BINGHAM CENTRE FOR THE RULE OF LAW

Exercising Executive Power in Myanmar: Constitutional Options for Safeguarding the Rule of Law in Public Administration

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SUMMARY

1. One of the key roles of constitutions in democratic societies governed by the rule of law is to ensure that executive power is exercised only on the basis of and within the limits of the law, and to provide rights and effective accessible recourse to individuals if their rights have been unduly infringed by administrative decisions or executive acts. In Myanmar, where state power has long been exercised without any constitutional limitation or remedies, the 2008 Constitution has reintroduced some basic elements of governance under the rule of law. These include general commitments to the rule of law, a separation of powers between branches of government and fundamental rights coupled with the procedural rights of judicial review through writ jurisdiction. In practice, complaints about unlawful or unjust administrative action (or inaction) have been reported to be widespread, but effective legal recourse mechanisms have yet to be identified and to be made widely accessible.

2. This paper argues that the approach followed by the existing institutions of Myanmar so far, including the reintroduction of writs, has not led to significant improvements and an effective implementation of constitutional rights and principles. It is suggested that a number of avenues could be pursued to improve the accessibility of administrative justice including: (i) constitutional amendments; (ii) legislative changes; (iii) the creation of new structures and bodies and (iv) reforms to the practice and procedure of the courts and of administrative bodies The introduction of a specific constitutional right to administrative justice combined with the creation of an effective, dedicated administrative recourse mechanism may hold the potential to address the problem of the current state of affairs. Examples from other developing country contexts with common law backgrounds, where such reforms have recently been introduced, are included for reference. It is recognized that any such reforms would take considerable time to agree on and implement, and require commensurate political will to gradually change the nature of the state-citizen relationship in Myanmar.

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THE MYANMAR CONSITUTION OF 2008

A. Sections of the Constitution Relevant to this Paper

3. In its conclusion this paper suggests the incorporation into the constitution of a new right to administrative legal action. Also relevant to the issues addressed by this paper are sections 11 (separation of powers), ss. 18, 296, 377-381 (powers of Supreme Court to issue writs); s.19 (judicial principles), s.198 and s.224 (regarding supremacy of the constitution), Chapter VI, including ss.293, 294 and 319 (Courts Martial); and ss.299, 308, 321 (judicial appointments); 322-326 (operation and powers of and rights to petition the Constitutional Tribunal); Chapter VIII (fundamental rights), particularly ss.347 (equal rights before the law) and 377-378 (right to seek writs).

B. The Separation and Distribution of Power in Myanmar's Constitution

4. The 2008 Constitution of Myanmar lays down as one of its basic principles that the "three branches of sovereign power, namely legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves."[2] This horizontal separation of the three branches of sovereign power is to be replicated in the Union, Regions/States and the Self-Administered Areas, which share this sovereign power (Section 11 of the constitution).

5. The Executive Head of the Union is the President. The President appoints Union Ministers[3] with the approval of the Pyidaungsu Hluttaw and also has the power to appoint Chief Ministers of Regions/States, with the approval of the respective State/Region Hluttaw. The Constitution also prescribes as a basic principle that the judiciary should "administer justice independently according to law" and "to guarantee in all cases the right of defence and the right of appeal under law."[4] The fact that the executive power retains a degree of control over the judiciary as the President nominates the Chief Justice of the Supreme Court, and a third of the Constitutional Tribunal's nine members and holds the keys to the financing of Myanmar's court system is seen by some as evidence that the judiciary cannot be considered fully independent.[5]

6. The 2008 Constitution creates a quasi-federal system, which divides constitutional authority between (primarily) the Union and the 14 States/Regions. The head of the administrative service at the state/regional level is the Secretary of the State/Region, who belongs to the structure of the General Administration Department and therefore formally reports to the Union Ministry of Home Affairs, in addition to the Chief Minister of the respective State/Region. The lower levels of districts and townships are not an elected level of government, but are purely administrative divisions, headed by subordinate officers of the General Administration Department.[6]

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[2] Earlier versions of parts of this paper were included in a study conducted by the author for UNDP Myanmar under the title" Democratic Governance in Myanmar: Situation Analysis", October 2013.

