KONRAD ADENAUER STIFTUNG

The Importance of an Administrative Law System in Myanmar's Democratic Transition

A Brief Study on Germany's Model

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Introduction

The primary scope of this research is to provide a brief overview of the administrative law and judicial review system of administrative acts in Germany. Germany's legal system is well established and its administrative law system and judicial review of administrative acts are rooted in the German Constitution.[1] Myanmar on the other hand, a country undergoing a democratic transition, has a common law tradition[2] without specific administrative laws and mechanisms in regards to the administrative duties of the government. The purpose of this paper is not to suggest that Myanmar should adopt a judicial review system identical to Germany's. Instead, it aims to present an overview of the German judicial review system of administrative actions from which Myanmar could borrow elements to improve its administrative laws and system, whilst keeping into consideration its own historical, social and legal specificities.

Part I introduces the nature of the German Basic Law and its application of the separation of state powers into three branches, followed by an explanation of Germany's unique judiciary system with the establishment of five different federal courts and one Federal Constitutional Court.

Part II is devoted to the German Administrative Courts system and the judicial and constitutional review system.

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[1] "*German Administrative Law in Common Law Perspective*" by Mahendra. P. Singh and *The Constitutional Jurisprudence of the Federal Republic of Germany* by Donald P. Kommers and Ressell A. Miller are extremely useful sources for the author of this study, a non - German speaking researcher from a common law country, in helping her understand the judicial review in German Administrative law. The author would like to express her utmost gratitude to Prof. Dr. Rainer Grote for his expert explanation on German Basic Law and administrative law system.

[2] Myanmar is still categorised as a common law country though it may be said that its prevailing legal system is a hybrid common/civil legal system. There are two main reasons for this. Firstly, Myanmar's legislature and courts confirmed that if old laws and principles are not appropriate to be applied with the current changing system and society's customs, they will be filled by legislation as enactment for new laws, amendments and repeal for old laws and by judicial precedents decided by courts. Secondly, Myanmar is the second common law country to have a separate constitutional court after South Africa's Constitutional court. Constitutional courts are a feature of civil law countries and the choice of a constitutional court was a departure from the common law norm. The Constitutional Tribunal of the Union of Myanmar was established under the Constitution of the Republic of the Union of Myanmar with the new democratic government. These two reasons are evidence about a changing trend of a mixed legal system in today's Myanmar.

Part I

1. The Federal Republic of Germany and its Basic Law

The Basic Law, or the constitution of the Federal Republic of Germany, was adopted on 23 May 1949. The Federal Republic of Germany[3] is a democratic and social federal state[4] composed by the *Länder* of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland- Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia.[5]

Chapter I of the German Basic Law entitled "Basic Rights" enshrines 19 fundamental rights. Article 1 guarantees that human dignity shall be inviolable, and all state authorities are obliged to respect and protect human dignity.[6] Article 1.2 extends these inviolable and inalienable human rights to any community and also to peace and justice in the world[1]. Article 1.3 declares that the Basic rights enshrined in Articles 1 to 19 bind the legislature, the executive and the judiciary as directly applicable law. These state branches are bound in a comprehensive way.[7]

Fundamental rights may be restricted, but such restrictions must comply with the general requirements listed in Article 19.1 to be constitutional.[8] In no case the essence of a basic right may be affected.[9] Accordingly, if any person's right has been violated by public authority, he or she could have recourse to the courts. If no other jurisdiction has been established, such claim shall be made to the ordinary courts of law.[10] However, if there is a specialized court for a specific jurisdiction in accordance with the Basic Law, recourse shall be made

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[3] Basic Law, *Grundgesetz* in German language is abbreviated as GG. It was lastly amended on 11 July 2012.

[4] Articles 20.1 & 20.2 of Basic Law.

[5] Preamble of the Basic Law.

[6] Article 1.1 of Basic Law.

[7] *60 Years German Basic Law: The German Constitution and its Court*. Ed. by Jürgen Bröhmer, Clauspeter Hill& Marc Spitzkatz, The Ma- laysian Current Law Journal, 2nd Edition, 2012, at 575. Federal Intelligence Service Judgment of BVerfGE (Federal Constitutional Court), 100, 313.

[8] Article 19.1 of Basic Law provides that "Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears."

[9] Article 19.2 of Basic Law.

[10] Article 19.4 of Basic Law

to that court. For example, administrative acts are dealt by administrative courts.

Articles 1-17 establishes other rights, such as freedom of expression, of assembly, of movement and religion; the right to property, profession, citizenship and family; and so forth. Articles 17a, 18 and 19 define certain restrictions of these substantive rights, and the legal remedies to follow if they have been violated.

Chapter II (Articles 20 - 37) titled "The Federation and the Länder" presents the foundation, objectives and purposes of the state, its participation in the development of the EU, the primacy of international law, and the relations between the Federation and the Länder. Articles 38 to 48 of Chapter III concern the Federal Parliament and the Bundestag while Articles 50 to 53 of Chapter IV relate to the Federal Chamber and to the Bundesrat. Article 53a regulates the Joint Committee, which is the conference committee between the Bundestag and the Bundesrat in the cases of a legislative deadlock.

Chapters V and VI concern the provisions surrounding the Federal President and of the Federal Government. The status and powers of the Federal President are explained in Articles 54 to 61, and those of the Federal Government in Articles 62 to 69.

Articles 70 to 82 under Chapter VII relate to Federal Legislation and Legislative Procedures. Articles 83 to 91 of Chapter VIII address the issues of administration and implementation according to federal law.

Chapter IX (Articles 92 to 104) concerns the judiciary and Chapter X (Articles 104a to 115) relates to the finances of the Federal Republic. Chapter Xa (Articles 115a to 115l), is a chapter added to the Basic Law in 1968 and it addresses the state of Defence.

The final chapter XI from Articles 116 to 146 presents the transitional and concluding provisions.

2. The Separation of Powers and Check and Balances under the German Basic Law

The doctrine of the separation of powers has played a major role in the formation of every modern constitutional state. In the Basic Law, Article 20.2 describes the German application of the separation of power as split into three branches:

> …. It [all state authority] shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

Although the Basic Law refers to a separation of powers, it does not divide the powers and functions of a particular body from other bodies of the federal government in the strict sense. Indeed, the Federal Constitutional Court defines the principle of separation of powers as "a system of reciprocal controls marked by numerous checks and balances."[11]

Not only does the German Basic Law enshrine the separation of powers between different bodies of the federal government, it also determines the sharing of power between the Federation and the regions (Länder).[12]

These two concepts are also defined in Myanmar's Constitution. The present study will now discuss the separation of powers at the federal level.

Germany has a parliamentary system of government. The federal President is elected by the "Federal Convention", a parliamentary committee composed of members from state parliaments and from the Bundestag.[2] The federal President however is not a member of the government.[13] The federal executive authority lies mainly with the federal Chancellor and his or her cabinet.[14] The Chancellor determines and holds responsibility for the Federation's general policy guidelines. He or she also conducts the proceedings of the Federal Government in accordance with the procedure rules adopted by the government.[15]

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[11] Donald P. Kommers and Ressell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany,* Duke University Press, 2012, at 152.

[12] Subject to the Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Länder. However, the Federal law takes precedence over Land law. Article 30 & 31 of Basic Law.

[13] Articles 54 & 55 of Basic Law.

[14] Article 62 of Basic Law. Federal Ministers are appointed and also dismissed by the Federal President upon the proposal of the Federal Chancellor, under Article 64 of Basic Law.

[15] Article 65 of Basic Law.

Unlike Germany's Basic Law, Myanmar's 2008 Constitution[16] defines a government close to a hybrid presidential-parliamentary system, with a bicameral Parliament (the "Assembly of the Union" or "Pyidaungsu Hluttaw") and a President, head of the Union and of the executive.[17]

Under the Basic Law, the Bundestag[18] in cooperation with the Bundesrat[19] exercises the federal legislative power. The members of Parliament are "not bound by orders or instructions, and [are] responsible only to their conscience."[20]

The judicial power is exercised by judges who are "independent and subject only to the law,"[21] from the Federal Constitutional Court, the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court and the Federal Social Court.[22] The Federal Constitutional Court is the body competent to give binding rulings on the meaning of the constitutional provisions and to settle constitutional disputes. The German Basic Law has divided governmental power into three branches as mentioned above. However, the Basic Law does not insist on a strict division of the legislative, executive and judicial powers.

As in other world jurisdictions, Germany's practical application of the separation of powers doctrine is subject to the principle of check and balances. Though in a parliamentary system of government there is a close relationship between the legislature and the executive in terms of power distribution and in terms of staffs' activities, the judiciary is completely separated from these two state branches.[23] The legality of executive actions is subject to judicial control by five different types of Supreme Federal courts as ordinary judicial remedy. The constitutionality of legislative and executive acts is subject to constitutional review by the Federal Constitutional Court as extra ordinary judicial remedy.[24]

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[16] The third and current post-independence Constitution, the Constitution of the Republic of the Union of Myanmar, came into force when the new civilian Government of the Republic of the Union of Myanmar took over the state power on 31 January 2011.

