



## Judicial Corruption as a Violation of Human Rights in Myanmar

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### ABSTRACT

Corruption is a global problem which occurs in every society and its causes, forms and impacts are diverse and multi-faceted. The government, its officials and agents including all individuals are accountable under the law. Although the Myanmar government has acknowledged and tried to build a just and fair government, many people in Myanmar have experienced an incident of bribery or other form of corruption in the judicial sector. Justice should be administered by a competent, impartial and independent judicial institutions. Corruption is not an isolated crime. In the judicial sector, the corrupt conduct of all judicial actors, including the prosecuting body, has directly damaged the consequences on the functions of judicial institution, in particular on the administration of justice. It decreases public trust in justice and affects judicial systems to guarantee the protection of human rights. Society accepts that when there is corruption, human rights disappear. Violated rights vary from one another by a different way of corrupt conduct. Common violated rights include equality before the law and fair trial rights, especially, judicial independence and impartiality. To prevent corruption in every sector including the judicial sector, the government of Myanmar is taking action upon the corruption not only by Anti-Corruption Law but also other related laws. However, some of these cases can be taken action and judicial corruption still exists in the country. Therefore, it is important to identify the impact and consequences of judicial corruption. The purpose of the paper is seeking to contribute to strengthening the judicial system as well as ensure an adequate accountability mechanism.

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## Introduction

Corruption occurs in all countries, both developed and developing, as well as in the public and private sectors. It is an impediment, especially in Myanmar, to the process of economic development, human rights, sustainable development and rule of law. According to the 2019 *Corruption Perception Index* of Transparency International (2019), Myanmar ranked 130<sup>th</sup> on the index out of 180 countries, down two places from 2018. In the World Bank's 2016 *Enterprises* survey of Myanmar people faced corruption in Myanmar when requesting a construction permit, securing a government contract and in meetings with tax officials (Lin, 2019). Among the various types of corruption in the country in political, administrative and judicial fields, the Anti-Corruption Commission *Annual Report 2018* puts administrative corruption as the highest, and judicial sector is the fourth highest sector of corruption. According to the data collection from the Myanmar Anti-Corruption Commission (ACC), the ACC received 24,604 complaints during the period of 2014 to 2019. Among them there were 3,764 complaints of judicial corruption, but the ACC prosecuted only 51 corruption cases to the relevant courts by taking legal action, and 44 cases were referred to the departments concerned. Since Myanmar is undergoing democratic transition,<sup>3</sup> anti-corruption has become a national priority and the government has implemented an anti-corruption framework.

Judicial corruption occurs in many forms in or around the courtroom such as bribery, extortion, influence peddling, and nepotism (Schultz, 2009; United States Agency International Development, 2009). In Myanmar's judicial sector, it is not only judges, lawyers, prosecutors and other office staff, but also police officers as the prosecuting actors who are responsible for accessing justice all without corruption. Moreover, it is expected that the judiciary shall be competent, impartial and independent. The courts are essential to address corruption effectively, but judicial institutions are themselves corruptible under according to the 2018 and 2019 Reports of Myanmar Anti-Corruption Commission.

Corruption not only undermines the courts' credibility as corruption fighters, it affects the public's trust in judicial impartiality. It harms all the core judicial functions such as

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<sup>3</sup> This paper was written before the events of the February 2021 Coup in Myanmar

decision making, law enforcement, protection of rights, accountability, securing the integrity of and sanctioning representatives of other branches when they make in contraventions of the law. It impacts the rule of law system and the whole trial procedure as well as destroys the ethics and morality of people. Although judicial body personnel must decide cases in accordance with laws, they have discretionary powers to decide cases, and this is where miscarriage of justice occurs due to the four elements of prejudice: greed, anger, fear and delusion.

This research paper is intended to identify the gaps between the procedures in laws and implementation in practice by the judiciary. It will do so by providing an overview of the current status of corruption according to the reports of the main bodies, both national and international, assessing corruption in Myanmar, and complement this overview with first-hand accounts from key stakeholders in the Myanmar court system. The research will thus provide a view of corruption from both outside and inside the system. By doing so an understanding can be reached on how corruption operates, what are the main impacts of corruption on the judiciary, and what human rights are violated due to the judicial corruption in Myanmar. In particular, the question of how judicial corruption impacts access to justice, and the how corruption can be understood as a violation of Human Rights.

## **Research Methodology**

In the current situation of the Judiciary system in Myanmar, corruption is accepted as complex and sensitive issues. To discuss issues and findings, the research applies with a mixed methodology. The paper uses a number of secondary sources such as, firstly, a review of reports based on research of Transparency International, Myanmar Anti-Corruption Commission and Myanmar National Human Rights Commission to gain an overview of corruption in Myanmar. This is complemented by a legal analysis of the definition of corruption based on international conventions, such as United Nations Convention Against Corruption, and the International Covenant on Civil and Political Rights (ICCPR) and national laws such as 2008 Constitution of the Republic of the Union of Myanmar and Anti-Corruption

Law 2013. Thirdly, cases of judicial corruption in Myanmar that were prosecuted by Myanmar Anti-Corruption Commission between 2014 and 2019, based on the data of official website of the ACC, are analyzed to understand both the nature of corruption and how counter corruption operates.

