



# MYANMAR RULE OF LAW ASSESSMENT\*

March 2013



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\* The then unelected military regime changed the English-language name of the country from Burma to Myanmar in 1989. The name change remains contested by the National League for Democracy, as well as several foreign governments, human rights groups, and pro-democracy advocates. This report follows the United Nations in using Myanmar.

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# EXECUTIVE SUMMARY

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## Background

- In June 2012, Perseus Strategies and New Perimeter, in partnership with the Jacob Blaustein Institute for the Advancement of Human Rights, initiated a broad rule of law assessment of Myanmar
- Upon completion of this assessment, New Perimeter and Perseus Strategies will launch a program where potentially thousands of pro bono hours from the global law firm DLA Piper will be invested into a focused project to advance law reform efforts in Myanmar

## Current situation

- On November 7, 2010, Myanmar held its first election in 20 years – much of the reaction to the reforms instituted by President Thein Sein, inaugurated in March 2011, reflects the hope that the country can break free of its authoritarian past that involves widespread human-rights abuses
- Following by-elections in April 2012, Aung San Suu Kyi has joined the government as an elected MP, along with several dozen representatives of the National League for Democracy and ethnic political parties
- Major reform efforts have been initiated by the government across an array of areas, which has reinforced these hopes, but there remains a large gap between public perception and the reality of the impact of reform efforts on the ground

- There is a strong consensus across the political spectrum that advancing the rule of law and law reform efforts are a top priority, but the government, opposition, and other parties have different views as to the sequencing of specific efforts

## Key findings

- President Thein Sein and his allies in the government are making **genuine reforms**; however, many **government institutions are quite fragile** and the **role of the military remains opaque**
- For these changes to be permanent and irreversible, **constitutional reform is important**, but it is unclear if the government will undertake such efforts in the near term
- Law reform is being implemented from the **top-down**, but these efforts must be **driven into government bureaucracies** and **down to the local level**, and coupled with **major grassroots efforts** to educate people about their rights
- The **judicial system is in need of large-scale reform** – corruption is a serious issue and decisions are sometimes made by the executive branch
- The **parliament** will be a significant player in law reform efforts, but requires **major investment** to build its capacity so its contributions can be meaningful
- Myanmar requires unprecedented effort to **create a criminal defense and legal aid system**,

**reconstitute the Bar Association**, and **rebuild the legal education system**

- The **Myanmar National Human Rights Commission** has potential, but should be reconstituted by the parliament as an independent government agency, in accordance with the Paris Principles
- The government has signed several new treaties, but reform efforts could also be advanced through the **signing and ratification** of the Int'l Covenant on Civil and Political Rights (**ICCPR**), Int'l Covenant on Economic, Social, and Cultural Rights (**ICESCR**), and Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment (**CAT**), which the government has indicated its intention to do



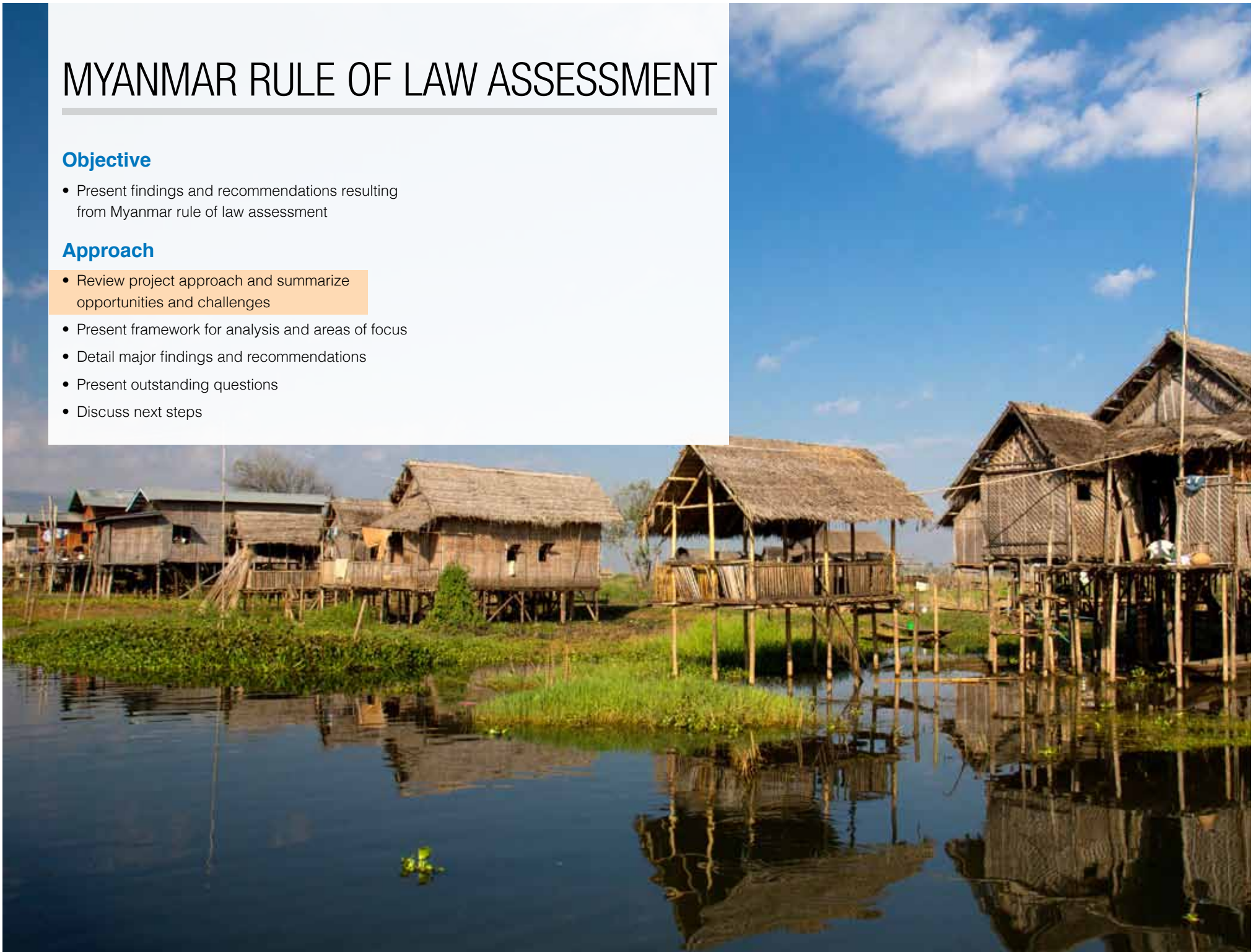
# MYANMAR RULE OF LAW ASSESSMENT

## Objective

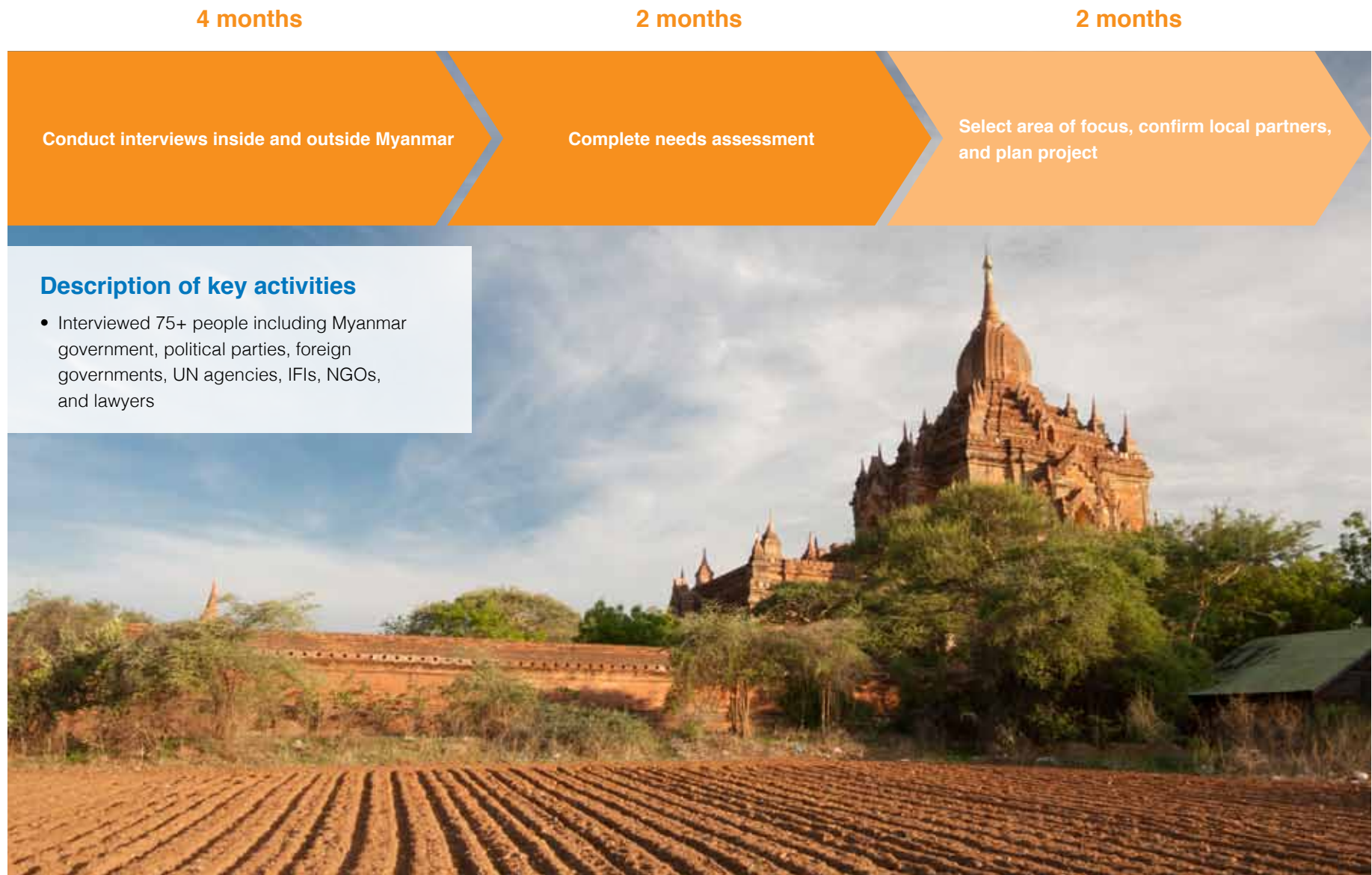
- Present findings and recommendations resulting from Myanmar rule of law assessment

