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# REDISCOVERING “LAW” IN MYANMAR: A REVIEW OF SCHOLARSHIP ON THE LEGAL SYSTEM OF MYANMAR

Melissa Crouch<sup>†</sup>

*Abstract.* Myanmar’s legal system is an understudied area in the academic field of Asian Legal Studies. This article aims to provide a map of legal scholarship in Myanmar that can be built on in the future. It identifies the key issues and arguments that have driven research on law in Myanmar, and the central academics whose oeuvre of publications have sustained the field. It is organized around four broad themes: custom, religion, and the law; public law and governance; corporate law; and the politics of law. It suggests that in order to build the next generation of legal scholarship, future research on Myanmar law must be grounded in its social, political, and historical context. This type of research requires the rediscovery of “law” in Myanmar by engaging with the existing body of social science literature on Burma Studies more generally.

## I. INTRODUCTION

This article aims to contribute to the discussion of Myanmar/Burma’s<sup>1</sup> legal system by mapping the scholarship in this area. The article identifies the fields of law that have been the focus of inquiry, the key themes that have driven research on law in Myanmar in the past, and how this foundation of scholarly inquiry can be built upon for future research. It demonstrates the range of secondary literature that is available, although one needs to keep in mind Professor Huxley’s lament that “Burmese law is one of the least studied of Asian legal systems.”<sup>2</sup> Although his statement was made in the context of a discussion on Burmese Buddhist law, it also applies to the study of the legal system in Myanmar more broadly. In particular, the article highlights the relevance of the rich body of social science literature on Myanmar and the way in which it can enhance our understanding of the

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<sup>1</sup> In this article I refer to the country as Burma pre-1988, and Myanmar after that time.

<sup>2</sup> Andrew Huxley, *Is Burmese Law Burmese? John Jardine, Em Forchhammer and Legal Orientalism*, 10 AUSTRALIAN J. ASIAN L. 184 (2008). One recent attempt to fill the gap identified by Huxley is the volume on LAW, SOCIETY AND TRANSITION IN MYANMAR (forthcoming 2014, Hart Publishing), edited by myself and Tim Lindsey. While I do outline some of the contributions from this volume, it is for others to assess its merits.

law in Myanmar more generally.<sup>3</sup> It also leads us to acknowledge the depth of social science research in this area as well as the need for scholars to rediscover “law” in the study of Myanmar.

There is not often an opportunity or need to review the entire legal academic literature for a given country in all areas of legal scholarship, including public law and private law. It is perhaps even more unusual to offer an agenda for the research of a particular country, especially in an era when legal scholarship is increasingly focused on the globalization of law and legal institutions<sup>4</sup> and the field of transnational or global law. Further, to conduct a review of the legal scholarship on an entire country may seem overly ambitious. Yet while acknowledging this fact, this article nonetheless offers a review of scholarship on the legal system of Myanmar.

Within Asian Legal Studies,<sup>5</sup> some scholars have reviewed a particular field of law or line of scholarly legal inquiry. There are recent examples of scholars who have surveyed the broader field of socio-legal studies in East<sup>6</sup> or Southeast Asia.<sup>7</sup> Such reviews highlight the importance of reflecting on the history and development of law and society studies of Asian legal systems, the themes that unite this particular area of scholarship, and its future potential and possible contribution to the literature.

Like any review of an academic field, this one also comes with a keen awareness of its limitations. This article only aims to review scholarly work (rather than primarily legal resources) published after independence in 1948.

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<sup>3</sup> My intended audience is legal scholars with no prior background in Burma Studies. This review cannot comprehensively cover all of the social sciences literature on Myanmar, but generally tries to highlight research that focuses particularly on the legal system.

<sup>4</sup> The literature on law and globalization is vast, but more recent volumes that consider these issues in the context of Asian legal systems include GLOBALISATION AND RESISTANCE: LAW REFORM IN ASIA SINCE THE CRISIS (Christoph Antons & Volkmar Gessner eds., Hart Publishing 2007); REGULATION IN ASIA: PUSHING BACK ON GLOBALIZATION (John Gillespie & Randall Peerenboom eds., Routledge 2009); LEGAL EDUCATION IN ASIA: GLOBALISATION, CHANGE AND CONTEXT (Stacey Steele & Kathryn Taylor eds., Routledge 2010).

<sup>5</sup> I use the term “Asian Legal Studies” as used in Stacey Steele, *The Study of Asian Legal Systems in Australia and Malcolm DH Smith*, in LEGAL EDUCATION IN ASIA: GLOBALISATION, CHANGE AND CONTEXT, *supra* note 4.

<sup>6</sup> Setsuo Miyazawa, *Where Are We Now and Where Should We Head For? A Reflection on the Place of East Asia On the Map of Socio-legal Studies*, 22 PAC. RIM L. & POL’Y J. 113 (2012). Professor Miyazawa takes as his starting point the creation of the East Asian Law & Society Collaborative Research Network (“CRN”) of the Law & Society Association, and provides a concise overview of socio-legal scholarship on East Asia, highlighting its strengths, its potential, and where it needs to move forward. *Id.*

<sup>7</sup> Lynette J. Chua, *Socio-legal Research on Southeast Asia: Themes, Directions, Challenges*, ASIAN J. COMP. L. (forthcoming 2014). Professor Chua’s analysis of socio-legal scholarship focuses more specifically on the narrower geographical area of Southeast Asia. *Id.* The catalyst for her review of twenty years of scholarship is the 1994 special edition on Southeast Asia in LAW & SOC’Y REV. She considers the ways in which the field has advanced since then, and the key themes and concerns it has been driven by. *Id.*

The primary legal resources available—including legislation, court decisions, law digests, brief legal commentaries, key texts written by Burmese authors, and so forth—have been set out in a research guide by myself and Dr. Nick Cheesman.<sup>8</sup> This article is designed to build on that research guide by focusing on academic scholarship. It does not deal with reports by advocacy organizations; although some such reports are empirically-based, generally they are not grounded in broader scholarly debates.<sup>9</sup>

This article is organized thematically because the existing literature falls within several key areas of inquiry. This approach allows the reader to go directly to his or her particular area of research interest. The four broad themes are: 1) custom, religion, and the law; 2) public law and governance; 3) corporate law; and 4) legal culture and the politics of law. Scholarship in each of these areas is considered in turn, noting its preoccupations and highlighting the scope of scholarship to date.<sup>10</sup> In doing so, the article profiles some of the key scholars who have shaped the field and their oeuvres of publications as a way of acknowledging the legacy of those who have recognized the importance of this field.

## II. THE CHALLENGES OF CONDUCTING RESEARCH IN MYANMAR/BURMA

It is necessary to briefly explain the comparative lack of legal scholarship on Myanmar and the particular challenges that this has presented for academics, legal practitioners, and local and foreign researchers. Since the 1960s, the quality of legal education in Myanmar has suffered seriously, as has the entire tertiary education system.<sup>11</sup> From the military coup of 1962 until 1999, Myanmar closed its universities on numerous occasions.<sup>12</sup> During such times of unrest, the military used lecturers to try to dissuade

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<sup>8</sup> Melissa Crouch & Nick Cheesman, *Conducting Research on the Legal System of Myanmar*, in *LAW, SOCIETY AND TRANSITION IN MYANMAR*, *supra* note 2.

<sup>9</sup> For example, reports on the political and legal situation in Burma have been published by organizations including, but not limited to: Article 19, Asia Foundation, Asian Human Rights Network, Amnesty International, Burma Lawyers Council, Earth Rights, International Crisis Group, International Bar Association, International Commission of Jurists, Human Rights Watch, Myanmar Development Research Institute, Myanmar Peace Centre, and the Transnational Institute.

<sup>10</sup> I limit my discussion to English language sources, primarily because of the lack in both quantity, and more importantly quality, of Burmese language materials, which are often more oriented toward an audience of legal practitioners than academics. For an overview of key Burmese language materials, see Crouch & Cheesman, *supra* note 8.

<sup>11</sup> See generally Myint Zan, *Legal Education in Burma Since the Mid-1960s*, 12 *J. BURMA STUD.* 63 (2008).

<sup>12</sup> Andrew Selth, *Modern Burma Studies: A Survey of the Field*, 44(2) *MOD. ASIAN STUD.* 401 (2010); see generally Andrew Selth, *Burma Watching: A Retrospective*, 39 *GRIFFITH ASIA INST.: REGIONAL OUTLOOK PAPER*, 2012.

students from demonstrating.<sup>13</sup> The longest period of closure was after the 1988 democracy uprising, when the universities were only open for the equivalent of three out of twelve years up until 2000.<sup>14</sup> Aside from the closure of universities, a wide range of other factors have inhibited local academics, including restrictions on the university departments and curriculum content; lack of academic freedom generally; rotation of lecturers to regional campuses; and a lack of basic funding and resources. In addition, the political climate led to the decline of whole areas of scholarship, including legal history, as legal historians disappeared from the 1970s onward because such research was considered too sensitive.<sup>15</sup> Many left the country or academia, while the local academics who remained have had no obligations, outlets, or incentives to publish, and censorship of publications in general has been a significant deterrent.<sup>16</sup> There currently appears to be no law journals published by any university in the country. Because there are few publication outlets, legal academics are not expected to publish and the main criterion for promotion is the number of years of teaching experience.<sup>17</sup>

Foreign researchers face both structural barriers and moral dilemmas to field research in Myanmar. The ethical dilemma has been whether to conduct research or attend conferences in Myanmar while the country was first under the socialist, and then later the military, regime.<sup>18</sup> Some travel books alert travelers to the debates on the sanctions against Myanmar in the 1990s and 2000s, and include sections on “[s]hould you go?” as well as suggestions on how not to support the military regime “[i]f you go.”<sup>19</sup>

Other challenges for foreigners include the practical and political issue of obtaining a visa, which is discussed by several scholars in their publications.<sup>20</sup> After the 1962 coup, tourist visas were restricted to twenty-

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<sup>13</sup> This influence over lecturers is mentioned in several accounts of the 1988 uprising, such as CAROLYN WAKEMAN & SAN SAN TIN, *NO TIME FOR DREAMS: LIVING IN BURMA UNDER MILITARY RULE* 174 (2009); CHRISTINA FINK, *LIVING IN SILENCE IN BURMA: SURVIVING UNDER MILITARY RULE* 41 (2d ed. 2009).

<sup>14</sup> Selth, *Modern Burma Studies*, *supra* note 12.

<sup>15</sup> Andrew Huxley, *Pre-Colonial Burmese Law: Conical Hat and Shoulder Bag*, 25 INT’L INST. ASIAN STUD. ONLINE NEWS. (2001), available at <http://www.iiasn.nl/iiasn/25/theme/25T7.html>.

<sup>16</sup> For examples of translations of literature that were censored, see ANNA J. ALLOT, *INKED OVER, RIPPED OUT: BURMESE STORYTELLERS AND THE CENSORS* (1993).

<sup>17</sup> My understanding is based on discussions with faculty members.

<sup>18</sup> See, e.g., Craig Reynolds, *The Ethics of Academic Engagement with Burma*, in BURMA MYANMAR: STRONG REGIME WEAK STATE? 123 (M.B. Pedersen et al. eds., 2000).

<sup>19</sup> See, e.g., ROBERT REID & MICHAEL GROSBURG, *MYANMAR (BURMA)* 17 (9th ed. 2005).

<sup>20</sup> For the experience of one scholar who obtained a research visa in the early 1990s, see MARY P. CALLAHAN, *MAKING ENEMIES: WAR AND STATE BUILDING IN BURMA* xi-xiv (2004). For the experience of an anthropologist in the early 2000s, see Monique Skidmore, *Scholarship, Advocacy and the Politics of*

four hours, although this was later extended to three days in 1969 and seven days in 1971.<sup>21</sup> In 1990, tourist visas were extended to fourteen days, and then to twenty-eight days in 1991, although permission for a visa for the purpose of research remained difficult.<sup>22</sup> Foreign scholars now have greater access to the country than at any other time since the 1960s.

In sum, both local and foreign researchers now have the opportunity to conduct field research and in doing so can build on the existing literature in terms of scholarship on law in Myanmar, which I discuss in the following sections.