(a) Primary Data Collection

In this research primary data is collected through key-informant interviews with professionals and independent experts on the judicial system and judicial corruption. Field research was carried out between May and June 2020 in Yangon and Mawlamyine in Mon State. The research questions involved exploring perceptions and experiences of the professional and independent experts for anti-corruption and human rights. The interviews are conducted using the semi-structured questionnaires and were carried out with professionals including judges, law officers,<sup>4</sup> practicing lawyers, and independent experts. Interviews and primary data collection were conducted in Yangon Region and Mon State. In Yangon Region, interviews were carried out by phone and messenger. In Mon State, phone and face to face interviews were conducted. Interviews took on average 30 minutes. In parallel, data collections for judicial corruption cases were activated in the Yangon Divisional Court, the High Court of the Sagaing Division and the High Court of the Mon State. Some conversations were audio-recorded and some were recorded through note-taking with the consent of the interviewees and the English translations were transcribed. Once the data files were cleaned and put into a common format, the analysis commenced with a close reading of the text. After each data collection and interviews, the researchers reviewed and summarized the data and interviews. The researchers also analyzed relevant information and data from the annual reports and the official website of these two commissions as a secondary source. The qualitative case data were recorded within a matrix and analyzed, and corroborated with interview data from professional and independent experts as well as supported through literature review.

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<sup>4</sup> Law Officers are also known as Prosecutors

(b) Sampling

The researchers chose two regions/divisions and one state for data collection. The researchers select the Yangon and Sagaing Divisions because these two divisions have a higher rate of corrupt conduct than other divisions based on the data that provide in the official website of the Myanmar Anti-Corruption Commission (<https://www.accm.gov.mm/acc>). Mon state is the higher rate of corrupt conduct of police officers than the other states according to the data of Myanmar Anti-Corruption Commission (<https://www.accm.gov.mm/acc>). The researchers interviewed individuals based on professional and independent experts who can freely and actively contribute to the achievement of research objectives. The researchers believed they could explore challenges and barriers to access to justice. Independent experts can identify their views on how to fight judicial corruption. Unfortunately, due to the time limit and COVID-19 pandemic, it is unachievable to interview all stakeholders relating to the research, such as the Myanmar National Human Rights Commission and Myanmar ACC. Although the researchers tried to connect and interview with these two commissions, the researchers did not have access to interview commissioner or support staff due to their strict internal procedures.

The researchers designed the study based on the different tripartite views and perspectives of judges and law officers, practicing lawyers, and civil society organizations. The researchers' choose judge and prosecutor as they are key actors in the judicial process. The researchers decided to interview with Human Rights lawyers and independent experts that could contribute freely and independently opinions from the perspective of human rights. The following table (1) is the profile of interviewees with sex disaggregation.

**Table1: Interviewee profile of Group of Professional**

No.	Code No.	Occupations	Gender	Date of Interview
1.	IJ 1	Judge (Retired)	Male	7.6.2020
2.	IJ 2	Judge	Male	26.6.2020
3.	IP 1	Law officer/ prosecutor	Female	26.6.2020
4.	IL 1	Freelance Lawyer	Male	1.6.2020

No.	Code No.	Occupations	Gender	Date of Interview
5.	IL 2	Freelance Lawyer	Male	6.6.2020
6.	IL 3	Freelance Lawyer	Female	17.6.2020
7.	IL 4	Freelance Lawyer	Female	29.6.2020

**Table1: Interviewee profile of Group of Independent Experts**

No.	Code No.	Occupations	Gender	Date of Interview
1.	Yangon Watch (Interview ID 1)	Political Organization	-	20.5.2020
2.	U ZayerHlaing (Interview ID 2)	Chief editor of Archive news	Male	4.6.2020
3.	U ZawLwinHtut (Interview ID 3)	Representative of Southern Myanmar Journalist Network	Male	4.6.2020

(c) Ethical Considerations

In order to be confidential because some interviewees did not agree to use their names in the research, the researchers used code numbers when interviewing. The researchers kept the original interview data on their personal computer (PC) by protected by a password. To ensure confidentiality, only the researchers read the primary data and translated the transcription from Myanmar to English. No questions were asked which could identify the interviewees, or that questioned the morality or status of the interviewees.

(d) Research Challenges and Limitations

The researchers faced many obstacles when collecting the primary data. In particular, many people, such as judicial authorities did not want to answer questions. People felt stressed talking about the sensitive topic of this research. In many cases if judicial authorities wanted to do the interview they would have to report the interview questions and their answers to their superior officers. Therefore, some refused to participate because several

steps needed to be taken for the interview and they did not have the time to devote to this. Although the researchers tried to connect and interview with Anti-Corruption Commissioners and Myanmar National Human Rights Commissioners, the researchers could not access commissioners or support staff due to their strict internal procedures. Researchers requested the ACC for an interview by email, but they replied that they had to report their superior officer to grant this interview and it needed some time. Researchers went to M NHRC to request an interview. M NHRC replied that researchers needed to attach a recommendation letter of the rector and Ethics Board of the University. It would take too much time, and during this process the COVID-19 pandemic struck, making it unachievable to interview these stakeholders. Therefore, the researchers decided to analyze relevant information and data from the annual reports and the official website of these two commissions as a secondary source.