## Approach

- Review project approach and summarize opportunities and challenges
- Present framework for analysis and areas of focus
- Detail major findings and recommendations
- Present outstanding questions
- Discuss next steps



# PROJECT APPROACH





# CAVEATS AND DISCLAIMERS

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## Scope of review

- While this needs assessment has gathered a wide range of information, our effort focused in areas where DLA Piper has substantive expertise and is best able to contribute
- Important areas relating to the rule of law, therefore, fell outside the scope of our review, such as reform of the military, security services, police, and prisons

## Geographic limits of review

- Given the scale of the challenges facing Myanmar and our limited resources, our review focused on national policy challenges
- While we have identified numerous areas relating to the rule of law at the federal level, a huge effort will need to be made to extend reform efforts to all states, regions, zones and divisions

## Depth of review

- The greater our engagement on this project, the more we appreciated how much needs to be done
- We have tried to provide a broad high-level review, but each major area requiring reform – e.g., legal education, access to justice, judicial reform – will require their own individual in-depth needs assessment and focused efforts

## Availability of information

- Access to information is and will remain an ongoing challenge in Myanmar for years to come – developments in many areas are opaque and it is often challenging to access the right people
- This assessment is based on the best information we were capable of acquiring, but there are large gaps in our knowledge



# OVER 75+ INTERVIEWS HAVE BEEN COMPLETED WITH INDIVIDUALS FROM THE FOLLOWING INSTITUTIONS\*

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## Myanmar Government

- Ministry of National Planning & Economic Development
- National Human Rights Commission
- Office of the President (Legal Advisors)
- Supreme Court
- Union Attorney General's Office

## Political Parties

- Chin National Party
- Karen National Union
- National League for Democracy
- Nationalities Brotherhood Forum
- Shan National Democratic Party

## UN Agencies / Governments / IFIs

- Asian Development Bank
- EU External Action Service
- International Labour Organisation
- UK Embassy (Myanmar)
- UK Foreign & Commonwealth Office
- UN Development Programme
- Office of UN High Commissioner for Human Rights
- UN Children's Fund

- US Agency for International Development
- US Embassy (Myanmar)
- US Department of Justice
- US Department of State
- World Bank
- UN Special Rapporteur on human rights in Myanmar

## NGOs / Lawyers

- ActionAid Myanmar
- American Bar Association
- Asia Justice and Rights
- Amnesty International
- Asia Society
- Burma Lawyers Council
- Burma Justice Committee
- Burma Partnership
- Earth Rights International
- Human Rights Watch
- International Bar Association
- International Center for Transitional Justice
- International Development Law Organization
- International Republican Institute

- Lawyers Performance Aid Centre & Lawyers Network (U Aung Thane)
- Johns Hopkins University
- Justice for All (Myanmar)
- Justice Base
- Myanmar Development Resources Institute
- Myanmar Legal Aid Network (MLAW)
- Myanmar Egress
- Myanmar Peace Centre
- National Democratic Institute
- National Endowment for Democracy
- Open Society Foundations
- Public International Law and Policy Group
- Project 2049
- Eugene Quah
- US Institute of Peace
- US Campaign for Burma
- United to End Genocide
- '88 Generation Students

\* For some organizations listed, multiple separate interviews were conducted with different people in different parts of the organization and world

# OPPORTUNITIES

## Meaningful reform

- President Thein Sein, his allies and even some of his opponents have embarked on a reform process which, if focused, sustained, and later expanded, could substantially transform the country

## Interest in outside help

- The Executive, Legislative, and Judicial branches of the Myanmar government have expressed a strong interest in receiving assistance from international experts

## Substantial resources

- The Myanmar government has significant resources to invest in the reform process – the country is resource rich, particularly with oil, gas, timber, and gemstones – but profits from the sales of these resources will need to be contributed to the national budget
- IFIs, foreign governments/aid agencies, UN agencies, private donors, and NGOs have expressed substantial interest in investing to improve life for the people of Myanmar

## Embrace of the rule of law

- While there is not a broad understanding of what the rule of law actually is, government officials and the people of Myanmar repeatedly assert its fundamental importance to sustain any reform process
- The government understands that attracting foreign investment will require law reform efforts and substantial adherence to the rule of law as it is understood by the international community





# CHALLENGES

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## Reform driven by handful of people

- Currently, law reform efforts are being driven from the top by the President and a handful of key ministers – power needs to be broadened and deepened, and reforms driven into the bureaucracy of different institutions

## Too many priorities

- While the pace, breadth, and ambition of the Myanmar government is admirable, it is trying to achieve too much too fast (e.g., the Union Attorney General's office is in the midst of reviewing, drafting or reforming 400 pieces of legislation)
- Substantial effort should be invested in prioritizing institution-building efforts that are prerequisites for other key developments

## Limited capacity

- There is a serious lack of legal capacity in the different government branches, among the political opposition, and in civil society; in addition, the capacity that is available is primarily in government
- As a result, there are serious problems of capacity to convey priorities to and accept assistance from the international community, let alone ability to implement programs

## Lack of local impact

- In the near term, reforms are likely to be institutional/legal and, with the exception of greater civil and political rights in large cities, not felt by the vast majority of the population of the country
- It will be very important that reform efforts translate into meaningful impact that can be felt by the entire population as quickly as possible

## Cultural shift required

- Historically, the people of Myanmar have seen the law and law enforcement as the enemy
- Reforms need to demonstrate to the people that the law will protect and not threaten them, and incorporate a gender perspective into these issues

## Lack of understanding of rule of law

- While there is substantial talk about the need for rule of law and law reform, most people believe it means rule by law, and fail to appreciate the range of elements necessary for the rule of law to exist in a society

## Inadequate information

- As mentioned previously, there is a real lack of legal capacity in and outside government in Myanmar
- This challenge is compounded by the lack of basic tools to access information such as publicly accessible laws, regulations, and legislation (draft and final)
- Further, procedures in executive branch agencies, where disclosure of a draft bill would be in violation of the Official Secrets Act, impact transparency and accountability

## Limited understanding of federalism

- The Constitution of Myanmar creates a federal system – but one that is out of balance with substantial control in the central government
- It is unclear how state and regional governments/parliaments will interact with the national government/parliament. It also remains unclear how the rights of ethnic minorities can be respected under the 2008 Constitution, despite the introduction of a bill to protect minority rights being introduced