[3] The President must "select suitable persons" who have the required qualifications from among the Hluttaw representatives (in which case they must relinquish their seats) or persons who are not Hluttaw representatives.

[4] Section 19

[5] See the report of the International Bar Association's Human Rights Institute (IBAHRI), "The Rule of Law in Myanmar: Challenges and Prospects", December 2012, p 59

[6] The Ward and Village Tract Administration Act, amended in 2012, foresees the election of Ward and Village Tract Administrators, as chief administrative officers of the village tract or ward. Their duties and responsibilities include ensuring the security of residents, to

LEGAL RECOURSE AGAINST UNLAWFUL ADMINISTRATIVE DECISIONS

7. The Constitution seems to foresee that administrative action must be based on, authorized and specified by a legal provision, as would be normal to expect in a system based on the rule of law and the legality of public administration. The manner in which this is formulated in the Constitution, however, is less than entirely clear and leaves some room for uncertainty. Section 224 states that

> *"Ministries of the Union Government shall, in carrying out the functions of their subordinate governmental departments and organizations, manage, guide, supervise and inspect in accord with the provisions of the Constitution and the existing laws."*

8. There is no equivalent provision for authorities of the State/Region Governments. Also, the responsibility for the constitutionality and legality of administrative action seems to lie with the President, given that all executive power is vested in him alone and is exercised in his name. What is missing, however, is **an equivalent explicit right of the general public to claim effective remedies against unlawful administrative action**. The constitution does not at the moment provide a clear right to lawful administration combined with a concrete possibility of legal recourse. The question whether the existing constitutional right to apply for writs is a sufficient and adequate substitute for such as right is subject to further discussion below.

9. What are the possible ways in which persons can take action against administrative acts, such as individual normative acts through administrative decisions or the direct exercise of command and constraint power by administrative authorities?

10. Following the general model of many jurisdictions in the tradition of English common law, Myanmar law does not distinguish between a body of private law and public law. It therefore also does not distinguish between the administration exercising state power authority (i.e. orders, decisions, executive acts, etc.) from the administration of private economic activities exercised by public administration bodies using the same forms and means of action as all other private individuals (contracts, etc.).

11. The first and foremost possibility to appeal against an administrative decision is to take the case to the next level in the administrative hierarchy, in the hope that a higher-ranking officer would quash or amend the decision of the subordinate. However, in practice such decisions are rare and are often seen as arbitrary and inconsistent, as they do not have to provide reasons and are often not communicated in writing. A number of laws, such as the recently adopted Land Acts[7], foresee recourse to higher instances within the administrative structure, but at the expense of the possibility to take a land-related case to court.[8] The appeal to an independent tribunal that would adjudicate an

prevent crime and supervise ward and village social affairs, as well as a number of punitive measures (such as arrest and fines), as well as policing functions.

[7] The Farmland Law and the Vacant, Fallow and Virgin Lands Management Law, which were enacted by the Union Legislature on 30 March 2012.

[8] This exclusion of judicial recourse is quite possibly unconstitutional. Art. 198(a) ("Effect of Laws ") explicitly contains provisions that establish a hierarchy of norms, in that it provides that if any provision of the law enacted by the Pyidaungsu Hluttaw [or other legislatures] is inconsistent with any provision of the Constitution, the Constitution shall prevail. Even in common law systems where the legislature has introduced such 'privative clauses/ouster clauses/finality clauses' courts have held that constitutional writs override any finality clause. That is, the parliament cannot take away a constitutional right by a simple law, and cases against decisions taken under such acts

administrative matter with the on the basis of laws and the rights enshrined therein and with legally binding force is essentially absent from administrative procedure.

12. In such a situation, the judiciary's constitutional power to issue writs appears to be the only effective option for a person whose rights have been affected by an administrative decision to seek justice.

