

LEGAL RIGHTS FOR FAIR TRIAL IN MYANMAR

Moh Moh Win*

Abstract

The right to a fair trial is a basic human right and essential for the prevention of the abuse of all other human rights. It is an essential safeguard of a just society and guarantee of the rule of law. Without fair trials, victims can have no confidence that justice will be done and then trust in government and the rule of law collapses. Every person has the rights to a fair trial both in civil and criminal cases and the effective protection of all human rights depends on competent, independent and impartial courts established by law and then the professions of prosecutors and lawyers each of whom in his own field of competence. And then, judges are required to maintain and enhance their legal knowledge, skills and personal qualities necessary for the proper performance of judicial duties. Judicial system shall have the principles of justice, liberty, equality and transparency. Therefore, fair trial is the only way to prevent miscarriages of justice and is an essential part of a just society.

Keywords: *Justice, Qualities, Impartial, Rights, Guarantee*

Introduction

The right to fair trial is a norm of International Human Rights Law and also adopted by many countries in their procedural laws. Fair trials have special protections that make sure everybody accused of a crime gets treated fairly, or justly, within the criminal justice system. Justice must be based on respect for the people, their freedom and their rights. This research mainly focuses on the legal rights during trial especially the intermediate time between stages of investigation and final judgment. It presents the right to equality, right to be presumed innocent, right to be heard by a competent, independent and impartial tribunal, the right to a fair and [public hearing](#), the right to be heard within a reasonable time, right to counseling, right to remain silent, right to examine witnesses and right to interpretation. In Myanmar, fair trial rights are guaranteed in the Constitution of the Republic of the Union of Myanmar 2008 and other related Laws.

Material and Methods

This paper reviews and analyzes on the legal concepts and terminology of human rights during fair trial under some of the International Instruments, Regional Instruments and National Laws in Myanmar. For the research of this topic, it has been used the Qualitative Research Work.

Findings

Fair trial rights shall have as the minimum standards in judicial system to trust on the courts by the people, to find out the truth, to access the justice and to strengthen the court system. A violation of fair trial rights is a threat to the entire rule of law system. The challenge is to ensure that justice is fair and applied equally to all people in every community regardless of colour, religion, race, social status, language, culture, origin and historical background. The main criteria for the effectiveness of the courts are a low level of corruption, a high level of education of judges, guarantees of independence and impartiality of judges and comply with the existing laws, rules and guidance. Then, judges should maintain and enhance their legal knowledge, skills and personal qualities necessary for the proper performance of judicial duties. Moreover, law

* Dr, Assistant Lecturer, Department of Law, University of Mandalay.

officer, lawyer, parties and witnesses are also required to have necessary qualities, skill and comply with the existing laws, rules and procedures. The government of the Republic of the Union of Myanmar places great importance on the citizens can fully enjoy the valuable standards of judiciary, right to independence, impartiality, integrity, prosperity and equality.

Conceptual Development of Fair Trial Right

The right to a fair trial is a central cornerstone of the Universal Declaration of Human Rights. Then, it is included in many International and Regional Human Rights Instruments and in many Constitutions around the world.

The right to fair trial goes way back. It has developed over thousands of years. In 1215, [Magna Carta](#) was a key first step in giving all freemen the right to fair trial by jury. Then, after the horrors of World War II, the [Universal Declaration of Human Rights](#) recognised the fundamental rights of human beings, including the right to fair trial.¹

Fair trial rights are a complex bundle of interlinked rights and norms derived from a range of international human rights treaties and principles.²

The rights concerning the fair trial have been provided in the following International and Regional Human Rights Instruments;

- Universal Declaration of Human Rights (UDHR), 1948
- International Covenant on Civil and Political Rights (ICCPR), 1966
- Convention on the Rights of the Child (CRC), 1989
- The Statute of the International Criminal Court, 1998
- Convention on the Rights of Persons with Disabilities (CRPD), 2006
- African Charter on Human and Peoples' Rights, 1981
- European Convention on Human Rights, 1950
- Protocol No. 7 to the European Convention on Human Rights, 1984
- The American Convention on Human Rights, 1969.