# MYANMAR RULE OF LAW ASSESSMENT

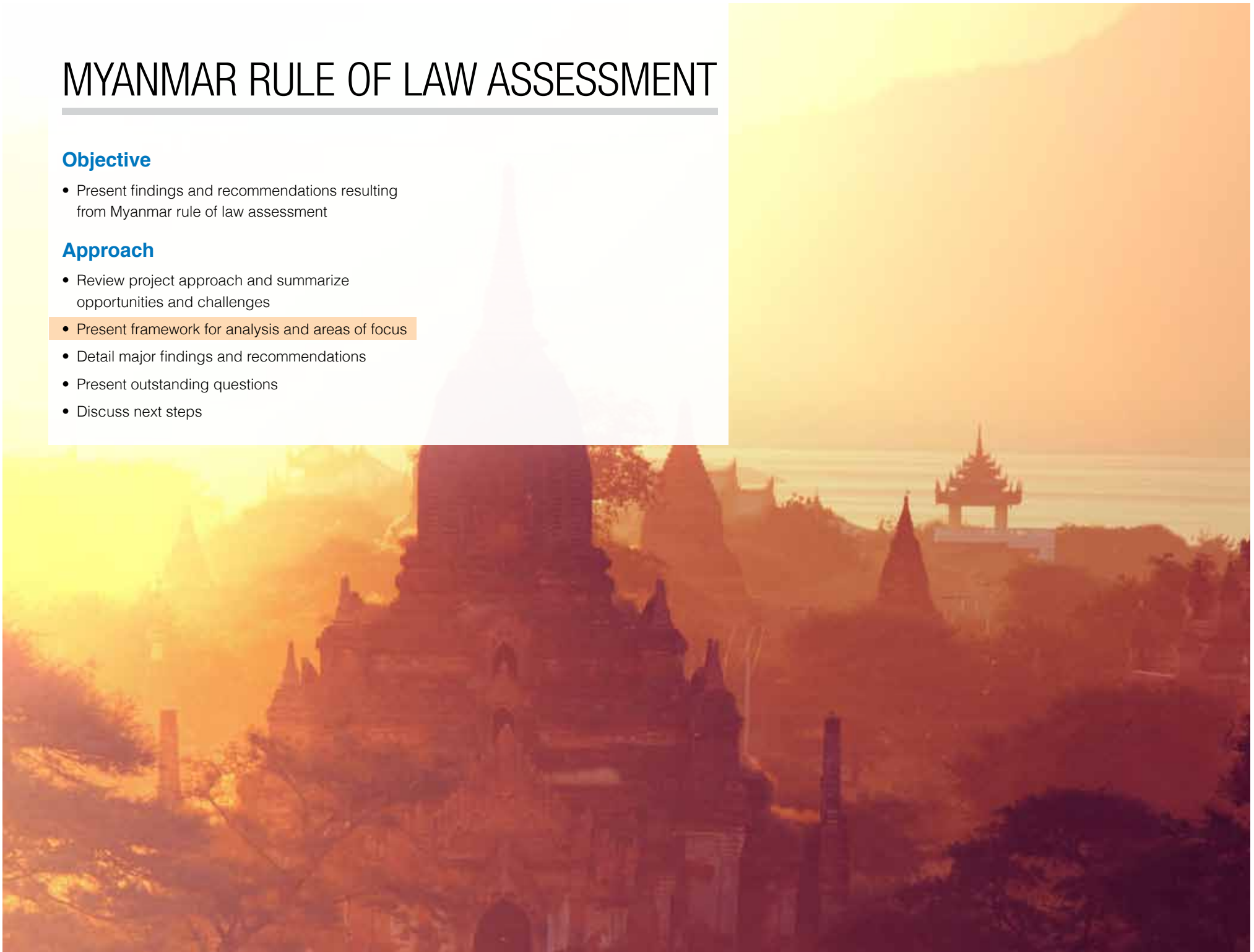
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## Objective

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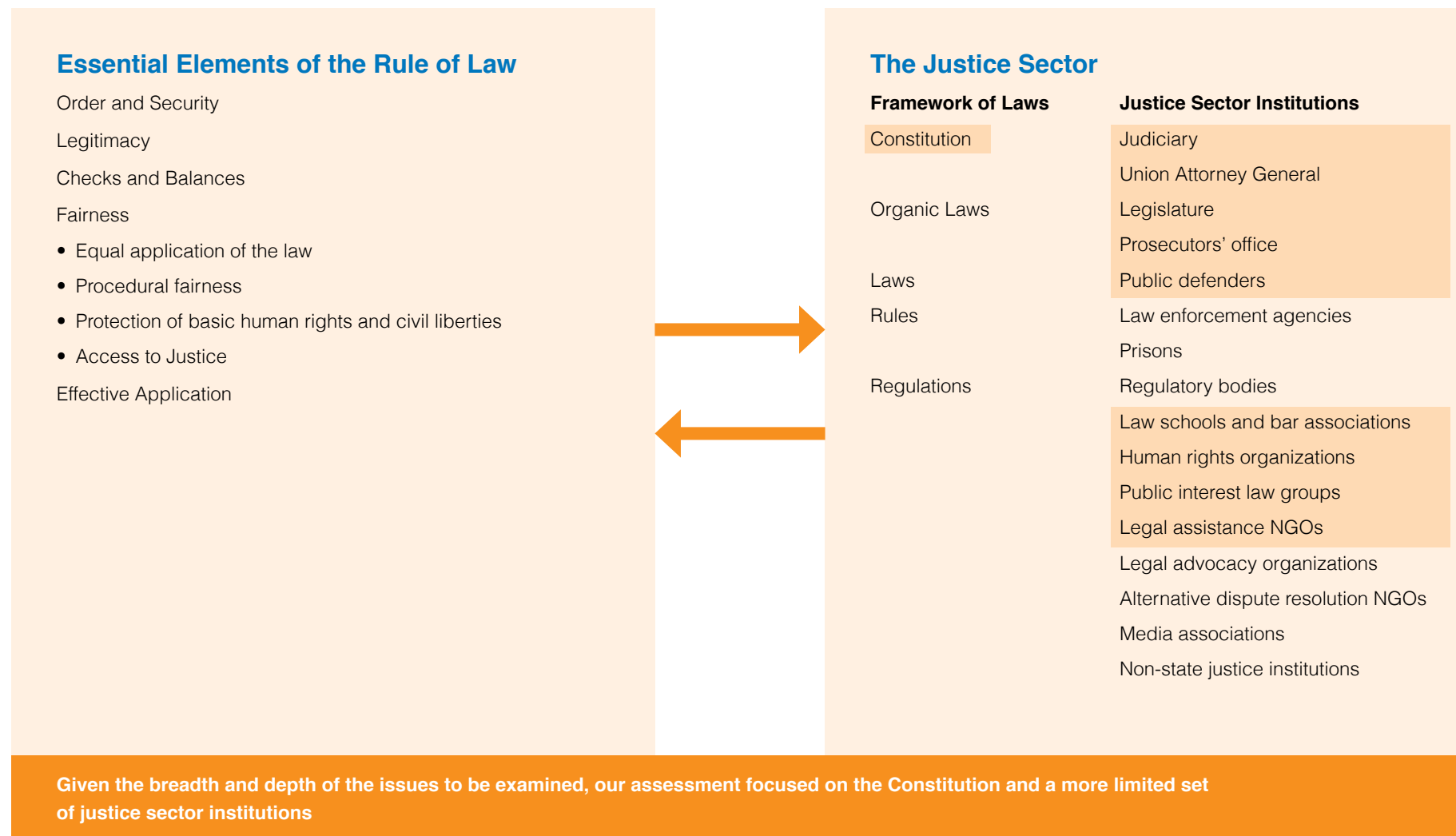
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# RULE OF LAW STRATEGIC FRAMEWORK

Areas of focus



Source: Adapted from: *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*, US Agency for International Development, January 2010



# ANY LAW REFORM PROCESS MUST BEGIN WITH A COMMON UNDERSTANDING OF THE RULE OF LAW

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The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to **laws** that are **publicly promulgated, equally enforced and independently adjudicated**, and which are consistent with **international human rights** norms and standards. It requires, as well, measures to ensure adherence to the principles of **supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness** and procedural and legal **transparency**

Report of the UN Secretary-General on  
the Rule of Law and Transitional Justice in  
Conflict and Post-Conflict Societies



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# ASSESSMENT FOCUS AREAS

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## Myanmar Constitution

### Branches of Government

- Executive Branch
  - Union Attorney General's Office
  - Ministry of National Planning and Economic Development
- Parliament
- Judiciary

## Myanmar National Human Rights Commission

### Criminal Defense and Legal Aid

### Legal Profession

- Bar Associations
- Legal Education

### Access to Information





# MYANMAR CONSTITUTION

Greater detail provided in Appendix

- Myanmar's 2008 Constitution is its third since obtaining independence in 1948
- All parties interviewed, except the government, had concerns about various provisions of the Constitution which, unless amended, would undermine the sustainability of reform efforts
- On April 9, 2008, the then military government of Myanmar released its draft Constitution; it was approved in a referendum held on May 10, 2008, days after Cyclone Nargis affected 2.4M people
- The military government claimed a 98 percent turnout in areas where the vote was held, with almost 93 percent approving the Constitution – reputable international observers found the referendum to be neither free nor fair, and do not consider these figures to be credible

## Implications

- Constitutional reform is a major point of dispute between government and opposition leaders – it appears unlikely these issues will substantially be addressed until after the 2015 presidential and parliamentary elections. In addition, any proposed constitutional change that lacks support of at least some of the military-appointed MPs cannot be adopted
- There is consensus that law reform efforts are underway in Myanmar, but questions remain as to whether these efforts can be permanent and irreversible without meaningful constitutional reform
- Illustrative concerns include how the Constitution can be amended, independence of the judiciary, role of the military, immunity for all acts taken by members of the previous military governments, and a provision stating Aung San Suu Kyi and others with children bearing foreign nationality are ineligible to be elected President