13. What is the position of the judiciary in the constitutional framework of Myanmar and what is its relationship vis-à-vis the executive branch, whose decisions it might be called upon by citizens to review and possibly quash? Does a petitioner have to exhaust the internal review of administrative decisions before submitting a case to a court? The current constitutional and legal framework appears to provide a basis for some remedies, such as those included in the Fundamental Rights Chapter in sections 377/378 and 381. Section 377 states that "In order to obtain a right given by this Chapter, application shall be made in accord with the stipulations, to the Supreme Court of the Union."[9]

14. In principle, the 2008 Constitution provides that prerogative writs are available to claimants and applications can be brought before the Supreme Court. Myanmar has had a brief colonial and post-colonial tradition of Common Law jurisprudence, and writs were actively used until the 1960s. As a result of the British-Indian common law tradition, the first Supreme Court of Burma, created in 1948, thus had the power to issue writs and used it until the late 1960s, when this option was abolished. The tradition has since been demolished, as writs were not restored by the military regime in the 1990s, although some judicial reforms were carried out following the abrogation of the 1974 Constitution. However, writs were again included in very broad and explicit terms in the 2008 Constitution, in the same way as it had been in 1947. This is significant, as it constitutes the primary tool for Supreme Courts in South Asia, in particular India, to promote the effective protection of constitutionally protected fundamental rights, as well as order the government to carry out certain measures if it finds that the Constitution so requires.[10]

15. Therefore, at present, the Supreme Court, as the only administrative court in the country, has exclusive jurisdiction to adjudicate on any recourse filed against a decision, act or omission of any organ, authority or person exercising any executive or administrative authority on the ground that it violates the provisions of the Constitution or any law or it is in excess or in abuse of any power vested in such organ, authority or person. According to the Common Law tradition, the available remedies which a judge can grant by way of judicial review of administrative acts are:

    - *certiorari,* the most commonly sought remedy, i.e. an order declaring the administrative act to be invalid, essentially for excess of jurisdiction or legal error on the face of the record; this does not entail any power, by way of modification, to substitute a different act; that matter normally must go back to the administration;
    - *prohibition* consists of restraining a body from acting unlawfully in excess of jurisdiction*;*

can still be brought to court. Whereas this is may be rather clear in law and comparative legal practice, it is a quite different matter whether this would be seen as such by lawyers and judges in Myanmar at the present stage, and it is unclear whether the Supreme Court would anyway accept land-related writ applications on the basis of this argument, or whether the Constitutional Tribunal would declare the relevant sections of the land acts unconstitutional.

[9] Section 378 provides that the Supreme Court of the Union shall have the power to issue the following writs as suitable: (1) Writ of Habeas Corpus; (2) Writ of Mandamus; (3) Writ of Prohibition; (4) Writ of Quo Warranto; (5) Writ of Certiorari. Section 381 provides that citizens have the right to redress by due process of law for grievances entitled under law.

[10] Compare, most importantly Article 32 of the Indian Constitution with Section 378 of the 2008 Myanmar Constitution.

- *more rarely, mandamus, i.e.,* an order directed to a public body to perform its public duty as specified in the law;[11]

16. One of the biggest problems of governance in Myanmar at the moment is the perception of many citizens that, despite the fundamental rights enshrined in the Constitution and the possibility to apply for writs, they have no effective recourse against administrative actions and decisions that may infringe on their rights. The Courts are not considered by judges, by other state representatives, and by the general public, as an effective instrument in this regard. For the time being, even though there have been a few successful writ applications the courts are not generally seen as a protector of the rights of people vis-à-vis executive power, due to perceived weakness and lack of independence. This may be one of the reasons why so many non-judicial bodies have been receiving complaints from citizens. However, such bodies cannot provide a judicial, i.e. legally binding decision (see below).

