



**International Bar Association's
Human Rights Institute**

Submission to the Human Rights Council's Universal Periodic Review

Republic of the Union of Myanmar: 23rd Session – 9 November 2015

1. INTRODUCTION

- 1.1. The International Bar Association's Human Rights Institute (IBAHRI) was established in 1995 to help promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and legal profession worldwide. Lawyers and judges play a fundamental role in facilitating access to justice, ensuring accountability of the state and upholding the rule of law. When the legal profession is not able to function independently or effectively, this gives rise to human rights violations, impunity and injustice.
- 1.2. The IBAHRI is working directly with lawyers, government and members of parliament in Myanmar to improve their capacity to advocate for the promotion and protection of human rights in the administration of justice. Fundamental to improving the human rights situation in Myanmar will be to ensure the justice system provides due process for rights holders and allows lawyers and judges to do their work independently and without fear of influence, harassment or intimidation.

2. METHODOLOGY

- 2.1. In 2012 the IBAHRI sent a high level delegation to Myanmar to undertake a fact finding mission on the state of the rule of law and human rights. Following this mission, through a legal specialist based in country since January 2014, the IBAHRI has conducted research in all 14 states and regions of Myanmar on the status of the legal profession, and has undertaken activities focused on enhancing the independence of lawyers. The information and recommendations in this submission are based on:
 - the conclusions of the fact finding mission to Myanmar in August 2012;
 - interviews with lawyers from 23 lawyers' associations and groups in all 14 states and regions during 2014; and
 - discussions between IBAHRI personnel and members of government, the judiciary and parliament during meetings, seminars and workshops from January 2014 to March 2015.

3. NORMATIVE FRAMEWORK

A. Scope of international obligations

3.1. Myanmar is a party to three of the core human rights treaties: the Convention on the Rights of Persons with Disabilities; the Convention on the Rights of the Child; and the Convention on the Elimination of All Forms of Discrimination Against Women. Myanmar is still to ratify many other human rights treaties, including the International Covenant on Civil and Political Rights, which provides important guarantees for effective and timely access to justice and legal remedies for violations of human rights, and the Convention Against Torture, which provides essential protection for the safety and rights of accused persons.

Recommendation 1:

- (a) ratify all human rights treaties to which it is not already a party, particularly the International Covenant on Civil and Political Rights and the Convention Against Torture as well as their Optional Protocols;
 - (b) incorporate all international obligations into its domestic laws; and
 - (c) seek financial support from the international community and allocate sufficient resources within the annual budget for the implementation of its international human rights obligations.
- 3.2. Public awareness in Myanmar about human rights, the justice system and the role of lawyers is in general very poor. This lack of awareness inhibits people's ability to advocate for their rights or to seek remedies for violations of them.

Recommendation 2:

Promote public awareness about international human rights law and the legal avenues available for defending those rights, including those provided for by the United Nations (UN) human rights mechanisms.

B. Constitutional and legislative framework

Legislative reform process

3.3. As noted by the Special Rapporteur on the situation of human rights in Myanmar (A/69/398, [72]), Myanmar's legislative process lacks transparency and consistency. Often laws are drafted in private, and they are not made public until they have reached parliament.¹ There is little scope for civil society input into law reform; public consultation has only been offered as a reaction to vocal criticism of draft laws by lobby groups in select cases. The failure to allow for genuine public input in the legislative reform process has in many cases resulted in draft laws that do not meet international standards or the needs of the people.²

¹ Opposition Leader Daw Aung San Suu Kyi told the IBAHRI fact finding mission in 2012 that draft bills are marked 'Secret' and sharing them would be in contravention of the Official Secrets Act: IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (IBAHRI December 2012) 43.

² Examples include the Association Registration law and the Media laws, both of which were later revised after vocal and persistent criticism from civil society.

Recommendation 3:

In line with the recommendation of the Special Rapporteur on the situation of human rights in Myanmar (A/69/398, [85]), establish and publicise a national legislative reform process with clear timelines, greater coordination, transparency, consistency and clarity, and inclusive public consultation that allows for genuine input from lawyers and civil society.