The major legal provisions on fair trial are to be found in article 14 of the International Covenant on Civil and Political Rights 1966, article 7 of the African Charter on Human and Peoples' Rights 1981, article 8 of the American Convention on Human Rights 1969 and article 6 of the European Convention on Human Rights 1950.

In Myanmar, the government is getting implemented to fully enjoy the valuable standards of judiciary, right to independence, impartiality, integrity, prosperity and equality. It has been ratified the Convention on the Rights of the Child (CRC) 1989 in 15 July 1991, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 in 22 July 1997, Convention on the Rights of Persons with Disabilities (CRPD) 2006 in 7 December 2011 and International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 in 6 October 2017.

According to the Constitution of the Republic of the Union of Myanmar 2008 and the Union Judiciary Law 2010, judicial principles are as follows:

¹ <https://rightsinfo.org/ARTICLE-6-why-the-right-to-a-fair-trial-is-important-for-everyone/>

² Justice Base, An Analysis of Myanmar's Compliance with Fair Trial Rights, OSF, 2017, Pg 6.

- (a) to administer justice independently according to law;
- (b) to dispense justice in open Court unless otherwise prohibited by law;
- (c) to obtain the right of defence and the right of appeal in cases according to law¹;
- (d) to support in building of rule of law and regional peace and tranquility by protecting and safeguarding the interests of the people;
- (e) to educate the people to understand and abide by the law and nurture the habit of abiding by the law by the people;
- (f) to cause to compound and complete the cases within the frame-work of law for the settlement of cases among the public;
- (g) to aim at reforming moral character in meting out punishment to offender.²

Therefore, the right to a fair trial has been provided in numerous International and Regional Human Rights Instruments. It is one of the most extensive human rights and all international and regional human rights instruments enshrine it in more than one article.

Legal Rights during Trial

The fundamental human rights during trial are as follows;

- right to equality before the court;
- right to be presumed innocent;
- right to be tried by a competent, independent and impartial court;
- right to a fair and public hearing;
- right to be tried without undue delay;
- right to defend and right to counsel;
- right not to be compelled to testify or to confess guilt;
- right to call and examine witnesses;
- right to interpretation and translation.

Right to Equality before the Court

The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.³ All are equal before the law and are entitled without any discrimination to equal protection of the law.⁴

Then, all persons shall be equal before the courts and tribunals.⁵ All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶

¹ Section 19, Constitution of the Republic of the Union of Myanmar 2008; Section 3(a)(b)(c), The Union Judiciary Law of Myanmar 2010.

² Section 3(a)(b)(c), The Union Judiciary Law of Myanmar 2010.

³ General Comment No.32 (Article 14), UN Human Rights Committee, 9th Session, 2007, Pg.1.

⁴ Article 7, Universal Declaration of Human Rights (UDHR) 1948.

⁵ Article 14(1), International Covenant on Civil and Political Rights (ICCPR) 1966.

⁶ Article 26, Ibid.

According to the Convention on the Rights of Persons with Disabilities 2006, states parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.¹

The principle of equality before the courts means in the first place that, regardless of one's gender, race, origin or financial status, for instance, every person appearing before a court has the right not to be discriminated against either in the course of the proceedings or in the way the law is applied to the person concerned. Further, whether individuals are suspected of a minor offence or a serious crime, the rights have to be equally secured to everyone. Secondly, the principle of equality means that all persons must have equal access to the courts.²

In Myanmar, every citizen shall enjoy the right of equality, the right of liberty and the right of justice, as prescribed in Section 21(a) of 2008 Constitution. Besides, the Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection.³

The Union shall not discriminate any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth.⁴

Moreover, the persons with disabilities shall have the rights from birth, right survive, and right to be a citizen, to have freedom, justice, security, equality and dignity.⁵

The right to equality before courts or tribunal must be available to all individuals, regardless of nationality or statelessness or asylum seekers or refugees or migrant workers, who may find themselves in the territory or subject to the jurisdiction of the State party. All human beings must have equal access to the courts without discrimination. In particular, women must have access to courts on an equal status with men, in order to be able to claim their rights effectively.