[17] Section 199 & 200 of Myanmar Constitution. In addition, under the Law on the State Counsellor of 2016, the State Counsellor Daw Aung San Suu Kyi, who is also the Union Minister for two different ministries, has the right to contact and advice government ministries, departments, organizations, association and individuals. She is accountable for her advices and functions to the Pyidaungsu Hluttaw.

[18] Bundestag means Lower House of German Parliament.

[19] Bundesrat means Upper House of German Parliament.

[20] Article 38 of Basic Law.

[21] Articles 92 & 97 of Basic Law.

[22] Article 92 & 95 of Basic Law.

[23] Some of these articles are 43, 44, 50, 51, 53, 54, 61, 63, 65, 67 and 68 of Basic Law. For further details, please see Donald P. Kommers and Ressell A. Miller, op.cit, p 152 to 165, and Mahendra P. Singh, *German Administrative Law in Common Law Perspective*, Springer, 200, at 14 - 18.

[24] Brief discussion on the constitutional review and judicial review by the Constitutional Court and Supreme Federal Courts will be discussed hereinafter.

Under the 2008 Myanmar Constitution, the Republic of the Union of Myanmar is constituted by what is termed a "Union system."[25] Unlike the German Basic Law, the Myanmar Constitution, 2008 section 11 (a) mentions that the three branches of sovereign power, the legislative, executive and judicial power, "are separated to the extent possible, and exert reciprocal checks and balances among themselves." As in the German system, these separated three branches of sovereign power are shared within the Union: Regions and States; and Self-Administered Areas.[26]

The legislative power is with the Pyidaungsu Hluttaw,[27] consisted of the Pyithu Hluttaw[28] and the Amyotha Hluttaw[29] and States Hluttaws.[30]

The executive power is with the Union Government and States governments.[31]

The judicial power is entrusted in the Supreme Court and its subordinate courts, in the Courts Martial and in the Constitutional Tribunal of the Union.[32]

Thus Myanmar's constitutional provisions are in theory aligned with the separation of powers doctrine.

Under the relevant constitutional provisions, Defence Services personnel are involved in all these three branches of State power. Some of these provisions will be highlighted here briefly.

One fourth of the legislature seats are occupied by military personnel.[33] In the military justice adjudication, the decision of the Commander-in-Chief of the Defence Services is

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[25] 2008 Constitution, section 8. The Union system, '*Pyai Taaung Su S Nit*' in the Myanmar official translation, means essentially a federal system.

[26] Section 11(b) of 2008 Myanmar Constitution. The legislative power of the Union, and of the States are listed in schedules one and two of Myanmar Constitution. The legislative powers of Self-Administered Areas are stipulated in third schedule.

[27] Combined Parliament.

[28] Lower House.

[29] Upper House.

[30] Section 12 of Myanmar Constitution. The Union of Myanmar is constituted by seven Regions, seven States and Union territories under section 49 of Myanmar Constitution. There shall be a Region Hluttaw in each of the seven Regions, and a State Hluttaw in each of the seven States under S. 13. The Regions and States have equal status in all aspects whilst Union territories do not.

[31] Section 17 of Myanmar Constitution. There is another type of executive power as Self-Administered power which is distributed among Self-Administered Areas as prescribed by the Constitution.

[32] Section 18 & 293 of 2008 Myanmar Constitution.

[33] Sections 74, 109,141 of 2008 Myanmar Constitution.

final and conclusive.[34] The high ranking military personnel are the Union Ministers for the major important ministries: Ministries of Defence, Home Affairs and Border Affairs. It is also possible for them to be appointed as ministers for other ministries in coordination with the President and Commander-in-Chief of the Defence Services. These military personnel are however required to not retire from the Defence Services. On the other hand, Union Ministers from the rest of ministries who are responsible for the President, are required to retire from the civil service concerned if he is a civil service personnel or to not take part in party activities if he is a member of any political party.[35] In the Union, under Constitution section 201, the National Defence and Security Council must be formed with a President and two Vice Presidents; the speakers of both houses; the Commander and Deputy Commander-in-Chief of the Defence Services; and ministers from four ministries led by military service personnel. Moreover, subject to the provisions of the Constitution, the executive power of the Union extends to administrative matters over which the Pyidaungsu Hluttaw has the power to enact laws. Therefore, apart from the legislative power specifically endowed with the Union Parliament, the Union ministries are competent to submit their respective draft legislations to the legislature for the enactment.[36] Although Myanmar's Constitution calls for the application of a separation of powers, the Defence Services, an institution holding a distinct position because of the country's historical background, is engaged with the three branches of government, and checking and balancing their powers.

In order to analyse the nature of the German judicial review of administrative acts, it is first necessary to understand the nature of the German judiciary and that of its supreme federal courts.

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[34] Section 343 of 2008 Myanmar Constitution.

[35] Section 232 of 2008 Myanmar Constitution.

[36] Section 216 of 2008 Myanmar Constitution.

3. The Nature of the Judiciary under the German Basic Law: the Federal Constitutional Court and Supreme Federal Courts

Articles 92 to 104 of the Basic Law concern the judicial power of the Federal Republic: the organization of the courts at the Federal level and at the Länder level,[37] the independence and legal status of the judges, the latter's responsibilities and conditions to their dismissal, suspension, etc.[38] Principles for a fair trial[39] and other basic provisions for the judiciary are provided as well in the Basic Law.

According to Article 92 of the Basic Law, judges are vested with judicial powers exercised by the Federal Constitutional Court, the Federal Courts and the courts of the Länder (the regional governments). It may be said that the judicial system in Germany is composed of three different types of courts:

- A constitutional court which is competent for constitutional review and constitutional interpretation in the Federation and the Länder
- Special courts, such as the administrative, labour, social and fiscal courts for specific purposes
- Ordinary courts of law dealing with criminal and civil cases.

Articles 93 and 94 of the Basic Law deal mostly with the jurisdiction and composition of the Federal Constitutional Court. The German Federal Constitutional Court,[40] which is autonomous and independent from all other constitutional organs,[41] is established by the Act on the Federal Constitutional Court.[42]

The jurisdiction of the Federal Constitutional Court is provided by Article 93. The exclusive task of this court is to ensure compliance with the Basic Law, its proper interpretation, to make decision on constitutional disputes between the Federation and the Länder, and on the constitutionality of legislations, etc.

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[37] Article 92 of Basic Law.

[38] Article 97 & 98 of Basic Law.

[39] Article 103 & 104 of Basic Law.

[40] The Federal Constitutional Court was established in 1951 in Karlsruhe. The details for the organization and procedure of the Federal Constitutional Court is provided by Article 94 of Basic Law. Länders also have their own Land constitutional courts to adjudicate upon the constitutional issues arising under the respective Land constitutions.

[41] Section 1 of Act on the Federal Constitutional Court.

[42] Act on the Federal Constitutional Court, *Bundesverfassungsgerichtsgesetz* in German language, is abbreviated as BVerfGG. It was signed on 12 March 1951 and lastly amended on 31 August 2015 (Federal Law Gazette I p. 1474).

In addition to the jurisdiction enumerated in Article 93 and Article 100 of the Basic Law, if a court concludes that a law on whose validity its decision depends on is unconstitutional, the proceedings shall be stayed and a decision shall be obtained from the Federal Constitutional Court on the issue of the constitutionality of the statutory provision, known as concrete judicial review. Besides, the Federal or Land government or one-fourth of the members of Bundestag can request to the Federal Constitutional Court to decide on the compatibility of a Federal or Land law with the Basic Law or other Federal Law in abstract review proceedings.[43] Individual constitutional complaints may also be filed at the Constitutional Court against judgments of the court (if only constitutional issues are involved in such judgment), after exhaustion of all remedies within relevant jurisdiction, as an extra ordinary judicial remedy.[44] The decisions of the Federal Constitutional Court are binding upon the constitutional organs of the Federation and of the Länders, as well as on all courts and those with public authority.[45]

In addition to the Federal Constitutional Court of the Federal Republic, Article 95.1 mentions that there are five different judicial courts at the federal level to review the legality of activities:

- the Federal Court of Justice
- the Federal Administrative Court
- the Federal Finance Court
- the Federal Labour Court
- the Federal Social Court[46]

These courts of equal constitutional status exercise their ordinary judicial functions and serve as a supreme and final court in their respective purposes at the federal level.[47] The

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[43] Basic Law, Article 93.1 nos. 2 & 2a; and the Act on the Federal Constitutional Court, section 13, nos. 6 & 6a and section 76.

[44] The details of this will be discussed in next subchapter.

[45] Article 31 of the Act on the Federal Constitutional Court.

