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# That Signifier of Desire, the Rule of Law

MYANMAR HAS THE UNHAPPY DISTINCTION OF HAVING BEEN UNDER THE thumb of its army for more than half a century. From 1958, when soldiers forced the civilian prime minister to vacate his office, to a quarter-century of unmediated military rule following the collapse of one-party administration in 1988, military men have had their way in Myanmar—or if you prefer, Burma—for longer than in most other countries. This observation still holds true: in 2015 former soldiers occupy most of the top posts in government, uniformed officers make up a quarter of the union legislature and hold key ministries, and the army has insinuated itself into practically every significant aspect of political and economic life.

Nevertheless, since 2012 when the army opened a new legislative assembly in its high-modernist dystopia, Naypyidaw, many things have changed. Some of the more noticeable changes involve the removal of repressive measures hitherto imposed on a recalcitrant public: censorship of the print media; prohibitions on trade unions, political parties, or human rights groups; roadblocks on the approaches to the lakeside house of democracy doyenne Aung San Suu Kyi in the former capital, Yangon. Nowadays, that road is clogged with new vehicles imported from Japan and China. A massive shopping and hotel complex on the site of the old Ministry of Industry No. 1, which has departed for the new capital, will soon overshadow the stately residence. Nearby, condominiums spring up with the backing of investors from Hong Kong and Singapore. One on a road named after Sayar San, the leader of a peasant uprising against the burdensome

taxation and capitalist usury of the late colonial period, advertises its garish luxury as the Royal Sayarsan without a hint of irony, even as protestors gather almost daily on the city's streets in response to contemporary forms of impoverishment.

Under these circumstances, it is hardly surprising to find that many people have been voicing grievances in the lexicon of the rule of law: old coinage getting renewed usage in the current period of hope and uncertainty (Cheesman 2014a, 2015). Inevitably, we see and hear this lexicon in the offices of not-for-profit groups and in the meeting rooms of four-star hotels where new think tanks hold press conferences. But we also see and hear it in the gatherings of peasants to protest land grabbing, such as rallies in the upcountry town of Myittha, where hundreds of farmers bearing a banner with the image of the eponymous anticolonial martyr Sayar San marched in September and December 2014 "for the rule of law" to be evidenced through the return of land confiscated from them by the prisons department back in 1976 (Aung Thu 2014).

We hear the rule of law too in reactions to politically motivated cases, like the charges brought against Htin Lin Oo, a writer and former officeholder of Aung San Suu Kyi's National League for Democracy, for allegedly insulting religion because of a speech in which he pointed out that the historical Buddha was not Burmese and therefore ethnic nationalists have no recourse to Buddhism's traditions. As he was led to jail from court in December 2014 he told journalists, "Now I'll have to work not only for the purification of religion but also for the rule of law," adding rather less confidently that, "If this is the rule of law in our country, Myanmar, then you can understand the lot of our citizenry" (Htay Hla Aung and Hein Min Htet 2014, 2).

And we see the rule of law invoked in thousands of letters about persistent abuses of public authority and human rights violations, such as one (on file with the author) submitted to the Myanmar National Human Rights Commission in March 2015, alleging that policemen thrice had assaulted a 32-year-old farmer detained for trespass in a protest over confiscated land while transporting him by van

from court to prison. The letter's signatory, the father of the detainee, observes in closing that although the government of Myanmar has said that it is now "governing in accordance with the rule of law, justice, and human rights," members of the police force are yet to get that message. Thousands of similarly worded written complaints against judges and judicial officers submitted to an assortment of newly established parliamentary committees and investigative bodies, such as the oxymoronic Rule of Law and Tranquility Committee headed by Aung San Suu Kyi, indicates general distrust of courts and reveals the durability of practices from earlier years. Letter writers commonly cite judges' tendency to decide matters on behalf of the executive rather than adjudicate fairly, and to accept money in exchange for case outcomes such as acquittal, conviction with release for time served, or reduction of sentence (Cheesman 2015, ch. 6).