# MYANMAR CONSTITUTION – BALANCE OF POWER CONCERNS

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- On September 7, 2012, the nine members of the Constitutional Tribunal resigned after a vote in the Lower House to impeach them; this followed a vote by the Upper House for impeachment the prior month
- The drive for impeachment began after President Thein Sein requested the Constitutional Tribunal to define the powers of the parliament's committees – the Tribunal issued a ruling in March 2012 clarifying that while the parliament is a national organ, its committees are not union-level organizations
- Parliamentarians were outraged because they saw the ruling tipping the balance of power towards the executive, by limiting the power of parliamentary committees to call and question government ministers
- The impeachment occurred after the Constitutional Tribunal failed to heed a warning from Parliament Speaker Shwe Mann to rescind the opinion
- In January 2013, the Parliament amended the Constitutional Tribunal law to provide greater parliamentary oversight of the appointments process





## Implications

- Those who were concerned that the executive, or by proxy the military, was too powerful under Myanmar's new constitution have some reason for optimism – the balance of power is not as skewed as some had believed
- However, the decision to impeach the entire court is a major setback for judicial independence – under the Constitution, it appears the executive and Constitutional Tribunal were operating within their rights – indeed, the parliament has no power to overrule decisions of the Constitutional Tribunal, whose rulings are supposed to be “final and conclusive”
- Recent amendments by the Parliament to the Constitutional Tribunal law, such as an attempt to make its rulings only binding in respect to disputes submitted to it by a court, may themselves be found unconstitutional
- This running dispute stems from various areas within the Constitution where the allocation of powers to the different branches of government are vague and also identifies a need for further Constitutional reform

Source: “Myanmar’s Crisis Calls for Constitutional Overhauling,” Center for Strategic and International Studies, September 14, 2012

# GOVERNMENTAL STRUCTURE

-  Focal point for law reform
-  Nominated and technically controlled by military

There are now 37 Government Ministers reporting to the President, which includes 31 Ministries and 6 Ministers in the Office of the President – the Union Attorney General and Union Auditor General are not Ministers

## Executive Branch

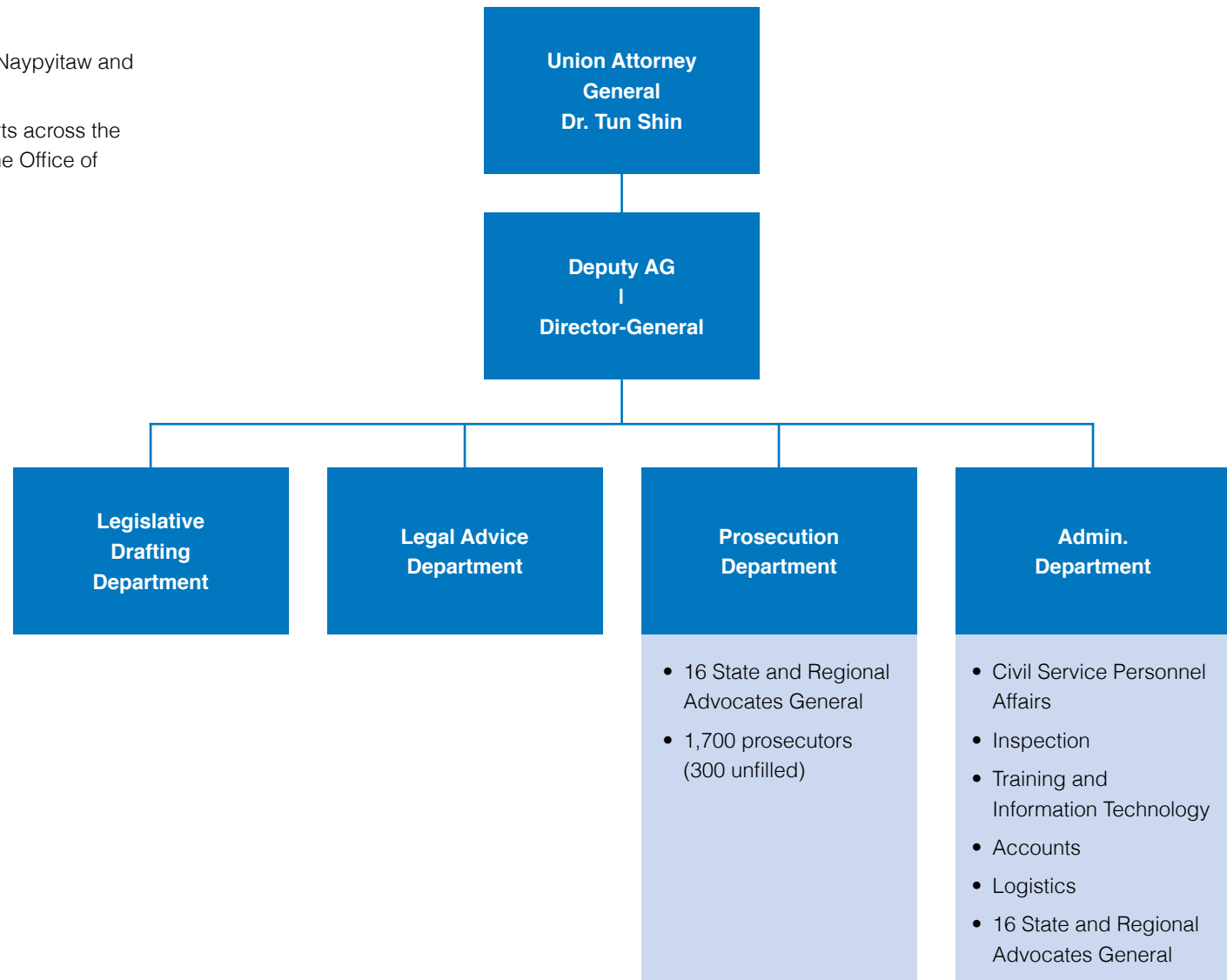
- Minister of Agriculture and Irrigation
- Minister of Border Affairs
- Minister of Commerce
- Minister of Communications and Information Technology
- Minister of Construction
- Minister of Cooperatives
- Minister of Culture
- Minister of Defense
- Minister of Education
- Minister of Electric Power
- Minister of Energy
- Minister of Finance and Revenue
- Minister of Foreign Affairs
- Minister of Finance and Revenue
- Minister of Environmental Conservation and Forestry
- Minister of Health
- Minister of Home Affairs
- Minister of Immigration and Population
- Minister of Hotels and Tourism
- Minister of Industry
- Minister of Information
- Minister of Labor, Employment, and Social Security
- Minister of Livestock and Fisheries
- Minister of Mines
- Minister of National Planning and Economic Development
- Minister of Rail Transport
- Minister of Religious Affairs
- Minister of Science and Technology
- Minister of Social Welfare, Relief, and Resettlement
- Minister of Sports
- Minister of Transport
- Ministers of President's Office
  - U Thein Nyunt
  - U Soe Maung
  - U Soe Thane
  - U Aung Min
  - U Hla Tun
  - U Tin Naing Thein
- Union Auditor General
- Union Attorney General



# EXECUTIVE BRANCH – UNION ATTORNEY GENERAL’S OFFICE

## Organization and role

- Roughly 4,000 staff – 300 in Naypyitaw and 3,700 across the country
- Coordinating law reform efforts across the Executive Branch and with the Office of the President



# EXECUTIVE BRANCH – UNION ATTORNEY GENERAL'S OFFICE

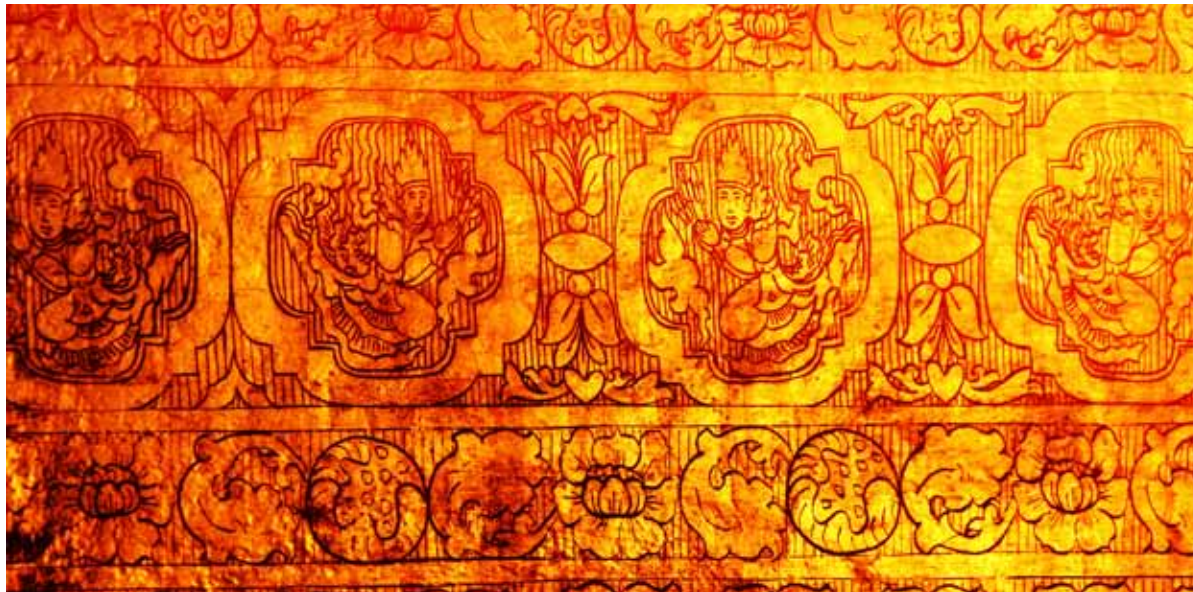
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## Strengths