### **Definition and Forms of Corruption**

Today the most accepted definition of corruption is one adopted by the Transparency International: “corruption is trusted the abuse of entrusted power for private gain” (Transparency International, 2019). The United Nations *Convention against Corruption* (UNCAC) does not define the word corruption explicitly but rather enumerate criminal acts which amount to corruption. In it judicial corruption means:

all forms of inappropriate influence that may damage the impartiality of justice” and may involve any actor within the justice system, including, but not limited to, judges, lawyers, administrative court support staff, parties and public servants (Judicial Integrity Initiative 2016, p.12).

According to Myanmar Anti-Corruption Law:

Corruption means doing directly or indirectly of an authoritative person by abusing his authoritative position, such as giving, accepting,

receiving, attempting to receive, offering, pledging, or discussing in any way of a consideration from a person concerned for himself or any other or any organization in order to do anything, refrain from doing any lawful act, give a person his legitimate right, or prohibit a person wrongfully from his legitimate right, or giving, accepting, obtaining and attempting to do the same by any means of corruption from the relevant person for him, any other person or organization, directly or indirectly. In addition, any act of person who is handling public finances of a government department or organization, public organization or any other organization, causes loss or damage the concerning rights on doing so by breach of laws, rules, regulations and procedures (Sec.3 (a) (1) & (2) of the Anti-Corruption Law. (Myanmar). (2013). Pyidaungsu Hluttaw law No.23/2013. <https://www.mlis.gov.mm>).

According to the various definitions, corruption is any conduct of authoritative person by misuse of his power or taking of public interests unlawfully.

In Myanmar, petty corruption is endemic in the everyday life of Myanmar citizens and it can be seen in many places from the low- to mid-level public officials (Saw, 2015). From personal experience and from statements of the independent experts and lawyers it can be said that most people in Myanmar face various forms of corruptions such as bribery, extortion, cronyism, nepotism, and influence peddling. The government of Myanmar does try to formulate the provision concerned with the conduct of corruption to the law but it cannot take action against all conducts except for bribery, because this is more clearly stated in the 2013 anti-corruption law. As an example, most of the cases of corruption that were prosecuted by Myanmar ACC are cases of bribery. Another point is that the misuse of his power or position in performing duty by any judicial actor related to his family, relatives and organization, is difficult to determine because the specific conduct of corruption is difficult to prove in practice. Corrupt conduct is mostly a secret act, and it is also cultural:

some people accepted it as common process. To avoid corruption, it is often regulated in the related law and code of ethics of various institutions.

There are some research papers studying on the forms, causes and consequences of corruption, and how they impact human rights. Within Myanmar, news sources, journals, the media, and other research papers generally mentioned the various points of view concern on corruption in different areas. However, it is rare to find a deep insight into the corruption of the Myanmar judicial sector. This research paper is intended to identify the gaps and challenges in Myanmar's present strategy and framework to address judicial corruption and seeks to contribute to strengthening the judicial system as well as ensure adequate accountability mechanism.

### **Myanmar Corruption Case Studies**

In this section three case studies are described to show some typical instances of corruption in the judicial system. The first one looks at police corruption in a drug trial, the second at the role of court officials in avoiding a murder trial, and the last is a typical example of how bribery works in the courts. These cases, however, are only cases which have been picked up by the AAC, and are thus cases where the perpetrators have been charged, though in some cases they perpetrator have avoided punishment.

#### U Soe Than Vs. U Than Zaw (Criminal Case No 1/2016)

This case has been suspected and prosecuted by ACC. In this case, U Than Zaw, a sub-lieutenant, arrested Mg Thaw Zin under the *Narcotic Drugs and Psychotropic Substances Law*. The parents of Mg Thaw Zin were persuaded by U Than Zaw to pay 2,000,000 Myanmar Kyats (about \$USD 1600) to reduce the sentence and 300,000 Myanmar Kyats (\$USD 250) to avoid being sent to a drug rehabilitation center. This kind of corruption is defined under Section 3 of the *Anti- Corruption Law*. U Than Zaw was convicted under Section 56, which provides that an authorized person (but not a political post holder) convicted for committing bribery shall be punished with imprisonment for a term of not more than 10 years and with a fine. The court sentenced U Than Zaw to 10 years' imprisonment.

In this case bribery is used to negotiate an easier punishment in the criminal case. The parents were also asked for money from policemen if they wanted their children to be released. The parents borrowed the required money with high interest rate and then gave it to policemen for terminating the criminal case (Interview ID 1). The parents of Mg Thaw Zin lived in a small far village of Mon state. They faced physical and linguistics barriers to access information and they had no legal knowledge in relationship to the procedures of court and police. In this case the police officer, U Than Zaw, did not inform the parents of Mg Thaw Zin of their rights and committed corruption. As a result, they suffer from stress and depression as well as financial problems.