The rule of law echoes throughout the language of demonstrators, detainees, and letter-writers in Myanmar not because of its particulars—or not only because of them—but because of what it signifies in general, what it evokes as a political ideal. As Elliott Prasse-Freeman has put it, "Burmese yearn for a system that attempts to adjudicate conflicts fairly, and the phrase 'rule of law' has become a signifier for invoking that desire" (2014, 103). But Prasse-Freeman also fears that the rule of law in Myanmar today is in danger of being reduced to "a substitute for substantive politics" (2014, 90) due to the work of international organizations and domestic counterparts who treat it as a technical matter that experts can address through more equipment and better training, more funding and greater specialization, more committees and bigger conference tables.

These two ways of thinking and discussing the rule of law—the one political and substantive, the other technical and formal—often overlap, because both are necessarily concerned with arrangements for the making and publicizing of general rules, and with their adjudication and administration: with the roles of courts, prosecutors, and police. But whereas one is a radical reading of the rule of law, in the sense that it goes to the radix, or root, of the idea, of what it is

good for and why we would bother with it, the other is a reformist interpretation, concerned largely with designing and making incremental changes to what already exists in the hope that these efforts will result cumulatively in an overall improvement of conditions.

That rule-of-law language in Myanmar occupies at least two significantly different spaces, and resonates in distinctive ways, is unremarkable. Scholars writing on the rule of law today are all but obliged to begin with some caveats on how the term everywhere is slippery, overused, contested, and perhaps essentially contested. But beneath all the confusion are real differences of opinion. In Myanmar, the rule of law as signifier of desire for political change versus the rule of law as technocratic program is not just a matter of expression or orientation. These two ways of talking and thinking about the rule of law reflect a genuine and striking divergence in debate: between the rule of law as political ideal and the larger ends that people attribute to it on the one hand, and the rule of law as an "anatomical" problem (Krygier 2009, 46) and the material conditions necessary to establish it on the other.

In Myanmar the distinction between these two ways of talking about the rule of law is particularly important because although it may be empirically possible to measure the country's institutional arrangements according to rule-of-law criteria, and proceed to work incrementally for generic improvements aimed at measurable outcomes, this approach misconstrues what it is purporting to improve. Myanmar's institutions are not animated by the rule-of-law idea at all, but instead by principles hostile to it. And because those institutions are opposed to the rule of law, in Myanmar today the rule of law is not sensible if represented anatomically. For the time being, at least, it only makes sense to talk about the rule of law as a signifier of something more.

IT GOES WITHOUT SAYING THAT BY WHATEVER RULE-OF-LAW STANDARDS WE judge Myanmar, its institutions are unlikely to perform well. Measured from a Weberian baseline, Myanmar's institutional decay, cumbersome

bureaucracy, and low technical capacity present rule-of-law proponents with no shortage of work to do. "Laundry lists" in hand (Waldron 2011), rule-of-law advocates can easily identify a multitude of structural defects and deficiencies requiring their prompt and effective intervention. Recommendations in bullet points are duly submitted to potential donors or clients and government officials, who are led to believe that with timely interventions, clearer priorities, greater expertise, and higher salaries, administrators, judges, and police will be disposed to act for, rather than against or indifferently towards the rule of law.

Among the best known of these laundry lists is Lon Fuller's eight routes by which a system of legal rules can either succeed or miscarry (1969, 39). When I used this list to initiate a discussion about the rule of law at a human rights group in central Myanmar during 2013, participants—who included local lawyers, journalists, and farmers—variously concluded that Myanmar had well and truly gone down between half and all of Fuller's routes to disaster. Everyone concurred that number five, the enactment of contradictory rules, and number eight, a failure of congruence between rules as announced and their actual administration, were very much a part of how things were done in their country. It was not a particularly useful exercise, and some of the participants made clear that they thought as much at the time. It was not just that intuitively, and predictably, Myanmar came out of the exercise as a rule-of-law failure. Rather, the list did not help us engage in meaningful discussion about conditions in Myanmar at all. We moved on.