- Large staff in Naypyitaw and throughout the country
- Coordinates law reform efforts across the Executive Branch and with Office of the President
- Serves all government ministries and thereby has a high-level view of the range of law reform efforts
- Strong leadership, which appreciates the need for international cooperation and support

## Challenges

- Not sufficient prioritization – required to do too much too fast across all government ministries
- Small number of lawyers with expertise in international law or legislative drafting
- Too much work – reviewing compatibility of all laws with new Constitution and drafting and amending of some 400 pieces of legislation simultaneously with relevant executive branch but, with minimal parliamentary input
- Many lawyers lack basic skills, tools to do their jobs, and capacity to absorb outside help
- Focus placed on prosecution without providing resources to criminal defendants for counsel



# EXECUTIVE BRANCH – MINISTRY OF NATIONAL PLANNING AND ECONOMIC DEVELOPMENT

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- The Ministry is developing a macroeconomic plan and privatization plan
- In addition, it is engaging in sectorial reform, working collaboratively with other relevant government ministries in the following areas, which each will require laws, rules, and regulations
  - Agriculture, livestock, fisheries
  - Capital markets
  - Education
  - Energy
  - Environment
  - Health
  - Manufacturing
  - Mining
  - Services
  - Social services
  - Telecommunications
  - Tourism
  - Transportation
- Land tenure, land reform, and land use is a major area of concern

## Implications

- **Strategic Planning** – each of these areas are massive undertakings and there is little appreciation that these cannot be done simultaneously; the current strategic plan appears to embrace doing all of these efforts
- **Basic Building Blocks** – in parallel with embarking on focused sectorial reform efforts, major areas of law need to be developed first, e.g.,
  - Government contracting
  - Government procurement
  - Privatization
  - Land tenure, land reform, and land use
- **Focus** – once sequencing of reforms are developed, substantial effort can be invested in a much smaller number of areas

# MYANMAR NATIONAL HUMAN RIGHTS COMMISSION – SUMMARY

## Establishment

### Key facts

- Established by executive order of President Thein Sein on September 5, 2011, with 15 members (including three women)
- It was formed “with a view to promoting and safeguarding fundamental rights of citizens described in the Constitution of . . . Myanmar” – but minimal specific duties outlined in executive order

## Self-defined duties

### Key facts

- To receive and investigate communications of human rights violations
- To convey findings to government departments and bodies
- To examine and make recommendations on international human rights instruments
- To enhance human rights awareness among the general public

## Actions to date

### Key facts

- Announced it would accept complaints from the public – it has received more than 1,000 complaints and is receiving 40-50 per day
- Publicly urged the release of prisoners who do not pose a threat to national security – followed by a presidential amnesty the next day for 6,359 prisoners, approximately four percent were political prisoners
- Conducted fact-finding investigation into Kachin state conflict and announced findings publicly, but minimized responsibility of military
- Visited Insein prison, interviewed prisoners and prison officials, and made public certain recommendations, but failed to find major concerns
- Chairman publicly recommended government ratification of ICCPR and ICESCR



Source: Myanmar National Human Rights Commission, Report of International Bar Association



# MYANMAR NATIONAL HUMAN RIGHTS COMMISSION – ILLUSTRATIVE CONCERNS

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## Independence

- Created by executive order rather than through a “constitutional or legislative text, specifying its composition and its sphere of competence” as required by the Principles Relating to the Status of National Human Rights Institutions (“Paris Principles”)
- Enabling legislation has been drafted and will be considered by the parliament; adequate funding is needed to carryout activities and ensure independence

## Membership

- The current membership is viewed as being close to the Executive Branch
- There needs to be an independent appointments process created in the new legislation and a more diverse membership more representative of the country selected

## Powers

- Currently, the Commission’s powers are limited to investigating and reporting on abuses
- To be effective, enabling legislation needs to provide additional powers to the Commission, such as allowing it to act on behalf of victims of abuses through judicial processes in the country including through determination of compensation

## National reconciliation

- Despite constitutional provisions providing immunity for past acts of SPDC and SLORC and major sensitivities, the Commission is the obvious governmental body to consider how the country can enter into a meaningful national reconciliation process to address past human rights abuses committed in the country

## Educational role

- The Commission is the natural institution to educate the public and raise awareness about the fundamental human rights of the people of Myanmar
- Such efforts would be enhanced by a web site with information about human rights in Myanmar, filing complaints online, and reporting on the Commission’s activities

# NATIONAL PARLIAMENT – STRUCTURE

	Pyithu Hluttaw (Lower House)	Amyotha Hluttaw (Upper House)
Composition	<ul style="list-style-type: none"> <li>• Up to 440 (330 elected to represent townships by population, plus 110 appointed by military)</li> <li>• Five-year terms</li> </ul>	<ul style="list-style-type: none"> <li>• 224 (168 elected, 12 per state and region and one per each self-admin. region/zone, plus 56 appointed by military)</li> </ul>
Committees	<ul style="list-style-type: none"> <li>• Rule of Law Committee</li> <li>• Bill Committee</li> <li>• Public Accounts Committee</li> <li>• Gov't Guarantees, Pledges, and Undertakings</li> <li>• Defense and Security Committee</li> <li>• Others</li> </ul>	<ul style="list-style-type: none"> <li>• Bill Committee</li> <li>• Public Accounts Committee</li> <li>• Gov't Guarantees, Pledges, and Undertakings</li> <li>• Defense and Security Committee</li> </ul>
Qualifications	<ul style="list-style-type: none"> <li>• 25 years old</li> <li>• Both parents citizens</li> <li>• Resided in Myanmar for last 10 years</li> </ul>	<ul style="list-style-type: none"> <li>• 30 years old</li> <li>• Both parents citizens</li> <li>• Resided in Myanmar for last 10 years</li> </ul>

- Together, the parliament is called the Pyiduangsaw Hluttaw and is comprised of 664 members
- The overall parliament and each chamber elects a speaker and deputy-speaker
- The Constitution and Pyithu and Amyotha laws explain the procedures by which a bill is adopted and conveyed to the President for signature

# NATIONAL PARLIAMENT – ILLUSTRATIVE CONCERNS

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## Structure

- Currently, there is only a minimal committee structure – a more robust and workable structure needs to be developed and implemented
- There is no centralized expertise or office for parliamentarians to obtain legislative drafting support

## Rules and procedures

- The rules and procedures for the Executive branch and individual parliamentarians to submit bills to the upper and lower houses of parliament could be further clarified
- The speed at which legislation is being adopted reinforces the perception that parliamentarians are law passers, not law makers

## Staff

- There are few staff working in the parliament, with most parliamentarians having no personal or committee staff to assist them in conducting their official duties
- Those staff that are present do not have substantial expertise in subject-matter areas such that they can be accessed by parliamentarians
- The lack of staff makes it exceptionally difficult for parliamentarians to provide substantive input into draft legislation proposed by the government, let alone draft legislation of their own

## Transparency and accountability

- Currently, the lawmaking process is opaque with only initial drafts of introduced bills and adopted bills being made public
- There needs to be an online, publicly-available, and searchable database of draft legislation

# LAWS ADOPTED BY PARLIAMENT 2011-PRESENT\*

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## Government Processes, Elections, and Budget

- Amyotha Hluttaw Election Law Amendment Law (2010)
- Anti-Bribery Bill (2012)
- Anti-Corruption Bill (2012)
- Bill to amend the Constitutional Tribunal of the Union Law (2013)
- Community Governance Law (2012)
- Disabled and Died or Fallen Tatmadawmen's Family Aid Law (2012)
- Election Commission Bill (2012)
- Families of Disabled or Deceased Soldiers Supporting Act (2012)
- Law Amending the Commercial Tax Law (2011)
- Law Amending the Division Regional or State Parliament Election Law (2011)
- Law Amending the Income Tax Law (2011)
- Law Amending the Myanmar Stamp Act (2011)
- Law Amending the Office Tax Act (2011)
- Law Amending the People's Parliament Election Law (2011)
- Law Amending the Registration of Political Parties Law (2011)
- Law Revoking the Foreign Relations Act (2012)
- Law Revoking the Public Welfare Services Protection Act (2012)
- Law Revoking the Revenue law (2011)
- National Parliament Election Law (2011)
- Pyithu Hluttaw Election Law Amendment Law (2012)
- Region or State Hluttaw Election Law Amendment Law (2012)
- Supplementary 2012-13 Union Budget Law
- Union Attorney General Law Amendment Law (2012)
- Union Auditor General Law Amendment Law (2012)
- Union Budget Law 2012 (2012) Union Election Commission Law Amendment Law
- Ward and Village Administration Amending Act (2012)
- 1955 Government Housing (Expelling) Act Amendment Law
- 2012 Supplementary Union Budget Allocation Law
- 2012-2013 National Planning Bill (2012)
- Law Revoking the 1964 Law Defining the Fundamental Rights and Responsibilities of the People's Workers (2011)
- Law Revoking the Law Defining the Fundamental Rights and Responsibilities of Public Workers
- Law Revoking the Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Oppositions
- Labor Organization Law (2011)
- Labor Union Law (2011)
- Peaceful Demonstration and Peaceful Grouping Law (2011)
- Repeal of Unlawful Associations Act (2012)