Right to be Presumed Innocent

The right to be presumed innocent until proved guilty is another principle that conditions the treatment to which an accused person is subjected throughout the period of criminal investigations and trial proceedings, up to and including the end of the final appeal.⁶

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.⁷

¹ Article 13(1), Convention on the Rights of Persons with Disabilities (CRPD) 2006.

² OHCHR, Profession Training Series No. 9, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003, Pg 217.

³ Section 347, Constitution of the Republic of the Union of Myanmar 2008.

⁴ Section 348, *Ibid.*

⁵ Section 8, The Right of the Persons with Disabilities Law of Myanmar 2015.

⁶ OHCHR, Profession Training Series No. 9, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003, Pg 219.

⁷ Article 11, Universal Declaration of Human Rights (UDHR) 1948.

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.¹

Under the Convention on the Rights of the Child, 1989, every child alleged as or accused of having infringed the penal law has the guarantees to be presumed innocent until proven guilty according to law.²

Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. The onus is on the Prosecutor to prove the guilt of the accused. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.³

Article 7(1)(b) of the African Charter on Human and Peoples' Rights, article 8(2) of the American Convention on Human Rights and article 6(2) of the European Convention on Human Rights all also guarantee the right to presumption of innocence.⁴

The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial.⁵

In Myanmar, the basic legal principle in conducting criminal cases is that the burden of proof lies on the prosecution.

Under Evidence Act 1872, whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. , When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.⁶ Besides, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.⁷

Under the Jail Manual of Myanmar, arrestees shall be kept separately from prisoners.⁸

In *Maung Tin Mya v. The Union of Myanmar*⁹ case, whether the action is right or wrong in reality, a finding of guilt and sentencing are based upon the statements made by the witnesses in the court of law. If evidence is in doubt, the accused shall be entitled to enjoy the benefit of the doubt.

¹ Article 14(2), International Covenant on Civil and Political Rights (ICCPR) 1966.

² Article 40(2)(b)(i), Convention on the Rights of the Child (CRC) 1989.

³ Article 6, Rome Statute of the International Criminal Court 1998.

⁴ OHCHR, Profession Training Series No. 9, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003, Pg 219.

⁵ General Comment No.32 (Article 14), UN Human Rights Committee, 9th Session, 2007, Pg.9.

⁶ Section 101, The Evidence Act of Myanmar 1872.

⁷ Section 102, Ibid.

⁸ Para. 415(3), The Jail Manual of Myanmar, 1969.

⁹ *Maung Tin Mya v. The Union of Myanmar*, 1966 M.L.R (H.C) Pp.644-653.

In *Maung Saw Bwar v. The Union of Myanmar*¹ case, in a trial for a case that can be sentenced to the death penalty, the decision should not be made based on the evidence of one witness that is not sufficient. The appeal complainant shall enjoy the benefit of doubt.

The right to be presumed innocence is the fundamental right for the protection of other fair trial rights. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt.

Right to be tried by a Competent, Independent and Impartial Court

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.²

The right to be tried by an independent and impartial tribunal must be applied at all times and is a right contained in article 14(1) of the International Covenant on Civil and Political Rights, which provides that “in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.³ Article 40 of the Statute of the International Criminal Court provides that “the judges shall be independent in the performance of their functions” and that they “shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence”.⁴

Under the Convention on the Rights of the Child, 1989, every child alleged as or accused of having infringed the penal law has the guarantees to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law.⁵

A competent, independent and impartial Judiciary is not only of importance to the rights and interests of human beings, but is essential to other legal persons, including economic entities, whether smaller enterprises or large corporations.⁶

In Myanmar, the administration of justice shall be independently according to law. The three branches of sovereign power namely; legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves. The three branches of sovereign power, so separated are shared among the Union, Regions, States and Self-Administered Areas⁷, in order to carry out the independent and impartial by each other.

¹ *Maung Saw Bwar v. The Union of Myanmar*, 1964 M.L.R (C.C) Pp.686-691.

² Article 8, Universal Declaration of Human Rights (UDHR) 1948.