### III. CUSTOM, RELIGION, AND LAW

The first major theme in the literature deals with customary law and Buddhism and the intersection between religious and ethnic traditions and the state. I begin by considering scholarship on Burmese law, which has at times been referred to as "Burmese Buddhist law" or "Burmese customary law," although it is not based on custom, nor is it ecclesiastical law as such. The second area is the legal traditions of Burma, which refers to scholarship on the legal orders and norms of non-Burman ethnic groups.

#### A. *The Development of Burmese Law*

Of all the themes identified in this review, Burmese law has attracted the bulk of scholarly research as well as generated vigorous and robust debate. The relatively large body of literature in this area is in part due to the importance of this particular area of law to the history of the country, and perhaps also to the fact that data for this research has been available outside the country and did not entirely depend on field research. Burmese law is recognized as rooted in, and influenced by, the practice of Buddhism in Burma.<sup>23</sup> The literature has generally focused on the substance of Burmese law and discussions have generally centered on the origins and construction of Burmese law.

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*Engagement in Burma (Myanmar)*, in ENGAGED OBSERVER: ANTHROPOLOGY, ADVOCACY AND ACTIVISM 42 (Victoria Sanford & Asale Angel-Ajani eds., 2006).

<sup>21</sup> See Selth, *Modern Burma Studies*, *supra* note 12 (noting that many areas were still off-limits to foreigners at this time).

<sup>22</sup> Pan Eiswe Star, *Tourism Industry Not New to the Golden Land*, MYAN. TIMES (Oct. 6-12, 2008), <http://www.mmtimes.com/feature/holiday08/hol05.htm>.

<sup>23</sup> See ORLAN LEE, LEGAL AND MORAL SYSTEMS IN ASIAN CUSTOMARY LAW: THE LEGACY OF THE BUDDHIST SOCIAL ETHNIC AND BUDDHIST LAW 272-83 (1978) (placing Burmese Law in comparison with customary systems in Asia, while also providing an analysis of Burmese case law).

### 1. *Works of Burmese Scholars*

In terms of scholarship by Burmese scholars, one key figure was E Maung (1889–1972), a lawyer and academic at the University of Rangoon (1926–32), and later a judge of the High Court and then the Supreme Court.<sup>24</sup> He was also appointed to the role of Minister of Foreign Affairs (1949), Minister for Judicial Affairs (1958), and Minister for Home Affairs (1961); in these roles he had an influence on the development of the legal system.<sup>25</sup> Throughout his work, he emphasized and justified the retention of English common law as the law of Burma, and published on Burmese law, particularly during the Konbaung dynasty (1752–1885).<sup>26</sup> In *The Expansion of Burmese Law*, E Maung outlines the main body of *dhammathats*, the written law that was used to adjudicate cases, and charted the “landmarks” of legal development under the kings.<sup>27</sup> In doing so, he rejects the theory of the “transplantation of Hindu law” in Burma.<sup>28</sup> He also provides a brief review of the social structures that were regulated by Burmese law, including the family, the law on goods, and contracts and torts, with reference to examples of rulings under the kings and comparisons to the English common law.<sup>29</sup>

Another Burmese lawyer who wrote on this subject (in English), among other areas of law,<sup>30</sup> is Professor Hla Aung. A 1955 graduate of Harvard Law School, he went on to work as an academic at the National University of Singapore, at Rangoon Arts and Science University, and as the Attorney General of Burma (1971–1974).<sup>31</sup> Hla Aung was critical of the negative impact of the transplant of the common law into Burma, and argued that the “importation of Indian codes and statues into Burma had shattered the whole fabric of Burmese law.”<sup>32</sup> In a brief article, he tackles the ubiquitous task of what is “law” and argues that the Burmese concept of law has traversed three eras: the “Age of the *Dhammathats*,” British

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<sup>24</sup> Andrew Huxley, *The Last Fifty Years of Burmese Law: E Maung and Maung Maung*, 1998 LAW ASIA 9, 11-13 (1998).

<sup>25</sup> *Id.* at 9-20.

<sup>26</sup> E MAUNG, BURMESE BUDDHIST LAW (1970); E Maung, *Insolvency Jurisdiction in Early Burmese Law*, 34 J. BURMA RES. SOC'Y 1 (1951). See also Huxley, *supra* note 15.

<sup>27</sup> See E MAUNG, THE EXPANSION OF BURMESE LAW: A SERIES OF LECTURES (1951).

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.*

<sup>30</sup> For example, Hla Aung has also written short pieces on international and comparative law. See HLA AUNG, LAW AND JUSTICE IN MYANMAR (2008).

<sup>31</sup> *Id.* at Prefatory Note.

<sup>32</sup> Hla Aung, *The Effect of Anglo-Indian Legislation on Burmese Customary Law*, in FAMILY LAW AND CUSTOMARY LAW IN ASIA: A CONTEMPORARY LEGAL PERSPECTIVE 67, 88 (David C. Buxbaum ed., 1968).

colonialism, and independence.<sup>33</sup> He also rejects the idea of the “Hindu” origins of the *dhammathats*, and asserts that there was a clear break with the Hindu legal literature.<sup>34</sup>

A more infamous Burmese legal figure is Dr. Maung Maung (1924–94). Dr. Maung Maung began his public career as a younger associate of Aung San and Ne Win in the 1940s.<sup>35</sup> He was a law officer in the Office of the Attorney General from 1953, and by 1958 was made Assistant Attorney General.<sup>36</sup> Aside from a career in public service, he studied at Utrecht University and was a visiting fellow at Yale University.<sup>37</sup> He became a judge in 1962 and was appointed as Chief Justice in 1965.<sup>38</sup> From 1971 to 1974 he was a member of Ne Win’s Revolutionary Council and the Minister for Judicial Affairs.<sup>39</sup> He was a member of the committee that drafted the 1974 Constitution, as well as a prolific writer and commentator.<sup>40</sup> Dr. Maung Maung’s career trajectory into the heart of the socialist regime no doubt influenced his written work.

Dr. Maung Maung was responsible for the devastating restructure of the legal system in the 1960s and 1970s.<sup>41</sup> On the topic of Burmese law, in *Law and Customs in Burma and the Burmese Family*, Dr. Maung Maung sets out to demonstrate that the term “Burmese Buddhist law” is “misleading” because it is not ecclesiastical law as such, reflecting previous debates on the matter, and is therefore better recognized as rather Burmese law.<sup>42</sup> He focuses on aspects of marriage, children, and property, with brief discussions on the broader debates on religion and state, as well as the legal profession.<sup>43</sup>

Some scholars have focused on the legal system under particular kings. For example, Daw Yi Yi provides an outline of the regulations introduced by King Mindon (1853–78) to combat corruption and improve administration.<sup>44</sup> She demonstrates that these regulations included judicial reform through the courts and the division of civil and criminal cases, and

<sup>33</sup> Hla Aung, *Burmese Concept of Law*, 52 J. BURMA RES. SOC’Y 27 (1969).

<sup>34</sup> *Id.* at 31, 33.

<sup>35</sup> The information on his career that follows can be found in sources such as Huxley, *supra* note 24, at 14-15; ROBERT TAYLOR, DR. MAUNG MAUNG: GENTLEMAN, SCHOLAR, PATRIOT 3-20 (2008).

<sup>36</sup> TAYLOR, *supra* note 35, at 11-12.

<sup>37</sup> *Id.* at 13; Huxley, *supra* note 24.

<sup>38</sup> TAYLOR, *supra* note 35, at 14.

<sup>39</sup> *Id.* at 17-18.

<sup>40</sup> *See generally*, TAYLOR, *supra* note 35.

<sup>41</sup> Nick Cheesman, *How an Authoritarian Regime in Burma Used Special Courts to Defeat Judicial Independence*, 45 L. SOC’Y REV. 801, 809-11 (2012).

<sup>42</sup> MAUNG MAUNG, *LAW AND CUSTOM IN BURMA AND THE BURMESE FAMILY* viii (1963).

<sup>43</sup> *See generally id.*

<sup>44</sup> Yi Yi, *The Judicial System of King Mindon*, 45 J. BURMA RES. SOC’Y 7, 11, 13, 19, 21 (1962).



setting court fees so that applicants would not be overcharged. Others such as Dr. Kyin Swi provide an accessible account of the system of administration and the rules of evidence and procedure under the Burmese kings, although in reality it was no doubt more complex and dynamic.<sup>45</sup> Broader accounts of the administration under particular kings include Professor Michael Aung-Thwin's work on the pre-modern period of Pagan,<sup>46</sup> while Professor Liebermann covers a period of 180 years spanning three dynasties, from 1580 until 1760, highlighting the trend towards centralization and the patterns in administration.<sup>47</sup>

Professor Myint Zan, a Burmese law professor who is currently based in Malaysia,<sup>48</sup> has published a translation of seventeenth-century royal orders that were issued as a warning to *she-ne* ("the lawyers").<sup>49</sup> In terms of legal developments in the modern period, he has suggested that Burmese law has not changed significantly since independence.<sup>50</sup> He has examined Burmese case law from the 1920s up until the late 1990s and in particular focuses on why a 1929 case declaring that adultery is not grounds for a wife to divorce her husband has never (to his knowledge) been overruled.<sup>51</sup> Professor Myint Zan's work is characterized by an intense attention to detail, the extensive use of footnotes to provide rich information, and a concern to fill the hole in terms of legal scholarship more generally.

## 2. *Works of Foreign Scholars*

Aside from Burmese scholars, the field is indebted to the extensive work of Professor Andrew Huxley, of the School of Oriental and African Studies (SOAS) London, whose work has largely been devoted to Burmese law.<sup>52</sup> Professor Huxley has spent a large part of his academic career expanding our understanding of Burmese Buddhist law, locating it in the

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<sup>45</sup> Kyin Swi, *The Judicial System of the Kingdom of Burma* (1965) (Ph.D. dissertation, University of London, School of Oriental and African Studies).

<sup>46</sup> MICHAEL AUNG-THWIN, *PAGAN: THE ORIGINS OF MODERN BURMA* (1985).

<sup>47</sup> VICTOR B. LIEBERMANN, *BURMESE ADMINISTRATIVE CYCLES: ANARCHY AND CONQUEST C 1580 – 1760* (1984).

<sup>48</sup> Myint Zan, *Judicial Independence in Burma: Constitutional History, Actual Practice and Future Prospects*, 4 S. CROSS U. L. REV. 17, 17 (2000).

<sup>49</sup> Myint Zan, *Woe Unto Ye Lawyers: Three Royal Orders Concerning Pleaders in Early Seventeenth Century Burma*, 44 AM. J. LEGAL HIST. 40 (2000).

<sup>50</sup> Myint Zan, *Law and Legal Culture, Constitutions and Constitutionalism in Burma*, in EAST ASIA: HUMAN RIGHTS, NATION-BUILDING, TRADE 180 (Alice Tay ed., 1999).

<sup>51</sup> Myint Zan, *Of Consummation, Matrimonial Promises, Fault and Parallel Wives: The Role of Original Texts, Interpretation, Ideology and Policy In Pre- and Post- 1962 Burmese Case Law*, 14 COLUM. J. ASIAN L. 153, 186-97 (1999).

<sup>52</sup> See, e.g., Andrew Huxley, *Burma: It Works But Is It Law?*, 27 J. FAM. L. 23 (1989).

context of the broader literature on Buddhist law in Southeast Asia.<sup>53</sup> For readers looking for a concise overview of the literature on Burmese Buddhist law published from the 1980s to 2001, his review offers an excellent introduction.<sup>54</sup> He is upfront in his assessment that for most of the last twenty years, he and a Japanese scholar have had the field to themselves, yet neither Britain nor Japan can be proud of their involvement in Burmese history.