Reform of the legislative framework regulating the legal profession

- 3.4. The Constitution of the Republic of the Union of Myanmar 2008 (the 'Constitution') establishes separation of powers between the executive, legislature and judiciary (Article 11) and guarantees equal rights before the law and equal legal protection to 'any person' (Article 347). It also prescribes the following as judicial principles: to administer justice independently according to law; to dispense justice in open court unless otherwise prohibited by law; and to guarantee in all cases the right of defence and the right of appeal under law (Article 19).
- 3.5. These guarantees of effective access to justice are restricted by laws that diminish the independence of the legal profession and the ability of lawyers to freely represent their clients, particularly in cases involving allegations of human rights violations. The laws that currently regulate the legal profession in Myanmar allow the executive and judiciary unchecked power to suspend or revoke lawyers' practising licences. Standards of professional conduct are unclear, and the rules and procedures for disciplinary proceedings lack due process.
- 3.6. The Bar Council is the body responsible for regulation of advocates, Myanmar's most senior lawyers with jurisdiction to appear in the country's highest courts. Under amendments to the Bar Council Act 1929, made in 1989 to give government more control over lawyers, the Bar Council is composed solely of government officials, members of the judiciary and a small number of court-appointed advocates. Under the Legal Practitioners Act 1880, 'pleaders' (lawyers entitled only to practise in subordinate courts) are regulated directly by the courts, in which judges' decisions remain susceptible to political influence. The laws governing disciplinary proceedings for both advocates and pleaders fail to clearly define the rules for professional conduct against which complaints will be judged, or to set out a clear and fair process for making, investigating, hearing and defending complaints.
- 3.7. The legislative framework for regulation of the legal profession in Myanmar has allowed government to arbitrarily punish lawyers representing clients in politically sensitive cases. Over 1,000 lawyers have been reprimanded, suspended or disbarred under these laws.³ While this practice has diminished significantly in recent years, the threat remains as long as the laws are in place. Many lawyers report they still feel intimidated by the power the government retains. This can have an effect on the kinds of legal services they are prepared to deliver, which can in turn limit access to justice for victims of human rights violations.

³ IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects* (IBAHRI December 2012) 63.

- 3.8. In June 2013, following a call from the Special Rapporteur on the situation of human rights in Myanmar to ‘[e]stablish a strong and independent bar council’ (A/HRC/22/58, [95(d)]), the Union Attorney-General’s Office advertised in a local newspaper an amendment to the Bar Council Act, seeking public comment. The proposed amendment improves the current situation by reinstating positions for a majority of elected independent lawyers as members of the Bar Council. However, the three most senior officials from the Union Attorney-General’s Office retain leadership of the Bar Council as its chair, vice-chair and secretary.
- 3.9. The proposed amendment falls short of international standards by failing to ensure that:
- the tribunal investigating complaints against lawyers is independent and impartial and subject to independent judicial review (UN Basic Principles on the Role of Lawyers, Article 28); and
 - ‘charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures’ (UN Basic Principles on the Role of Lawyers, Article 27).

In addition, the proposed amendment does not affect regulation of pleaders, who make up the bulk of the legal profession.

Recommendation 4:

Engage in genuine consultation with lawyers to bring the laws regulating the entire legal profession in line with international standards, including to:

- a) amend the Bar Council Act to transform the Bar Council into a self-governing professional association to defend the integrity and independence of the profession and maintain professional standards, as recommended by the Special Rapporteur on the situation of human rights in Myanmar (A/HRC/25/64, [86(a)]);
- b) reconstitute the Bar Council and any tribunal formed to investigate or adjudicate complaints against lawyers to be independent from government and impartial; and
- c) clearly define the professional standards and disciplinary procedures by which allegations of misconduct will be judged, ensuring they are transparent and provide for due process, a fair hearing and independent judicial review, in compliance with the UN Basic Principles on the Role of Lawyers.

Legal recognition of lawyers’ freedoms of assembly, expression and association

- 3.10. At its first consideration under the Universal Periodic Review (UPR) in 2011, Myanmar accepted Indonesia’s recommendation to ‘take steps to review domestic laws with a view to guaranteeing the right to freedom of expression, association and assembly, including assuring a free and independent media’ (Rec 104.10). To date, Myanmar has not explicitly recognised in law the right of lawyers to freedom of assembly, expression and association as recognised under customary international law for all persons, including lawyers.

Recommendation 5:

Recognise in national legislation the right of lawyers to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights, and to form and join self-governing professional associations to represent

their interests, promote their continuing education and training and protect their professional integrity, in compliance with articles 23 and 24 of the UN Basic Principles on the Role of Lawyers.

Revision of the draft law on legal aid

3.11. Myanmar's Constitution provides that 'every citizen shall enjoy the right of equality, the right of liberty and the right of justice' (Article 21). However, the state guarantees access to legal aid only in cases attracting the death penalty.⁴ In 2013 the Special Rapporteur recommended to 'set up a system of legal aid and establish citizens' advice offices' (A/HRC/22/58, [95(c)]). A draft law on legal aid was submitted to parliament in early 2015. No public consultation was offered during its drafting, and the draft law has been strongly criticised by many local organisations specialising in legal aid advocacy and services, as well as by international experts in legal aid.