[46] The Federal Government established as the highest courts in the country the Federal Court of Justice in Karlsruhe, the Federal Administra- tive Court in Leipzig, the Federal Finance Court in Munich, the Federal Labour Court in Erfurt and Federal Social Court in Kassel. http://www.bsg.bund.de/EN/Home/home_node.html#doc3468470bodytext1
http://www.bsg.bund.de/EN/Home/home_node.html

[47] These five federal courts have one or two more subsidiary courts respectively in each Land. Ordinary jurisdiction (civil and criminal) is consisted of local courts, regional courts, higher regional courts and the Federal Court of Justice; administrative jurisdiction is composed of administrative courts, higher administrative courts and the Federal Administrative Court; financial jurisdiction with finance courts and the Federal Finance Court; labour jurisdiction with labour courts, higher labour courts and the Federal Labour Court; and social jurisdiction with social courts, higher social courts and the Federal Social Court.

Federal Constitutional Court exists outside these five jurisdictions and does not review their decisions except on constitutionality issues.

The Federation may also establish other federal courts, such as a federal court for matters concerning industrial property rights,[48] federal military criminal courts for the Armed Forces,[49] federal courts for disciplinary proceedings against federal service personnel or to address complaints by federal service personnel.[50]

Section 293 of Myanmar's 2008 Constitution mentions three different types of courts and their relevant hierarchy:

- the Supreme Court, which has original, appellate and revisional jurisdiction with respect to all of its subordinate courts
- the Courts Martial, with special jurisdiction over military personnel
- the Constitutional Tribunal, which has special jurisdiction with respect to constitutional review.

These three judicial courts stand separately from one another, and each of these courts are supreme within their own jurisdiction. The Myanmar Constitutional Tribunal has the power to interpret the Constitution and to vet the constitutionality of executive and legislative acts. It also has the authority to decide on the constitutional disputes between the Union and its units; or between the units; and on disputes relating to the rights and duties of the Union and its units arising when implementing legislation.[51]

While the German Constitutional Court has the power to exercise judicial review either in the abstract or in concrete cases, the Myanmar Constitutional Tribunal has concrete judicial review power under section 323 of Myanmar's Constitution. When the trial court considers if a case before it deals with the constitutionality of a statute or of any provision, the court stays the trial, and may request the Tribunal through the Supreme Court to examine the constitutionality of the case.

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[48] The Federal Patent Court however does not constitute an independent branch of the judiciary because it is subject to the appellate jurisdiction of the Federal Court of Justice.

[49] The federal military criminal courts may exercise criminal jurisdiction only during a state of defence or over members of the Armed Forces serving abroad or aboard warships. Details shall be regulated by a federal law. These courts shall be under the aegis of the Federal Minister of Justice. (Under Article 96.2 of Basic Law)

[50] Article 96.1 to 96.4 of Basic Law

[51] Here units mean Regions, States or Self-Administered Areas.
Khin Khin Oo, "Judicial Power and the Constitutional Tribunal: Some Suggestions for Better Legislation Relating to the Tribunal and its Role." In *Constitutionalism and Legal Change in Myanmar*. Ed. by Andre Harding, 193 – 213. Hart Publishing, 2017, at 196 - 205.

Contrary to the German system, if a Myanmar citizen wishes to allege that a governmental act violates his or her constitutional rights, the jurisdiction on these matters is not within the Constitutional Court jurisdiction, but under the competence of the Supreme Court through writs proceedings as in section 378 of the Constitution. In connection with the filing of an application for fundamental rights of citizens granted by the Constitution, the Supreme Court of the Union has the power to issue writs of *habeas corpus; mandamus; prohibition; quo warranto and certiorari*.[52] However, a military personnel cannot file an application to issue writs at the Supreme Court because Constitution's sections 319 provides separate military justice adjudication for Defence service personnel; and constitutional provision for the finality and conclusiveness of the decision is made by the Commander-in-Chief of the Defence Services under section 343 of the Constitution.

[52] Section 296, 377 & 378 of Myanmar Constitution, 2008. These writs applications should be made under the Law relating to the Application of Writs enacted on 5 June 2014.

4. The Legislative Power of the Executive

According to the separation of powers doctrine, "there should be, ideally, a clear demarcation of personnel and functions between the legislature, executive and judiciary."[53] However, it does not insist that each institution should operate in isolation from each other. It is essential that there should be sufficient interplay between each institution of the state. Under Myanmar's 2008 Constitution, the administrative authorities have the right to propose the Bills to the legislature and to perform delegated legislation and quasi-judicial function, like other common law jurisdictions.[54] Furthermore, section 100 of the Constitution provides that the executive can propose the Bills related to the matters prescribed in the constitution to the Parliament for approval.

> Section 100
>
> (a) The Union level organizations formed under the Constitution shall have the right to submit the Bills relating to matters they administered among the matters included in the Union Legislative List to the Pyidaungsu Hluttaw [Union Parliament] in accord with the prescribed procedures.
>
> (b) Bills relating to national plans, annual budgets and taxation, which are to be submitted exclusively by the Union Government shall be discussed and resolved at the Pyidaungsu Hluttaw in accord with the prescribed procedures.

In connection with the delegated legislation, once the Bill is passed into law, the relevant union ministry[55] can make the rules and regulations in accordance with that law by using delegated or subordinated legislative power of the administrative authority. Section 97 (a) (i) of Myanmar's Constitution says that "When the Pyidaungsu Hluttaw enacts a law, it may authorize to issue rules, regulations and by-laws concerning that law to any Union level organization formed under the Constitution." It is, however, expressly provided that the rules, regulations, notifications, orders, directives and procedures issued under the power conferred by any law shall be in conformity with the provisions of the Constitution and the relevant law.[56]

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[53] Hilaire Barnett, *Constitutional Law and Administrative Law*, Routledge, 9th Edition, 2011, at 73-74.

[54] For present purpose the discussion will mainly focus on the Union and Federal level.

[55] That is, the Federal ministry or federal administrative authority.

[56] Section 97 (b) of Myanmar Constitution. Section 137 of the Constitution clearly lays down the procedures to be followed by the adminis- trators in and after issuing the delegate legislation as "the Body concerned shall distribute and submit the said rule, regulation or by-law to the nearest regular session of the Pyithu Hluttaw (lower house of Parliament)."

Therefore in Myanmar, the legislative power of the executive i.e. the ability of the administrative authority to submit certain bills to the legislature and to make subordinate legislation, is clearly provided in the Constitution itself. In order to carry out the object and purpose of the "mother law", the latter prescribes the scope of the power to make rules, regulations and other types of subordinate laws.[57]

Under the German Constitution, there is no provision allowing the executive to possess legislative powers. The executive can exercise delegated legislative powers under the term of *statutory instruments*[58] as and when specifically authorised by the legislature in the prescribed form.[59] Article 80 of the Basic Law clearly controls and regulates the "issuance of statutory instruments"[60] by governmental authority, such as Federal Government, Federal Minister and Land governments. Article 80.1 reads as follows:

> The Federal Government, a Federal Minister or the Land governments may be authorised by a *law* to issue *statutory instruments* (*Rechtsverordnungen*). The content, purpose and scopes of the authority conferred shall be specified in the law. Each statutory instrument shall contain a statement of its legal basis. If the law provides that such authority may be further delegated, such *sub delegation* shall be effected by statutory instrument.

Therefore, the executive's inherent power to issue delegated legislation, like Myanmar executives, has not been embodied by the German Basic Law, and delegated power can only derive from the Federal Parliament to the executive after fulfilling the requirements provided by article 80.1 of the Basic Law. The rationale behind this strict limitation in the German constitution is due to the bitter experience of the misuse of delegated legislative power by the executive, particularly in the late stages of the Weimar Republic under the Constitution of 1919.[61]

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[57] However, their continued existence depends on the legislature. The legislature may pass the resolution to annul or amend any rule, regu- lation or by-law issued by any administrative authority, if they were no in line with the mother law, without prejudice to the validity of any action previously taken under Section 97 (e) of Myanmar Constitution.

[58] Statutory instruments is *Rechtsverordnungen* in German language.

[59] Article 119 of Basic Law is the exception article of this strict rules for delegated legislative power of the administration. Article 119 permits the Federal Government only, with the consent of the Bundesrat, to issue statutory instruments for matters relating to refugees and expellees during the pendency of federal law. Also please see Mahendra P. Singh, op.cit, at 41.

[60] Statutory order is another English translation from German language which was used in the book of Mahendra P. Singh. The author would use the "statutory instruments," instead, which has been a translation uploaded by Federal Constitutional Court website at http://www.bundesverfassungsgericht.de/EN/Das-Gericht/Zeitstrahl/zeitstrahl_node.html

[61] For further details, please see the Mahendra P. op.cit, at 42.