## Civil and Political Rights

- Amendments to Ward or Village Tract Administration Act (2012)
- Appeal of Forced Labor Law (2012)
- Labor Disputes Settlement Act (2012)

\*These are limited to those available in English-language sources and bills adopted by one or both Houses of Parliament



# LAWS ADOPTED BY PARLIAMENT 2011-PRESENT\* *(CONTINUED)*

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## Foreign Investment, Trade, and Development

- Foreign Currency Expenditure Law
- Foreign Investment Law (2012)
- Import-Export Law
- Law Revoking the Myanmar Five Star Shipping Line Corporation Law (2012)
- Major Commodity and Service Law (2012)
- Microfinance Law (2011)
- Trade Disputes Act (2012)

## Land and Environment

- Consideration of Adopting International Land Mine Treaty (2012)
- Environmental Conservation Act (2013)
- Environmental Law (2012)
- Farmland Act (2012)
- Law Revoking the Land Confiscation (Mines) Act
- The Vacant, Fallow and Virgin Lands Management Law (2012)

## Judiciary

- Revisions to Prisons Act of 1894 (2012)
- Law Amending the Court Fees Act (2011)

\*These are limited to those available in English-language sources and bills adopted by one or both Houses of Parliament

# LAWS REPORTEDLY BEING CONSIDERED BY THE PARLIAMENT

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## Government Processes, Elections, and Budget

- Amyotha Hluttaw Election Law Amendment Law
- Amyotha Hluttaw Office Law
- Civil Servants Law
- Emolument, Allowance, and Privileges of Region/ State Officials Amendment Law
- Law Enforcement Officers Protection Act Amendment Law
- Law on Recalling a Hluttaw Representative
- Law Revoking the 1933 Municipal Law
- Limitation Act Amendment Law
- NGO Law (to amend the 1988 Law Relating to Forming of Organizations)
- Public Property Protection Act (1947)
- Region/State Hluttaw Law
- Repeal of Custodian of Moveable Property Act (1945)
- Republic of the Union of Myanmar National Races Affairs Law
- State Law and Order Restoration Council Law No. 11 (1990)
- Union Citizenship Act (1948)
- Union Citizenship (Election) Act (1948)
- 1950 Emergency Act Amendment Law

## Foreign Investment, Trade, and Development

- Duties and Rights of the Central Committee for the Management of Culturable Land, Fallow Land, and Waste Land (1991)
- Highways Law (2000)
- Myanmar Central Bank Law
- Myanmar Citizens Investment Law (1994)
- Securities Exchange Law
- Telecommunications Law
- Thilawa Special Economic Zone Laws

## Land and Environment

- Amendments to the 1994 Mining Law (2013)
- Draft Amendments to Transfer of Property Act (2013)
- Environmental Conservation Act (2013)
- Law Revoking the State Agricultural Produce Dealing Board Act
- Natural Disaster Management Law

## Judiciary

- Amendments to Civil Procedure Law
- Contempt of Courts Amendment Law
- Contempt of Court Law
- Penal Code Amendment Law
- Union Judiciary Law Amendment Law

## Civil and Political Rights

- Myanmar Language Commission Law
- 2012 Minimum Wage Law

## Education

- Higher Education Bill
- Profession and Capacity Building Law
- 2012 Basic Education Law
- 2012 Education Research Law
- 2012 Examination Board Law
- 2012 University Education Bill

# MYANMAR IS A STATE PARTY TO A NUMBER OF INTERNATIONAL TREATIES

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## Treaties

- Convention Against Corruption (UNCAC)
- Convention on the Elimination of Discrimination Against Women (CEDAW)
- Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG)
- Convention on the Rights of the Child (CRC)
- Convention on the Rights of Persons with Disabilities (CRPD)
- Geneva Conventions I, II, and III
- ILO Forced Labour Convention, 1930 (No. 29)
- ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No.87)



- There remains a substantial gap between the treaties signed by the Myanmar government and the implementation of rights protected by the treaties in practice
- The Myanmar government has performed no assessment regarding the compatibility of existing Myanmar law with its obligations under international law
- The Myanmar government would benefit from becoming a party to additional treaties such as
  - International Covenant on Civil and Political Rights (ICCPR)
  - International Covenant on Economic, Social, and Cultural Rights (ICESCR)
  - Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment (CAT)
  - Geneva Convention IV (Related to Rights of Civilians in Armed Conflict)

# RELATIONSHIP WITH INTERNATIONAL LABOUR ORGANISATION (ILO)

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- Over the last six years, more than 2,300 complaints of forced labor have been filed with the ILO Office in Myanmar
- In the wake of 13 years of sanctions imposed on Myanmar for violations of the Forced Labour Convention, the new government entered into a MOU with the ILO with detailed action plans for the Ministries of Agriculture, Defense, Foreign Affairs, General Affairs, Home Affairs, Information, Labor, as well as the Union Attorney General's Office and Supreme Court
- The ILO reports there is senior-level commitment as well as extensive collaboration and cooperation
- Numerous new laws have been adopted, including the Dispute Settlement Act, creating a new mechanism of panels to assist with mediation, conciliation, and arbitration



- There remains a gap between the ability of government officials to understand the problems versus their capability to drive reform into government bureaucracies
- Certain government ministries are more collaborative and engaged such as the Ministry of Labor – others much less so
- A positive challenge is keeping up with the interest of the government in moving reform efforts forward



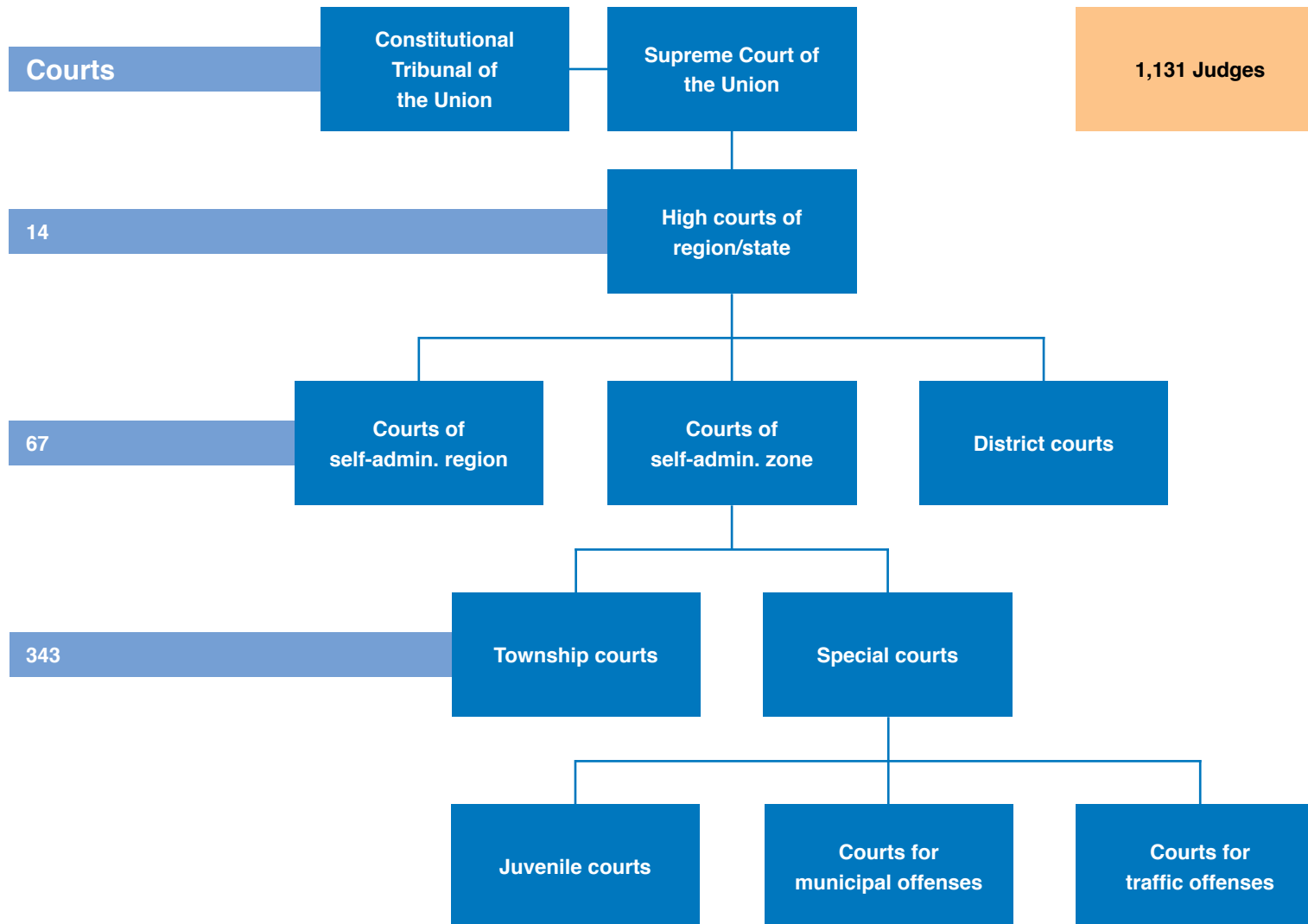
# EXISTING LAWS REPORTED AS INCOMPATIBLE WITH MYANMAR'S INTERNATIONAL LAW OBLIGATIONS\*

