Myanmar have been used in quite different ways by successive Indonesian leaders to strengthen their own legitimacy. He also considers how Indonesian understandings of Myanmar's geo-strategic significance have been central to this process. The chapter closes with an assessment of how far Indonesia's largely successful transition to democracy can be used as a way of understanding the current political changes taking place in Myanmar.

The example of Indonesia as a 'norm leader' is also highlighted by Catherine Renshaw in the following chapter, *The Regional Context of Myanmar's Democratic Transition: What Role for ASEAN's New Institutions?*, which considers the regional dynamics of Myanmar's membership of the Association of Southeast Asian Nations (ASEAN). Renshaw offers a timely focus on Myanmar's history as a Member State of ASEAN and the potential of this connection for the future development of concepts of democracy and human rights in the region. This is an important issue, given that Myanmar is chair of ASEAN in 2014.

Renshaw considers the extent to which ASEAN as a regional institution may have influenced Myanmar's democratic transition but suggests that any discernible 'neighbourhood' effect is weak at best. She questions what, if any, significance the introduction of the ASEAN Charter in 2007 might have for Member States such as Myanmar, exploring whether 'non-democratic' conduct on the part of a Member State could amount to a breach of the ASEAN Charter. While noting the newness of the Charter, she also emphasises that even prior to this ASEAN represented Myanmar's 'most important and sustained multilateral engagement'. This has made tensions between ASEAN and Myanmar – such as ASEAN's rare criticism of Myanmar after the 2007 Saffron Revolution – even more significant. She identifies three potential future trajectories for

⁹ For a critical analysis explaining why the constitutional amendment process in Indonesia was so successful, see Horowitz (2012).

Myanmar's reform process: incremental transition, military entrenchment or military takeover. She concludes that while ASEAN is unlikely to reward steps taken towards democracy, or provide a source of democratic legitimacy, the fact that Myanmar remains a part of the ASEAN 'family' leaves open an avenue for external influence.

Finally, in *Law and Development in its Burmese Moment: Legal Reforms in an Emerging Democracy*, Andrew Harding reflects on the reforms that have taken place in Myanmar since 2011 in light of the literature on law and development, identifying this period as Myanmar's 'Burmese moment' in law and development. He considers the link between Myanmar's transition process and developments in the literature on law and development, suggesting we should move beyond discussion of 'movements' because law reform is 'situational, not chronological'. In providing an overview of some of the key issues and developments in the transitional context, he focuses on central topics such as the Constitution, the rule of law, law and economics, and the challenge of human rights. He questions whether a rigid or flexible Constitution would be more likely to weather the transition process. He also notes the paradox in constitutional reform that 'bodies created to act as checks and balances on the exercise of power may come into conflict with each other'. He emphasises the need for research on popular understandings of constitutionalism and public perceptions of law.

As to the complex question of whether Myanmar is a common law system, Harding argues that the debate on the classification of law and legal families may not be particularly useful, and that it is ultimately more important to consider how the law actually works and is understood in practice. He also questions the current law-making process, particularly the privatisation of legal drafting that took place over the Special Economic Zone Law. His chapter raises important questions for those involved in the law reform process, and calls for greater attentiveness to, and emphasis on, local practice. His chapter captures the views and discussions of scholars during this 'Burmese moment' in law and development. He concludes that Myanmar and the law and development movement should both be seen as involved in a 'long process of mutual discovery'.

CONCLUSION: A SNAPSHOT OF LAW REFORM IN MYANMAR

Whether Myanmar is a country in transition from one system to another, or simply from one government to the next, 'moments of transition' always present challenges for the law (Sarat 2012), usually resulting in either its reform or marginalisation. In Myanmar, the future of its political transition is still not certain but it clearly has the potential to usher in a dramatic shift to democracy and a substantially reformed legal and political system – both things that have long been awaited by its people.

Before this will be possible, there are a large number of complex problems that must be resolved, many of which have been explored in the chapters just described, and which have implications well beyond the borders of Myanmar. To take one example, despite the efforts of many legal reformers in Myanmar to reposition its legal system more squarely in the 'common law' world, it defies easy classification and demonstrates the inherent complexity that so often obstructs attempts to classify legal systems by legal families or systemic origins.

Likewise, Myanmar offers a valuable point of departure for discussions on the use of comparative law and the need for it to go beyond comparison of rules to a deeper inves-

tigation of the influence of social and political context on similarities and difference identified. The chapters in this volume demonstrate that there are multiple points of comparison that could be made, for example with post-socialist states, with transitional and democratising regimes, with common law countries, or with other legal systems in Southeast Asia. The nature of comparative law is such that these sorts of investigation may be of real practical benefit. It is significant, we think, that legal practitioners, Members of Parliament, and scholars in Myanmar involved in the law reform process have, in different ways, already shown interest in comparative law as they consider the possibilities inherent in the reform process.

In closing, we note that the pace of reform in Myanmar has been rapid and this is unlikely to change in the short term. This volume cannot hope to keep up with those changes. Instead, we hope the snapshot of law in Myanmar this volume offers – law as it was lived until early 2014 – will become the basis for further research on, and engagement with, a society that for too long has been a blind spot for lawyers and scholars beyond its borders.

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