While the German executive enacts delegated legislation with very specific terms, Burmese legislation refers to a broader interchangeable terminology such as rules, regulations, orders, bylaws, directives, etc., based on sources of the executive power.[62]

Under Article 80.1 of the Basic Law, two different status of legislation can be analysed:

- Federal laws[63] enacted by the federal legislature in accord with the Basic Law[64]
- (Federal) statutory instruments issued by executives within the scope of the relevant federal laws, if such federal laws specifically and particularly authorize them with detailed provisions.[65]

In addition, the executives may, if federal law allows them, further sub delegate their respective delegated legislative power to their subordinates by statutory instruments. This is the notable feature of sub delegated legislation power-making of the executive in Germany.

Contrary to Germany, Myanmar applies the maxim of *delegatus non potest delegare (or delegate potestas non potest delegari),"*a delegated authority cannot further delegate." Therefore, section 97 (a) (ii) of the Myanmar Constitution 2008 itself has inserted the sub delegation clause as "When the Pyidaungsu Hluttaw enacts a law, it may authorize to issuance of notifications, orders, directives and procedures to the respective organization or authority." The power of the respective organization or authority to issue notifications, orders, directives and procedures under the relevant law is authorized not by executive, but by the legislature.

In issuing the statutory instruments by the Federal Government or a Federal Minister, unless a federal law otherwise provides, the consent of the Bundesrat shall be required in certain areas. These issues are outlined by the Article 80.2.[66] In other words, even in the issuance of the statutory instruments for particular matters by the executive, the federal administrative

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[62] Article 80 is the only article under the Basic Law in connection with the issuance of statutory instruments. However, under section 47.2 of the Code of Administrative Court Procedure, there are other types of delegated legislations made by the administrative authority. These types of legislation, namely by-laws and statutory orders, fall under the particular special law of Federal Building Code. They are not within the scope of this work.

[63] Mahendra P. Singh used the term *enabling law* instead of *federal law* in this respect in his work of *German Administrative Law in Common Law Perspective*.

[64] This is commonly known to the common law countries including Myanmar as supreme legislation or direct legislation.

[65] The common law jurisdiction terms this practice as either subordinate or delegated legislation or indirect legislation interchangeably though, German jurists prefers to term as delegated legislation only.

[66] Some issues among others are issues concerning with fees or basic principles for the use of postal and telecommunication facilities, basic principles for levying of charges for the use of facilities of federal railways, or the construction and operation of railways, etc.

authority requires federal council's[67] prior consent. The procedures for certification, promulgation and entry into force of law and statutory instruments are fixed by Article 82 of Basic Law.

According to the Article 80.1 of the Basic Law, whenever the law establishes statutory instruments conferring authority to the executive, the specific contents, purpose and scope of such authority must also be provided. The question whether any legislation authorizes or not federal executives to issue statutory instruments with well-defined contents, purpose and scope of delegation should be decided according to the needs of each individual case. Indeed, laying down the strict standard test will provide neither practicable nor implementable result. By observing different decisions by the Federal Constitutional Court however, it can be understood that "the content refers to the subject-matter of the statutory order, the purpose to the programme drawn out by the legislature to be achieved through the statutory order, and the scope to the limits or extent of the statutory order."[68]

[67] It is an upper house of parliament similar to the US Senate.

[68] Mahendra P. Singh, op.cit, at 44 - 45.

Part II

1. German Administrative Courts

The best known feature of German Law is a sharp division between the public and private law sphere. Germany inherits this system from Roman law although it takes stronger theoretical basis and more important practical significance from its Basic Law than other civil law countries. The public law jurisdictions in Germany are divided into administrative jurisdiction, social jurisdiction and fiscal jurisdiction. Administrative courts are competent for disputes related to non-constitutional public law insofar as a social or fiscal jurisdiction competence does not exist.[69] These administrative courts are independent judicial courts separated from the administrative authorities.[70]

The first German administrative court was established in Baden in 1863 as an independent administrative court separated from ordinary judicial courts for administrative disputes arising from outside of the public law field. Between 1874 and 1924, Germany created the administrative courts with different jurisdiction, such as the highest administrative court and its subordinate administrative courts holding different judicial autonomy. However, the system of the administrative courts dealing with the disputes involving the violation of individual rights by an administration was the least exercised during the National Socialism regime. After World War II, the Federal Republic of Germany then known as West Germany, re-assigned general jurisdiction for all public law disputes to the administrative courts with some modifications. Since then, there has been a comprehensive legal protection on the State government actions in Germany.[71]

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[69] Section 2 of the Administrative Procedure Act. Typical examples of actions brought before the general administrative courts are disputes arising from laws relating to public order and security, assemblies, foreign nationals and asylum, building, traffic, trade and industry, munici- pal revenue and municipal administrative organisation, subsidies, access to public institutions and public welfare, education, protection of the environment, nuisance caused by public facilities, project planning and civil service matters. Thomas Schmitz, *The administrative procedure in German administrative law*, 2013, accessed October 19, 2017, at 1; George Herbert, Administrative Justice in Europe: Report for Germany, accessed October 19, 2017, at 2; Carsten Gunther, Administrative Justice in Europe: Report for Germany, at 3.

[70] Section 1 of Code of Administrative Court Procedure.

[71] Mahendra P. Singh, op.cit, at 23. Jurgen Schwarze, *European Administrative Law*, Sweet and Maxwell, Revised Edition, 2006, at 114-115. George Herbert, Administrative Justice in Europe: Report for Germany, accessed October 19, 2017, at 1.

Establishment of Administrative courts are mentioned in Basic Law, Article 95.1. The Federation shall establish the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court and the Federal Social Court as supreme courts of ordinary, administrative, financial, labour and social jurisdiction.

Administrative courts constitute one of the five branches of the German judiciary. They hold independent judicial power from other judicial bodies and establish a three-tier-court system up to the federal level. One of the Federal Administrative Court presidents says that "Administrative law is concretized constitutional law."[72]

The Federal Administrative Court came into existence on 8 June 1953 in West-Berlin, and is located in Leipzig since 2002. The Code of Administrative Court Procedure of 21 January 1960 replaced all the earlier laws and established a uniform system of administrative courts in all the Länder. The Administrative Procedure Act[73] was adopted in 1976 to be applied by the administrative authorities to handle administrative cases. The scope of the direct application of this Act is limited to the administrative activity of federal official bodies and institutions, and not to the administrative activity of the Länder. These two laws are important in regulating the legality of administrative actions decided by the authorities in public law disputes.

Section 1 of the Code of Administrative Court Procedure[74] declares that Germany's administrative jurisdiction is exercised by independent courts separated from the administrative authorities. Each Land has one or more Administrative Courts, and one Higher Administrative Court. On top of the pyramid, there is one Federal Administrative Court seating in Leipzig.[75]

The lower administrative courts are the courts of first instance and have only original jurisdiction.[76]

The original jurisdiction of the Higher Administrative Courts is of two kinds under Sections 47 and 48 of VwGO. Under the section 47, the courts adjudicate on the validity of bylaws

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[72] Eberhard Schmidt-ABmann, "Basic Principles of German Administrative Law." In *Comparative Constitutional Law*. Ed. by Mahendra P. Singh, 405 - 415. Eastern Book Co, 1990, at 407.

[73] The Administrative Procedure Act, Verwaltungsverfahrensgesetz in German language, is abbreviated as VwVfG. This Act came into force on 25 May 1976, and lastly amended in 2003.
http://germanlawarchive.iuscomp.org/?P=292.

[74] The Code of Administrative Court Procedure, Verwaltungsgerichtsordnung in German language, is abbreviated as VwGO. Hereinafter referred to it as VwGO. The same system was extended to the former East Germany after the unification of Germany on 3 October 1990. This Act was most recently amended in 2010.
http://germanlawarchive.iuscomp.org/?P=292.

[75] Section 2 of VwGO.

[76] Section 45 of VwGO.

under the provisions of the Building Code and of the statutory orders made under it section 246 (2). Besides, the courts decide on the validity of other legal provisions below the statutes of a Land subject to that Land Law. In addition, they have original jurisdiction on certain disputes falling under section 48 of VwGO.[77] These courts can hear the appeals on both points of fact and law against judgments of the Administrative Courts.[78]

The Federal Administrative Court, a revisionary court, principally reviews points of federal law against the final decisions of the higher administrative courts and of the lower administrative courts under some specific laws.[79] Besides, the Federal Administrative Court also has original jurisdiction on the matters outlined by Section 50 of VwGO including public law disputes between the Federation and the Lander and between different Landers but not concerning constitutional issues. The Federal Administrative Court is unified as the apex administrative jurisdiction in the German Federal Republic and mainly reviews the cases related to federal law questions.[80]

Justice Georg Herbert of the Federal Administrative Court stated that the German administrative courts in public administration act "not as a general control of the administration, but [as] the protection of the individual rights before the public administration."[81]

The distinction between public law and private law exists in Myanmar as well. Public law deals with the relations between state and citizen whereas private law regulates relations between the individuals. However contrary to Germany, such distinction is not emphasized in Myanmar as the judicial courts from different levels within the country have jurisdiction to try both criminal cases and civil cases. Myanmar judicial courts try civil and criminal cases as first instant courts and appellate courts with the exception of township courts (the lowest level of courts).[82]

There are many statutes, such as the Tax Laws, Labour Law, Farmland Law, Investment Law, Civil Service Personnel Law, etc. These enable the concerned executive authority to establish administrative bodies or tribunals to execute quasi-judicial functions. Respective quasi- judicial functionary power is expressly provided by the relevant law.