17. There are at present no nationwide reliable statistics of people accessing and using the courts, or an analysis for what reasons they do so. Different groups of society may also experience access to justice differently. There is however at present no accessible information on the access to justice of disadvantaged groups, and on the possible reasons for their disadvantage. Also, the effect of protracted conflict in the border areas on access to justice, and questions related to languages used by ethnic minorities would have to be considered in any meaningful analysis. Some INGOs and Think Tank Institutions have taken steps to study access to justice and rule of law in some states and regions.[12] The initial findings of these preliminary field visits show that courts were generally not considered a reliable way of securing justice, in particular against decisions by the executive. Respondents considered legal action to be unduly expensive, and frequently identified alternative avenues of redress, e.g. seeking the assistance of a priest or a monk. What is more, it appears that local government officials and police are considered to be more reliable than the judiciary.[13]

18. What is more, is that the jurisdiction of the Supreme Court arguably does not extend to the decisions and factual actions of the military, to which the Constitution grants the right to independently administer and adjudicate all affairs of the armed forces through 'Courts-Martial'.[14]

19. Whether more could be made of the existing constitutional provisions to ensure effective remedy largely depends on the ability and the courage of the judiciary to play an effective role of protecting citizens' rights vis-à-vis the state in this regard, on the ability of lawyers to see and seize such opportunities to help their clients, and on the political will of the executive authorities to submit themselves under the verdict of an independent judiciary setting limits to its discretion and freedom of action.

20. The rule of law debate in Myanmar has already recognized the importance of writs for the protection of fundamental rights. Steps have been made to expand the possibilities for applying this new tool in

[11] The other two writs included in the Constitution, *quo warranto* and *habeas corpus*, can be left aside in this discussion. *Quo warranto* is very rarely used in most other countries, and *habeas corpus* is mostly related to criminal law and criminal procedure.

[12] E.g. the International Bar Association's Human Rights Institute (IBAHRI) travelled to Yangon, Nay Pyi Taw, Bago and Mandalay. The United States Institute of Peace (USIP) travelled to Mawlamyaing in Mon state, Nyaung Shwe and Taunggyi in Shan state to collect data on access to justice.

[13] See more details from the report of the International Bar Association's Human Rights Institute (IBAHRI), "The Rule of Law in Myanmar: Challenges and Prospects", December 2012 and the report of United States Institute of Peace, "USIP Burma/Myanmar Rule of Law Trip Report June 2013", by USIP Rule of Law Center

[14] Anecdotal evidence exists that people have actually brought writ cases against the military, but they have all been unsuccessful.

a more effective manner.[15] In August 2013, the Union legislature began to discuss judicial reform and a writ bill.[16] The aim of these discussions was to draft a Writ Petition Bill to protect the rights of citizens and strengthen the judiciary. One of the main points to be amended was to make the Writ of Certiorari to be taken by more than a single judge, but rather two or three. The background for these discussions was the fact that even after the reintroduction of writs through the 2008 Constitution, most writs filed to the Supreme Court had been rejected almost immediately, and in some cases lawyers had even been deregistered within hours of filing them. After some delay, the new Bill was adopted in June 2014.[17]

21. Melissa Crouch[18] has found that there has been a significant increase in the number of administrative law cases that have been taken to the Supreme Court, putting the number of applications between 2012 and 2013 as high as 300.[19] She has, however, also analyzed that the fate of the constitutional writs in Myanmar is tied to the broader direction of the legal system, which "depends on the release of the judiciary from executive-military control."[20]

22. As will be argued below, strengthening the applicability of the writs currently provided in the Constitution may not be the only alternative. Another option, chosen by other developing countries in the Common Law tradition, may be to introduce a clear right to good public administration in the constitution, which may be combined with renewed efforts to strengthen the role of the ordinary judiciary in this regard, or, possibly, establish a separate system of independent administrative tribunals to hear and adjudicate cases.

23. Administrative justice and complaints mechanisms should also be understood as part of a wider discussion of mechanisms of accountability that also relate to the overall role of the judiciary in Myanmar's constitutional framework in general and its responsibility for safeguarding the rule of law in particular. Other important aspects of this discussion, which cannot be addressed here due to the brevity of this paper, are judicial appointments (sections 299, 308 and 321 and the role of the executive in this regard), the role of the Constitutional Tribunal and the court-martial system which so far has been outside the scope of any detailed mapping or critical analysis in the context of the rule of law reform debate.