Professor Huxley highlights the way in which the *dhammathats* are evidence of the important role that law played under the kings, and that it was not the British who first introduced the rule of law.<sup>55</sup> He argues that it is significant to historians, Pali scholars, lawyers, and to present society because it remains the source of personal law for most citizens.<sup>56</sup> His work has advocated for the view that the legal system that existed in Burma prior to colonialism was well-developed.<sup>57</sup>

Professor Huxley addresses the works of prominent colonial figures, such as John Jardine (1844–1919) who held the position of Judicial Commissioner of British Burma and is well-known for his *Notes on Buddhist Law* (1882–83);<sup>58</sup> and Em Forchhammer (1851–90), a Government Archaeologist of British Burma who wrote *The Jardine Prize: An Essay 1885*.<sup>59</sup> On Forchhammer, Professor Huxley questions his argument that the *dhammathat* literature of 1880s was derived from a single Mon work, and suggests instead that Mon influence varied depending on place and overtime.<sup>60</sup> On Jardine, Professor Huxley has argued that he distorted reality in his attempts to assert that the origins and form of Burmese law were not really Burmese.<sup>61</sup>

Professor Huxley emphasizes the largely unchanged nature of Burmese family law from independence up until the time of writing (1988),

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<sup>53</sup> For his guide to legal literature on Buddhist law in Southeast Asia, see Andrew Huxley, *Studying Theravada Legal Literature*, 20 J. INT'L ASS'N BUDDHIST STUD. 63 (1997).

<sup>54</sup> Huxley, *supra* note 15.

<sup>55</sup> Andrew Huxley, *The Importance of the Dhammathats in Burmese Law and Culture*, 1 J. BURMA STUD. 1, 15 (1997).

<sup>56</sup> *Id.*

<sup>57</sup> Huxley, *supra* note 15.

<sup>58</sup> Jardine's work includes JOHN JARDINE, JUD. COMMISSIONER, BRITISH BURMA, NOTES ON BUDDHIST LAW (1882-83); JOHN JARDINE, MEMORANDUM ON LEGAL EDUCATION (1883).

<sup>59</sup> EMANUEL FORCHHAMMER, THE JARDINE PRIZE: AN ESSAY ON THE SOURCES AND DEVELOPMENT OF BURMESE LAW FROM THE ERA OF THE FIRST INTRODUCTION OF THE INDIAN LAW TO THE TIME OF THE BRITISH OCCUPATION OF PEGU (1884).

<sup>60</sup> Andrew Huxley, *Thai, Mon & Burmese Dhammathats: Who Influenced Whom?*, in THAI LAW: BUDDHIST LAW ESSAYS ON THE LEGAL HISTORY OF THAILAND, LAOS AND BURMA 81, 105-09 (Andrew Huxley ed., 1996).

<sup>61</sup> Huxley, *Is Burmese Law Burmese?*, *supra* note 2, at 191.

and has provided a descriptive overview of the key elements of marriage, divorce, adoption, and the resolution of conflict between different personal laws.<sup>62</sup> Professor Huxley has described *dhammathat* in terms of what it is not; that is, it cannot be easily likened either to law reports, legislation, codifications of law, or religious texts.<sup>63</sup> He has also examined them from the perspective of gender and power.<sup>64</sup>

Professor Huxley provides an insightful overview of government policies towards religion and towards the *sangha* in particular,<sup>65</sup> which is accessible to readers from a common law background with its comparative approach to the conceptualization of religion and the state in England and Burma. He identifies three shared concerns: who can oversee religious organisations, which texts are recognized as authoritative, and how the state deals with non-conformists.<sup>66</sup> He provides examples of monks being prosecuted by kings, but acknowledges that such prosecutions did not happen often.<sup>67</sup> He highlights the way in which Buddhist ecclesiastical law was applied in the courts from annexation up until 1918, but after that time declined as judges demonstrated a preference for *dhammathat* over *vinaya*.<sup>68</sup> Overall, he demonstrates the way in which the position of the *sangha* has changed dramatically since independence when the *sangha* and the *vinaya* were encouraged and recognized, to the other extreme of excessive legislative control over the *sangha*.<sup>69</sup>

Professor Huxley argues that reception in Myanmar was driven by Southeast Asian donees rather than Indian donors, contrary to the bulk of scholarship in this area.<sup>70</sup> Professor Huxley has often adopted the approach of a comparative law scholar, such as his comparison of sixteenth-century Burmese legalism with Western European approaches to law and kingship.<sup>71</sup> He has also written on Burmese political theory in the late 1800s.<sup>72</sup>

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<sup>62</sup> Huxley, *supra* note 52, at 23-34.

<sup>63</sup> *Id.* at 24.

<sup>64</sup> Andrew Huxley, *Gender and Power in Two 18th Century Burmese Dhammasats*, 47 TENGGA: J. SOUTHEAST ASIAN LITERATURE 49 (2004).

<sup>65</sup> Andrew Huxley, *Positivists and Buddhists: The Rise and Fall of Anglo-Burmese Ecclesiastical Law*, 143 L. SOC. INQUIRY 113 (2001).

<sup>66</sup> *Id.* at 117.

<sup>67</sup> *Id.* at 118.

<sup>68</sup> *Id.* at 131.

<sup>69</sup> *Id.* at 133-36.

<sup>70</sup> Andrew Huxley, *The Reception of Buddhist Law in Southeast Asia 200 BC - 1860 CE*, in LA RECEPTION DES SYSTEMES JURIDIQUES: IMPLANTATION ET DESTIN 139 (Michel Doucet & Jacques Vanderlinden eds., 1994).

<sup>71</sup> Andrew Huxley, *Lord Kyaw Thu's Precedent: A Sixteenth-Century Burmese Law Report*, in LEGALISM, ANTHROPOLOGY AND HISTORY 309-10 (Paul Dresch & Hannah Skoda eds., 2012).

<sup>72</sup> See Andrew Huxley, *Rajadhamma Confronts Leviathan: Burmese Political Theory in the 1870s*, in BUDDHISM, POWER AND POLITICAL ORDER 26 (Ian Harris ed., 2005).

Professor Huxley's most recent chapter was written at the time of his retirement<sup>73</sup> and constitutes a reflection on the broader socio-political and legal changes that took place after independence and are now taking place at the sixty-fifth anniversary of the country, combined with detailed discussion of the *dhammathats*. He argues that prior to 1885, Burmese law was distinctly Buddhist; however this year marked not only the end of Burmese rule and the beginning of colonialism across the country, but also the replacement of codified Burmese law with case law.<sup>74</sup> A unique feature of Professor Huxley's work is the way in which he deftly speaks across legal cultures and families, drawing parallels and contrasts with common and civil law contexts, as well as both Western and Asian legal traditions.

The Japanese scholar whose work on Burmese law is referred to by Professor Huxley is Professor Emeritus Ryuji Okudaira, who previously served as a Japanese diplomat, including in Myanmar. He considers the only known collection of local court decisions of Yezajyo during the time of King Badon (1782–1819) to illustrate the extent to which judges of the time used the *dhammathats*, contrary to the views of many colonial authorities.<sup>75</sup> His English language publications rely on colonial sources to examine the substance of *dhammathat*,<sup>76</sup> the development of law and administration under King Badon,<sup>77</sup> and a profile of a key jurist of seventeenth-century Burma.<sup>78</sup> He has also translated and analyzed with Professor Huxley the Manugye *dhammathat* of 1782, an important text they suggest was composed as a guide for the new king that drew on the knowledge of the Ava court.<sup>79</sup>

A scholar of Pali Buddhist literature, Dr. D. Christian Lammerts, has written an extensive thesis on Burmese legal texts of the pre-modern era, based on analysis of hundreds of palm-leaf *dhammathat* manuscripts.<sup>80</sup> It

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<sup>73</sup> See Andrew Huxley, *Is Burmese Law Buddhist? Transition and Tradition*, in LAW, SOCIETY AND TRANSITION IN MYANMAR, *supra* note 2.

<sup>74</sup> *Id.*

<sup>75</sup> Ryuji Okudaira, *How Judges Used Dhammathats (Law Books) in Their Courts in 18th-19th Century Myanmar (Burma) With Special Reference to Yezajyo Hkondaw Hpyahton*, 66 J. ASIAN AFRICAN STUD. 319 (2003).

<sup>76</sup> See Ryuji Okudaira, *The Burmese Dhammathat*, in LAWS OF SOUTH-EAST ASIA. VOL. 1. THE PRE-MODERN TEXTS 23 (M. B. Hooker ed., 1986).

<sup>77</sup> See Ryuji Okudaira, *Judicial Administration Under the Reign of King Badon in 18th to 19<sup>th</sup> Century Myanmar*, in ESSAYS IN COMMEMORATION OF THE GOLDEN JUBILEE OF THE MYANMAR HISTORICAL COMMISSION 82 (2005).

<sup>78</sup> Ryuji Okudaira, *The Role of Kaingza Manuyaza, an Eminent Jurist of the 17th Century, in the Development of the Burmese Legal History*, 27 J. ASIAN AFRICAN STUD. 180 (1984).

<sup>79</sup> Ryuji Okudaira & Andrew Huxley, *A Burmese Tract on Kingship: Political Theory in the 1782 Manuscript of Manugye*, 64 BULL. SCH. ORIENTAL AFRICAN STUD. 248 (2001).

<sup>80</sup> D. Christian Lammerts, *Buddhism and Written Law: Dhammasattha Manuscripts and Texts in Premodern Burma* (2010) (unpublished Ph.D. dissertation, Cornell University).

constitutes a highly sophisticated and in-depth textual analysis of manuscripts from the seventeenth and eighteenth centuries. His thesis brings a new and informed perspective to our understanding of the origins and form of the *dhammathat*. He demonstrates that we must unpack the “structural logic” and the connection between such texts before we can inquire into the substance of the text or its author.<sup>81</sup> In a separate article, Dr. Lammerts provides new insight into local understandings of the origin and role of *dhammathat* in seventeenth through nineteenth-century Burma.<sup>82</sup> He argues that the emergence of authoritative texts must be seen as a product of local practices and internal histories.<sup>83</sup> He has also illuminated our understanding of seventeenth-century inheritance regulations as they applied to monks.<sup>84</sup> His research will be an important source of future scholarship in this area.

Almost all of the research on Burmese law mentioned above has been historical, text-based, and doctrinal. Given the political transition that is taking place, there are now opportunities for research on the contemporary practice of Burmese law in matters of personal law. Aside from Burmese law, it is often overlooked that Myanmar also recognizes the personal law of other religions, such as Islamic law and Hindu law. While Professor Khin Maung Sein, formerly of the Law Department at Yangon University, but now at the International Islamic University of Malaya, has published the main Burmese-language text on Islamic law,<sup>85</sup> which draws on the English-language publications on Anglo-Muhamedan law as it was inherited from India, there is otherwise a gap in this area.<sup>86</sup> Recognition of personal law is just one indication of the diverse legal traditions of Myanmar, which I discuss in the next section.

### B. *The Legal Traditions of Myanmar*

I use the term the legal traditions of Myanmar to refer to the diverse and complex political and social systems, structures, and norms of ethnic nationalities, as well as non-Buddhist religious groups that live in the area now recognized as Myanmar. Here, I consider the major monographs on ethnic groups including the Karen, Kachin, Shan, Chin, and Wa, which

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<sup>81</sup> *Id.* at 361.

<sup>82</sup> D. Christian Lammerts, *Narratives of Buddhist Legislation: Textual Authority and Legal Heterodoxy in 17th-19th Century Burma*, 44 J. S.E. ASIAN STUD. 118 (2013).

<sup>83</sup> *Id.* at 120.

<sup>84</sup> D. Christian Lammerts, *Genres and Jurisdictions: Laws Governing Monastic Inheritance in 17th Century Burma*, in *BUDDHISM AND LAW: AN INTRODUCTION* (forthcoming 2014).

<sup>85</sup> KHIN MAUNG SEIN, *ISALAM UBADE [ISLAMIC LAW]* (1984).