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- Sections 143, 145, 152, 505, 505 (b) and 295A of the Penal Code
- The Act to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts (1975) (known as the State Protection Act)
- Citizenship Act (1982)
- The Code of Criminal Procedure
- The Computer Science Development Law (1996)
- The Electronic Transactions Law (2004)
- The Emergency Provisions Act (1950)
- The Law Relating to Forming of Organizations (1988)
- The Motion Picture Law (1996)
- The Official Secrets Act (1923)
- The Printers and Publishers Registration Act (1962)
- The Television and Video Law (1985)
- The Unlawful Associations Act (1908)
- The Wireless Telegraphy Act (1933)

\* According to reports by UN Special Rapporteur on Human Rights in Myanmar, Tomás Ojea Quintana , and other reputable international observers – some laws have been amended. However, concerns have been expressed regarding some of the revised legislation and the lack of adequate consultation with relevant stakeholders including civil society.

# JUDICIARY – STRUCTURE



Source: Supreme Court of Myanmar

# JUDICIARY – ILLUSTRATIVE CONCERNS

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## Independence

- The President appoints judges, controls financing of the court system, and may have the power to dismiss lower court judges – the parliament also has substantial power on financing and impeachment of judges
- There is no independent process for appointing lower court judges – they are selected by government-appointment processes that are the same for appointing civil servants

## Change of culture

- Under the martial law, it was reported widely that judges carried out instructions they were given in any sensitive case without having to provide an explanation for their conduct
- While some constitutional and legal reforms could advance an independent judiciary, judges themselves need to shift to a culture where they are expected to adhere to the rule of law and explain in written rulings the reasoning for their decisions

## Training

- There is a judicial training in Hlaing Tharyar township where courses are run by the Supreme Court
- Substantial additional training programs for judges, including building on those provided by international agencies would be highly valuable

## Anti-corruption measures

- It was reported widely in consultations with civil society and lawyers that the judiciary is viewed as highly susceptible to corruption
- In addition to considering an increase of judicial salaries, reporting mechanisms and enforcement actions should be taken by the Supreme Court

# CRIMINAL DEFENSE AND LEGAL AID

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- There was a consensus view outside the Myanmar government that after some 50 years of military control, the people of Myanmar have come to see the law as a tool of repression rather than as something which stood as a safeguard to their fundamental rights and freedoms
- Given the historical lack of independence of the judicial system, no governmental resources were invested to provide counsel to criminal defendants except as required in death penalty cases (indeed, few bothered to obtain counsel) and it was viewed that there was no purpose in providing a system of legal aid for the poor



- Any system where the rule of law prevails must provide at least the most basic of support for criminal defendants without resources to obtain counsel and for the poor to obtain legal services
- Changing the perceptions of the people of Myanmar about the legal system will require meaningful investment to develop a criminal defense and legal aid system



# CRIMINAL DEFENSE – ILLUSTRATIVE CONCERNS

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## Basic laws require reform

- Major overhaul of the criminal law and criminal procedure law is needed
- Harsh national security laws that have been used historically against political opponents of the military government require abolition or serious reform

## No public defender system

- While the Constitution provides a right to counsel, unless a criminal defendant faces the death penalty, there is no financial support to hire a lawyer
- There is a consensus view outside government of the need for a vigorous independent criminal defense system for poor defendants

## Broader system needs reform too

- Under the current system, the conviction rate for criminal defendants is reportedly very high (some private lawyers estimated 90-95 percent) – convictions are based almost exclusively on confessions and police testimony
- Without substantial judicial and prosecutorial training, merely providing counsel to defendants will have little effect

## Near-term fixes

- Building a vigorous criminal defense system is going to take a lot of time and resources – in the interim, private lawyers emphasized the need for:
  - Basic educational materials for criminal defendants
  - Increasing paralegal programs that could broaden access to legal support for criminal defendants more quickly
  - Greater monitoring of criminal trials and reporting of statistics

# CHARACTERISTICS OF A CREDIBLE LEGAL AID SYSTEM

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## Accessible

- Everyone who is poor and qualifies must be able to receive legal aid – and it must be available beyond large cities

## Affordable

- Must be supported by a serious budget

## Sustainable

- Must be in national budget, thereby signaling a clear commitment to the rights of the poor

## Credible

- People need to trust the system – thus, it should have an independent statutory authority

## Accountable

- It must be operated under sound business principles and transparent accounting



# LEGAL PROFESSION: BAR ASSOCIATION – ILLUSTRATIVE CONCERNS

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## Not independent

- Under the military regime in the country, the Bar Association was a tool for repression controlled by the government – it continues to be controlled by the government and that is not going to change under a proposed bill to amend the Bar Council Act
- More than 1,000 lawyers have suffered reprimands, suspensions, and disbarments in last 20 years, primarily for actions taken viewed as opposing the government – hundreds of lawyers remain disbarred, though there have been some recent reinstatements

## Qualifications processes suspended

- Previously, there were multiple levels of qualifications for lawyers to practice and later appear before courts in Myanmar – those qualifications systems and oversight of legal practice were suspended many years ago
- In addition to the generally low quality of legal education in Myanmar, the Bar Association currently provides no quality control regarding the qualification of lawyers and monitoring and disciplining of their conduct

## Few quality lawyers

- While there are an estimated 8,300 advocates (barristers) and 39,700 higher-grade pleaders (solicitors), substantially few are believed to be practicing or capable of practicing law in a high-quality manner

## Profession in disarray

- According to private lawyers, the state of practice for lawyers in Myanmar is truly dismal – with most qualified lawyers in the country not practicing law and those who practice lacking access to sufficient office space, basic legal materials, computers, and printers

# LEGAL PROFESSION: LEGAL EDUCATION – ILLUSTRATIVE CONCERNS

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## Demographics

- There are only 200-300 law graduates annually across Myanmar
- Qualifications required to be admitted to law school are lowest among all professions

## Quality of education

- The quality of education provided to law students is very low (e.g., Union Attorney General assumes newly-hired lawyers for his office have no sufficient legal education prior to entering their six-month training program)
- It is reported that students are mostly taught to memorize and repeat very basic information required for graduation and the Bar examination

## Curriculum

- The curriculum for legal education in the country requires major reform (e.g., University of Yangon does not provide undergraduate training for law students in domestic civil or criminal law nor is there any clinical legal education)

## Organization

- Law programs are not independent schools or faculties within universities
- Oversight and funding for legal education is provided by the Ministry of Education, which has not prioritized legal education programs

## Strategy

- The Ministry of Education, which is undertaking a sectorial review of education overall, has to prioritize investment in legal education and develop a serious strategy for overhauling the entire system
- There is a strong international desire among law schools, law firms, and lawyers to assist in improving legal education in Myanmar, but the Ministry needs to enable law programs to accept this assistance easily



# ACCESS TO INFORMATION

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- A prerequisite to advancing law reform efforts in any particular area of concern is having a basic understanding of relevant domestic laws, regulations, orders, and judicial opinions
- Furthermore, it is critically important both for the people of Myanmar and institutions worldwide to be able to
  - Access relevant data and related information to inform law reform efforts
  - Understand proposed changes in real-time to provide an opportunity to have input into reform efforts
- There was strong consensus that legal research is exceptionally difficult and that basic data is unavailable

## Implications

- **Legal Database** – there is an urgent need to build a publicly accessible and searchable database of laws, regulations, orders in both Burmese and English – the Union Attorney General agrees this is a priority need and is prepared to provide the relevant materials and options for moving forward on this project are being explored. However, support of the Supreme Court is needed to include judicial opinions.
- **Parliamentary Database** – the creation of a database to catalog introduced legislation and track its development will be extremely important
- **Freedom of Information Act** – given the historical unwillingness of the prior government to provide access to basic information, having a mechanism for ordinary people to obtain basic governmental information would help facilitate transparency and accountability in government operations