Then come the indicator projects, such as the World Justice Project's Rule of Law Index, which in 2014 ranked Myanmar 89 out of 99 countries surveyed by aggregation of data across eight factors, ranging from constraints on government powers and absence of corruption to civil and criminal justice. Although Myanmar occupies a low rung on the index, its figures are buoyed by rather counterintuitive findings that it "is safe from crime" (WJP 2014, 44), which the publishers of the country's many crime news periodicals might lament if they did not know better, and that it does not do too badly in

control of corruption—other than judicial corruption—despite an illicit economy that may very well exceed the formal one. The strangely high ranking on the factor for absence of civil conflict also presumably can be attributed to the noncollection of data in Kachin and Shan states, where villagers fleeing the most intense ongoing civil war in Southeast Asia would have returned different results from people in Naypyidaw and Yangon. So too would the tens of thousands of people, mostly Muslims, who survived mass violence in Rakhine state, as well as in Meikhtila, in Mandalay region, not so far from one of the project's data collection sites, where attackers in 2013 reportedly razed some 1,500 houses and 12 out of 13 mosques (PHR 2013).

Today the researcher on Myanmar also encounters an abundance of new reports about the rule of law by a plethora of fact-finding missions and locally based researchers and groups. One such report, compiled by a trio of consultancies keen to announce their presence in the country, adapts the US Agency for International Development (USAID) strategic framework for analysis of the rule of law to list among its "illustrative concerns" on justice-sector institutions the appointment of judges in the manner of civil servants and the pressing need for more judicial training, increases in salaries, and mechanisms to monitor corruption. The authors add that "judges themselves need to shift to a culture where they are expected to adhere to the rule of law" (DLA Piper, Perseus, and JBI 2013, 31). This last recommendation, which sounds rather like someone advising a friend to move house to a better neighborhood, might have some merit were it not for the absence from the assessment of any considered account of the political and cultural arrangements that keep judges where they are.

Another project under the auspices of the British Council and a local partner contains substantive findings drawn from close research but nonetheless falls back on generic explanations for Myanmar's rule-of-law inadequacies, observing that the legal system's "weakness derives from the same problems that plague all countries to some degree and developing nations in particular: limited resources, corruption, opaqueness, too much institutional interconnectedness, and

arbitrariness" (Fernández 2014, 6). Although this statement contains some truth, it hardly assists the reader to understand the peculiarities of conditions in Myanmar, or how it is possible for institutions there to function with a high degree of coherence despite their apparent weakness in assessments on the rule of law. Not surprisingly, the report's recommendations circle back to the premises from which it started: with the need for more education, more transparency, and more public participation in the judicial process.

Admittedly, these studies make for easy targets. The validity problems of ostensibly scientific data obtained by homogenizing and ironing out reported perceptions of people with diverse class and cultural backgrounds, who speak in different languages and have unalike conceptions of what they are being asked, so as to "produce a world knowable without the detailed particulars of context and history" (Merry 2011, S84), are manifest. Glossy primers from consultancies crowded with photographs of scenic pagodas and rustic pottery, their big boxes and bold arrows depicting something but explaining nothing, succeed at the level of tourist brochure or self-promotional exercise but fail to excite serious thought about the problems regarding which they profess to be concerned. And facile explanations for the failure of Myanmar's institutions to deliver a package of goods with the rule-of-law label are not necessarily wrong; they just are not particularly useful either.

But the larger issue is not one of accuracy or inaccuracy, of sophisticated or infantile explanations about the rule of law's absence in Myanmar. Rather, it is that all these studies miss the point. Courts, prosecutors, police, and government departments in Myanmar have spent the past five decades or so not attempting to establish the rule of law but doing something entirely different. Rule-of-law lexicon notwithstanding, they have spent this time in pursuit of a political ideal that is asymmetrically opposed to the rule of law, namely, law and order (Cheesman 2014b, 2015). That they do not tick the boxes in a rule-of-law laundry list or appear anatomically correct to the rule of law's international exponents is not due to a lack of achievement but

the exact opposite. The absence of the rule of law in Myanmar is not an instance of failure. Nor is it incidental to the politics of military dictatorship. It has been willed.