<sup>86</sup> An edited volume on *Muslims and the State in Myanmar* is in progress as a result of a conference held at the National University of Singapore in January 2014.

touch on social and legal norms. Scholarship on legal pluralism has largely emerged from detailed ethnographies and anthropological accounts of particular ethnic groups.<sup>87</sup> Prior to the coup in 1962, Burma was a site for ground-breaking research in terms of ethnography and anthropology among ethnic nationalities. Rev. Harry Marshall presents an anthropology study of the Karen, which includes a chapter on "law and order."<sup>88</sup> He discusses the precepts of caring for the poor, rules of inheritance, and the recognition of sanctions for adultery, theft, and murder.<sup>89</sup> His description is brief and general, emphasizing the unique customs of the Karen, while at the same time affirming a sense of order and that their system of governance is, in his opinion, "really democratic."<sup>90</sup>

Aside from the Karen, Professor Edmund R. Leach, a British social anthropologist (1910–89), authored a seminal ethnographic text of the Kachin Hills Area, which includes the Kachin, but also the Shan.<sup>91</sup> His specific characterization of social structures has been debated and criticized.<sup>92</sup> Professor Leach nevertheless made a broader contribution to conventional understandings of culture that were prevalent among anthropologists at the time. The most recent monograph on the Kachin is a fascinating and detailed historical study, published by Dr. Mandy Sadan, which concerned how some groups claimed authority over group identity and political ideology.<sup>93</sup>

In terms of Shan State, Sai Aung Tun provides a comprehensive overview of the feudal administration and governance system of the Shan from the time of the kings up until the 1962 coup.<sup>94</sup> He identifies several distinct stages of the British administration of Shan State: voluntary engagement on the part of the Shan (1886–97), the introduction of a form of local self-government (1897–1922), a federated form of administration

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<sup>87</sup> For a more extensive review of anthropological studies on Burma, see U Chit Hlaing, *Anthropological Communities of Interpretation for Burma: An Overview*, 39 J. S.E. ASIAN STUD. 239 (2008).

<sup>88</sup> HARRY MARSHALL, *THE KAREN PEOPLES OF BURMA: A STUDY IN ANTHROPOLOGY AND ETHNOLOGY* Ch XV (1922).

<sup>89</sup> *Id.* at 143-51.

<sup>90</sup> *Id.* at 142.

<sup>91</sup> EDMUND R. LEACH, *POLITICAL SYSTEMS OF HIGHLAND BURMA: A STUDY OF KACHIN SOCIAL STRUCTURE* (1954).

<sup>92</sup> For a critical reflection on the life and work of Leach, see EDMUND R. LEACH, *SOCIAL DYNAMICS IN THE HIGHLANDS OF SOUTH EAST ASIA: RECONSIDERING POLITICAL SYSTEMS OF HIGHLAND BURMA* (Mandy Sadan & Francois Robinne eds., 2007).

<sup>93</sup> MANDY SADAN, *BEING & BECOMING KACHIN: HISTORIES BEYOND THE STATE IN THE BORDERWORLDS OF BURMA* (2013).

<sup>94</sup> SAI AUNG TUN, *HISTORY OF THE SHAN STATE: FROM ITS ORIGINS TO 1962* (2009). Sai Aung Tun author was a member of the National Convention in 1993, and was also a member of the military-sponsored Myanmar Historical Commission.

(1922–35), and the post-1935 phase of representation in the government.<sup>95</sup> He considers the negotiations between the government and Shan State leaders, which led to constitutional amendment. Finally, he highlights the effect of the 1962 coup, which included the abolition of the Shan State Council and the arrest of some of its leaders.<sup>96</sup> While largely descriptive, this publication is a rich source of both primary and secondary data of legal and political documents on Shan State.

Turning to the Chin, Professor Lehman's seminal work on the Chin presents an analysis of the social structure and organization of the Chin based on field research from 1957–58.<sup>97</sup> This book includes an analysis of the use and possession of land, inheritance, as well as a comparison of the social structure of Chin groups in the south and the north. In a later volume on the shifting religious and ethnic identity of the Chin, Lian Sakhong charts the abolition of the traditional political system of chieftainship and feudalism of land ownership as a result of the British annexation of Chinram.<sup>98</sup> He describes the introduction of the Chin Hills Regulation 1896 as the “basic constitution” for the British approach to the Chin throughout the colonial era.<sup>99</sup> He provides a fascinating analysis of the effect of the Government of Burma Act 1935 on the Chin population<sup>100</sup> and the effect it had on Christian mission organizations. He provides an analysis of the Panglong conference from the perspective of the Chin representatives, and notes the limitations of the 1947 Constitution that later emerged, which only recognized six major Chin tribes.<sup>101</sup>

On the Wa ethnic group,<sup>102</sup> Ronald Renard provides a fascinating perspective on the changes and challenges in governance in the Wa Special Region since the Wa negotiated a ceasefire with the military in 1989.<sup>103</sup> Based on his experience as a consultant in the region since 2003 and as manager of the United Nations Office of Drugs and Crime (“UNODC”) Wa Project from 2006–07, Renard provides a sober assessment of the absence of

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<sup>95</sup> *Id.* at 223-24.

<sup>96</sup> *Id.* at 483-87.

<sup>97</sup> FREDERICK K. LEHMAN, *THE STRUCTURE OF CHIN SOCIETY: A TRIBAL PEOPLE OF BURMA ADAPTED TO A NON-WESTERN CIVILISATION* (1963).

<sup>98</sup> LIAN H. SAKHONG, *IN SEARCH OF CHIN IDENTITY: A STUDY IN RELIGION, POLITICS AND ETHNIC IDENTITY IN BURMA* (2003).

<sup>99</sup> *Id.* at 102.

<sup>100</sup> *Id.* at 179-201.

<sup>101</sup> *Id.* at 220.

<sup>102</sup> For a more general introduction to scholarship on the Wa, see Mangus Fiskesjo, *Introduction to Wa Studies*, 17 J. BURMA STUD. 1 (2013).

<sup>103</sup> Ronald D. Renard, *The Wa Authority and Good Governance 1989-2007*, 17 J. BURMA STUD. 141 (2013).

legal infrastructure or personnel in the region, which is worth excerpting in full here:

There was no court structure and no system of appealing decisions (as is so today). Criminal cases were and are settled through the Political Affairs and Justice Bureau, often in consultation with the police. There was and is no legal profession and there never have been any practicing Wa lawyers in the Wa Region.<sup>104</sup>

He does, however, go on to mention that some draft laws and regulations were being prepared, and that a land administration system was in process.<sup>105</sup> Nevertheless, he argues that the major social and economic issues—such as illegal logging, drug crops, unemployment, illiteracy, and lack of unifying language—arise as more immediate and pressing issues that need to be addressed before greater concerns about governance and administration can effectively be reformed.<sup>106</sup>

Scholars have also discussed the conflict between ethnic nationality armies and the military, and the absence of law. Most prominently, Martin Smith’s work reviews the period up until the late 1990s, when many ceasefires were made with many ethnic nationality armies.<sup>107</sup> Ashley South’s monograph takes a slightly different focus on the ethnic nationality issues, providing an overview of the history of ethnic nationalities and the state, and focusing in particular on the complexities of the ceasefires under the State Peace and Development Council (“SPDC”).<sup>108</sup>

There is also a wide range of scholarship on the people and social structures of mainland Southeast Asia, of which Myanmar is a part. One of the most well-known books is James C. Scott’s *The Art of Not Being Governed*.<sup>109</sup> In his self-proclaimed “anarchist history” of the region,<sup>110</sup> he engages with the key Burma Studies scholars mentioned above, including the works of Lehman and Professor Leach,<sup>111</sup> and emphasizes the flexible

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<sup>104</sup> *Id.* at 152.

<sup>105</sup> *Id.* at 155.

<sup>106</sup> *See generally id.*

<sup>107</sup> *See generally* MARTIN SMITH, *BURMA: INSURGENCY AND THE POLITICS OF ETHNICITY* (1999) (explaining that the oral ceasefires occurred over a number of years).

<sup>108</sup> ASHLEY SOUTH, *ETHNIC POLITICS IN BURMA: STATES OF CONFLICT* (2008).

<sup>109</sup> JAMES C. SCOTT, *THE ART OF NOT BEING GOVERNED: AN ANARCHIST HISTORY OF UPLAND SOUTHEAST ASIA* (2010).

<sup>110</sup> *Id.* at 232.

<sup>111</sup> *See, e.g., id.* at 213-16 (discussing the work of Leach).



social structures in comparison to valley societies.<sup>112</sup> His incisive and original analysis of the relationship between the central state and peoples on the periphery in broader mainland Southeast Asia encompasses the Karen, the Shan, the Chin, the Kachin, the Lahu, and the Pa-O, among others.<sup>113</sup> He convincingly argues that these are “populations who live in the shadow of the state but who have not yet been fully incorporated.”<sup>114</sup> Scott’s statement needs to be kept in mind by those scholars conducting research on the reach or limits of state law in mainland Southeast Asia, including in Myanmar.

Aside from studies based on ethnic traditions, some political scientists have focused on the debates on law, religion, and politics in Myanmar, particularly between the Buddhist *Sangha* and the state.<sup>115</sup> The most comprehensive study on this debate is by Donald E. Smith,<sup>116</sup> which includes a detailed account of the debates during the drafting of the 1947 Constitution as well as the debates in the 1960s in the lead up to the 1961 constitutional amendment declaring Buddhism the state religion.<sup>117</sup> These debates intersected with broader discussions on constitutional reform, and I turn to scholarship on public law next.

#### IV. PUBLIC LAW AND GOVERNANCE

A second major theme in the literature on the legal system of Burma is public law and administration, which ties into broader debates on the relevance and strength of the common law and ideas of constitutionalism.<sup>118</sup> This section considers scholarship on administration under the kings through to the colonial period and the preoccupation with constitutional law.

##### A. *From Burmese Kings to Colonial Administration*

The scholarship on the history of politics and governance in Myanmar from the time of the kings through the colonial period contains some analysis of legal administration and institutions. This section briefly refers

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<sup>112</sup> *Id.* at 219.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 325.

<sup>115</sup> DONALD E. SMITH, *RELIGION AND POLITICS IN BURMA* (1965).

<sup>116</sup> *Id.*

<sup>117</sup> See The Constitution (Third Amendment) Act, 1961 and The State Religion Promotion Act, 1961, in SMITH, *supra* note 115, at 329-31; The State Religion Promotion Act, 1961, in SMITH, *supra* note 115, at 332-35.

<sup>118</sup> Crouch & Cheesman, *supra* note 8 (providing a brief introduction to the history of the legal system of Myanmar, likening the successive legal regimes to various layers that must be unpacked in order for the rhetoric of the “common law” and constitutionalism to be understood).

to historical accounts that contain some analysis of legal institutions and actors. There are a number of biographies and memoirs of key legal and political figures, but these have been covered in previous bibliographies.<sup>119</sup> Some scholarship discusses the kings and the legal structures central to the administration of these kingdoms, within a broad historical timeframe from the early kings to the modern era.<sup>120</sup> Two accessible and incisive accounts include a history of the kings from the 1700s–1885 by Dr. Thant Myint-U (grandson of the late U Thant, former UN Secretary General),<sup>121</sup> and a history of the modern period from 1893–2000s by Professor Michael Charney.<sup>122</sup>

Other studies have focused more specifically on public administration. Situated within literature on public administration, Dr. Kyaw Yin draws a line of continuity from the period of the kings through colonialism and independence up until the coup in the 1960s.<sup>123</sup> He provides a useful description of the administrative structure during these periods, the way in which it developed, and the points at which it was disrupted, such as the major changes to village administration introduced by the British in 1886.<sup>124</sup>

To return to the work of Professor Huxley on the issue of colonial administration, he demonstrates that administrative governance preoccupied the colonial government from 1870–1900, and that during this time it shifted from indirect to direct rule.<sup>125</sup> He charted the way arguments about the governance of Burma revolved around the cheapest way to maintain control and the inevitable way in which “legal positivism and imperialism marched hand in hand.”<sup>126</sup>

Dr. Nick Cheesman provides the main work on courts and law enforcement in the colonial period. Dr. Cheesman offers a socio-legal

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<sup>119</sup> See, e.g., BA MAW, *BREAKTHROUGH IN BURMA: MEMOIRS OF REVOLUTION 1939-1946* (1968) (by Burma's first prime minister under the 1937 Constitution); BA U, *MY BURMA: THE AUTOBIOGRAPHY OF A PRESIDENT* (1958) (by the first President under the 1947 Constitution); U NU, *U NU-SATURDAY'S SON* (1975) (by the former Prime Minister U Nu).