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[77] Mahendra P. Singh, op.cit, at 202 - 203.

[78] Section 46 of VwGo.

[79] Section 49 of VwGo.

[80] Ralf Leithoff, "Introduction to the Public Administrative Jurisdiction in Germany." Paper presented at Seminar on European Integration and Administrative Reform, Budva, Serbia and Montenegro, December 4 - 6, 2005), at 27.

[81] George Herbert, op.cit, at 1.

[82] Sections 293, 295, 306, 315, 316 & 317 of the Myanmar Constitution, 2008.

Myanmar Union ministries, union level organizations and government departments make decisions on the public law disputes between the government departments and individuals as quasi-judicial function of the administrative authorities in accordance with the different relevant legislations through different administrative mechanisms.

In order to perform their quasi-judicial functions, different laws relating to various administrations have their own procedures in formation pattern; hearing procedures; decision making processes based on the needs of concerned administration. Although most of the procedures are common, there is no standard operating procedure. Each concerned Ministry could also initiate administrative review across their department exercising their power as provided in section 224 of the Constitution. "The Ministries of the Union Government shall, in carrying out the functions of their subordinate governmental departments and organisations, manage, guide, supervise and inspect in accord with the provisions of the Constitution and the existing laws."

In the case of the Farmland Law of 2012, Farmland Management Bodies were formed at different levels by sections 15 & 16 of Chapter V, and consequently these bodies have quasi-judicial functions enumerated in sections 19 & 21. Sections 22 to 26 deal with land dispute settlement by administrative authorities and appeal procedures to different level of superior Land Management Bodies. A Ward or Village Tract Farmland Management Body rules over land disputes in respect of the rights under the Farmland Law. The aggrieved party can appeal against the decisions passed by the relevant Farmland Management Body to higher Farmland Management Bodies. The Farmland Management Bodies at different levels will review the decision and will either approve, revise or annul the decision.[83] The Region or State Farmland Management Body is the highest administrative body of appeal. In this regard, "the decision made by the Region or State Farmland Management Body is final."[84]

Myanmar laws relating to administration have included this finality clause. It is not historically uncommon for Acts and Laws of Myanmar which exclude the courts power to review administrative decisions by inserting a finality clause. However, although there is finality clause under a particular legislation, finality clauses are not very effective in all cases, and the Supreme Court is ready to judicially review the administrative actions and omissions; and if it is necessary, to exercise its power to issue writs either to quash the administrative acts or to compel the administrative authority to act its functions in accord with law.[85] It

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[83] Sections 22 to 25 of the Farmland Law.

[84] Section 25 (c) of the Farmland Law.

[85] Thakhin Aye Mg vs. Justice U Aung Tha Gyaw and others, 1949 BLR (SC) 188; Mg Chaw vs. Ma Aye Ma & 3, 1955 BLR (SC) 89; U San Win vs. The Secretary of Ministry of Justice, 1957 BLR (SC) 884-89.

only means that no judicial appeal lies from an order made by administrative authority to the ordinary judicial courts. It does not prohibit him or her to apply writs to the Supreme Court under the constitutional provision as judicial review.[86] For instance, in the case of *U Zaw Phyu vs. Chairman of Thaninthayi Region Farmland Management Body & 1*,[87] 2014 Civil Miscellaneous case No 305, the Supreme Court issued writs of quo warranto to quash the decision made by the Taninthayi Region Farmland Management Body as an ultra vires act of administrative body, although there has been a finality clause in Farmland Law.

2. Constitutional Review and Judicial Review of the Administrative Acts

Since the last decades, constitutional review in which the judiciary controls the constitutionality of acts done by the executive and the legislature has become a common feature. In this sense, the terms "judicial review" and "constitutional review" are often used interchangeably.

A US-style judicial review refers to when the review of the constitutionality of statutory legislation is exercised at every level of the ordinary judiciary with the Supreme Court deciding in last instance. The United States was the first country in which this form of judicial review of legislation was practiced.

By contrast, constitutional systems in which the function of judicial review is concentrated in a specialized constitutional court outside the ordinary judiciary are often classified as falling within the Austrian/European or Kelsenian model of judicial review. The famous Austrian scholar Hans Kelsen first introduced this model in the Austrian Constitution of 1920 which he helped draft.

Constitutional adjudication mainly deals with constitutional issues, such as questions of interpretation of the constitution, decisions on the constitutionality of the federal and state laws, and on constitutional controversies between the Federation and the federal states or among the federal states, and some other prescribed matters[88] depending on the constitution of a country.

In the German constitutional system, constitutional adjudication is performed by the Federal Constitutional Court including decisions on the constitutionality of court judgments and

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[86] However, the finality clause under the Constitution (such as finality clause under sections 295 (c), 324, 343 (b) and 402 (a)) will always prevent the Union Supreme Court from exercising its judicial review power.

[87] U Zaw Phyu vs. Chairman of Thaninthayi Region Farmland Management Body & 1, 2014 Civil Miscellaneous case No 305.

[88] Such as impeachment of president, dissolution of political parties, individual constitutional complaints.

administrative acts which have been challenged unsuccessfully in the superior ordinary courts and in the administrative courts respectively. Alongside constitutional review, the German Basic Law has established a Federal Administrative Court as the highest administrative jurisdiction, in addition to provisions on a two-tier structure of Administrative Courts and an Upper Administrative Court as highest administrative jurisdiction at the state level in Sections 2, 5 and 9 of the Act on Administrative Court Procedure.

According to the German model of judicial review of the administrative acts, the administrative courts have jurisdiction to determine public law disputes of a non-constitutional character under Section 40 Act on Administrative Court Procedure. In particular, they are competent to review the legality of administrative authorities' acts which directly affects the rights of individuals under Section 42 Act on Administrative Court Procedure and implements the constitutional guarantee of Article 19 (4) which allows every person claiming that his/her rights have been violated by an act of public authority to have recourse to the courts. In this respect, judicial review means review of acts issued by the legislature or an executive body by a judicial authority for their consistency with higher law, namely the constitution (in the case of primary legislation) and statutory legislation (in the case of executive acts, including secondary legislation). The details will be explained in the following headings.

2.1. Judicial Review of the Administrative Acts

The judiciary plays an important role in the German legal system. In general, all disputes in the area of public law with the exception of constitutional disputes fall under the jurisdiction of the administrative courts. The German administrative courts have jurisdiction to review the legality of administrative acts or omissions instituted either between public authorities or between individual citizens and the administrative authorities. The second scenario is especially relevant for this study. Therefore, the judicial review of administrative acts in Germany means the power of the German administrative courts to review the legality of acts, functions, refusals and omissions of an administrative authority.[89]

[89] These administrative courts are staffed with professional judges selected by the state parliaments from different courts or constituencies. Donald P. Kommers and Ressell A. Miller, op.cit, at 1.

Article 19.4 of the German Basic Law guarantees a legal remedy against every act of the public power which violates the rights of a person. It states:

> Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts.

Although this review system has been classified as judicial review of administrative actions in order to distinguish it from the constitutional review, the system is closely connected with constitutional principles. Article 19.4 (1) of the Basic Law is the principal and founding provision for the judicial review of administrative acts. It constitutionally guarantees judicial protection of individual's subjective rights as a model for "the rights-based approach of the Federal Constitution."[90] Under this Article, if any person's rights have been infringed by the public authorities, he or she has access to legal remedies at judicial courts for the violation of individuals' subjective rights.[91] The administrative courts at different levels have been established with the ultimate aim of protecting individuals' subjective rights from being violated by administrative acts, and without the "aim of a comprehensive objective control"[92] of administration.

One of the decisions of Federal Constitutional Court explains the importance of Article 19.4 of the Basic Law as "Article 19.4 of the Basic Law contains a fundamental right to effective judicial protection from acts of public authority that is as complete as possible. The guarantee provided by the Basic Law comprises access to the courts, the examination of the relief sought in formal proceedings and the binding decision of the court. The citizen has a substantial claim to judicial review that is as effective as possible."[93]

Article 19.4 of the Basic Law establishes citizens' right to effective judicial review in cases where their rights may have been violated by acts of state power. Hence, the jurisdiction of the administrative courts and an individual's right to recourse to the courts against the infringement of administrative functions is established in the Basic Law itself. It is not a just formal right to invoke the courts but also a guarantee to have effective legal protection

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[90] Rainer Grote, "The scope of judicial review of administrative action and the changing rule of law: Some comparative reflections." In *South Africa Public Law*. Vol 9, No.1, 513- 531. University of South Africa, 2004, at 516.