Recommendation 6:

Engage civil society, lawyers and relevant experts in consultations to redraft a legal aid law that provides for fair and sufficient access to legal services to the poor and other disadvantaged persons.

4. PROMOTION AND PROTECTION OF HUMAN RIGHTS

A. Cooperation with human rights mechanisms

4.1. Myanmar has cooperated to an extent with the Special Rapporteur on the situation of human rights in Myanmar, but has not accepted visits from other Human Rights Council Special Procedures. As recommended by a number of States during Myanmar's consideration under the UPR in 2011, and by the Special Rapporteur on the human rights situation in Myanmar in 2014 (A/HRC/25/64, [85(e)]), to enhance the independence of the legal sector and thereby increase meaningful access to justice, Myanmar could benefit from the expert advice of the UN Special Rapporteur on the independence of judges and lawyers.

Recommendation 7:

Strengthen cooperation with the Special Rapporteur on the situation of human rights in Myanmar and issue an open invitation to the Special Rapporteur on the independence of judges and lawyers to visit Myanmar.

B. Implementation of international human rights obligations concerning the independence of lawyers and judges

Administration of justice and the rule of law

4.2. In 2011, at its first consideration under the UPR, Myanmar accepted the recommendation to 'continue to improve its domestic legislation and judiciary system to be in line with

⁴ Attorney General of the Union Law 2010, Art 36(1).

international human rights standards and obligations including *intensifying human rights education and training*, especially for its military and law enforcement officers, in order to enhance their awareness and promote greater accountability' (Rec 104.9) [emphasis added].

- 4.3. Tertiary legal education and continuing professional development for lawyers and judges remain at a low standard in Myanmar after decades of neglect and systematic weakening by previous regimes. This has had an adverse effect on the ability of lawyers to provide quality legal advice and services in an ethical and professional manner and to promote public awareness of the law, human rights, and the role of lawyers. Lack of education and training has also diminished the ability of judges to interpret and apply the law in an independent and professional manner.

Recommendation 8:

Reform legal education and continuing legal education by: upgrading curricula, teaching methodology and assessment methods in line with modern international standards; offering compulsory units on legal ethics and human rights in Myanmar universities; and ensuring lawyers and judges have access to appropriate ongoing legal training and professional development, including on international human rights law and the UN human rights mechanisms.

Freedom of expression and assembly

- 4.4. Contrary to the guarantee of freedom of expression, assembly and association in Article 354 of the Constitution, lawyers in Myanmar frequently suffer harassment by government authorities who attend their meetings, documenting proceedings and asking for attendance lists. Many lawyers report they are unwilling to meet with other lawyers to discuss matters relating to the law, justice system and human rights due to intimidation by authorities.

Recommendation 9:

Guarantee the right of lawyers to freely assemble and express their views on matters including the law, the administration of justice and the promotion and protection of human rights and to form and join professional organisations and attend their meetings without harassment, intimidation or professional restrictions.

- 4.5. Many lawyers also report difficulty gaining access to clients awaiting trial and to their files. As a corollary to the criminal defendant's right to a fair trial, lawyers must be given the right to consult freely and confidentially with their clients (UN Basic Principles on the Role of Lawyers, articles 16, 21, 22).

Recommendation 10:

Ensure lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference, and guarantee the right of lawyers to meet with their clients and be given early access to all relevant information, files and documents.

Freedom of association

- 4.6. The government has not granted permanent registration to any independent lawyers' association since 1988, including nine state and regional bar associations which had enjoyed official recognition as registered associations up to that point. The inability of bar associations to register has had the effect of making their activities unlawful, with the Organisations Law 1988 imposing legal penalties on the exercise of the right of association. As a result, most of those bar associations ceased or severely limited their activities, which in turn has had a detrimental impact on the development of the profession and the provision of legal services in all states and regions.
- 4.7. The UN Basic Principles on the Role of Lawyers recognises in its preamble the role of professional associations of lawyers have to play in 'upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest'.
- 4.8. In 2014 the Myanmar parliament abolished the Organisations Law 1988, enacting a new law that places no criminal penalty on unregistered associations and that is expected to make registration easier to achieve. However, the law itself does not set out the process for registration, and the by-laws that do so are pending approval. Until these by-laws are adopted, no new applications for registration can be made.
- 4.9. There are over 20 unregistered professional organisations of lawyers in Myanmar, and the country's first independent national lawyers' association is currently in the process of being formed. Many of these associations have expressed an intention to apply for registration under the new laws, in order to gain a professional and legal identity and recognition from government as legitimate organisations.

Recommendation 11:

Immediately adopt clear, reasonable and efficient rules and procedures for registration of associations, and ensure all professional organisations of lawyers who apply under those rules are granted registration in a timely manner.