After more than 50 years at the law-and-order game, to pull out a scorecard for the rule of law and rate Myanmar's courts or police force on its criteria is like trying to score baseball according to the rules of cricket. As the pitcher approaches the mound and the batter readies at the plate, we can shake our heads disapprovingly, look around searchingly for wickets and a pitch, and mutter that it just isn't cricket. But the people playing the game know that, and we are only fooling ourselves if we pretend otherwise. Baseball has to be understood according to its own rules. Having learned the rules, an advocate of cricket will then have some informed basis upon which to make a comparison and suggest changes. Similarly, if we are going to talk about the rule of law in Myanmar, we ought at least understand what it means for institutions there to be animated by law and order, before we discuss how they might conceivably be brought around to realize the value of the rule of law.

WHAT IS THE LAW-AND-ORDER IDEA? HOW DOES IT DIFFER FROM THE RULE of law and how can we assess institutions working according to the idea of law and order on their own terms? Based on research on Myanmar over the last decade, I have argued that law and order is not an analogous concept to the rule of law, as is often taken to be the case, but an asymmetrically opposed one (Cheesman 2014b, 2015). The relationship between the rule of law and law and order is asymmetrical because they do not occupy points on the opposite ends of a scale of identical values. Rather, they are opposed to one another because each has its own contents, its own principles. The rule of law's absence from Myanmar is not a problem that we can understand by contrasting life with the rule of law and life without it. It is not, as I previously wrote, the un-rule of law (Cheesman 2009). It is a space actively occupied by other ideas about political association. Therefore, when studying the rule of law we should take seriously those countries, like Myanmar, where the rule of

law is denied both as a matter of practice and principle, and treat them not as rule-of-law negatives or caricatures but as places in which political and juridical institutions are animated differently.

Law and order differs from the rule of law in four primary ways. First, the rule of law relies on general rules to maintain order, whereas law and order rests on particularistic commands and directives, in response to exigencies. Second, the former emphasizes the role of juridical institutions, whereas the latter privileges administrative ones. Third, under the rule-of-law ideal, public adjudication according to general rules guides conduct so people can make decisions of their own accord. To maintain law and order, authoritative institutions act on specific injunctions to intervene directly in people's lives. Fourth, law and order entails the exogenous imposition of discipline, which requires a superordinate-subordinate political relationship, whereas under the rule of law, discipline is an endogenous feature of political relations: it is characteristic of those relations, not imposed on them.

Whereas the rule of law is concerned with minimizing arbitrariness, law and order has as its primary concern nonrestlessness. Its ultimate object is quietude. Law and order conceives of a mode of association whereby essentially administrative immobilizing mechanisms quiet people. Some kind of subordination is implicit to obtain law and order. Quietude does not happen of its own accord. Somebody is immobilized and somebody else immobilizes.

This formulation has four immediate consequences for our understanding of how Myanmar's courts do what they do. First, courts ideally are beholden to other parts of the state apparatus. Second, courts function essentially as administrative agencies. Third, many matters that in rule-of-law settings would fall in the purview of the courts do not in Myanmar. Fourth, practices that would be corrosive to a political arrangement for the rule of law—in particular, the buying and selling of case outcomes—are in a law-and-order setting tolerated and to an extent encouraged, provided they do not interfere with the immobilizing project.

All formulas for the rule of law emphasize judicial independence. It is not always clear what independence consists of and how it is distinguished from the separation of powers, but that the Myanmar "judiciary is currently subject to inordinate influence by the executive and military" (IBAHRI 2012, 7), including by the home affairs ministry, police, and immigration department, among others, might be of concern to its functionaries—if not for the fact that they are not working according to the political ideal of the rule of law at all. Rather, consistent with law and order, they are intended to operate as subordinates to other institutions. This subordinate relationship is illuminated nicely in Figure 1, a cartoon of a judge—one of many since 2012—seated at his bench with paper in hand, saying, "Hereafter, I will read verdicts delivered from above in accordance with the rules of law" (Ne Myo Win 2014). The judge is procedurally correct in his delivery of judgments that are not his own. He maintains a semblance of orderliness through adherence to procedure, and demonstrates a commitment to policy by following instructions delivered to him. He recognizes that the role of the courts is not to challenge or question other state institutions but to assist them in their quietening project.