<sup>120</sup> Early histories include G. E. HARVEY, *HISTORY OF BURMA: FROM THE EARLIEST TIMES TO 10 MARCH 1824* (1925) (covering the period of the kings up until 1824); G. E. HARVEY, *BRITISH RULE IN BURMA: 1824-1942* (1942) (covering from 1824 until 1942); MAUNG HTIN AUNG, *A HISTORY OF BURMA* (1967) (addressing the history of Burma from the early kings until independence). Maung Htin Aung was the former Rector of the University of Rangoon from 1946-1958. For a more recent publication, see ROBERT TAYLOR, *THE STATE IN MYANMAR* (2d ed. 2009) (covering from the early kings up until 2008).

<sup>121</sup> THANT MYINT U, *THE MAKING OF MODERN BURMA* 12 (2001).

<sup>122</sup> MICHAEL CHARNEY, *A HISTORY OF MODERN BURMA* (2009).

<sup>123</sup> KYAW YIN, *THE FOUNDATIONS OF PUBLIC ADMINISTRATION IN BURMA: A STUDY IN SOCIAL AND HISTORICAL PERSPECTIVES* (1968).

<sup>124</sup> *Id.* at 302.

<sup>125</sup> Andrew Huxley, *Should Rangoon Follow Bombay Or Punjab? The Debate Over the Government of British Burma 1870-90*, in *MERGING THE UNSUITABLE* (Tilman Frasch ed., 2006).

<sup>126</sup> *Id.* at 23.

reading of the Burma Law Reports from 1892–1922, using the metaphor of the body to explore the way in which colonial authorities sought to control the bodies of the colonized through legal proceedings.<sup>127</sup>

Beyond the courts in the colonial period, Dr. Jonathan Saha considers investigations of corruption against colonial authorities, based on extensive archival research.<sup>128</sup> He argues that law and disorder are intimately related, and that subordinate officials were central to the everyday project of creating and maintaining the colonial state.<sup>129</sup> In particular, he emphasizes the way in which corrupt behavior was investigated by colonial authorities under the guise of “misconduct,” and the way in which misconduct cases were themselves mishandled.<sup>130</sup> Saha highlights the attitude of tolerance that was extended to British officials accused of misconduct,<sup>131</sup> the way cases of misconduct reinforced racial divisions, and the masculine qualities of the colonial state.<sup>132</sup> Ultimately, he argues that corruption should be seen not as a reflection on Burmese society at the time, but as a direct result of colonial rule.<sup>133</sup> In concluding with reference to the more recent period of military rule, he contends that a clear link cannot be drawn between colonial misrule and post-colonial corruption, and that any such link would not necessarily absolve the (then) military junta of all responsibility.<sup>134</sup>

A key colonial figure and author, although not a legal professional, John S. Furnivall first arrived in Burma in the early 1900s as a civil servant and later founded the Burma Research Society.<sup>135</sup> After retiring, he went to Cambridge University to teach Burmese language, but after Burma became independent, he returned when U Nu appointed him as a National Planning Adviser for the newly independent government.<sup>136</sup> His most well-known monograph on Burma, *Colonial Policy and Practice*, was scathing in its assessment of the devastation caused by British colonialism and the way in

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<sup>127</sup> Nick Cheesman, *Bodies On the Line in Burma's Law Reports 1892-1922*, in LAW, SOCIETY AND TRANSITION IN MYANMAR, *supra* note 2.

<sup>128</sup> JONATHAN SAHA, LAW, DISORDER AND THE COLONIAL STATE: CORRUPTION IN BURMA C. 1900 (2013). See also Jonathan Saha, *Madness and the Making of a Colonial Order In Burma*, 47 MODERN ASIAN STUD. 1 (2012); Jonathan Saha, *A Mockery of Justice? Colonial Law, the Everyday State and Village Politics in the Burma Delta 1890-1910*, 217 PAST AND PRESENT 187 (2012).

<sup>129</sup> See SAHA, LAW, DISORDER AND THE COLONIAL STATE, *supra* note 128 at 38-39.

<sup>130</sup> *Id.* at 18, 20.

<sup>131</sup> *Id.* at 15.

<sup>132</sup> *Id.* at 9, 13, 72-74.

<sup>133</sup> *Id.* at 18.

<sup>134</sup> *Id.* at 126.

<sup>135</sup> For one analysis of the work of Furnivall, see Hoai Julie Pham, *J. S. Furnivall and Fabianism: Reinterpreting the “Plural Society” in Burma*, 39 MODERN ASIAN STUD. 321 (2005).

<sup>136</sup> *Id.* at 325.

which it was responsible for further dividing society.<sup>137</sup> He wrote a short, creative yet sobering assessment of the early years of British attempts after the First Anglo-Burmese War to establish rule by law, invoking the metaphor of Leviathan.<sup>138</sup> He also published an analysis of the political economy of Burma up until the 1950s,<sup>139</sup> as well as a more extended review of governance of Burma from the first attempts of colonial authorities to establish a legal system up until the independence period, including discussion of the Government of Burma Act 1935, which he suggested effected little change.<sup>140</sup>

In the context of the steps towards limited self-government in British India, Hugh Tinker briefly discussed the administrative and political structure in Burma under dyarchy from 1923 to 1937.<sup>141</sup> He argued that this period of governance was an abject failure, yet he attributes this failure not so much to corruption or the lack of participation in elections, although this was also true, but rather to the incongruous mismatch between the imposition of Indian administration techniques and Burma’s local context.<sup>142</sup> In a separate volume, *The Union of Burma*, Tinker devotes his attention to political developments from independence in 1947 up until the mid-1950s.<sup>143</sup> From a sweeping review of diverse fields such as education, foreign relations, and agriculture, he concluded that British colonialism was an abject failure and that there had been no substantial reform since independence.<sup>144</sup>

Finally, there is little scholarship available to date in terms of law and governance at the local level in the post-2011 environment. In terms of the six ethnic nationalities whose regions have been designated as Self-Administered Zones under the 2008 Constitution, I have argued that the key determinant in central-local relations in transitional Myanmar has been a “Look to Naypyidaw” policy, which means that the Self-Administered

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<sup>137</sup> JOHN S. FURNIVALL, *COLONIAL POLICY AND PRACTISE: A COMPARATIVE STUDY OF BURMA AND NETHERLANDS INDIA* (1948).

<sup>138</sup> JOHN S. FURNIVALL, *THE FASHIONING OF LEVIATHAN: THE BEGINNINGS OF BRITISH RULE IN BURMA* (1991).

<sup>139</sup> JOHN S. FURNIVALL, *AN INTRODUCTION TO THE POLITICAL ECONOMY OF BURMA* (1957).

<sup>140</sup> *See generally* JOHN S. FURNIVALL, *THE GOVERNANCE OF MODERN BURMA* (1960).

<sup>141</sup> HUGH TINKER, *FOUNDATIONS OF LOCAL SELF-GOVERNMENT IN INDIA, PAKISTAN AND BURMA* 214-44 (1967).

<sup>142</sup> *Id.* at 216.

<sup>143</sup> HUGH TINKER, *THE UNION OF BURMA: A STUDY OF THE FIRST YEARS OF INDEPENDENCE* (1956).

<sup>144</sup> *Id.* at 380-81.

Zones have not yet exercised any of the formal judicial and legislative powers they have been given under the Constitution.<sup>145</sup>

*B. Studies on Constitutional Law*

Aside from administration and governance, there has been a large focus on constitutional law since independence. The key early text on the 1947 Constitution is Dr. Maung Maung's *Burma's Constitution*,<sup>146</sup> and his book is still used in law departments to teach Constitutional Law.<sup>147</sup> He also continues with the theme of constitutionalism and the need for Burma to take its place in world politics in *Burma in the Family of Nations*,<sup>148</sup> which covers the period from the time of the kings to the post-independence period under the 1947 Constitution.

Professor Silverstein's work reviews the constitutional debates and developments from the 1947 Constitution to its various amendments and then to the 1974 Constitution.<sup>149</sup> He paints a bleak picture of the amendments made to the 1947 Constitution in the late 1950s and early 1960s as ethnic nationality leaders effectively traded their rights under the Constitution for money.<sup>150</sup> Professor Silverstein's work also extends to an authoritative monograph on Burmese politics up until the late 1970s,<sup>151</sup> as well as a concise review of the first fifty years of independence (1947–1997).<sup>152</sup>

An early analysis of the 1974 Constitution issued by Ne Win's socialist regime is offered by Albert Moscotti.<sup>153</sup> He criticizes the lack of competition during the 1974 elections, stating that there was basically only one candidate who ran for each seat.<sup>154</sup> In a similar way, Professor David Steinberg argues that there was little in common between the 1947 and 1974 Constitutions, although both were rooted in Burmese concepts of

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<sup>145</sup> Melissa Crouch, *Constitutionalism and Minority Rights in Myanmar/Burma: Ethnic Nationalities and the Self-Administered Zones*, in CENTRAL-LOCAL RELATIONS IN ASIAN CONSTITUTIONAL SYSTEMS (Andrew Harding & Mark Sidel eds., forthcoming 2014).

<sup>146</sup> MAUNG MAUNG, *BURMA'S CONSTITUTION* (1961).

<sup>147</sup> Copies of the curriculum of Yangon and Mandalay Law Departments are on file with the author.

<sup>148</sup> MAUNG MAUNG, *BURMA IN THE FAMILY OF NATIONS* (1956).

<sup>149</sup> JOSEF SILVERSTEIN, *BURMA: MILITARY RULE AND THE POLITICS OF STAGNATION* (1977).

<sup>150</sup> *Id.* at 78.

<sup>151</sup> JOSEF SILVERSTEIN, *BURMESE POLITICS: THE DILEMMA OF NATIONAL UNITY* (1980).

<sup>152</sup> Josef Silverstein, *Fifty Years of Failure in Burma*, in GOVERNMENT POLICIES AND ETHNIC RELATIONS IN ASIA AND THE PACIFIC 167 (Michael Brown & Sumit Ganguly eds., 1997).

<sup>153</sup> ALBERT D. MOSCOTTI, *BURMA'S CONSTITUTION AND THE ELECTIONS OF 1974: A SOURCE BOOK* (1977).

<sup>154</sup> *Id.* at 157.

socialism.<sup>155</sup> He suggests that the 1974 Constitution cemented military rule.<sup>156</sup> In contrast, Professor Robert Taylor is more sympathetic to the socialist Constitution and argues that the 1974 Constitution could be viewed as more suited to the Burmese social and political context than the 1947 Constitution.<sup>157</sup>

Turning from the 1974 Constitution to the drafting of the 2008 Constitution, there has been some analysis of the processes and politics in drafting the 2008 Constitution, which was a long-winded affair mired by the military's control over the process,<sup>158</sup> and this work has largely been written from a human rights and advocacy perspective.<sup>159</sup> There have also been several textual analyses of the contents of the 2008 Constitution.<sup>160</sup> Jeremy Sarkin offers a normative comparison and assessment of the National Convention draft Constitution in 2001 alongside the alternative draft that was proposed by the National Council of the Union of Burma.<sup>161</sup>

Since the 2008 Constitution has come into force, Professor David Williams undertook a thorough textual analysis of its contents and potential implications.<sup>162</sup> Informed by his long-standing engagement with ethnic nationalities of Burma and their exercises in state constitution drafting through the Centre for Constitutional Democracy,<sup>163</sup> Professor Williams provides an accessible overview of a complex and controversial area. His

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<sup>155</sup> David Steinberg, *Union of Myanmar*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1990).

<sup>156</sup> *Id.* at 83.

<sup>157</sup> See, e.g., Robert Taylor, *Burma's National Unity Problem and the 1974 Constitution*, 1 CONTEMP. S.E. ASIA 232 (1979); Robert Taylor, *The Constitutional Future of Myanmar in Comparative Perspective*, in BURMA: THE CHALLENGE OF CHANGE IN A DIVIDED SOCIETY 55 (Peter Carey ed., 1997).

<sup>158</sup> Derek Tonkin, *The 1990 Elections in Myanmar: Broken Promises or a Failure of Communication?*, 29 CONTEMP. S.E. ASIA 33, 33-54 (2007).