³ Article 14(1), International Covenant on Civil and Political Rights (ICCPR) 1966; OHCHR, Profession Training Series No. 9, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003, Pp 253-254.

⁴ Article 40 of the Statute of the International Criminal Court; OHCHR, Profession Training Series No. 9, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003, Pp 253-254.

⁵ Article 40(2)(b)(iii), Convention on the Rights of the Child (CRC) 1989.

⁶ OHCHR, Profession Training Series No. 9, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003, Pg 216.

⁷ Section 11, Constitution of the Republic of the Union of Myanmar 2008.

The Chief Justice of the Union or Judges of the Supreme Court of the Union, The Chief Justice of the High Court of the Region or State and Judges of the High Court of the Region or State or Member of the Constitutional Tribunal of the Union shall be free from party politics.¹

Although the 2008 Constitution guarantees the separation of powers and the independence of the judiciary, they sometimes have improper executive influence over the judicial function, judicial corruption and inadequate training of judges and lawyers.

Besides, judges shall have the provided qualifications in 2008 Constitution. The full capacity of judges and judicial officers is very crucial for public confidence in the judiciary. In order to improve the capacity of judges, judicial officers and court staff, the Supreme Court of the Union has been making the regular courses and workshops in collaboration with International Organizations and other States.

Basically, factors that may influence the judge to favour one of the parties, such as engaging in commercial activities with one of the parties, accepting presents, accepting private invitations, giving or taking bribes are strictly prohibited.²

Myanmar ratified the United Nations Convention against Corruption (UNCAC) in 2012, and the Myanmar Anti-Corruption Law, 2013 was subsequently enacted to comply with the Convention. Under this law, all public servants, including judges and law officers, are subject to penalties including imprisonment and a fine if they engage in corruption. Moreover, the Supreme Court issues the directions from time to time to protect the case of corruption.

A competent, impartial and independent judiciary plays the important role in the protection of fair trial standards and for the maintaining respect for the administration of justice.

Right to a Fair and Public Hearing

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.³

Under International Covenant on Civil and Political Rights (ICCPR) 1966, the press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.⁴

According to the Rome Statute of the International Criminal Court 1998, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially.⁵

¹ Section 300(a), 309(a) and 333(e), *Ibid.*

² Union Attorney General's Office, *Fair Trial Guidebook for Law Officers*, 2018, Pg. 43.

³ Article 10, *Universal Declaration of Human Rights (UDHR) 1948.*

⁴ Article 14(1), *International Covenant on Civil and Political Rights (ICCPR) 1966.*

⁵ Article 67(1), *Rome Statute of the International Criminal Court 1998.*

In Myanmar, justice is to be dispensed “in open Court unless otherwise prohibited by law.”¹ The right to a public hearing is not absolute and the law permits judges to exclude the public from courts under certain circumstances.

Besides, Section 352 of the Code of Criminal Procedure 1898 provides:

The place in which any criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them: that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.²

The judgment in every trial in any criminal court of original jurisdiction shall be pronounced, or the substance of original jurisdiction shall be pronounced, or the substance of such judgment shall be explained in open court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders.³

All judges and magistrates should try cases or hear appeals in the Court room and not in a private chamber unless there are special reasons for so doing. Matters of an informal nature may in the discretion of the judge or magistrate be disposed of in chambers, but other judicial business of a formal nature should be transacted in open Court.⁴

In tried to the juvenile cases, it must be heard and tried in separate Court or separate building. When it does not have the separate Court or separate building, it must be heard and tried in other building or room other than regular open Court.⁵

The 2014 Myanmar News Media Law prevents pre-publication censorship and, among other things, gives media the right to freely criticise the judiciary. But while a Media Access Handbook published by the Supreme Court permits journalists to report on court proceedings, it instructs media to seek permission from the Chief Judge of a Court before entering a courtroom.⁶

A public hearing requires oral hearings held in public, and attendance must not be limited to a particular category of persons. Information about the time and venue of the trial shall be made for the knowledge of the public. In addition, the courts must provide adequate facilities for the attendance of interested members of the public at courtroom. The written judgment must be pronounced orally in the session of the court open to the public.⁷

In the Union of Myanmar v. Maung Shwe (a) Maung Shae⁸ case, the court stated that, ‘Justice must not only be done, but also be seen to be done’. If the court may consider the reasonable connected facts in the decision of the case, it must be more truth. Then, it may be seen the fair and truth decision.