**Figure 1.** Cartoon by Ne Myo Win from the *Voice Daily*, December 19, 2014. Used with permission.

Judicial subordination does not imply that in every matter before a court or every relationship a judge has with an executive officer he or she gives way to the views or demands of the other. Rather, it establishes a general arrangement in which the one is responsive to the other's needs. This arrangement is not accidental. Nor is it merely pragmatic. It is reaffirmed both in practice and in principle, since the separation of branches of government is not anywhere guaranteed in existing law. It is the result of a program begun in the 1960s to render courts as instruments for the effective delivery of policy (Cheesman 2011), compliant agencies in the project for law and order, working cooperatively with their counterparts. That this arrangement perseveres in the current period despite withering criticism is an instance of the success and durability of the law-and-order model, not a failure to establish the rule of law.

Because the most egregious and outrageous processing of accused persons in Myanmar's courts under executive instructions has—for the time being at least—passed into history, optimistic observers insist things have changed. To an extent they have. Gone are the entirely closed courts, outright blocking of access to counsel, and ridiculously short hearings followed by jail sentences that sometimes cumulatively exceeded a hundred years. Gone too are the large numbers of celebrity political prisoners that once drew international interest: the likes of now deceased journalist U Win Tin; student union leader Min Ko Naing, who today fronts the 88 Generation political group; comedian Zarganar; and, of course, Aung San Suu Kyi. But the pursuit of enemies, people who decline to be quieted when ordered or urged to do so, continues through the courts in a manner largely consistent with earlier periods.

Today people who have the status of enemies brought before the courts include villagers who around the country are contesting the occupation of farmland by army-owned or army-backed companies in partnership with local and foreign investors, against whom over 700 cases were pending and of whom around 300 had been jailed at the end of 2014 (Wai Yan Phyo Oo, 2014); Muslims in places of

intercommunal violence, reportedly jailed in disproportionate numbers to members of other communities, even though they were also disproportionately the victims of violence; and journalists who overestimate the degree to which they are free to report in the post-censorship era. Among the latter are five involved in publishing an article alleging that an army camp was being used to manufacture chemical weapons, and another who wrote on public dissatisfaction with the police force (Min Thiha 2014), prosecuted for damaging the force's reputation (MH-0030 2014).

Potential enemies also consist of anyone who assembles without explicit authorization. Political domination of the sort practiced under military rule in Myanmar contains an implicit assumption that subordinates mobilize only when permitted to do so. Hence, successive governments there have been concerned with managing, controlling, and prohibiting autonomous public assemblies. In the current period, management occurs through colonial-era laws as well as the Peaceful Assembly and Procession Law, 15/2011, which requires anyone wishing to assemble to submit details of the intended event to a police station for approval.

When police and bureaucrats intervene against gatherings that have not obtained requisite authorization, they respond in a rule-of-law idiom, but according to law-and-order principles. In February 2015, for instance, a stream of announcements warning students marching in support of amendments to a new education law repeatedly adopted the familiar tropes of earlier military dictatorships. Beginning with intimations that the students ought to realize that success of government projects for "tranquility, the rule of law and socioeconomic development" depends on public cooperation, the government stressed that it had been striving to avoid dangers to the rule of law as a result of the protests, before ordering that "for the sake of state security, the rule of law and community peace," marchers approaching Yangon from the north not enter the city or surrounding region (Press Release Team 2015a, 2015b, 2015c). In footage of police assaulting and detaining demonstrators encamped at

the town of Letpadan north of Yangon on March 10, 2015, the same invocation of the rule of law can be heard broadcast over loudspeakers ordering their dispersal (DVB 2015).