<sup>159</sup> Janelle M. Diller, *Constitutional Reform in a Repressive State: The Case of Burma*, 33 ASIAN SURV. 393, 393 (1993). See also Janelle M. Diller, *The National Convention: An Impediment to the Restoration of Democracy*, in BURMA: THE CHALLENGE OF CHANGE IN A DIVIDED SOCIETY, *supra* note 157; Grahaem Wiffen, *Drafting a Constitution in Burma: A Comparison of the Government's and an Expatriate Opposition Group's Proposals*, 4 S. CROSS U. L. REV. 117 (2000). For a different perspective, see TAYLOR, *supra* note 120, at 487-506.

<sup>160</sup> YASH GHAI, THE 2008 MYANMAR CONSTITUTION: ANALYSIS AND ASSESSMENT (2008), available at [http://www.burmalibrary.org/docs6/2008\\_Myanmar\\_constitution--analysis\\_and\\_assessment-Yash\\_Ghai.pdf](http://www.burmalibrary.org/docs6/2008_Myanmar_constitution--analysis_and_assessment-Yash_Ghai.pdf); Zhu Xianghui, *Constitution in the Scope of Parliamentarism and Authoritarianism: A Comparative Study On the 1947 and 2008 Constitution of Myanmar/Burma*, in MYANMAR: PROSPECT FOR CHANGE (Li Chenyang & Wilhelm Hofmeister eds., 2010).

<sup>161</sup> Jeremy Sarkin, *Examining the Competing Constitutional Process in Burma/Myanmar from a Comparative and International Democratic and Human Rights Perspective*, 2 ASIA-PACIFIC J. HUMAN RIGHTS & LAW 42 (2001).

<sup>162</sup> David C. Williams, *What's So Bad About Burma's 2008 Constitution? A Guide for the Perplexed*, in LAW, SOCIETY AND TRANSITION IN MYANMAR, *supra* note 2.

<sup>163</sup> See Center for Constitutional Democracy, INDIANA UNIV. BLOOMINGTON, <http://ccd.indiana.edu> (last visited May 17, 2014).

central message emphasizes the relative importance of constitutional law in the transitional period, and that reform is taking place in Myanmar “not because of the Constitution, but in spite of it.”<sup>164</sup> Professor Williams has also written directly on the process of ethnic nationalities drafting their own state constitutions.<sup>165</sup> He has considered the complex role of the Burmese diaspora and their engagement in the broader reform process.<sup>166</sup> The distribution of power between the central and the local governments has also been a central concern, and Professor Williams, along with Lian Sakhong, is the author of a short but accessible volume on federalism, which has been distributed within Myanmar.<sup>167</sup>

In terms of judicial power, the 2008 Constitution introduced a new judicial structure and a new institution for constitutional review, the Constitutional Tribunal.<sup>168</sup> Dominic Nardi explores the motivations behind the establishment of the Constitutional Tribunal.<sup>169</sup> His central line of inquiry is why authoritarian regimes, such as Myanmar, introduce new courts with the power of constitutional review.<sup>170</sup> Written before the Constitutional Tribunal began operating, he argued that the Tribunal was established for several reasons, including to enforce elite discipline and to manage intra-elite disputes and disputes between the central government and states and regions.

There is little scholarship on administrative law, or more specifically the constitutional writs as they are known in Myanmar, although they were first introduced in the 1947 Constitution.<sup>171</sup> Dr. Cheesman offers a sophisticated analysis of the so-called return of habeas corpus under the 2008 Constitution, cautioning that the revival of the right to review detentions may not be all that it seems.<sup>172</sup> By framing his discussion within the broader misuse of the writs in South Asian countries such as Sri Lanka

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<sup>164</sup> *Id.*

<sup>165</sup> David C. Williams, *Constitutionalism Before Constitutions: Burma's Struggle to Build a New Order*, 87 TEX. L. REV. 1657 (2009).

<sup>166</sup> David C. Williams, *Changing Burma From Without: Political Activism from the Burmese Diaspora*, 19 IND. J. GLOBAL LEGAL STUD. 121 (2012).

<sup>167</sup> DAVID C. WILLIAMS & LIAN H. SAKHONG, *DESIGNING FEDERALISM IN BURMA* (2005). On a trip to Burma in 2011, a Burmese friend gave me a copy of this book saying “Can you please take this? I am worried I may get into trouble if I am caught with it.” He had also blacked out the title on the front page, presumably to avoid attracting any attention.

<sup>168</sup> THE CONSTITUTION OF THE UNION OF BURMA § 46, 293, 320-336 (2008).

<sup>169</sup> Dominic Nardi, *Discipline-Flourishing Constitutional Review: A Legal and Political Analysis of Myanmar's New Constitutional Tribunal*, 12 AUSTL. J. ASIAN L. 1 (2010).

<sup>170</sup> *Id.*

<sup>171</sup> THE CONSTITUTION OF THE UNION OF BURMA § 25(2) (1947).

<sup>172</sup> Nick Cheesman, *The Incongruous Return of Habeas Corpus to Myanmar*, in *RULING MYANMAR: FROM CYCLONE NARGIS TO NATIONAL ELECTIONS* (Nick Cheesman, Monique Skidmore, & Trevor Wilson eds., 2010).

and Nepal, he outlines the way in which authorities may simply manipulate the system, the fact that applications may backfire if lawyers are charged with contempt of court, and that ostensible “success” cases may lull us into a false sense of hope offered by review of government action.<sup>173</sup> Ultimately, he argued that habeas corpus is based on the premise that law enforcement agencies will follow a court order, and this may not be true in Myanmar.<sup>174</sup> Dr. Cheesman’s article may partly be read as a reflection of the political conditions and general skepticism about any reform process that existed in 2007.

I have conducted a broader analysis of writ applications, including, but not limited to, habeas corpus.<sup>175</sup> Focusing on the low number of reported cases by comparison to the large number of cases lodged, I explore the socio-political dynamics of constitutional writ cases.<sup>176</sup> I analyze the six reported cases in 2011, showing the Tribunal’s highly procedural and technical nature in supervising the jurisdiction of lower courts in contrast to unreported cases of habeas corpus that were unsuccessful.<sup>177</sup> I conclude from the reported writ cases and from the draft writ bill discussions that the relationship between the executive and the judiciary blurs any line between the branches of government established by the formal separation of powers, limiting the potential for accountability of executive action.

Professor Mairii Aung-Thwin’s work analyses the history of emergency powers, providing insight on how constitutional provisions on states of emergency have actually worked in practice.<sup>178</sup> I provide a more recent, brief analysis of the use of emergency powers in the post-2011 transition era, which suggests that this power has been used selectively to target the Rohingya and maintain military involvement in areas where they live, and not in areas of conflict with other ethnic nationalities due to the government’s desire to be able to declare a nation-wide ceasefire.<sup>179</sup>

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<sup>173</sup> *Id.* at 98-105.

<sup>174</sup> *Id.* at 105-06.

<sup>175</sup> Melissa Crouch, *The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar*, in LAW, SOCIETY AND TRANSITION IN MYANMAR, *supra* note 2.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Mairii Aung-Thwin, *Discourses of Emergency in Colonial and Post-Colonial Burma*, in EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY 187 (Victor V. Ramraj & Arun K. Thiruvengadam eds., 2010).

<sup>179</sup> Melissa Crouch, *The Constitution, Emergency Powers and the Rule of Law*, in MYANMAR IN TRANSITION: POLITY, PEOPLE & PROCESSES 45, 47 (2013), available at [http://www.kas.de/wf/doc/kas\\_36387-1522-2-30.pdf?131213105916](http://www.kas.de/wf/doc/kas_36387-1522-2-30.pdf?131213105916).



## V. CORPORATE LAW

Turning from public law to private law, the third issue that scholarship has centered around is corporate law. After 1988 and the abrupt change from socialism to a market economy, the military junta made efforts to open up opportunities for foreign investment in Burma, as well as allow for the establishment of private banks.<sup>180</sup> This led to the abolition of the socialist economic system and the introduction of new laws on foreign investment and the central bank, among others.<sup>181</sup> While businesses from some Asian countries invested in the 1990s and 2000s,<sup>182</sup> few Western countries did due to the imposition of Western sanctions.<sup>183</sup> The issue of trade sanctions against Myanmar was addressed by Michael Ewing-Chow who argues for an approach between “sweeping trade sanctions,” which may hurt the poor most, and “laissez fair engagement,” to avoid bolstering the legitimacy of the military regime.<sup>184</sup>

Most analysis in this area is doctrinal, practice-oriented, and some publications are dated or may soon become obsolete. For example, commentary and descriptive practice notes were published in the 1990s and 2000s on aspects of commercial law at a time when there was an overt push to attract foreign investment.<sup>185</sup> There are also publications that addressed specific areas of interest to foreign businesses that were subject to new regulations, such as the National Drug Law 1992.<sup>186</sup>

Crossing legal borders, there has been some research on the *Unocal* case, which was a case originally filed in 1997 in the United States by Burmese peasants who sought redress from Unocal because of human rights

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<sup>180</sup> SEAN TURNELL, *FIERY DRAGONS: BANKS, MONEYLENDERS AND MICROFINANCE IN BURMA* 256-60 (2009).

<sup>181</sup> See e.g., The Union of Myanmar Foreign Investment Law, 1988, No. 10 (Myan.); The Central Bank of Myanmar Law, 1990, No. 15 (Myan.).

<sup>182</sup> See Jared Bissinger, *Foreign Investment in Myanmar? A Resource Boom but a Development Bust*, 34 CONTEMP. S.E. ASIA 23, 35 (2012) (demonstrating that China, Hong Kong, South Korea, and Thailand were the major investors between 1989 and 2010).

<sup>183</sup> For a sustained analysis of the political debates surrounding Western sanctions against Myanmar, see MORTEN B. PEDERSEN, *PROMOTING HUMAN RIGHTS IN BURMA: A CRITIQUE OF WESTERN SANCTIONS POLICY* (2008).

<sup>184</sup> Michael Ewing-Chow, *First Do No Harm: Myanmar Trade Sanctions and Human Rights*, 5 NW. J. INT'L HUMAN RIGHTS 153, 179 (2007).

<sup>185</sup> See Alec Christie, *The Rule of Law and Commercial Litigation in Myanmar*, 10 PAC. RIM L. & POL'Y J. 48 (2000); Alec Christie, *Protecting Trademarks in Myanmar: Strategies for Foreign Trademark Owners*, 95 TRADEMARK REP. 1357 (2005); ALEC CHRISTIE & SUZANNE SMITH, *FOREIGN DIRECT INVESTMENT IN MYANMAR* (1998); Alec Christie, *Myanmar's Legal System And Contract Law*, DLA PIPER AUSTL. (Sept. 11, 2006), <http://www.mondaq.com/article.asp?articleid=42668>.

<sup>186</sup> Thida Aye & James Finch, *Pharmaceuticals in Myanmar: Law and Procedure*, 4 SING. J. INT'L COMPAR. L. 115 (2000) (explaining the procedure that foreign companies must comply with in order to register and sell pharmaceutical products).

violations committed by the military as a result of a pipeline project.<sup>187</sup> Professor Huxley, one of the expert witnesses in the case,<sup>188</sup> has written briefly on the case from a comparative law perspective.<sup>189</sup> He argues that the judge was correct to prioritize the question of "outcome and process values," rather than the precise determination of which legal family Myanmar most resembles.<sup>190</sup> Dr. John Dale considers the *Unocal* case and the role of transnational legal action in greater detail from the perspective of social movements.<sup>191</sup> He illustrates this by referencing three case studies: the *Unocal* case; the passage of Free Burma laws by local governments in America; and a case of human rights abuses brought under the U.S. Alien Tort Claims Act.<sup>192</sup> Dale's broader purpose is to examine the transnational dimension of Burma's pro-democracy movement and demonstrate the leverage it had.<sup>193</sup>

Another area of research has been the Myanmar Company Act 1914.<sup>194</sup> A thesis by Daw Ma Ma Thant, formerly of the Law Department at Yangon University and now at the Myanmar-Japan Legal Resource Centre, aptly captures the frozen state of directors' duties in Myanmar.<sup>195</sup> She focuses on how to protect minority shareholder rights given the correlation to the country's economic growth since the transition in 2011.<sup>196</sup> She provides a brief history of the Company Act 1914 and its use in Myanmar,<sup>197</sup> and highlighted the only three reported cases on directors' duties.<sup>198</sup> She considers comparative approaches to shareholder remedies in the United Kingdom and Singapore.<sup>199</sup> Due to the almost complete absence of case law, she recommends that a statutory derivative action should be inserted in Myanmar's Company Act.<sup>200</sup>

In keeping with this theme, Melinda Tun makes a compelling case for reform of the Company Act and suggests lessons to be learned from the

<sup>187</sup> See *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).