#### U Thant Zin Oo Vs. Than Htut Aung and 2 Others (Criminal Case No. 340/2018)

On 1<sup>st</sup> January 2018, Aung Yae Htwe, a comedian, was hit by Than Htut Aung (Thar Kyi), Pyae Phyo Aung (Aung Lay), and Kyaw Zaw Han (Kyaw Zaw) at a New Year party. Aung Ye Htwe later died of his injuries on January 2, 2018. U Thant Zin Oo, the brother of Aung Yae Htwe, filed and opened a case at the police station. The offenders were charged in the Yangon East District Court under Section 302 of the Penal Code. After 14 witnesses of the plaintiff-side had been examined, Yangon District Law Officer reported to withdraw the case under Section 494 of the Criminal Procedure Code to the Yangon Advocate General Office. Yangon Advocate General concluded that there was not enough strong evidence, and the testimony was weak relating to the assault by three accused persons. Yangon Advocate General Office reviewed the report and permitted the withdrawal of the case. In line with permission of the Yangon Advocate General Office, the Yangon District Court Judge permitted the withdrawal of the case and discharged three accused persons.

According to the news of media, the three accused persons and the victim are Muslim, and that an Ayatollah (the head of a Yangon Mosque) negotiated between both parties to settle the case. In every criminal case the plaintiff should be the State, with the responsibility to give an effective remedy for the victim, and even though the victim wants to settle the case, the court has to consider whether it is fit or not. Relating to this

judgement, the Yangon Region Advocate General, U Han Htoo and five others<sup>5</sup> were investigated for allegations of corruption. They were prosecuted by ACC in the Yangon Divisional Court under the Sections 56 of the Anti-Corruption Law. The Advocate General was prosecuted under Section 55 of the Anti-Corruption Law. It was asserted that the judicial authorities intentionally and negligently pressured witnesses from the plaintiff side to create circumstances where the witnesses could not produce testimony about the offense, and took bribes from the father of suspects. Aung Yae Htwe was a popular Facebook celebrity, especially for his funny clips and was often on live air talking with his fans. His funeral ceremony was broadcasted widely and followed throughout Myanmar. This case itself was followed by the public through media and immediately many thought it suspicious that it was not possible to find eye witness accounts at the Night Club. For that reason, public voiced concern, forcing action by the ACC.

In this case there are many violations of international and national standards. Human rights of non- discrimination, equal before the law, and the right of fair trial and justice are violated. Moreover, the government has to implement effectively the constitutional rights such as Section 21 and Section 19 (a) of the 2008 Constitution. Evidence is as an essential element to find the truth, but as a consequence of corrupt conduct by judicial authorities, the plaintiff lost the right to evidence as well as the right to remedy. The consequences of corruption create a sense of lawlessness and mistrust to the public. In this case, there is no exact solution whether there is fair trial or not. The law officer bribed and released the accused. It points out that lack of fair trial rights in Myanmar (Interview ID 2, 4.6.2020, accessed to 10.6.2020).

#### Daw Yi Yi Mon, Daw Zar Chi Win and U Ye Wana Criminal Case No.319/17

In this case, a judge, lawyer and court staff bribed a defendant's mother in a forestry case at the Khin Oo Township Court. The three people, Daw Yi Yi Mon, a Judge, Daw Zar Chi Win, a lawyer, and U Ye Wana a cleaner at the court asked for around three million Kyat

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<sup>5</sup> Yangon East District deputy law officer Daw Thit Thit Khin, Yangon East District law officer U Ko Ko Lay, Yangon Region law officer U Thein Zaw, Yangon East District Court Judge U Aung Kyi, police Lieutenant Chit Ko Ko.

(almost USD 2,000) for a favourable judgement. While the judge took the money (about two million Kyat), she made a decision against the defendant, leading the mother to make a police complaint. This lead to a case of bribery under Section 56 of Anti-Corruption Law by the ACC. However, the judge could not be caught and she has escaped punishment. The corruption by the judge affects judicial impartiality, equality before the court, and rights to a fair trial. The party and his family are both complicit in the corruption because they gave a bribe, but also suffered from it, losing their money. This conduct weakens trust in the judicial system and its actors. If they won the case, they would assume their conduct to be reasonable and innocent until he is guilty. This may be usage for them as well as encourage them to do more a crime.