¹ Section 19(b), The Constitution of the Republic of the Union of Myanmar 2008; Section 3(b), The Union Judiciary Law 2010.

² Section 352, The Code of Criminal Procedure of Myanmar 1898.

³ Section 366(1), Ibid.

⁴ Paragraph 21, The Courts Manual of Myanmar, 1999.

⁵ Section 84(1), The Child Rights Law of Myanmar 2019.

⁶ Justice Base, Behind Closed Doors: Obstacles and Opportunities for Public Access to Myanmar's Courts, 2017, Pg 5.

⁷ Union Attorney General's Office, Fair Trial Guidebook for Law Officers, 2018, Pg. 45.

⁸ The Union of Myanmar v. Maung Shwe (a) Maung Shae, 1966 M.L.R (H.C) Pp.616-618.

A transparent judicial system supports the independence and fairness of the legal and judicial systems. The right of public hearing ensures the transparency of proceedings and is an important safeguard for the interest of the individual and of society.

Right to be tried without undue delay

In order to hear the criminal cases fairly and speedily, completion of all proceedings from pre-trial stages to final appeal and passing judgments within a reasonable time is one of the fair trial standards. When an accused is in detention during the criminal proceedings, the right to trial without undue delay takes on additional importance because the aim is not just to reduce uncertainty and ensure a more reliable outcome, but also to limit the length of detention.¹

According to article 14(3)(c) of the International Covenant on Civil and Political Rights 1966, every person facing a criminal charge shall have the right “to be tried without undue delay”.² In the words of article 7(1)(d) of the African Charter, article 8(1) of the American Convention and article 6(1) of the European Convention, everyone has the right to be heard “within a reasonable time”.³

Under the Rome Statute, the accused shall be entitled to be tried without undue delay.⁴

In Myanmar, the Chief Justice of the Union and Judges of the Supreme Court of the Union, the Chief Justices and Judges of the High Court of the Region or State, Judges of the Court of Self-Administered Division, Self-Administered Zone and Judges of the District Courts may inspect prisons, prisoner camps and police lock-ups within their jurisdiction, for enabling convicted persons and those under detention to enjoy lawful rights to which they are entitled and for preventing undue delay in the trial of cases.⁵

The juvenile cases must be tried without undue delay or within a reasonable time.⁶

In the Courts Manual, avoidable postponement and unjustifiable delay are strictly forbidden. When a subordinate judge or magistrate is really unable to overtake his judicial work, it is incumbent on him to represent matters to the district judge or district magistrate, as the case may be. It is the duty of these officers respectively to make suitable arrangements throughout the district for the disposal of all civil and criminal judicial business within a reasonable time.⁷

The case of *Maung Tin Ngwe v. The Union of Myanmar*⁸ pointed out that adjudication should be speedy and done in the correct manner.

Trial without unreasonable delay aims not to be uncertainty due to prolonged trial, not to lose evidence and fade the memory of the witnesses. That is to say “Justice delay is justice denied”, so trial without delay is important for searching the truth.

¹ Union Attorney General’s Office, Fair Trial Guidebook for Law Officers, 2018, Pg. 51.

² Article 14(3)(c), International Covenant on Civil and Political Rights (ICCPR) 1966.

³ OHCHR, Profession Training Series No. 9, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003, Pg 267.

⁴ Article 67(1)(c), Rome Statute of the International Criminal Court, 1998.

⁵ Section 67 and Section 68, The Union Judiciary Law 2010.

⁶ Section 84(6), The Child Rights Law of Myanmar 2019.

⁷ Paragraph 22, The Courts Manual of Myanmar, 1999.

⁸ *Maung Tin Ngwe v. The Union of Myanmar*, 1966 M.L.R (H.C) Pp.639-643.