[91] Ibid, at 513-514.

[92] Carsten Gunther, op.cit, at 1.

[93] *60 Years German Basic Law: The German Constitution and its Court*, op.cit, at 719. European Arrest Warrant Act Judgment of BVerfGE (Federal Constitutional Court) 113, 273.

against any alleged infringement of subjective rights by an action of the public power.[94] The fact that the judge has sufficient authority to review both factual and legal aspects of a dispute is an integral part of the guarantee of effective legal protection guarantee under Article 19.4 of Basic Law.[95]

The establishment of the Federal Administrative Court is defined under Article 95 of Basic law while the composition of such court shall be in accord with section 10 of VwGO. The constitution and dissolution of an Administrative Court and of a Higher Administrative Court are mentioned under the section 3 of VwGO.

Section 40 (1) of VwGO allows access to administrative courts in all public law disputes of a non-constitutional nature subject to any Federal or Land Law. It reads as follows:

> Recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature insofar as the disputes are not explicitly allocated to another court by a federal statute. Public-law disputes in the field of Land law may also be assigned to another court by a Land statute.

If the law regulating the relationship between parties to a dispute qualifies as part of public law, the administrative court has jurisdiction over such dispute.[96] "Typical examples of actions brought before the general administrative courts are disputes arising from laws relating to public order and security, assemblies, foreign nationals and asylum, building, traffic, trade and industry, municipal revenue and municipal administrative organisation, subsidies, access to public institutions and public welfare, education, protection of the environment, nuisance caused by public facilities, project planning and civil service matters."[97]

Section 35 of the Administrative Procedure Act[98] defines the administrative act as "the basic form of administrative action in matters of individual applicability."[99]

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[94] *60 Years German Basic Law: The German Constitution and its Court, op.cit, at 303.* Classroom Crucifix Judgment of BVerfGE (Federal Constitutional Court) 93, 1.

[95] Ibid at 719. European Arrest Warrant Act Judgment of BVerfGE (Federal Constitutional Court) 113, 273.

[96] Franz Erath, "Scope of Judicial Review in German Administrative Law." *Stellenbosch Law Review*. Vol 8, 192 - 204. 1997, at 194.

[97] Jurgen Schwarze, op.cit, at 1.

[98] Although it is a Federal law, almost all Lands have embodied the definition of administrative act under Federal law into their Land legisla- tions. http://germanlawarchive.iuscomp.org/?P=292.

[99] Franz Erath, op,cit, at 194.

> An administrative act shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect. A general order shall be an administrative act directed at a group of people defined or definable on the basis of general characteristics or relating to the public law aspect of a matter or its use by the public at large.

If there is an administrative act, an individual can bring either:

- A rescissory action to attack an administrative act which violates his/her basic rights
- An enforcement action to issue such an administrative act as its omission violates his/her basic rights against an administrative agency under Section 42.1 of VwGO as follows:

The rescission of an administrative act (rescissory action),[100] as well as sentencing to issue a rejected or omitted administrative act (enforcement action)[101] can be requested by means of an action.

Section 42.2 is also about restriction: "unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission."[102]

Detailed administrative court procedures cannot be discussed here other than the process for previous preliminary proceedings of the aggrieved person. It is a prior step before bringing administrative actions at the administrative court. In most cases, the aggrieved party should submit his objection to the relevant authority as preliminary proceedings for the "lawfulness and expedience of the administrative act"[103] within one month after such administrative act has been done. If the authority thinks the objection is correct and well founded, he shall provide remedies accordingly. If such first authority refuses the objection, the aggrieved party can forward it to next higher authority to review the matter. If the latter also does not give remedy for his or her grievances, the aggrieved citizen can bring his objection before

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[100] "Rescissory action (*Anfechtungsklage* – which may be used to seek the quashing of an administrative act)." Rainer Grote, op.cit, at 519.

[101] Mandatory injunction (*Verpflichtungsklage* - which seeks to obtain a judgement ordering the administration to issue an administrative act)." Rainer Grote, op.cit, at 519

[102] Section 42.2 of VwGO.

[103] Section 68 of VwGO.

the administrative court within one month of receiving the result of the review.[104] Apart from this preliminary proceedings internally controlled by the administrative authority, the German legal system provides judicial control of administrative acts.[105]

If the administrative court has found out that the alleged administrative act is unlawful and it has violated the plaintiff's rights, "the court shall rescind the administrative act and any ruling on an objection."[106] When the court decides that alleged "rejection or omission of the administrative authority is unlawful"[107] and, thereby, it has violated the plaintiff's rights, the court will issue an order upon the administrative authority to make a new decision, taking into account the court's legal point of view. The administrative courts will investigate the facts of the case itself whether the alleged fundamental right is violated or not and will not review the result of the investigation undertaken by the administration. In addition, "they do not decide whether or not the act is or would be expedient."[108] Therefore, every administrative court always examines and reviews the complaints for the administrative acts within the wide scope of the Basic Rights provisions under the Basic Law. The administrative courts have constitutional obligation to review all factual and legal assessments made in the alleged administrative decision. The administrative courts, however, have jurisdiction on the disputes involving constitutional issues.

Therefore judicial review of administrative actions begins at the administrative courts and is settled in the same courts as ordinary judicial remedy.

If the complainant has exhausted all legal remedies available from the administrative courts and still believes that there is no recourse for asserted violation of fundamental rights under the Basic Law, he may submit his constitutional complaint to the Federal Constitutional Court. This means that only after exhaustion of ordinary judicial remedy before the administrative courts, the complainant may ask extra ordinary judicial remedy before the constitutional court if alleged administrative action were in violation of his fundamental rights. He shall not be allowed to ask for the merits of the case.[109]

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[104] Sections 69 - 75 of VwGO. Franz Erath, op.cit, at 194- 195. Wolfgang Heyde, *Justice and the Law in the Federal Republic of Germany.* CFM, Heidelberg, 1994, at 61- 62.

[105] It is learnt that some federal states have adopted general legislation or legislation concerning several subject matters to omit this internal preliminary proceedings and to grant direct access to the Administrative Courts. Carsten Gunther, op.cit., at 9.

[106] Section 113.1 of VwGO.

[107] Section 113.5 of VwGO.

[108] Wolfgang Heyde, op.cit, at 62.

[109] For further details, please see Chapter 5, General Principles of Judicial Review, of *German Administrative Law in Common Law Perspec- tive* by Mahendra P. Singh.

Before addressing the details of the constitutional review of administrative acts, this study will provide a brief explanation on complaints by individuals that challenge the statutory instruments issued by the executive authority. In principle, there is no ordinary judicial remedy available for an individual by means of an individual complaint against specific legislation.[110] However, as already discussed above under the heading of legislative power of executive, under Article 80.1 of the Basic Law, there are two main different types of legislation:

- Federal laws enacted by the federal legislature in accord with the Basic Law
- (Federal) statutory instruments issued by executives within the scope of the relevant federal laws.

Therefore, he or she may file an individual complaint against certain statutory instruments issued by the executive as an administrative act before administrative court as listed in Section 47 (1) of VwGO.[111] Applications may be made by any individual to the Higher Administrative Court claiming that he or she has been or will be aggrieved by the legal provision or its application.

In Myanmar, only after exhaustion of the administrative remedy, there will be external merits of judicial review of the administrative activities under section 296 of the Constitution.[112] The aggrieved party can make writs application to the Union Supreme Court (the highest judicial court of the country), to review the legality of the decisions passed by administrative authorities. Unlike Germany, Myanmar's Constitution empowers the Supreme Court only to review the legality of the administrative acts done by the administrative authorities under the writs application proceedings.[113]

Under section 296 of Myanmar's Constitution, the Supreme Court has the power to issue

- Writs of Habeas Corpus – an order that declares the lawfulness of the detention of aperson by a Myanmar court or authority, after presenting the detainee before the court withthe authority to issue[114]

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[110] Right to challenge the legislation is endowed with the Federal Government, a Land Government or one quarter of the Members of the Bundestag as an abstract judicial review of statutes under Section 76 of BVerfGG; and with the concerned judicial court under Article 100 of Basic Law as concrete judicial review before the Federal Constitutional Court as extra ordinary judicial remedy.

[111] Donald P. Kommers and Russell A. Miller, op.cit, at 12.

[112] Sections 377 and 378 of the Constitution grant the citizens the right to file writs application at the Supreme Court in order to obtain any of the rights given under the chapter 8 of the Constitution under the title of "Fundamental Rights and Duties of Citizens."

[113] Sections 296, 322 & 378 of the 2008 Myanmar Constitution.

[114] Section 2 (c) of Law relating to the Application of Writs.