<sup>188</sup> Andrew Huxley, *Case Note: Comparative Law Aspects of the Doe v. Unocal Choice of Law Hearing*, 1 J. COMPAR. L. 219 (2008).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 220-21.

<sup>191</sup> JOHN DALE, *FREE BURMA: TRANSNATIONAL LEGAL ACTION AND CORPORATE ACCOUNTABILITY* (2011).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Myanmar Company Act, 1914 (Myan.).

<sup>195</sup> Ma Ma Thant, *Directors Duties and Shareholder Remedies in Myanmar: A Comparative Approach to Reform* (2012) (Ph.D. dissertation, Nagoya University, Graduate School of Law).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 8-10.

<sup>198</sup> *Id.* at 26-33.

<sup>199</sup> *Id.* at 45-116.

<sup>200</sup> *Id.* at 111-14.

wealth of comparative experience in other common law jurisdictions.<sup>201</sup> She concludes with a plea for a reform process that is both guided by transparent principles and inclusive, while remaining under the control of local actors.<sup>202</sup> On the related issue of the security exchange market, Tun Zaw Mra analyzes equity capital markets and prospectus regulation in light of plans to establish a stock exchange in Myanmar in 2015.<sup>203</sup> In considering the legal framework within which companies operate, he cautions that the general rhetoric that Myanmar is part of the “common law family” could engender a “false sense of comfort.” He insists that it is equally, if not more, important to pay attention to local practices and the historical development of the legal system in its social and political context.<sup>204</sup> He also points out that government regulations and ministerial policies and procedures have the greatest influence on equity capital markets—and this is true also of many other areas of legal practice in Myanmar.<sup>205</sup>

Economic reforms will remain a key area for research due to the ongoing nature of legislative reforms and regulations in this area. Professor Sean Turnell, a leading scholar of Myanmar’s economy, highlights the centrality of the financial system in Myanmar in its turbulent political history.<sup>206</sup> On recent reforms, Professor Turnell specifically addresses the legal building blocks of the reform process in relation to the economy, including the Foreign Investment Law, the Central Bank of Myanmar Law, the Microfinance Law, and the Special Economic Zone Law.<sup>207</sup> He provides a concise analysis of the central economic reforms up until the end of 2013 and indicates areas where further reforms are necessary for the growth and stabilization of the economy.<sup>208</sup> Finally, Professor Ian Brown has published the most recent monograph on the modern economy of Burma, which argues that Myanmar’s economic failures cannot simply be attributed to military mismanagement, but rather must be seen in light of its longer historical legacy and the substantial administrative weaknesses under the British.<sup>209</sup>

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<sup>201</sup> Melinda Tun, *Company Law Reform in Myanmar*, in LAW, SOCIETY AND TRANSITION IN MYANMAR, *supra* note 2.

<sup>202</sup> *Id.*

<sup>203</sup> Tun Zaw Mra, *Early Sketches of Equity Capital Markets Regulation in Myanmar*, in LAW, SOCIETY AND TRANSITION IN MYANMAR, *supra* note 2.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> TURNELL, *supra* note 180.

<sup>207</sup> Sean Turnell, *Legislative Foundations of Myanmar’s Economic Reforms*, in LAW, SOCIETY AND TRANSITION IN MYANMAR, *supra* note 2.

<sup>208</sup> *Id.*

<sup>209</sup> IAN BROWN, *BURMA’S ECONOMY IN THE TWENTIETH CENTURY* (2013).

## VI. LEGAL CULTURE AND THE POLITICS OF LAW

This final section examines scholarship under the broader rubric of Myanmar's legal culture and the politics of law, including literature on the courts and law enforcement; the legal profession and legal education; and the rule of law and human rights. While encompassing a broad range of issues, the research discussed in this section speaks to literature on law and society in Asia, particularly on the role and use of law in authoritarian regimes.

### A. *The Courts and Law Enforcement*

For many casual readers, their introduction to the judiciary in Myanmar is through their reading of the classic novel *Burmese Days* by George Orwell.<sup>210</sup> The character featured in the opening scene of the book is the conniving U Po Kyin, a Burmese magistrate in Upper Burma who secures a promotion as Deputy Assistant Commissioner from British colonial authorities by criminal intentions.<sup>211</sup> The reader may be struck, however, by the complete absence of courtroom scenes, with Orwell's focus instead directed at the exclusive European club and U Po Kyin's efforts to be appointed as the only Burmese member.<sup>212</sup> This is one indication of the marginal role of the courts at this time, although some scholars have focused more broadly on the dynamics of law enforcement.

One recent historical study of crime under colonial rule is Professor Maitrii Aung-Thwin's monograph on the case of Saya San,<sup>213</sup> also known as the Galon King who was the leader of one of the largest anti-colonial movements in Southeast Asia from 1930–32.<sup>214</sup> Professor Maitrii Aung-Thwin deconstructs the conventional narrative of rebellion under colonial rule by returning to original sources. In doing so, he issues a broader call for the importance of constructing and producing historical narratives in a way that is faithful to historical sources.<sup>215</sup>

Turning to the contemporary period, Professor Andrew Selth investigates the role and function of the police force in connection with the

<sup>210</sup> GEORGE ORWELL, *BURMESE DAYS* (1934).

<sup>211</sup> *Id.* at 1.

<sup>212</sup> *Id.* at 297.

<sup>213</sup> See Patricia Herbert, *The Hsaya San Rebellion (1930-1932) Reappraised* (Monash Univ., Ctr. of Se. Asian Studies, Working Paper No. 27, 1982).

<sup>214</sup> MAITRII AUNG-THWIN, *THE RETURN OF THE GALON KING: HISTORY, LAW AND REBELLION IN COLONIAL BURMA* (2010). See also Maitrii Aung-Thwin, *Recovering Peasant Politics in Colonial Burma: Orientalism, Rebellion, and the Law*, 7 *J. COMPAR. L.* (2013).

<sup>215</sup> *Id.*

military, both past and present.<sup>216</sup> He describes the reform of the police force that began in the early 2000s and pinpointed areas in which further reforms are needed, including at the state and regional levels, if and when power is decentralized. His work is policy-oriented, and it emphasizes the need for the police to develop a good reputation, a sense of legitimacy and integrity, and a culture of professionalism.<sup>217</sup>

Other scholars have considered the role of the police within the broader context of the criminal justice system. Dr. Cheesman's work sits at the intersection between a study of the police, criminal law, and the politics of the courts. His impressive thesis, *The Politics of Law and Order in Myanmar*, based on court documents of over 340 cases, is undoubtedly the most sustained contribution to date of criminal court proceedings in Myanmar.<sup>218</sup> He begins with an exploration of the ideological origins of the Penal Code in Burma and its use during the colonial period and post-independence.<sup>219</sup> He focuses on the central role of criminal procedure, as well as the practice of extorting confessions.<sup>220</sup> He delivers the first sustained analysis of law under Ne Win's socialist system post-1962,<sup>221</sup> and demonstrates the ways in which policy triumphed over law.<sup>222</sup> He convincingly argues that the Special Criminal Court Appeals Court came to triumph over the Chief Court and the system of courts below it.<sup>223</sup> He also suggests that two important shifts in practice occurred during this time: the denial of substantive rights and the drastic reduction of procedural rights.<sup>224</sup>

In turning to the post-1988 military period, Dr. Cheesman shows the ways in which courts, in the absence of a binding ideology, turned into business-like operations with the police as central actors, and cases were decided based on financial terms.<sup>225</sup> He not only considers the rise of corruption in the courts, but also the response of individuals to this situation

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<sup>216</sup> See, e.g., Andrew Selth, *Myanmar's Police Forces: Coercion, Continuity and Change*, 34 CONTEMP. S.E. ASIA: J. INT'L STRATEGIC AFF. 53 (2012); Andrew Selth, *Police Reform and the "Civilianisation" of Security in Myanmar*, in LAW, SOCIETY AND TRANSITION IN MYANMAR, *supra* note 2.

<sup>217</sup> *Id.*

<sup>218</sup> Nick Cheesman, *The Politics of Law and Order in Myanmar* (2012) (Ph.D. dissertation, Australian National University, Department of Political and Social Change). Cheesman's thesis will be published with Cambridge University Press in 2015.

<sup>219</sup> *Id.* at 29-70.

<sup>220</sup> *Id.* at 40-54.

<sup>221</sup> *Id.* at 71-107.

<sup>222</sup> *Id.* at 72.

<sup>223</sup> In a separate publication, Cheesman has examined the question of why authoritarian regimes establish special courts, building on the body of literature that combats the view that courts are irrelevant to authoritarian regimes. See Cheesman, *supra* note 41.

<sup>224</sup> Cheesman, *supra* note 218, at 106.

<sup>225</sup> *Id.* at 156.

by sending complaint letters to a wide range of officials, indicating both the ambiguity in the choice of avenues of complaint as well as the risks inherent in lodging complaints.<sup>226</sup>

Dr. Cheesman has written on the way in which courts currently operate in the public sphere, occasionally claiming to launch anti-corruption efforts, and how this tactic obscures the patterns and practice of corruption.<sup>227</sup> In a separate article, Dr. Cheesman studied a particular court trial in 2007 that arose from the Saffron Revolution.<sup>228</sup> He uses this example to consider the substance of discourse on the rule of law in Myanmar and to demonstrate the ways in which military rulers have shaped the courts into "a reliable instrument for authoritarian control."<sup>229</sup> His assessment of the courts is damning: despite the fact the courts are now a separate institution, in reality, "the courts in Myanmar are now [2010] more integrated into the army-dominated executive than at any time in their recent history."<sup>230</sup>

Aside from Dr. Cheesman's body of work on the courts, the first monograph that focuses on a prominent court trial in Burma's history is Dr. Maung Maung's account of the trial of U Saw and the men accused of killing Aung San.<sup>231</sup> This book is based on Dr. Maung Maung's observations of the trial proceedings and access to court records, and was written while he was reading for his law degree.<sup>232</sup> There are other books focused on court trials in the colonial period that are more autobiographical, such as Mauris Collis' book that describes his experience as a magistrate in Rangoon handling cases during the colonial period, and the politics of race that colored court trials in that era.<sup>233</sup>

Aside from this, Professor Myint Zan offers a more traditional legal analysis of confession in criminal cases and why the post-1962 Special Criminal Courts Appeal Court did not follow decisions of the previous Supreme Court.<sup>234</sup> Professor Myint Zan has also conducted a comparative analysis of the Burma Law Reports in 1948 and 1998, fifty years since

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<sup>226</sup> *Id.*

<sup>227</sup> Nick Cheesman, *Myanmar's Courts and the Sounds Money Makes*, in MYANMAR'S TRANSITION: OPENINGS, OBSTACLES AND OPPORTUNITIES (Nick Cheesman, Monique Skidmore & Trevor Wilson eds., 2012).

<sup>228</sup> Nick Cheesman, *Thin Rule of Law or Un-Rule of Law in Myanmar?*, 82 PAC. AFF. 597, 604-11 (2010).

<sup>229</sup> *Id.* at 611.

<sup>230</sup> *Id.* at 612.

<sup>231</sup> MAUNG MAUNG, *A TRIAL IN BURMA: THE ASSASSINATION OF AUNG SANG* (1962).

<sup>232</sup> *Id.*

<sup>233</sup> See MAURICE COLLIS, *TRIALS IN BURMA* (1938); see also MAURICE S. COLLIS, *LAST AND FIRST IN BURMA* (1956).