As in their reactions to other politically threatening events, the authorities in this instance did not stipulate precisely what form their response would take other than to indicate that they would "act in accordance with law." When people in Yangon city on March 5 rallied in support of the students, police, and youths wearing red armbands acted "in accordance with law" by assaulting and detaining participants in a manner reminiscent of the crackdown on monk-led protests in 2007 (Cheesman 2015, ch. 7). A day earlier, unidentified men had assisted police breaking up a factory strike after the labor ministry announced its intention to take action "in accordance with established laws" against the workers, whom it characterized as "assembling lawlessly" to provoke violence and "damage community peace and the rule of law" (MLESS 2015). And on March 10, the president announced that an army officer would lead a commission of inquiry into whether the handling of the protest outside the town hall had been "in accordance with law or not" (Thein Sein 2015).

The references to "law" in these and other official texts cannot be read literally. In a political arrangement for the maintenance of law and order, "law" at best has a figurative usage. Law, or rather, positive law, statute is simply one type of injunction among others (Myanmar remains bound to a Benthamite model of codification and has no modern tradition of customary law; see Cheesman 2015, ch. 2). Where order has subsumed law, the difference between a law, a regulation, and an instruction loses significance. Juridical injunctions all occupy the same semantic plane, be they laws, rules, procedures, orders, directives, or notifications. They all serve the state's interests and all carry much the same weight.

The leveling out of injunctions, the placing of law on the same semantic plane as an order from a government minister, might cause cognitive difficulties to a student of the rule of law; however, in a law-and-order setting, where courts operate essentially as administrative

agencies, no such difficulties arise. Of course, courts everywhere perform both administrative and adjudicative tasks. But in Myanmar, law-and-order imperatives have greatly enlarged the courts' administrative character. Judges and judicial bureaucrats work as civil servants and are assessed according to essentially the same standards as personnel in ministries and departments. What matters most is how efficiently they have applied government policy. Whether they have fairly or correctly undertaken their tasks is of lesser importance. Thus, tabulated data on judges' work performance contain a great deal of information on how many cases they have handled and how many accused they have convicted, and to prison terms of what length. They contain little with which to evaluate performance on questions of law, but those questions are largely irrelevant. The data serve to inform superiors as to whether or not their subordinates are complying with orders from above: whether they have shown sufficient commitment to the project for law and order by doing, or at least appearing to do, as they have been told.

As a political ideal, the rule of law has as one of its paramount concerns the addressing of impunity, which is to say, the holding of state actors responsible for criminal behavior. But for adjudicative agencies that are annexed to the executive and function as administrators in accordance with an idea opposed to the rule of law, the question of impunity does not occur. To the extent that officials are held accountable for their crimes, they are punished for disciplinary reasons, in accordance with principles aimed at ensuring the integrity and viability of state institutions. They are punished not because they have committed offences that in a rule-of-law framework are illegal but because they have in some way engaged in practices that undermine their responsibilities for the maintenance of law and order. No general principle to punish wrongdoing exists, nor is punishment consistently applied.

Impunity in Myanmar is usually secured by preventing cases from reaching courts in the first instance, and by taking administrative measures consistent with the idea of law and order to address

perceived problems instead. Arrangements to prevent cases from coming forward are both structural—in the form of alternative mechanisms and legal measures requiring administrative approval for prosecutions to proceed in courts—and agentive, in that officials interpret their roles, depending on the circumstances, to require some form of action against the offender but not action consistent with a rule-of-law model.

Many matters that fall within the purview of courts in rule-of-law settings do not come within their domain in Myanmar. These matters get directed for adjudication elsewhere: into a proliferation of boards and committees set up under a variety of instruments, into special courts for military and police personnel, and upward to senior executive officers. The role of courts in this setting is highly circumscribed. Consider, for example, the cases brought against farmers, such as the approximately 56 in Kanbalu township of Sagaing region imprisoned mid-2014 for engaging in a plowing protest (Eleven Media 2014)—occupying and tilling land that had previously been theirs but that the army had occupied in 1997 and 1999. While courts could convict the farmers for trespass and causing of mischief, they have no role to play over questions of whether or not the army occupied the land illegally, which is a matter for the attention of other agencies. The question of military impunity for land-grabbing on a massive scale, not only in Kanbalu but across the country, remains outside the remit of the courts, whereas political actions taken by citizens to reclaim land and challenge impunity fall firmly within their jurisdiction.