COMPLAINTS AND COMPLAINT MECHANISMS

24. The political opening over the past three years has encouraged many Myanmar citizens to exercise their rights of expression, communication, and information. This has lead among others things to an increase in citizen complaints to a number of committees, ministerial administrative bodies and statutory bodies, such as the Myanmar National Human Rights Commission (MNHRC), as well as civil society organizations. Most of the complaints received by the NMHRC and the Pyithu Hluttaw's Rule of Law Committee were in one way or another related to land. This process has been driven by good

[15] In February 2013, a seminar on the prerogative writs was jointly organized by the Union Attorney-General and the International Commission of Jurists.
[16] Myanmar Times, Soe Than Lynn, 1 September 2013
[17] See the Annex for a summary of key provisions.
[18] See a blogpost on 9 July 2013, "Constitutional Writs as Weapons in Myanmar", at www.melissacrouch.net
[19] For a more detailed analysis, see Crouch, Melissa 'The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar' in Crouch, Melissa, and Lindsey, Tim (Eds.) 'Law, Society and Transition in Myanmar' (Hart Publishing, 2014).
[20] See fn 10

intentions on behalf of the bodies concerned but also appears muddled and unsustainable.[21] The high number of informal complaints submitted to various bodies in the hope of obtaining justice serves to demonstrate the ineffectiveness and inadequacy of the existing legal and formal mechanisms of administrative review and recourse to the judiciary against unlawful administrative decisions.

25. Sending complaints rather randomly to whichever body citizens believe might help them – without much clarity on the terms of reference and adjudicative powers of such institutions – implies the appearance of assisting people. Yet, by their nature these organizations generally have no legal authority as bodies of judicial appeal or to review administrative decisions in view of revising, correcting or annulling them. This means they are dependent on the use of 'political' influence with the ministries or territorial administrations to solve anything (which is antithetical to the rule of law as it is arbitrary, unpredictable, opaque and subject to politicization). Eventually it can dampen people's trust in these institutions/organizations, as they appear unable to solve problems. It also enables the ministries to deflect responsibility and remain unaccountable to citizens while preserving authority over issues and the accompanying budget that could be directed to resolve complaints.[22]

26. On the positive side, it must be emphasized that the opening of space to criticize and debate maladministration and the abuse of executive powers is a long overdue and welcome development of crucial importance. Most people are no longer afraid to speak about flaws of the authorities or to criticize government decisions. It is an unreservedly positive thing that members of the public are using the political opening to press their rights and voice their grievances. However, the improvised and ad hoc nature of the methods for addressing these grievances means that their effectiveness is limited.

27. As in most cases these bodies have no legal authority to adjudicate the problems, whatever action the respective body takes may be dependent on the political influence and the political leaning of these bodies. Having recourse to such bodies can be a good thing in a democratic system of governance, but it cannot substitute the due process of review of administrative decisions by legally competent and authorized institutions of appeal, as well as a role for the judiciary to protect the rights and entitlements of the people. While the new phenomenon[23] of sending letters to complaints commissions and committees is a good indicator of increased openness, it is an untenable solution in the quest for laying foundations for the rule of law.

28. In some cases, newly adopted legislation and newly formed institutions have even led to a deterioration of people's ability to seek legal recourse through the judiciary, and to obtain a hearing on their rights by an independent, impartial tribunal. For instance, the Farmland Law, which stipulates that land can be legally bought, sold and transferred on a land market with land use certificates (LUCs) legalized a land market without strong safeguards and has been perceived as extremely

[21] As people began to feel freer to voice complaints, a number of entities have stepped up to receive complaints, and to try to assist in solving people's problems – this ranges from the Myanmar National Human Rights Commission, a multitude of committees in both houses of Parliament, as well as citizens initiatives such as the 88 Generation. The Rule of Law and Tranquility Committee alone received more than 2000 letters, complaints and petitions in the first three months of its existence. In 2013, the President's Office also opened up a "hotline" to receive complaints by citizens on administrative matters.