### **Judicial Corruption in Myanmar**

According to Transparency International, there are various causes of judicial corruption such as undue influence, weak disciplinary mechanisms, low remuneration, weak discretionary powers, fear of retribution, inadequately monitored court administrative procedures, lack of accountability and transparency, and social tolerance of corruption (Transparency International, 2007). While these causes vary significantly from State to State most researchers accept these are the most common forms of judicial corruption (Dimant & Tosato, 2018). Judicial corruption can be conducted by both judicial officers and parties. Officers may offer services for a bribe, a practice which has occurred for many years but more recently is reducing in number because of a stronger anti-corruption enforcement (Interview IP.1 and IJ.2). In other cases, parties may want to ensure their own interests so they offer bribes. Corruption in the Myanmar judiciary may be generally the lack of legal knowledge. Though there is the saying “ignorance of law excuses no one,” there is insufficient legal information for the public. Some people consider that the jurisdiction of Myanmar’s judiciary is not independent and corruption is inherent in the system because of Myanmar’s history of military rule, so it is not surprising that the influence of the administration is given as a main cause of corruption (Interview ID.2). One outcome from the

lack of knowledge of the court system is that some parties assume that they have to pay something to win a case. As a result, they approach and offer the court officers bribes, even if the officers explained that they do not accept money and that the case should be fair and in accordance with law. However, the parties think that the officer denies their bribes because they have already accepted a bribe from other party. For such a case, it is important to explain to the clients that nothing shall be given to any government servants just to win the suit (Interview IP.1 and IJ.2). In addition, the judiciary is faced with pressure to accepted bribes. It was also noted that people in Myanmar alongside their lack of legal knowledge also consider that being prosecuted at court is shameful. As a result, they will do anything to stay out of the court (Interview ID.2). Low salary is also major factor: judges and police officers are not paid very well, they get around US\$200, a month, and it can take many years of progressing through the ranks to exceed US\$250 a month. Bribes are thus a common coping mechanism for civil servants with low salaries and corruption is an important, and sometimes necessary, source of income to supplement their wages (Interview ID.3). However, experts from Yangon Watch noted that some judges are working in their professional without taking any bribery at all. Thus, taking bribes due to low wages and salary is unacceptable.

Apart from bribery, another reason for corruption in the courts can be intimidation and fear because of forced impartiality, or bias, of the judges. Impartiality is mainly observed in the cases filed by the military, where the judges made a conviction reflecting the desire of the plaintiff even when the defendant was not proven guilty by law (Interview ID.1). The accused were sentenced to jail by the judge in order to satisfy the accusations of the government or military. Judges can be intimidated by local authorities as well. Some law officers agreed that the long history of a military government has resulted in ability of the courts to be influenced through extortion and bribery (Interview IL.3). Intimidation can occur from private citizens as well. For instance, a judge said that he accepted the bribes from the accused who was prosecuted with the *Narcotic Drugs and Psychotropic Substances Law* because he was asked to choose between his life and release the accused by taking money.

Currently, judicial bribery occurs not only because of the low salaries but also other factors such as job security and administrative requirements for work. For instance, law officers need references to obtain further work, which necessitates them to follow the demands from the Government. Also legal officers may require certain reports for promotion or for deciding cases, but these documents are not accessible and incentives are needed to obtain them (Interview IL.4). It is common to find corruption in non-billable offences (in criminal cases) and cases which are being prosecuted under special laws because the accused is looking for a way to get bail. These cases of corruption are related to court officers, case brokers and police officers. In civil cases, the corruption is found in succession and administration suits. As both lawyers and parties usually approach the judge offer bribes order to win the suit (Interview IL.1).

The judge who was interviewed for this research did take a different view. The Judge said that there are no sound causes for corruption, but it depends instead on the ethics and morality of individual. The judge stated that the judicial system is independent and no there is no influence from political authorities, so most judges decide the case based on facts and the discretionary power (Interview IP.1). Sometimes corruption may occur for reasons of love, anger, fear and ignorance as well as the basic needs of a staff member, or from material desires to catch up with the developing world (Interview IJ.1). It may also be in relation to nepotism, for protecting or helping families or friends, but favoritism and intimidation is difficult to prove easily because it is secret (Interview IJ. 2). Some of the public servants have committed offences of corruption by neglecting their official duties and disregarding the laws.

Bribes and irregular payments in exchange for favorable judicial decisions are very common in the Myanmar judiciary, though this does not mean that the whole system is corrupt, but the problem is significant. All people interviewed agreed that judicial corruption involves not only judges, but also law officers, lawyers, police, court staffs and parties. The performance of current judicial situation is still a long way from achieving a society without corruption (Interview ID.1). One observer of corruption cases in Mon State said that the variety of corrupt activities are frequently found. For example, in a case filed under the

*Narcotic Drugs and Psychotropic Substances Law*, the actual number of tablets found on the accused was 20, but the seller bribed the police officers to decrease the number of tablets so the charge is of a user and not a seller. Also the prosecutor was bribed to reduce the sentence, as well as the judge in court for the same purpose. In a single case three different judicial officers were bribed so the accused could escape a serious conviction. Within Mon state there are no specific actions on Judges and law officers relating to the judicial corruption, but actions against the court staff and police officers are different. In practice, police officers and court staff have been prosecuted, convicted and resigned, though judges cannot be punished even though they have committed corruption (Interview ID.3).