- Writs of Mandamus – an order that compels any public authority or institution or governmental departments to perform a particular statutory duty to which the relevant authority had failed or refused to perform[115]

- Writs of Prohibition – an order to prevent the actions or decisions done as judicial or quasi-judicial function which is *ultra vires* the power or contrary to the principles of natural justice[116]

- Writs of Quo Warranto – an order that declares the legality of laws, rules, regulations, procedures, orders, notifications or directives issued by government department or authority either upon an individual or upon public at large[117]

- Writs of Certiorari – an order to quash any judicial or quasi-judicial function which has not been done in accord with law[118]

Gallant Ocean Factory vs. Dispute Settlement Arbitration Council & 2,[119] stated that "The power of the Union Supreme Court to issue writs shall not be confined to only those grounds for violation of fundamental rights of citizens, and shall not be interpreted as such." Under Chapter VI titled "Judiciary" section 296, the Supreme Court has the power to issue five different categories of writs as and when necessary.

In issuing these writs, the Supreme Court never interferes with the judgment of a subordinate court, if the judgment is made within the competent jurisdiction.[120] In other words, the Supreme Court places emphasis on the legality of the decision, that is, whether the courts had exercised power within their endowed jurisdiction or not, and does not take into account the merits of the case.[121] In addition, if any decision made by the administrative body is in the nature of the quasi-judicial function and is ultra vires the powers of the administrative authority, the Supreme Court shall review the decision, will issue a writ of certiorari and (if necessary) a writ of prohibition to quash the decision.

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[115] Section 2 (d) of Law relating to the Application of Writs.

[116] Section 2 (e) of Law relating to the Application of Writs.

[117] Section 2 (f) of Law relating to the Application of Writs.

[118] Section 2 (g) of Law relating to the Application of Writs.

[119] Daw Win Win Khaing vs. Dispute Settlement Arbitration Council & 2, 2015 MLR (SC) 245.

[120] U Myin Than & 5 vs. President of the Republic of the Union of Myanmar & 2, 2011 MLR 79.

[121] Daw Than Than Htay & 2 vs. Magwe Regional High Court Judge & 6, 2011 MLR 127.

In the case of U Htwe (a) A E Madari vs. U Tun Ohn & 1 of 1948,[122] the then Supreme Court established that for an administrative act to be reviewed by the superior court, four criteria must be respected. These are (1) having legal authority (2) determining the questions affecting the rights of subjects (3) having the duty to act according to law, and (4) acting in excess of their legal authority.[123] As these are principles followed by Myanmar courts, a purely administrative function will never be judicially reviewed by the Supreme Court by means of issuing writs,[124] unlike the German judicial review of administrative acts.

As a principle, the Myanmar Supreme Court will issue the writs to prevent the violation of an individual's rights as a consequence of act or omission of judicial and administrative authorities; and to ensure that its subordinate courts, tribunals and administrative authorities perform their designated duties by using their respective power in accordance with law.[125]

Professor Dr. Daw Kyin Htay vs. Union Minister for the Ministry of Education of 2013[126] was the very first case in which a writ of certiorari was issued, and in which the Supreme Court quashed the administrative decision made by the Ministry of Education. The applicant was Daw Kyin Htay, then Professor and Head of the Economic Department of Yangon University of Distance Education. She was forced to retire by Ministerial order without any right to be heard, to explain, or to appeal. It was argued that the decision of the Minister of Education was *ultra vires* the power of the Minister endowed by Civil Service Personnel Law. This case was followed by many similar others claiming the ultra vires act of the administrative actions.

The Writs Law requires submitting the application for certiorari and *quo warranto* before the Supreme Court within a two year time starting from the time cause of action arises. There is, however, no clear provision in terms of *locus standi*. Section 2 (j) of the law plainly defines the applicant as a person who applies the writs application in accordance with this law. However, Section 319 of the Constitution provides for separate military justice adjudication for Defence Services personnel. Again section 343 provides for the finality and conclusiveness of the decision made by the Commander-in-Chief of the Defence Services.

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[122] U Htwe (a) A E Madari vs. U Tun Ohn & 1, 1948 BLR (SC) 541.

[123] Myanmar Supreme Court followed the concept of judicial act laid down by Atkin, L. J., in the case of Rex vs. Electricity Commissioners, [1924] 1 KB 171, with some modifications since 1948 up to now.

[124] Mg Tin Ko Latt (@) Bi Lay vs. Township Administrative Officer of Pyay Township General Administrative Department & 1, 2012 Criminal Miscellaneous Case No 6 (SC). U Ne Win & 90 vs. Head of Department of Yangon City Development Committee, 2014 Civil Miscellaneous Case No 222 (SC).

[125] U Dar Ron vs. Director General from General Administrative Department & 1, 2012 Civil Miscellaneous Case No 138 (SC).

[126] Professor Dr. Daw Kyin Htay vs. Union Minister for Ministry of Education, 2013 Civil Miscellaneous Case No 290 (SC).

Therefore, individual military personnel cannot apply for writs but according to section 325 (a), the Defence Services as an institution may do so to the Supreme Court through the President. Such case has not yet occurred.

Under section 11 of the Law, the decision of the Supreme Court is final and conclusive. Therefore, Myanmar Supreme Court judicially reviews the actions and omissions of the administrative authorities in two respects: On one hand, if their functions are *ultra vires*. On the other hand, if their functions are of a quasi-judicial nature, like the German Administrative Courts' judicial review of administrative acts at different levels. The Myanmar Supreme Court decides on the applications and issues the writs based on the related Union laws and regulations.

2.2. Constitutional review of the administrative acts

Under the title "Judiciary" of the German Basic Law, Articles 92 to 94, 99, and 100 are the legal basis for the Federal Constitutional Court. The other articles concern the entire judicial system of the Federal Republic. The Federal Constitutional Court Act[127] was enacted on 12 March 1951 to reflect and implement the Basic Law's provisions relating to the organization, powers and procedures of the Constitutional Court.

The German Constitutional Court is an autonomous body set up to establish constitutional administration of justice. Its main task is to take decisions in matters of constitutional law and to render final and binding interpretation of the constitution.[128] The German Basic Law Article 93 enumerates detailed jurisdictions of the Federal Constitutional Court.[129]

Under the German constitutional complaint system, any person, whether he or she is natural person having the right to sue or a legal person such as a corporate body, can bring a constitutional complaint before the Constitutional court if any public authority (i.e. judicial decisions, administrative act and legislations) has violated any one of his or her basic rights under the Constitution or one of the rights under specific Articles 20.4, 33, 38, 101, 103 or

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[127] Act on the Federal Constitutional Court has been supplemented by the Rules of the Federal Constitutional Court of 15 December 1986.

[128] Wolfgang Heyde, op.cit, at 65.

[129] This Basic Law Article 93 is followed and supplemented by the Section 13 of the Act on the Federal Constitutional Court. In particular, Article 93.1 no.4a of the Basic Law has connected with section 13 no.8a of the Act.

104 of the Basic Law.[130] The individual constitutional complaint[131] is " a special guarantee for citizens' constitutional rights; they guarantee that the legislator, the government, the administration and the judiciary observe the basic rights and apply them uniformly".[132]

Unlike other constitutional courts, the German Federal Constitutional Court is composed of two senates. Each senate is presided by eight judges under section 2 of the Act on the Federal Constitutional Court.[133] They have their own competency for different judicial review proceedings mentioned in section 13 of the BVerfGG.[134] Nevertheless, both senates have equal status.[135] Constitutional complaints made under Article 93 (1) no. 4a of the Basic

Law, that is, complaints of violation of basic rights are handled by the First senate. Those based on the other articles are submitted to the Second senate.[136]

In connection with Article 93 (1) no. 4a of Basic Law and section 13 no. 8a of BVerfGG, section 90 of BVerfGG allows the court to try the constitutional complaint of an individual regarding the violation by public authority of his or her fundamental rights or rights under specific Basic Law articles.

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[130] In this connection, the constitutional complaint proceedings are different from the rest of the proceedings fallen under Article 93 as the prescribed governmental and parliamentary institutions are only parties for latter proceedings.

[131] In connection with the individual legal capacity, however, there is "no official declaration of legal incapacity or mental illness may service to bar a constitutional complaint directed against such declaration." Besides, in terms of the legal capacity, "whether an organization lacking legal capacity can hold constitutional rights … will generally depend upon various circumstances." Foreign corporations are entitled to file the constitutional complaints for the violation of procedural rights under Articles 101 (1) (2) and 103. Please see further details at the Donald P. Kommers and Russell A. Miller, op.cit, at 12. Michael Singer, "The Constitutional Court of German Federal Republic." In *International and Comparative Law Quarterly*. Vol 31, 331-356. British Institute of International and Comparative Law, 1982, at 342 - 345.

[132] Wolfgang Heyde, op.cit, at 71.

[133] Hereinafter referred to Act on the Federal Constitutional Court as BVerfGG.

[134] Section 14 of BVerfGG.