The military effectively reserves the right to decide on all matters involving its personnel, right down to the lowest levels. Even in the most flagrant ordinary criminal cases, where soldiers are acting outside of operations and not under command, the army brooks no civilian interference in what it still deems its affairs—such as when three low-ranked men absconded from their base to rob and kill a young couple sitting near a popular riverside lookout in Pyay, Bago region, in 2013. The soldiers murdered one of the two targets, but

the other escaped by feigning death, and raised the alarm. Two of the three perpetrators were quickly apprehended. The police initiated criminal proceedings, but an officer from the battalion where the men were stationed came and took them from police custody (AHRC 2013). Although investigating police said they had enough evidence to prosecute, the army refused to hand the killers over. Instead, the battalion conducted a court martial that was closed to the families and that found the men in violation of their code of conduct for leaving the base without permission; it reportedly sentenced them to short periods of detention within the base. But since civilian lawyers cannot get access to the records of a court martial, even these basic details could not be confirmed.

In some cases, such as deaths in police custody, court hearings are obligatory but still may be insufficient to initiate further action. In mid-2012, for example, police in the suburbs of Yangon killed a teenage boy while attempting to force him to confess to murder. His body showed extensive signs of torture, including the use of a roller to peel the skin from his shins. The examining doctor helped the police by recording the cause of death as a heart attack. Despite the finding, a judge wrote in her inquest report that she found it "difficult to conclude that the death was natural" (*Union of Myanmar* v. *Deceased Myo Myint Swe*, 2012 Criminal Misc. Case 161, Mayangon Township Court). Three police were later dismissed from service while five were demoted (AHRC 2014). No criminal charges were brought against them: as in the preceding case, from a rule-of-law perspective, an entirely dissatisfactory outcome, but from a law-and-order angle, an altogether suitable one, since it delivers a message to state officers that the killing of detainees is not encouraged; however, it does not threaten the integrity of the police force by giving outsiders the idea that they are entitled to challenge its practices—or not, at least, through institutional avenues over which the police do not have full control.

The manner in which the Supreme Court has responded to habeas corpus petitions since their reintroduction in 2011 is also indicative of how provisions on paper to protect rights ordinarily associated

with the rule of law can be doggedly undermined through belligerent formalism consistent with the idea of law and order. The return of habeas corpus to Myanmar after a half-century hiatus is incongruous (Cheesman 2010), because the writ traditionally has been a bulwark against arbitrary arrest, detention, and related practices of precisely the sort that proliferate in arrangements for the maintenance of law and order. But in Myanmar the duration, cost, and effort associated with getting an application to the Supreme Court prohibit most potential applicants, and the messages sent back by the court—four of whose seven sitting judges are former army officers—through the cases that it has heard have discouraged others. By the time applications reach the court, the detainees on whose behalf they are lodged may very well be transferred to legal custody, with the work of a period of arbitrary detention, such as to obtain a confession through torture, already completed. And where the army has abducted and killed people and then disposed of bodies, it can simply deny ever having held them, such as in the case of a 28-year-old mother in the north of the country whom soldiers allegedly detained, repeatedly raped, and murdered. In that instance, a judge declined to entertain an application on her behalf on the ground that no evidence existed of her ever being in army custody (*U Dau Lum* v. *Lt-Col. Zaw Myo Htut*, 2012 Criminal Misc. Application [Writ] 3, Supreme Court).

In cases like this one, the obvious futility of bringing an application against the military and the effect of repeated failures to hold soldiers accountable through the courts reconfirms the subordinated status of the judiciary to other parts of the state in Myanmar and reemphasizes the continued supremacy of the army through institutional arrangements that it has built up over decades with its law-and-order program. But another cause for pessimism about the role of the courts in the current period is the persistence of longstanding moneymaking practices that news media report almost daily. The small number of bribery and corruption cases brought against judges, prosecutors, and bureaucrats notwithstanding, people have good rea-

son to be skeptical about the prospects of ridding Myanmar's courts of their moneymaking function.