Right to Defend and Right to Counsel

In the determination of any criminal charge against him, everyone shall be entitled to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.¹

Everyone shall be entitled to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.²

Under the Convention on the Rights of the Child, 1989, every child alleged as or accused of having infringed the penal law has the guarantees to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence.³

Article 7(1)(c) of the African Charter on Human and Peoples' Rights, article 8(2)(d) of the American Convention on Human Rights and article 6(3)(c) of the European Convention on Human Rights all guarantee the right of anyone charged with a criminal offence to defend himself in person or through legal assistance of his own choice.⁴

In Myanmar, an accused shall have the right of defence in accord with the law.⁵

Under Section 340(1) of the Code of Criminal Procedure 1898, any person accused of an offence before a criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.⁶

Then, in the Court Manual Paragraph 455 (1), every person accused may of right be defended by a pleader. Furthermore, if in a case the possible punishment is death, the government must provide the accused with a lawyer under Courts Manual Paragraph 457 (1).

Under the Legal Aid Law 2016, in respect of the detained or arrested persons, the legal aid provider shall provide necessary legal aid during trial.⁷

In tried to the juvenile case, parents, guardian, relative or other reasonable person shall have the right to defend on behalf of the child.⁸

The persons with disabilities shall have the right to request for the necessary arrangements for the rights to sue, to be sued, to defend and to be investigated as a witnesses at the court.⁹

¹ Article 14(3)(b), International Covenant on Civil and Political Rights (ICCPR), 1966; Article 67(1)(b), Rome Statute of the International Criminal Court, 1998.

² Article 14(3)(d), International Covenant on Civil and Political Rights (ICCPR), 1966.

³ Article 40(2)(b)(ii), Convention on the Rights of the Child (CRC), 1989.

⁴ OHCHR, Profession Training Series No. 9, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003, Pg 271.

⁵ Section 19(c), Constitution of the Republic of the Union of Myanmar 2008; Section 3(c), The Union Judiciary Law of Myanmar 2010; Section 375, The Code of Criminal Procedure of Myanmar 1898.

⁶ Section 340(1), The Code of Criminal Procedure of Myanmar 1898.

⁷ Section 25(d), The Legal Aid Law of Myanmar 2016.

⁸ Section 84(3), The Child Rights Law of Myanmar 2019.

⁹ Section 14(d), The Rights of the Persons with Disabilities Law of Myanmar 2015.

In order to find the truth and justice, the right to defend and right to counsel are the important rights at every stage during trial. Everyone charged with a penal offence has the right to defend oneself in person or through a lawyer of his own choice. Moreover, the government must provide a lawyer if the accused is unable to hire a lawyer in grievous offences.

Right not to be compelled to testify or to confess guilt

Under the International Covenant on Civil and Political Rights, everyone shall not be compelled to testify against himself or to confess guilt, in the determination of any criminal charge against him.¹

Under the Convention on the Rights of the Child, 1989, every child alleged as or accused of having infringed the penal law has the guarantees not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality.²

Besides in the determination of any charge, the accused not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence.³

According to article 8(2)(g) of the American Convention, everyone has “the right not to be compelled to be a witness against himself or to plead guilty”, and article 8(3) further specifies that “a confession of guilt by the accused shall be valid only if it is made without coercion of any kind”.

In Myanmar, a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.⁴

Under Code of Criminal Procedure 1898, a magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him, and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily.⁵

In the Union of Myanmar v. U Ye Naung and Three⁶ case, no one shall be compelled by direct or indirect physical or psychologies on the accused, in order to obtain a confession of guilt.

A confession of guilt from an accused in court is not admissible unless satisfied that the confession was made voluntarily. Any coercion, inducement or threat exerted by authorities for making a statement or confess guilt is prohibited. If the authorities draw adverse inferences from the silence of the person suspected and accused of a crime, the right to be presumed innocent is violated.

¹ Article 14(3)(g), International Covenant on Civil and Political Rights (ICCPR) 1966.

² Article 40(2)(b)(iv), Convention on the Rights of the Child (CRC) 1989.

³ Article 67(1)(g), Rome Statute of the International Criminal Court 1998.