[135] Although the capacity of the judges of the constitutional justices are not a focus of this study, the researcher would like to highlight this point briefly. Under section 18 of BVerfGG, "Justices of the Federal Constitutional Court shall be barred from exercising their judicial duties if they are a party to the case, or are or were married to a party, or …" The Constitutional Tribunal Law of Union of Myanmar does not have such provision. In 2016, submission 1/2016 (23 Amyotha Hluttaw Representatives including U Sai Than Naing vs. Union Parliament) asked the CTU to interpret the constitution section 333 (d) (iv) dealing with the qualifications of CTU members appointed by the President. As a matter of fact, this submission is substantially connected with 2 existing members of CTU body. However, this submission was heard and decided by the whole CTU body including said 2 members.

[136] Section 14 of BVerfGG

Section 90 of BVerfGG establishes that:

1. Any person claiming a violation of one of his or her fundamental rights or one of his or her rights under Article 20.4, Articles 33, 38, 101, 103 and 104 of the Basic Law by public authority may lodge a constitutional complaint with the Federal Constitutional Court.

2. If legal recourse to other courts exists, the constitutional complaint may only be lodged after all remedies have been exhausted. However, the Federal Constitutional Court may decide on a constitutional complaint lodged before all remedies were exhausted if the complaint is of general relevance or if prior recourse to other courts would cause the complainant severe and unavoidable disadvantage.

However, as mentioned above, under Basic Law Article 93.1 no. 4a, any individual is allowed to submit his or her constitutional complaint to the Federal Constitutional Court to correct or prevent the actions done by the administrative authorities only after exhaustion of all legal remedies available from the administrative courts, and when he has believed that there has been no recourse for asserted violation of fundamental rights under the Basic Law.

Moreover, although, Section 90 of BVerfGG allows any person to claim for his or her injury, according to the court decisions, such complaint must be made by the complainant who is *personally* affected by *present* injury because of *direct* violation of individual rights as consequence of administrative actions.[137]

Complaints of unconstitutionality must be lodged within a period of one month after the alleged executive act was reviewed by the court of last instance and the decision was served upon the complainant.[138] The constitutional complaint against a law [i.e., statutory instruments] may be lodged within one year since the enactment of the law.[139]

Under the constitutional complaints procedure, the Federal Constitutional Court reviews the complaint for the constitutionality of the alleged administrative act if the administrative

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[137] Michael Singer, op.cit, at 349. BVerfGE 1, 97 case lays down these three requirements for standing to bring individual constitutional complaint. Please see further details at 349 - 355 of same book.

[138] Section 93.1 of BVerfGG.

[139] Section 93.3 of BVerfGG.

court has violated the complainant's basic rights. The court will not review the court's other decisions to ensure that all measures applied in every specific cases are correct. Besides, the Federal Constitutional Court will not issue any other decisions on account of a constitutional complaint. It cannot, for instance, award damages or initiate criminal prosecution as its main task is to review the constitutionality of the alleged administrative act. Approximately ninety-eight percent of constitutionality complaints are not admitted for adjudication of the Constitutional Court, although if the court finds out that an asserted administrative act violates any individual's basic right, it will not hesitate to declare such administrative act as the violation of the Basic Law[140] and order the administrative court to reconsider the case.[141]

Under the 2008 Myanmar Constitution, the Constitutional Tribunal has jurisdiction on the interpretation of the Constitution, on the decisions on the constitutionality of legislative and executive acts adopted by the Union and its Regions and States; and on the decisions on constitutional controversies between the Union and its Regions and States or between the Regions and States themselves.[142] Contrary to the German Federal Constitutional Court under the Basic Law, the Myanmar Constitution does not empower the Constitutional Tribunal to hear individual complaints of citizens' violated fundamental rights. Their remedy is writ proceedings at Supreme Court. Sections 377 and 378 of the Constitution grant the citizens the right to file writs application at the Supreme Court in order to obtain any of the rights given under the chapter 8 of the Constitution under the title of "Fundamental Rights and Duties of Citizens." Moreover, although in most models of constitutional review, courts deal with electoral issues to a greater or lesser extent, in Myanmar only the Union Election Commission (UEC) is in charge of electoral issues. One of the UEC's eight duties provided in section 399 of the 2008 Constitution is to constitute electoral tribunals for the trial of electoral disputes. Section 402 of the 2008 Constitution establishes the functions of the UEC and the provisions for the finality of the resolutions. The case *U Aung Kyaw Zan vs. Members of the Union Election Commission including chairperson*[143] confirmed that the Union Supreme Court cannot intervene with the decision made by the UEC by way of issuing the writs. Therefore, the decision passed by the UEC can never be judicially reviewed by the Union Supreme Court nor constitutionally reviewed by the Constitutional Tribunal.

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[140] Section 95.1 of BVerfGG.

[141] Section 95.2 of BVerfGG.

[142] Section 322 of the 2008 Myanmar Constitution.

[143] U Aung Kyaw Zan vs. Members of the Union Election Commission including chairperson, Civil Miscellaneous Case No 28/2011.

Conclusion

This research explored the German administrative laws and review system based on significant articles of the German Basic Law and relevant sections under German Administrative Laws among many other important provisions. These provisions guarantee individuals' basic rights under the Basic Law, they ensure the legal usage of administrative powers and they review the administrative functions for the protection of individual's basic rights in public law matters. In addition to German administrative provisions, this paper presented Myanmar's current administrative law and its judicial review system with the objective of understanding both countries system.

During the 20th century, especially after World War II, the importance of good governance and of a supporting system of administrative law has drastically increased around the world. Countries have made significant changes and reforms to introduce specific and comprehensive rules and procedures for administration and its adjudication. This includes countries with a common law system.

In Myanmar, there is no holistic mechanism of administrative law. There are many different laws under which administrative review for administrative function is available, such as the Tax Law, Myanmar Investment Law, Farmland Law, Union Election Commission Law, etc. Each law has its own procedure relative to the formation of concerned administrative tribunal or commission respectively. The supreme and superior administrative officials review the decisions made by their subordinate administrative bodies in accordance with the concerned law. Recently, judicial review of administrative actions has been made available for an individual before the Supreme Court as writs application under the Law Relating to Application of Writs, 2014. Under the Writs Law, the Supreme Court judges review and alter administrative decisions whenever necessary in accordance with the law. The application of a writs process is in practice, not easily accessible for every individual. Besides, the Supreme Court never intervenes nor alters the administrative authorities' decisions if these are of a purely administrative nature.

Hence it is essential for Myanmar during its democratic transition, to consider reforming its administrative law and its review system in order to establish accountable, transparent, good governance, as well as to promote and achieve rule of law. Myanmar could take inspiration from the South African example. With the technical and intellectual support of Germany, South Africa took elements from the German administrative law by inserting

section 33 in the Constitution of the Republic of South Africa 1996, under the heading "Just Administrative Action clause", and enacted the Promotion of Administrative Justice Act (PAJA) for judicial review of administrative action. In the case of Myanmar however, due to its current political situation largely based on its 2008 Constitution, it is not an easy task to adopt a new administrative law and review system, as it would be in other countries. The process may be long and difficult, but presenting ideas and a legal framework for a new administrative law system adapted to the Myanmar context is not impossible. Meanwhile, it is important for legal scholars and university teachers to educate and disseminate the knowledge of jurisprudence and the concept of administrative law to judges and administrative authorities at various levels. Comparative studies on Administrative Law alongside International Law and Constitutional Law should be compulsory courses at the universities. Last but not least, researchers from universities and other concerned departments and institutions should be encouraged to conduct more research projects and comprehensive studies on this area of law in collaboration with regional and international researchers.

In conclusion, the author hopes that this study is helpful and beneficial for the Myanmar public administrative personnel, for the administrative institutions, as well as for the university administrators who carry out their administrative functions and make administrative decisions on public law matters. The author hopes as well that this initial introduction to German administrative law and its review system will encourage university law teachers in Myanmar to further conduct their research on administrative law.

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About the Author

Khin Khin Oo, Professor at the Department of Law, University of Mandalay (Myanmar), received her LLB (1993), LLM (1997), and PhD (2005) degrees from the University of Yangon, Myanmar. Her teaching career began as a tutor at the Law Department of Dagon University in 1995. She continued teaching and researching at a number of Myanmar universities' Law departments. Her area of specialization is Civil Law – particularly criminal law, family law, constitutional and administrative law, corporate law, and child rights. In 2004, she obtained her Ph.D degree from the International Institute for the Rights of the Child (IDE) in Sion, Switzerland. She was a visiting Research Fellow at CALS, National University of Singapore (2014), at Seoul National University (2014), and at Central European University (2016). Her current research interest is on constitutional adjudication systems and judicial review of administrative acts from different countries and different legal systems. This research is the result of her stay at Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany from August to October 2017 as a Visiting Researcher.

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1. Marriage under Myanmar Customary Law (Margaret Brinig (ed.), International Survey of Family Law, Intersentia Publishers, Belgium, September 2018).

2. Analytical Study on Myanmar Investment Law, Journal of Asia Research Centre, Yangon University, Vol. 6, No. 1 & 2, 2017.

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