[22] These observations were raised, for the first time, in the Rule of Law Assessment Report of a joint USAID/USG mission to Myanmar in February/March 2013.

[23] Some have observed that this phenomenon may actually not be entirely new and that there was already a culture of these, even during the Socialist and military periods. What is new, however, is that a lot more is publicly known about these and that the relevant institutions openly acknowledge how many they have received and in relation to what issues.

problematic.[24] Titles are registered by the Settlement and Land Records Department (SLRD). The law gives power over the allocation of farmland to the Farmland Administration Bodies (FAB), whose highest level is chaired by the minister of the Ministry of Agriculture and Irrigation (MOAI). Decisions of the FAB are, however, beyond the reach of the judiciary, meaning that aggrieved farmers are deprived of any legal recourse through ordinary courts.[25] The complaints bodies and structures established in relation to the Farmland Law essentially fall short of providing any meaningful legal recourse and remedies for rights-holders against administrative decisions.[26]

OTHER COUNTRIES' EXPERIENCES IN INTRODUCING ADMINISTRATIVE JUSTICE WITH A COMMON LAW BACKGROUND

29. Worldwide, there is a large variety of models for administrative justice. Comparative administrative justice is a scientific field in its own right and is understandably highly complex. The brevity of this paper does not allow even a summary of the different traditions, models and ongoing reform debates around this issue. What is included here, are simply a few observations from relevant jurisdictions which may provide ideas for the further debate on this subject in Myanmar, which has admittedly only just begun.

30. Many developing countries with Common Law traditions have recently introduced constitutional provisions which provide for judicial review of administrative action based on constitutional guarantees. Article 33 of **South Africa's** Constitution is a significant reference point in this regard:

"Just administrative action: (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal."

31. These provisions have been given effect by the enactment of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), which contains a long and complicated definition of "administrative action". One unanticipated result article 33 has been that the concept of "administrative action" has moved to the center stage in South African administrative law. While progress in terms of implementing these reforms has been mixed, and the extent of the legislation itself has been considered as suboptimal, one of the most important impacts of the new legislation was "educating South Africans on administrative law and, more specifically, giving administrators training" on administrative justice.[27] The training institution of the Department of Justice began holding workshops and courses for administrators shortly after the PAJA was enacted. Initial awareness-raising workshops allowed the trainers to identify problem areas which were then addressed in practical training. The main objectives of the training were to ensure that participants had a clear understanding of the Act and would be

[24] Transnational Institute, Burma Policy Briefing Nr 11, May 2013, 'Access Denied - Land Rights and Ethnic Conflict in Burma'

[25] Whether this also precludes the possibility to bring such cases before the Supreme Court as part of writ applications, is another question. See footnote 5.

[26] In June 2012 the President established the Land Allocation and Utilization Scrutiny Committee, headed by the minister of the Ministry of Environmental Conservation and Forestry (MOECAF). This committee is to advise the President on land use policy and land laws, and was partly created to offset the MOAI's monopoly of power over the land laws and land allocation. A Land Investigation Committee, composed of MPs, was also set up but has no decision making power and is only mandated to investigate land grab cases. The committee submits findings to the President.

[27] Cora Hoexter, Administrative Law in South Africa 2 ed (2012).

able to comply with its provisions in practice; and to motivate participants to implement the Act, which included changing attitudes regarding the way administrative decisions are made. The workshops revealed some quite alarming ignorance, such as the fact that many administrators had never set eyes on the empowering legislation in terms of which they were making decisions.[28]

32. Similarly, Art. 18 of the 1990 Constitution of Namibia, which is entitled "Administrative Justice" reads:

"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

33. This constitutional provision constituted a firm basis for the development of administrative law in Namibia. It also served as a catalyst for the development of democratic principles and behaviour in that through Art. 18 an individual's right to judicial review and extra-judicial adjudication of administrative action which in almost all of the Commonwealth is a common law right, an ordinary right, has been transformed into a fundamental human right protected by the Constitution. What this means is that an individual aggrieved by administrative action - whether such action affects his constitutionally protected human rights and freedoms or not - may seek redress in 'a competent Court or Tribunal.'[29]