Yangon Watch states that bribery is the widespread in forms such as cases of bribery for negotiation to lessen the degrees of the punishment in the criminal cases, especially regarding with the *Narcotic Drugs and Psychotropic Substances Law*. Taking bribes by the court clerks are frequently reported, often having severe repercussions for people treated unfairly (Interview ID.1). In a case in North Oakalarpa Township court, the accused person was punished with imprisonment. The client tried to appeal to higher court to reduce the sentence, but this could not be done because the judgment was not recorded in the document. The lawyers for the clients went to the Regional Court to make a copy of the required case files, but they were unable to access the requested files because the official asked for bribes of around 50,000 Kyats, or about US\$ 40, as the fee to allow a copy of each document. Here, asking for money for a court file is illegal, as the judgment file should be issued through a regular procedure of the court. The interviewees noted that while there are various kinds of corruption such as nepotism and cronyism in Myanmar judicial sector, there is no doubt that bribery is most common with extortion and cronyism generally less common (Interview IP.1, IJ.2, IL.3). In some cases, the clients or the authoritative persons ask judge and law officer for help in the case, but the judicial officers say they do not want to accept any kind of bribe for any reason. However, they also said that they can accept for gifts after the case is finished as a thank you gesture and they will accept these. Even though such cases are common in judicial fields these are not considered corruption and

action cannot be taken by law. According to the opinion of interviewees, while there are clear cases of corruption, there is also sometimes a misunderstanding (Interview IJ.1). For example, the accused does have to pay for some services under official rules and regulations, but this is misinterpreted as bribing judiciary officers (Interview IJ.2).

### Legal Framework to Address Judicial Corruption

As a member of the United Nations Convention against Corruption (UNCAC), Myanmar is trying to fight corruption in all sectors by enacting special law.<sup>6</sup> Although Myanmar has not yet ratified the ICCPR, international fair trial standards in judiciary are still expected, and an obligation of the Government. Under the Article 14 (1) of ICCPR and Article 10 of UDHR, every person shall be equal before the courts and the judiciary shall be independent, impartial and competent. Judges preside over trials in line with international fair trial standards. Although the UDHR is non-binding upon the State, it is an influential guidance over the world. Myanmar should obey the principles of UDHR. Moreover, to measure the standards of judiciary it needs to consider Article 14 of ICCPR even though Myanmar still exists as non-State member.

To reduce the judicial corruption, the Myanmar government uses the Anti-Corruption Law, as well as the Civil Service Personnel Law, and it also takes action on corruption through the Myanmar Penal Code. Before the enactment of Anti-Corruption law, the offenders were punished by the *Suppression of Corruption Act*, 1948. Under the Penal Code, the public servants can be punished with up to three years' imprisonment or with fine, if they committed the corruption offences such as taking gratification other than legal remuneration in respect of an official act by corrupt or illegal means (Sec. 161). In relationship to the judiciary, there are other related laws, ethics and standard consider the performance of official duties. Under the UNCAC, every State Party requires taking measures to strengthen integrity and to prevent opportunities for corruption among members of the

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<sup>6</sup>Myanmar ratified to UNCAC since 2012 and then the government approved an anti-corruption bill in August 2012, and enacted Anti-Corruption Law for the eradication of corruption in August 2013.

judiciary (Article 11). Myanmar established a special Anti-Corruption Commission under the Anti-Corruption Law in 2013 which focuses primarily on bribery. All public servants, including judges and law officers, are subject to penalties including 10 years' imprisonment with a fine if they engage in corruption, though political post holder are exempt (Sec. 56 of the Anti-Corruption Law. (Myanmar). (2013). Pyidaungsu Hluttaw law No.23/2013. <https://www.mlis.gov.mm>)

With regard to the judiciary, the 2008 Constitution says that justice should be administered independently according to law as a judicial principle (Sec. 19 (a) of the Constitution of the Republic of the Union of Myanmar. (Myanmar). (2008) <https://www.myanmar-law-library.org>). The judicial administration shall be independent and transparent in line with the law for protecting the interests of the people (Sec. 3(a) of the Union Judiciary Law. (Myanmar). (2010) *The State Peace and Development Council Law No.20/2010*. <https://www.mlis.gov.mm>). According to the *Code of Judicial Ethics*, judges are not allowed to accept or receive gifts, money or any other things from anyone involved in a case (Article 2, Chapter 6, Code of Judicial Ethics. (Myanmar). (2017). <http://www.myanmar-law-library.org/law-library/legal-journal/judicial-journal/code-of-judicial-ethics-for-myanmar-judges.html>) The judges must have integrity and shall decide based on the facts of the case according to the law. They should refrain from favoritism upon one of the parties. They should not accept presents, accept private invitations, or give or take bribes. Law officers are responsible for strengthening a fair and just system for the benefits of State and citizens (Union Attorney General's Office (Myanmar), 2018, P.5 and 43). All these provisions are the main factors which apply to a fair trial.