# SUMMARY OF RECOMMENDATIONS

Area of Concern	Recommendations
<b>Constitution</b>	<ul style="list-style-type: none"> <li>The Myanmar government should <b>initiate a process to review and amend the Constitution</b>, providing opportunities for the opposition, civil society, and the Myanmar people to address such concerns as the process for amending the constitution; office holder qualifications; basic rights; independence of the judiciary; impunity; ethnic minority issues; and military coups</li> </ul>
<b>Union Attorney General's Office</b>	<ul style="list-style-type: none"> <li>The Union Attorney General's Office should develop a <b>strategic plan</b> to broaden its international law and legislative drafting expertise; expand its support to other government ministries; and focus its activities in the areas of greatest need</li> </ul>
<b>Ministry of National Planning and Economic Development</b>	<ul style="list-style-type: none"> <li>The Ministry should develop a <b>strategic plan</b> to focus and sequence its reform efforts over time</li> <li>The Ministry should focus on <b>advancing key laws</b> up front such as those on government contracting, procurement, privatization, and land tenure</li> </ul>
<b>Myanmar National Human Rights Commission</b>	<ul style="list-style-type: none"> <li>The Myanmar government should <b>adopt MNHRC's enabling legislation</b>, including provisions for funding, independent appointments, broadening investigation powers, providing powers to represent victims in courts, and authority to determine compensation</li> <li>The MNHRC should <b>launch a web site</b> with an online complaints process</li> </ul>
<b>National Parliament</b>	<ul style="list-style-type: none"> <li>The Parliament should obtain <b>funding for building out its capacity</b>, including expert staff and its own independent legislative drafting capability</li> <li>The Parliament should create a <b>more defined committee structure</b> and <b>explain its rules</b></li> <li>The Parliament should provide <b>open access to the public at large</b> to its activities</li> </ul>
<b>Judiciary</b>	<ul style="list-style-type: none"> <li>In cooperation with the Executive branch, the Judiciary should develop a system for appointing judges through <b>independent selection panels</b></li> <li>The Judiciary should develop and implement a <b>comprehensive re-training program</b> for all judges</li> <li>The Judiciary should develop a <b>program to address corruption</b></li> </ul>

# SUMMARY OF RECOMMENDATIONS

Area of Concern	Recommendations
<b>Criminal defense and legal aid</b>	<ul style="list-style-type: none"> <li>Working collaboratively with lawyers and civil society, the Myanmar government should develop a <b>strategic plan for instituting a national criminal defense and legal aid system</b>, including intervening measures to provide immediate assistance to those who require it</li> </ul>
<b>Bar Association</b>	<ul style="list-style-type: none"> <li>The Myanmar government should <b>allow the Bar to become an independent self-governing body</b></li> <li>The Bar should develop a <b>strategic plan</b> for assuring quality control for existing lawyers and developing a new and fair system for qualifying and licensing lawyers</li> </ul>
<b>Legal education</b>	<ul style="list-style-type: none"> <li>The Ministry of Education should <b>prioritize government investment in legal education</b>, develop a <b>national strategy to rebuild legal education</b>, and facilitate <b>easy collaboration between international actors and law schools</b>. Legal education for members of parliament (national and regional) and ministry staff should also be prioritized.</li> </ul>
<b>Access to information</b>	<ul style="list-style-type: none"> <li>The Myanmar government should build a <b>publicly accessible and searchable database of laws, regulations, orders, and judicial opinions in both Burmese and English</b></li> <li>The Myanmar government should <b>amend the current laws prohibiting sharing of draft legislation</b> and the Parliament should create a <b>database of proposed legislation</b></li> <li>The Myanmar government should adopt a <b>Freedom of Information Act</b>, providing a mechanism for people to access government information</li> </ul>

# MYANMAR RULE OF LAW ASSESSMENT

## Objective

- Present findings and recommendations resulting from Myanmar rule of law assessment

## Approach

- Review project approach and summarize opportunities and challenges
- Present framework for analysis and areas of focus
- Detail major findings and recommendations
- Present outstanding questions
- Discuss next steps



# OUTSTANDING QUESTIONS – HOW TO ACHIEVE THE FOLLOWING?

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## Focus

- As is clear from this presentation, which itself covers only several major areas of endeavor, what has been initiated in Myanmar is extraordinary
- That said, sustaining law reform will require focusing and sequencing the range of activities now being undertaken simultaneously

## Building domestic capacity

- Given Myanmar's recent history, there is huge need to advance the capacity of government institutions, civil servants, politicians, media, civil society, and range of other private actors
- Any major investment by the international community in advancing the rule of law should have a major capacity-building component to it

## Absorbing international support

- The direct consequence of the lack of domestic capacity is the country's limited ability to absorb international support, especially at the pace at which it is and will be offered
- The international community should focus in the near-term on building capacity of local people to bridge the divide between domestic institutions and people and the international community

## Impacting the population

- Despite major reforms underway, there remains a substantial gap between the promise of reform and its implementation
- It is important, particularly in the area of law reform, that all the people of the country, particularly outside urban areas see and feel the difference the reform process is making



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# NEXT STEPS

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- Through this needs assessment, we have identified a consensus perspective on the highest-priority reforms that are required
- The needs are both broad and deep – thus, we are ultimately going to select only one or two narrow areas where our skills and capabilities best match local needs
- We have also identified a range of prospective partners on the ground who are best equipped to absorb the kind of capacity that Perseus Strategies and New Perimeter are capable of offering
- We have initiated discussions with prospective local partners about projects and anticipate being able to move forward in the coming months



# ABOUT THE ASSESSMENT TEAM

	<p>New Perimeter (<a href="http://www.newperimeter.com">www.newperimeter.com</a>) is a non-profit organization established by global law firm DLA Piper to provide pro bono legal assistance primarily in the developing and post-conflict world. Its mission is to provide long-term, high-impact pro bono legal support to qualifying non-profit organizations, governments and academic institutions primarily in developing and post-conflict regions. New Perimeter draws on the skills and talents of more than 4,200 DLA Piper lawyers globally.</p> <p>Contact: Kristen Abrams, International Pro Bono Counsel  <a href="mailto:kristen.abrams@dlapiper.com">kristen.abrams@dlapiper.com</a>  +1 (202) 799-4355</p>
	<p>Perseus Strategies (<a href="http://www.perseus-strategies.com">www.perseus-strategies.com</a>) is a law and consulting firm which focuses on corporate social responsibility, human rights, and humanitarian projects. Our mission is to have a positive impact on the world, to help our clients achieve breakthrough results addressing their toughest challenges, and to build a great firm that attracts and develops extraordinary people.</p> <p>Contact: Jared Genser, Managing Director  <a href="mailto:jgenser@perseus-strategies.com">jgenser@perseus-strategies.com</a>  +1 (202) 320-4135</p>
	<p>Since it was established in 1971, the Jacob Blaustein Institute for the Advancement of Human Rights (<a href="http://www.jbi-humanrights.org">www.jbi-humanrights.org</a>) has aimed to narrow the gap between the promise of the Universal Declaration of Human Rights and all other international human rights agreements and the realization of those rights in practice. JBI served as a partner and funder for the rule of law assessment.</p> <p>Contact: Marra Guttenplan, Advocacy/Editorial Officer  <a href="mailto:guttenplanm@ajc.org">guttenplanm@ajc.org</a>  +1 (212) 891-6744</p>





APPENDIX

# MYANMAR CONSTITUTION – ILLUSTRATIVE CONCERNS

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## Amending of constitution

- Under Articles 109/141/161(d), the military appoints 25 percent of the seats in the upper and lower houses of parliament nationally and in state and regional parliaments
- The military has the de facto right to veto any proposed constitutional amendment given approval of any amendment requires support from more than 75 percent of both houses of parliament

## Independence of judiciary

- The President or the Parliament can impeach justices of the Supreme Court for a wide range of offenses, including under overbroad provisions such as no longer being loyal to the Union or violating any provision of the Constitution

## Office holder qualifications

- Under Article 59(f), Aung San Suu Kyi would be ineligible to be elected President because her sons (“legitimate children”) are foreign nationals (“owe allegiance to a foreign power”)
- Under Article 120, no one who was in exile and has returned to the country can be elected to the parliament until they have resided for 10 years consecutively in the country

## Basic rights

- There are numerous “exception clauses” in the Constitution to fundamental rights and freedoms
- Under Article 354, for example, the rights to freedom of expression, association, and assembly are guaranteed, but only if “not contrary to the laws enacted for Union security, prevalence of law and order, community peace and tranquility, or public order or morality”
- In short, this provision reverses the ordinary superiority of constitutional rights over enacted laws, thereby preserving a range of harsh laws enacted by the SLORC and SPDC – while ultimately some of these laws are being suspended, revoked, or revised, the Constitution does not provide a check to infringement by the Executive and Legislative branches of government on fundamental rights and freedoms

## Impunity

- Article 445 provides no legal action can be taken against SLORC and SPDC members who carried out their official duties “according to their responsibilities,” thereby providing immunity for all acts taken by members of the previous military governments
- Under Article 20(b), there is no oversight to the military’s actions as it “has the right to independently administer and adjudicate all affairs of the armed forces”

## Ethnic minority issues

- Under Article 261, Chief Ministers of each region or state are appointed by the President
- Under Article 37(a), the national government owns all land, including above and below land rights and (b) provides that the state shall enact laws to supervise extraction of natural resources – such substantial resources are underground in ethnic minority areas

## Military coups

- Under Articles 410/414(b), the President may unilaterally declare a “state of emergency” and, for unlimited time, “restrict or suspend” any or all fundamental rights of citizens
- In such a situation, under Article 418(a), all the powers of the Executive, Legislative, and Judicial branches are transferred to the Commander in Chief of the Defense Services