⁴ Section 24, The Evidence Act of Myanmar 1872.

⁵ Section 164(3), The Code of Criminal Procedure of Myanmar 1898.

⁶ The Union of Myanmar v. U Ye Naung and Three, 1991 M.L.R (S.C) Pp.63-69.

Right to call and examine witnesses

According to the International Covenant on Civil and Political Rights (ICCPR) 1966, in the determination of any criminal charge against him, everyone shall be entitled to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.¹ The accused shall also be entitled to raise defences and to present other evidence admissible under the Rome Statute of the International Criminal Court, 1998.²

Article 6(3)(d) of the European Convention on Human Rights contains an identically worded provision, while article 8(2)(f) of the American Convention on Human Rights contains the “right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts”.³

According to the Human Rights Committee, article 14(3)(e) “does not provide an unlimited right to obtain the attendance of witnesses requested by the accused or his counsel”, and where there is no evidence that the court’s refusal to call a certain witness does not violate the principle of equality of arms.⁴

In Myanmar, the accused shall be allowed to examine any witness not previously right of named by him, if such witness is in attendance: but he shall not, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.⁵

According to Section 505(2) of the Code of Criminal Procedure 1898, the parties to any proceeding under this Code may appear before such Magistrate by pleader, or if not in custody in person, and may examine, cross-examine and re-examine the witness.⁶

The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.⁷

An accused person has the right to call and examine or have examined witnesses against him or her under the same conditions as the prosecution. The right to call witnesses does not mean that an unlimited number of witnesses may be called. Witnesses to be called must be likely to be relevant to the case.

Right to Interpretation and Translation

In the determination of any criminal charge against him, everyone shall be entitled to have the free assistance of an interpreter if he cannot understand or speak the language used in court.¹

¹ Article 14(3)(e), International Covenant on Civil and Political Rights (ICCPR) 1966; Article 67(1)(e), Rome Statute of the International Criminal Court 1998.

² Article 67(1)(e), Rome Statute of the International Criminal Court 1998.

³ OHCHR, Profession Training Series No. 9, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003, Pg 285.

⁴ Ibid.

⁵ Section 291, The Code of Criminal Procedure of Myanmar 1898.

⁶ Section 505(2), Ibid.

⁷ Section 135, The Evidence Act of Myanmar 1872.

Under the Convention on the Rights of the Child, 1989, every child alleged as or accused of having infringed the penal law has the guarantees to have the free assistance of an interpreter if the child cannot understand or speak the language used.²

In the determination of any charge, the accused shall be entitled to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.³ And then, the accused shall be entitled to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks.⁴

According to Article 6(3)(e) of the European Convention, everyone shall be entitled to “have the free assistance of an interpreter if he cannot understand or speak the language used in court”.⁵ Article 8(2)(a) of the American Convention guarantees “the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court”.⁶

It is not a violation of article 14 that the States parties make provision for the use of only one official court language, and the requirement of a fair hearing does not “mandate States parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language”.⁷

In Myanmar, when the services of an interpreter are required by any criminal Court for the interpretation of any evidence or statement, he shall be bound to state true interpretation of such evidence or statement.⁸

According to Section 361 of the Code of Criminal Procedure 1898;

- (1) Whenever an evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.
- (2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.
- (3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.⁹

Whenever the accused is examined by any Magistrate or by any Court other than the High Court the whole of such examination, including every question put to him and every answer

¹ Article 14(3)(f), International Covenant on Civil and Political Rights (ICCPR) 1966.

² Article 40(2)(b)(vi), Convention on the Rights of the Child (CRC) 1989.

³ Article 67(1)(a), Rome Statute of the International Criminal Court 1998.

⁴ Article 67(1)(f), *Ibid.*

⁵ Article 6(3)(e), the European Convention on Human Rights 1950.

⁶ Article 8(2)(a), the American Convention on Human Rights 1969.

⁷ OHCHR, Profession Training Series No. 9, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003, Pg 291.

⁸ Section 543, The Code of Criminal Procedure of Myanmar 1898.