Counter corruption is weakened when cases are transferred to Government departments. After scrutinizing the case, the ACC can assign the case to the relevant department if it thinks it fits under this section of the law (Sec.16(m) of the Anti-Corruption Law. (Myanmar). (2013). Pyidaungsu Hluttaw law No.23/2013. <https://www.mlis.gov.mm>)

According to the Civil Service Personnel Law, if any civil servant fails or violates his duty and rule of conduct, action shall be taken action under the law, rules and regulations related to the maintenance of discipline. If his violation is a legal offence, the person shall

be convicted by legal action (Sections 38 and 41 of the Civil Service Personnel Law. (Myanmar). (2013). The Pyidaungsu Hluttaw Law No.5/2013. <https://www.mlis.gov.mm>). The Department concerned can take action and pass a suitable penalty against the corrupt person under Sec. 53 of this Law. Although there are some complaints to the ACC, it considers if these cases can be managed inside each department or office after checking on such complaints. However, there is no regulations on how to decide exactly for each case. The result is a lack of transparency as once a case goes to a Department no one knows who is involved, how the inquiry is done, and whether there was a punishment. In some cases, when there is public knowledge of a punishment, exactly why this punishment was done, and for which case is not known. In cases under the Anti-Corruption Law most of them were be referred to relevant department.

As an effort to reduce corruption, the government also issued guidelines on 4 April 2016 to government officials regarding gifts that can be accepted. In the guidelines, members of the public service may not accept any gift given by virtue of their official position. However, they may accept gifts not exceeding the value of Ks 25,000 (approximately USD 20) as an exception (Para. 5 of the Guidelines for Acceptance of Gifts (Myanmar). (2016). The government established the Corruption Prevention Unit (CPU) and passed the Code of Conduct for compliance with integrity in society. It also has aligned counter corruption in the implementation of Myanmar Sustainable Development Plan (MSDP) 2018-2030. Therefore, the courts must be independent and the judicial actors must administer impartially and fairly, with respect for human rights (Goal 1, Strategy 1.3 of Myanmar Sustainable Development Plan. (2018)). In practice, there are many provisions, rules and guidelines were passed by the government to prevent the corrupt conduct, but it still remains a significant problem, especially in relations to the violation of human rights.

### **Impact of Judicial Corruption on Human Rights in Myanmar**

Corruption in the judicial system impacts the opportunities for sustainable development in Myanmar. Further, corruption reduces the protection of human rights. As

Anne Peters, a German-Swiss Jurist, states, a country with high rate of corruption can be regarded as one with poor human rights records (Peters, 2015). If court officials and the police pay bribes rather than taking action in accord with the law, parties cannot seek justice. If the medical staff give better treatment to patients who give bribes, hospitals do not heal people (International Council on Human Rights Policy, 2009). The State Counselor, Daw Aung San Suu Kyi, spoke out that corruption destroys the trust, good governance and dignity in the whole mechanism of public service in the country (Annual Report of the Anti-Corruption Commission, Myanmar, 2019).

Corruption is prevalent at all levels of the judiciary, from police to court staff, lawyers and judges. People believe that the outcomes they desire can be bought. But, unfortunately this exacerbates divisions in society as many poor people cannot afford access to the formal justice system due to rampant corruption which makes public legal services more expensive than they should be (Lin, 2019). In Myanmar, a significant number of people cannot afford access justice through statutory institutions. They do not trust the neutrality of the courts and thus the majority of people do not believe it is in their best interest to take legal action through statutory courts. Minor corruption is widespread. The courts functions like an open market where the highest bidders win (Bak, 2019). If anyone wants to give a meal to someone inside the jail, they have to give money to the police officer. Tea money (pocket money) and facilitation payments are involved in many transactions with justice institutions, if not all (Interview ID 2). This, destroys the ethics and morality of people because they believe that money can buy an authorized person or a decision in court. Consequently, people are encouraged to do illegal activities again and again in their community. When any judicial actors such as prosecutors conduct or encourage corruption by means of giving or taking something, there cannot be equality in the law and right to impartiality under fair trial rights. Corruption in the administration of justice endangers the basic rights to judicial protection, including the right to a fair trial without undue delay under Article 14 of the ICCPR (Peters, 2019, p.1257).

Corruption in the courts means people are not entitled to be protected from any discrimination to equal protection of the law, found in UDHR Article 7. Other international

standards such as parties to the judicial proceedings shall be ensured equal access and equality of arms, and treated without any discrimination. According to the equality of arms, all parties shall enjoy the same procedural rights based on law without distinction, and not be entailed the fairness of the defendant.<sup>7</sup> UNCAC does not directly refer to human rights but its preamble makes reference to fairness, responsibility and equality before the law. It also notes that there can be no rule of law without the protection of rights (Art.5(1) of the United Nations Office on Drugs and Crime. (2005, December, 14). United Nations Convention against Corruption: Adopted and opened for signature, ratification and accession by General Assembly resolution 58/4 of 31 October 2003 enter into force 14 December 2005, in accordance with Article 68 (1). <https://www.unodc.org/unodc/en/corruption/uncac.html>).