34. In a number of countries, courts now have express powers to review any law, act or conduct of government. The 1994 Constitution of **Malawi** introduced fundamental changes to Malawi's administrative law, and its conceptual foundation and grounds for judicial review. The new grounds of review are lawfulness, procedural fairness, the giving of reasons and justifiability. These grounds offer litigants more avenues for challenging the exercise of public powers than was the case under the common law.[30] Courts now have express powers to review any law, act or conduct of government. The doctrine of constitutional supremacy, not parliamentary supremacy, guides judicial review and the new grounds of review are lawfulness, procedural fairness, the giving of reasons and justifiability. These grounds offer litigants more avenues for challenging the exercise of public powers than was the case under the Common Law. The source of administrative law is the Constitution itself. The relevance of the Common Law is now limited to informing the interpretation of the constitution. Thus, in order for a person to apply for judicial review, he or she has to rely on section 43 of the constitution and prove that the impugned conduct constitutes administrative action.[31]

35. **Kenya's** Constitution of 2010 includes a section on "Fair administrative action". Accordingly,

[28] Ibid.

[29] The 'Administrative Justice' provision of the constitution of the Republic of Namibia: a constitutional protection of judicial review and tribunal adjudication under administrative law, Collins Parker, The Comparative and International Law Journal of Southern Africa. Vol. 24, No. 1 (MARCH 1991), pp. 88-104

[30] See, for a discussion of this matter in a country with similar legal traditions, "Liberating Malawi's Administrative Justice Jurisprudence from Its Common Law Shackles", by Danwood Mzikenge Chirwa, in Journal of African Law, 55, 1 (2011), School of Oriental and African Studies, 2011

[31] The practical experience in Malawi since the introduction of these new provisions demonstrates that courts have not fully grasped the extent to which the constitution has altered the country's administrative law. As a consequence, the full potential of the right to administrative justice remains untapped.

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

36. Similarly, the 2013 Constitution of **Fiji**, adopted to end an extended period of military rule and the transition to democracy, includes a section on "Executive and administrative justice":

16. (1) Subject to the provisions of this Constitution and such other limitations as may be prescribed by law

(a) every person has the right to executive or administrative action that is lawful, rational, proportionate, procedurally fair, and reasonably prompt;

(b) every person who has been adversely affected by any executive or administrative action has the right to be given written reasons for the action; and

(c) any executive or administrative action may be reviewed by a court, or if appropriate, another independent and impartial tribunal, in accordance with law.[32]

37. Other remedies often found in Common Law jurisdictions are injunctions: as an adjunct to its primary powers, particularly those of certiorari and prohibition, courts may make an order restraining the executive branch body from continuing to act unlawfully or may grant an urgent interim injunction to prevent irreparable damage. Another avenue is through awarding damages (i.e. monetary compensation).[33]

CONCLUSION AND OPTIONS FOR CONSTITUTIONAL REFORM IN MYANMAR

38. Whether it is begun before or after the elections in 2015, constitutional reform in Myanmar offers a number of possibilities for strengthening people's access to justice and enhancing the relationship between the state and those subjected to its authority. A democratic state exists to serve its citizens. In a democracy ruled by law, and under a government committed to high-quality and responsive public services, simply appealing to government officials' sense of fairness is not, and has never been, enough. There has to be an avenue for effective redress.

39. One important lesson from countries around the world is that it makes sense to avoid ad hoc-ism, which has however been the common characteristic of efforts to set-up complaints bodies and procedures in Myanmar in recent years. Some basic recommendations are offered here below with the intention to generate further debate, encourage research and begin inclusive consultations involving the different branches of government, as well as the legal community and civil society organisations in efforts to create an effective model of administrative justice for Myanmar.

[32] Similar provisions have also been included in the recent constitutions of Zimbabwe and the Cayman Islands.