<sup>234</sup> Myint Zan, *Two Divergent Burmese Rulings on Criminal Defendants' Confessions: An "Ideological Analysis"*, 19 U. TASMANIA L. REV. 335 (2000).

independence.<sup>235</sup> Professor Myint Zan questions the novelty of the court structure introduced under the 2008 Constitution and whether it can really be seen as a break with the past.<sup>236</sup> He argues that we need to proceed with caution and contextualize these developments in light of the past history of the courts in Myanmar.<sup>237</sup> Professor Myint Zan has considered the topic of judicial independence in detail, tracing the tragic demise of judicial independence after 1962, and then assessing the possible implications of the draft 2008 Constitution.<sup>238</sup> He suggests that the biggest challenge in relation to judicial independence is not only structural, but that larger concerns relate to the political environment and the rejection of any concept of judicial independence.<sup>239</sup>

Finally, Dominic Nardi and Lwin Moe analyze the caseload of the Supreme Court of Myanmar from 2007–2012 based on the official, yet selective, court reports.<sup>240</sup> This article is the first statistical analysis of Burmese-language court reports. They found that the bulk of reported court decisions during this period concerned matters of inheritance, contracts, and criminal procedure.<sup>241</sup> The use of quantitative research methods provides another angle from which to explore the courts in Myanmar.

### B. *The Legal Profession and Education*

The themes of legal education and the legal profession are intimately related. On legal education, Hla Aung has published a brief note describing the state of legal education in the late 1950s, in which he diagnosed the need for “radical change in modern Burmese legal education.”<sup>242</sup> A similar early account of the challenges facing legal education in the parliamentary period is provided by Dr. Maung Maung who also pushed for a review of legal education, though prior to the coup.<sup>243</sup> Writing in 2008, Professor Myint Zan picked up where they left off in the 1960s, providing a thorough and detailed analysis of the form and content of the curriculum and the quality

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<sup>235</sup> Myint Zan, *A Comparison of the First and Fiftieth Year of Independent Burma's Law Reports*, 35 VICTORIA U. WELLINGTON L. REV. 385 (2004).

<sup>236</sup> Myint Zan, *The New Supreme Court and Constitutional Tribunal: Marginal Implications for Judicial Independence or More of the Same?*, in MYANMAR'S TRANSITION, *supra* note 227.

<sup>237</sup> *Id.*

<sup>238</sup> Zan, *supra* note 48.

<sup>239</sup> *Id.*

<sup>240</sup> Dominic Nardi & Lwin Moe, *Understanding the Myanmar Supreme Court's Docket: An Analysis of Cases from 2007 to 2012*, in LAW, SOCIETY AND TRANSITION IN MYANMAR, *supra* note 2.

<sup>241</sup> *Id.*

<sup>242</sup> Hla Aung, *A Brief Note on Legal Education*, 1 BURMA L. INST. J. 83 (1958).

<sup>243</sup> Maung Maung, *Lawyers and Legal Education in Burma*, 11 INT'L COMPAR. L. Q. 285 (1962).

and scope of legal education up until the mid-2000s.<sup>244</sup> He highlights shifting practices in the use of Burmese and English language in the courts, court reporting, teaching, and research, a dilemma that persists today. His assessment of the severe damage to legal education led him to caution that when space opens for reform, as is now the case, the enormity of the task should not be underestimated.<sup>245</sup>

In terms of the contemporary legal profession, Dr. Cheesman and Kyaw Min Sann offer an incisive analysis of cause lawyers under Myanmar's authoritarian regime,<sup>246</sup> contributing to the literature on the role of cause lawyers more generally. They argue that cause lawyers in Myanmar are characterised by their "advocacy for law itself" and their role as guardians of the law. They attributed this to the particular form of authoritarianism in Myanmar, in which the authorities showed little regard for formal legality.<sup>247</sup> They focus on a particular court case in Kanma, in which the applicant successfully challenged the military-owned Union of Myanmar Economic Holding Limited takeover of farming land.<sup>248</sup> Dr. Cheesman and Kyaw Min Sann demonstrate the power complex at play but also the importance of fighting for adherence to formal legality. Their article makes an extremely important contribution to our understanding of the role of the legal profession in Myanmar, particularly of the way in which some lawyers worked for justice and respect for the law itself under the authoritarian regime, relying on a combination of both local and international networks.

### C. *Human Rights*

Human rights are a new and old area of research for Burma Studies. It is old in the sense that it has driven a large portion of advocacy cum scholarship to date. But it is new in the sense that the language of human rights is now explicitly used by the quasi-civilian government, and therefore raises questions about the meaning and use of the language of human rights in the transitional period. Scholars such as Professor David Kinley and Trevor Wilson argue that steps forward were made in terms of government

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<sup>244</sup> Zan, *supra* note 11.

<sup>245</sup> *Id.* at 104.

<sup>246</sup> Nick Cheesman & Kyaw Min Sann, *Not Just Defending: Advocating for Law in Myanmar*, WIS. INT'L L. J. (forthcoming 2014).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*



support for human rights training in Myanmar in the early 2000s.<sup>249</sup> They argue that the controversial human rights program funded by the Australian government gave government officials the opportunity to access materials on international human rights norms, and that prior to 2003, local actors had some space to implement what they had learnt.

It was only in 2011 that the Myanmar National Human Rights Commission was established,<sup>250</sup> and I offer an analysis of its first two years of operation from a comparative and regional perspective.<sup>251</sup> I argue that the Myanmar Commission has relied heavily on its affiliation with the regional national human rights commission network as a source of legitimacy, primarily in an attempt to justify the government's transition to democracy credentials.<sup>252</sup>

Most research on labor law has been written from a human rights perspective in terms of forced labor.<sup>253</sup> The most extensive research in the area of labor rights is by Professor Richard Horsey, who writes from his perspective as a former worker with the International Labour Organization ("ILO").<sup>254</sup> While recognizing the unusual nature of the ILO's engagement in Myanmar under military rule, and the long way the country has to go in terms of respect for labor rights, he nevertheless seeks to highlight the progress made by the ILO in its work with the authoritarian regime.

From a different perspective, Kyaw Soe Lwin offers insights into the history and development of mechanisms for resolution of industrial disputes in Myanmar.<sup>255</sup> He reviews shifts in how individuals have sought to resolve industrial disputes over different political periods.<sup>256</sup> Under post-independence parliamentary rule, for example, he demonstrated that the conditions for workers and employment opportunities available to them deteriorated as the economic position of the country declined.<sup>257</sup> In addressing the transition period, he notes not only significant changes that have taken place to the legal framework in this area, both through the repeal

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<sup>249</sup> David Kinley & Trevor Wilson, *Engaging a Pariah: Human Rights Training in Burma/Myanmar*, 29 HUMAN RIGHTS Q. 368, 395 (2007).

<sup>250</sup> Formation of Myanmar National Human Rights Commission, 2011, Notification No. 34 (Myan.).

<sup>251</sup> Melissa Crouch, *Asian Legal Transplants and Lessons on the Rule of Law: National Human Rights Commissions in Indonesia and Myanmar*, 5 HAGUE J. RULE L. (SPECIAL EDITION: RULE L. E. ASIA) 146 (2013).

<sup>252</sup> *Id.* at 172-73, 176.

<sup>253</sup> See, e.g., Ken Maclean, *Lawfare and Impunity in Burma Since the 2000 Ban on Forced Labor*, 36 ASIAN STUD. REV. 189 (2012).

<sup>254</sup> RICHARD HORSEY, *ENDING FORCED LABOUR IN MYANMAR: ENGAGING A PARIAN REGIME* (2011).

<sup>255</sup> Kyaw Soe Lwin, *A Legal Perspective on Industrial Disputes*, in LAW, SOCIETY AND TRANSITION IN MYANMAR, *supra* note 2.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

of old laws and the introduction of new ones, but also a corresponding increase in labor strikes due to the atmosphere of greater political freedom.<sup>258</sup>

In terms of elections, Michael Lidauer and Gilles Saphy examine the legal framework for electoral reform, and placed it in historical context.<sup>259</sup> They unpacked the dynamics of the 2010 general election that was surrounded by allegations of massive manipulation, and the subsequent dramatic and unexpected unfolding of the 2012 by-elections, in which the National League for Democracy ("NLD") won every seat it contested.<sup>260</sup> They persuasively argue that the difference in process and outcome of the 2010 and 2012 elections had almost nothing to do with the legal framework, and everything to do with the good will of the country's leaders.<sup>261</sup>

The transition era is ushering in new law and development projects, and this development has not yet been the subject of scholarly inquiry. Professor Andrew Harding reflects on the reforms that have taken place in Myanmar since 2011 in light of the literature on law and development, identifying this period as Myanmar's "Burmese moment" in law and development.<sup>262</sup> He considers the link between Myanmar's transition process and developments in the literature on law and development, suggesting we should move beyond discussion of "moments" because law reform is "situational, not chronological."<sup>263</sup> He argues that Myanmar and the law and development movement should both be seen as involved in a "long process of mutual discovery."<sup>264</sup>

## VII. CONCLUSION

This map of scholarship on the Myanmar legal system demonstrates that a large part of the literature to date is found primarily in the social sciences, with the exception of the work of legal scholars such as Professor Andrew Huxley and Professor Myint Zan. The future of legal scholarship on law in Myanmar depends in part on its ability to build on the existing literature on the social and political role and function of law as studied in the humanities. As legal scholars, we must reach beyond our own discipline to

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<sup>258</sup> *Id.*

<sup>259</sup> Michael Lidauer & Gilles Saphy, *Elections and the Reform Agenda*, in LAW, SOCIETY AND TRANSITION IN MYANMAR, *supra* note 2.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> Andrew Harding, *Law and Development in its Burmese Moment*, in LAW, SOCIETY AND TRANSITION IN MYANMAR, *supra* note 2.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

the rich source of materials already available in order to ground and contextualize legal studies on Myanmar.<sup>265</sup>

This history of ideas and scholarship on the legal system of Myanmar that I have outlined demonstrates that there are a handful of legal scholars to whom we are in debt and whose contributions have played a large role in shaping the field to date. Professor Huxley's rich comparative work has kept discussions on Burmese Buddhist law alive, while Dr. Lammerts has begun to establish a new generation of scholarship based on original Pali texts in this area. Professor Myint Zan has provided many valuable descriptive accounts on a range of important issues from the courts to legal education in Myanmar. Dr. Cheesman's work is the most sophisticated political analysis of the modern legal system and constitutes a significant contribution to the literature on authoritarian regimes and criminal prosecutions.

From this survey of the academic literature, there is clearly a gap in traditional legal research from public to private law. A noticeable omission is that the doctrinal lawyer will find little to satisfy her on entire areas of law and legal doctrine, such as contracts, property, evidence, and civil procedure. This dearth is partly because some areas of modern legal practice—for example trademarks—do not yet even exist in Myanmar. No doubt this will change, and scholarship by those both within and outside the country will need to keep up with these changes.

In terms of methods, most research has been historical, doctrinal, or case-based. Most research has been qualitative rather than quantitative, and most research on the legal and political system has been written by scholars not based in law faculties. The possibilities for empirically grounded research on law in Myanmar means that there is real potential for scholarship to inform practice and policy, as Professor Miyazawa suggested in his review of East Asian legal studies.<sup>266</sup> Beyond this, scholars working on Myanmar law should also heed Professor Mizayawa's call to ensure that research on Asian Legal Studies contributes to broader academic concepts and theories,<sup>267</sup> as Dr. Cheesman's thesis on the rule of law does so well.<sup>268</sup> This research may include the literature on transitional and democratizing

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<sup>265</sup> For several bibliographies on Burma Studies, see Michael Charney, *The Bibliography of Burma (Myanmar) Research: The Secondary Literature*, SOAS BULL. BURMA RESEARCH BIBLIOGRAPHIC SUPPLEMENT (Winter 2004); Selth, *Modern Burma Studies*, *supra* note 12; ANDREW SELTH, BURMA (MYANMAR) SINCE THE 1988 UPRISING: A SELECT BIBLIOGRAPHY (2012).

<sup>266</sup> Miyazawa, *supra* note 6, at 128.

<sup>267</sup> *Id.* at 137

<sup>268</sup> Cheesman, *supra* note 218.

states; socialist regimes;<sup>269</sup> the legacy of the common law; legal transplants; the rule of law; legal consciousness, social movements, and law and development; among other areas. From a methodological, empirical, and theoretical perspective, Myanmar therefore offers a new geographical location for Asian Legal Studies scholars from which to confirm, challenge, and extend our existing understanding of law in the region.

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<sup>269</sup> See, e.g., *ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM* (John Gillespie & Pip Nicholson eds., 2005).