The 2008 Constitution of Myanmar repeatedly emphasizes that all citizens shall enjoy the right of equality before the law and shall not be discriminated based on race, birth, religion, official position, culture, sex or wealth (Section 21 (a) and 347) of the Constitution of the Republic of the Union of Myanmar. (Myanmar). (2008). <https://www.myanmar-law-library.org>). The president, U Win Myint spoke that corruption contributes to the expansion of inequality in social and economic affairs which is undermining the trust and equal participation in government institutions (Annual Report of the Anti-corruption Commission, Myanmar, 2019). All professionals serving in Myanmar Judicial system have a responsibility to perform their duties to uphold the basic principles of equality before the law. The trial process must ensure that all accused, regardless of the seriousness of the crime with which they are charged or their individual circumstances, receive equal treatment and right of provide defense in accordance with the law. Women, children, minorities, the poor, and persons with disability must also enjoy the same rights as other members of society under the law (United Nations Development Programme [UNDP] & Union Attorney General's Office [UAGO], 2018). If the judicial authority decides cases though corruption, this can cause unreasonable delays in proceedings, presenting evidence and argument, and issuing a judgment that contradicts the evidence.

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<sup>7</sup> These rights are elaborated in the General Comment 32 of the ICCPR, (para.13)

Judicial independence and impartiality are fundamental principles of the judicial system,<sup>8</sup> and attempts to combat corruption and improve accountability must be prioritized. Transparency and accountability are positive effects on the ability of judiciary to be fair and impartial. Judicial Independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge must therefore uphold and exemplify judicial independence in both its individual and institutional aspects. Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made (Code of Judicial Ethics. (Myanmar). (2017). <http://www.myanmar-law-library.org/law-library/legal-journal/judicial-journal/code-of-judicial-ethics-for-myanmar-judges.html>). Both Section 19 of the Constitution of the Republic of the Union of Myanmar. (Myanmar). (2008). <https://www.myanmar-law-library.org> and Section 3 (a) of the Union Judiciary Law. (Myanmar). (2010). The State Peace and Development Council law No. 20/2010. <https://www.mlis.gov.mm> provides the independence of the judiciary. According to Section 11 of the Constitution of the Republic of the Union of Myanmar. (Myanmar). (2008). <https://www.myanmar-law-library.org>, the State uses the principle of separation of powers between legislative, executive and judiciary organs. The State can prevent excessive abuse and abuse of authority by using this principle. An independent judiciary is one of the pillars of the rule of law and it also plays a crucial and specific role in the protection of fair trial standards. Judges must treat the parties in a fair and equal manner, and make decision impartially based on the subject matter of the case. Basically, factors that may influence the judge to favour one of the parties, such as engaging in commercial activities with one of the parties, accepting presents, accepting private invitations, giving or taking bribes are strictly prohibited. Impartiality and propriety are fundamental for maintaining respect for the administration of justice (UNDP & UAGO, 2018). The public must also perceive the tribunal itself to be impartial, meaning that the system is

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<sup>8</sup> Found in Art.10 of the UDHR, and under Art.14 (1) of the ICCPR, the judiciary shall be independent of executive and legislative branches of government or judicial independence in deciding legal matters (General Comment 32, para.18). Judges must not make their judgment influenced by personal bias or prejudice, nor act to promote the interest of the one of the parties to the detriment of the other (General Comment 32, para. 21).

free of bias. For example, the public would likely view a tribunal that fails to disqualify a judge with a personal interest in a case as lacking impartiality (Justice Base, 2017, p. 28). Judges can also be pressured by the Government. In situations of criminal cases sued by the government or military who they have an interest in ensuring a guilty conviction (which may be due to political or public pressure), judges may provide a guilty verdict in order to satisfy them. The underlying reason is that the judges can be intimidated by local authorities. This fear results in the partiality of judiciary affairs (Interview ID.1).

## Conclusion

In Myanmar judiciary corruption in the form of bribery, nepotism, and extortion impacts the rule of law and process of fair and justice trial. Corrupt conduct is a result of social values which tolerate corruption and inadequate facilities to fight it. People have lost trust in the judiciary and as a result themselves engage in illegal activities in order to search for fair judgments. Parties face violations of their rights because they are extorted by the judicial actors, and judicial actors are offered bribes by parties to create favourable outcomes. Parties have their rights violated and judicial actors threaten the integrity of the office because they accept bribes. A functional and effective judiciary system requires the independence of judges and prosecutors and all staffs. To reduce judicial corruption, the courts, need more transparency. Due to the lack of legal knowledge in the general public, the fear of going to court, and the strong desire to win the case, people can become victims of corrupt officials. To reduce this, the courts could promote the role of public relations which will give more accessible information (online and offline) to the public, and listen to the voice of the public. Though courts now all have a webpage which details much information, not everyone can access, or understand, this information. Public Relations bodies should also receive complaints about judicial corruption and can negotiate issues between court and parties. Actions such as this can not only benefit the public and create trust, accountability and access to justice, but it can also reduce corruption. Other counter corruption actions include providing adequate salaries and facilities for all staff, upgrading

the judicial infrastructure, and encouraging judicial independence. For corruption to end in Myanmar a significant three sector reform is needed: a fiscal sector reform, justice sector reform, and security sector reform.

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