⁹ Section 361, *Ibid.*

given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court, any such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.¹

Under Legal Aid Law 2016, in respect of the accused, defendant, convicted person and confined person, the legal aid provide shall:

- (a) If there is language difficulty in communication although he is a citizen, carry out through the person who understands the language;
- (b) If he is a foreigner, explain through an interpreter that he can access to the legal aid and inform the relevant consulate through the Ministry of Foreign Affairs without delay;
- (c) If he is a person with disabilities, carry out through the expert who understands the gesture, sign language and braille of him.²

In tried to the juvenile cases, it must be arranged the interpreter if necessary for child and witnesses.³

A violation of the right to a fair trial can occur when a conviction was based on a confession allegedly made by the accused without an interpreter. In order to get justice, it must measure to understand the language of the court by the interpreter, if it is different to understand the court language. The right to interpretation and translation is important not only for those who cannot speak the language but also for those who cannot read the language even though they can speak it. Besides, it must be extended to facilitate for people with disabilities including visual or hearing disable persons.

Conclusion

Fair trial is the only way to prevent miscarriages of justice and is an essential part of a just society. The right to fair trial is covered under the core of the human rights protection system because the courts can only restore the violated rights and deliver the fair remedies. The provisions of Myanmar existing laws concerning fair trial standard during trial are almost consistent with the International fair trial standards during trial. The courts of the Republic of the Union of Myanmar place great importance to fully enjoy the fair trial rights without discrimination. In order to access the justice, cases shall be tried by a competent, independence and impartial courts in accordance with the laws. Besides, judges are also to bear in mind that punctuality, courtesy, patience, observance of the prescribed procedure and avoidance of delay. Not only the judges but also law officers, lawyers, parties or witnesses shall have the necessary qualities, skill and awareness. Then, the cases are to be tried with fairly, transparent and speedily. Every person shall have the fundamental rights during fair trial in order to trust on the courts and to implement strengthen of judicial system.

¹ Section 364(1), *Ibid.*

² Section 27, The Legal Aid Law of Myanmar 2016.

³ Section 84(5), The Child Rights Law of Myanmar 2019.

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References

Laws and Conventions

- African Charter on Human and Peoples' Rights, 1981.
- American Convention on Human Rights, 1969.
- Constitution of the Republic of the Union of Myanmar, 2008.
- Convention on the Rights of Persons with Disabilities (CRPD), 2006.
- Convention on the Rights of the Child (CRC), 1989.
- European Convention on Human Rights, 1950.
- International Covenant on Civil and Political Rights (ICCPR), 1966.
- Myanmar Anti-Corruption Law, 2013.
- Rome Statute of the International Criminal Court, 1998.
- The Child Rights Law, 2019.
- The Code of Criminal Procedure, 1898.
- The Courts Manual, 1999.
- The Evidence Act, 1872.
- The Jail Manual, 1969.
- The Legal Aid Law, 2016.
- The Right of the Persons with Disabilities Law, 2015.
- The Union Judiciary Law, 2010.
- Universal Declaration of Human Rights (UDHR), 1948.

Books and Materials

- General Comment No.32 (Article 14), UN Human Rights Committee, 9th Session, 2007.
- Justice Base, An Analysis of Myanmar's Compliance with Fair Trial Rights, OSF, 2017.
- OHCHR, Profession Training Series No. 9, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003.
- Union Attorney General's Office, Fair Trial Guidebook for Law Officers, 2018.

Cases

- Maung Saw Bwar v. The Union of Myanmar, 1964 M.L.R (C.C) Pp.686-691.
- Maung Tin Mya v. The Union of Myanmar, 1966 M.L.R (H.C) Pp.644-653.
- Maung Tin Ngwe v. The Union of Myanmar, 1966 M.L.R (H.C) Pp.639-643.
- The Union of Myanmar v. Maung Shwe (a) Maung Shae, 1966 M.L.R (H.C) Pp.616-618.
- The Union of Myanmar v. U Ye Naung and Three 1991 M.L.R (S.C) Pp.63-69.

Internet Website

- <http://rightsinfo.org/ATICLR-6-why-the-right-to-a-fair-trial-is-important-for-everyone/>