[33] However, although Courts have power to award damages, no right to damages automatically flows from the declaration that an administrative act is invalid. The applicant must show either lack of bona fides on the part of the public body or establish that some other recognized legal wrong (such as trespass or assault) has been committed under the guise of that act.

A. Constitutional Amendment

40. It is suggested that a first step in the process would be for the legislature to signal an intention to strengthen administrative justice at the level of the constitution, as part of any package of reforms that are taken forward.

- Introduce into the Constitution a right to administrative action that is lawful, reasonable and procedurally fair. Every person should be entitled to a fair and public hearing by a court or at least independent, impartial tribunal within a reasonable time.

B. Implementation of that Right

41. Such a right can procedurally either be assured

- Through more effective application of writ jurisdiction by the Supreme Court on cases where constitutionally guaranteed rights have been infringed; or
- Additionally, through the establishment of a separate branch of the judiciary in the form of an Administrative High Court and Administrative Courts/Independent Administrative Tribunals at the State/Region level which would adjudicate cases against unlawful administrative decisions.

C. Implementation Measures without Legislative Change

42. There is much that might be done in Myanmar to strengthen Administrative Justice by way of implementation of the existing provisions of the constitution and Laws, and by strengthening administrative agencies. For example:

- Wherever administrative agencies exercising adjudicatory powers discharge various other administrative and governmental functions, they essentially combine the functions of prosecutor and judge in one. In the interest of justice and for regaining the lost faith of the people in administrative justice some sort of separation of functions might be advisable.

D. Practice and Procedure in the Courts

43. In introducing various forms of administrative justice, due consideration should be given to issues such as preconditions of access to the courts and the right to bring a case before the court; admissibility conditions; time limits to apply to the courts; administrative acts excluded from judicial review; as well as screening procedures, distribution of legal costs and forms of application. The possibility of bringing proceedings via information technologies could also be considered. Other important issues include court fees; compulsory representation; legal aid; and fines for abusive or unjustified applications. Fundamental principles of the main trial should include judicial impartiality, the duty to provide evidence; and rules on the form of the hearing and judicial deliberation and grounds for the judgment. Finally, there should be consistent rules about the public pronouncement and notification of the judgment and a right to the execution of judgment. Recourse against judgments should be provided through an appeal procedure.

44. No administrative acts should be beyond the scope of judicial review. Consideration might also be given to ensuring that administrative authorities and tribunals accord fair and proper hearing and

give sufficiently clear and explicit reasons in support of their orders. This would go some way to ensuring that administrative authorities and tribunals exercising quasi-judicial functions will be able to justify their existence and carry credibility with the people by inspiring confidence in the administrative adjudicatory process.

45. Certainly, introducing an explicit right to administrative justice in the Constitution alone will be no panacea. There is no guarantee that the inclusion of administrative justice in the chapter on fundamental rights in the Constitution would protect administrative justice more fully or more securely than the law does at present. Also in other countries, the constitutionalisation of the right to administrative justice has not always proven to improve matters. It should be noted that the reintroduction of writs in the 2008 Constitution has so far led to very little in terms of actual jurisprudence, and has not yet helped anyone in effectively defending their rights vis-à-vis the state in Myanmar. Much of this is also due to the fact that even those cases that were accepted and those decisions that were made are often unknown or inaccessible to the general public due to inadequacies in law reporting and publishing.

46. However, if it is accompanied with a general concerted drive towards administrative reform and the protection of fundamental rights and freedoms, and serious efforts to change the relationship between state and people in Myanmar, such an insertion into the Constitution could perhaps make a difference. A right to administrative justice, or to good administration, in the bill of fundamental rights might be of symbolic significance - particularly so, if it were to be accompanied with a well-prepared and thought-through introduction of new administrative tribunals that are more accessible and less cumbersome than traditional courts of law. Given the mixed character of Myanmar's legal system, especially its current constitution, it may be worthwhile borrowing elements from countries following the civil law tradition in addition to drawing from lessons from common law jurisdictions worldwide.