In part, this skepticism is encouraged by the continuity of officeholders who are said to be, or to have been, motivated in their work by an enthusiasm for the buying and selling of case outcomes—such as a senior judge who spoke at an event I attended in November 2014. As the judge pontificated on constitutionalism, lawyers in the audience quietly traded stories about how he had been notorious for the giving of bribes and other illicit practices while working as private counsel—practices to which they attributed his rise to a position of seniority. Whether the stories they shared are true or not, the perception that senior members of the judiciary obtained their posts by doing favors and making payments contributes to the generally low esteem in which courts are held, including among the people who work in them.

But while low public esteem may damage arrangements for law and order, they are not fatal to them, because officials can manage by maintaining an appearance of orderliness, both in their general affairs and in their responsiveness to specific instructions from superiors or other authorities. In a law-and-order setting the appearance of orderliness has a higher premium than actual adherence to law (Cheesman 2015, 168–176). Orderliness in moneymaking is maintained through a variety of mechanisms, including by calibrating arrangements with other professionals in and around courts, using case brokers to negotiate outcomes, and by not flagrantly or excessively taking money from parties to cases or by taking money and not delivering on promises. It is also maintained by restricting moneymaking to routine business in court and by eschewing opportunities to make money in politically motivated cases, and by tacit advice to personnel on how to go about earning appropriately, and what lines not to cross when profiting from their positions. And, orderliness is maintained while making money through a language of disguise, which enables open negotiations about the buying and selling of case outcomes

without upsetting the appearance of orderly practice in and around courts (Cheesman 2012).

The use of subtextual signals to indicate to judges and other court personnel that their moneymaking activities are tolerated and to an extent encouraged—provided they are orderly—is consistent with Fuller's observations on how toleration of illicit practices in a bureaucratic context can increase the power of a superior over his subordinates, by allowing him opportunities "to obtain gratitude and loyalty through the grant of absolutions, at the same time leaving him free to visit the full rigor of the law on those he considers in need of being brought into line" (Fuller 1969, 213). This arrangement does not require that rules be general, publicized, clear, or consistently enforced. On the contrary, it is in the interests of a superior working in such an arrangement that they not be. And while such an arrangement may be antithetical to the rule of law, it is consonant with the idea of law and order.

### THE PRACTICES OF INSTITUTIONS HABITUATED TO MILITARY DICTATORSHIP

everywhere take time and effort to change, not only for reasons of ineptitude or weakness but also because they are animated by different ideas, and ideas once institutionalized tend to linger. Given that Myanmar's army has had things its own way for longer than its counterparts in most other military-dominated countries, and given that it continues to call the shots up to the present, we should expect the ideas and behaviors it has inculcated to be more durable than in other states passing through periods of political change—not least of all, in the courts. The animating force of law and order, as against the rule of law, is not simply going to dissipate by virtue of legislative and party political reforms, or in response to more cars and condos along city streets.

Institutions animated by the idea of law and order may be cruel and capricious, unlikable and inconvenient, but studied for what they are, they are also likely to be more intelligible than if we try to assess them against rule-of-law criteria. Moneymaking practices through courtroom outcomes are hostile and damaging to the rule of law, but

at worst they are incidental to a project for law and order, and in some circumstances may enable it. The delimiting and diminishing of the role of the courts in adjudicative matters and corresponding enlargement of their administrative functions may unsettle partisans of the rule of law, but is consistent with the needs of law and order. Likewise, institutional interconnectedness and administrative subservience may be inimical to the rule of law but consonant with law and order.

Anatomical or laundry list approaches to the rule of law miss the point in places where they try to measure up institutions that do not fit with their methodologies: institutions that are not animated by the principles to which they subscribe. If we assess places animated by other ideas according to rule-of-law criteria, then we will probably misunderstand and misrepresent them, and our interventions may at best have modest results and at worst be counterproductive. If we misconstrue the rule-of-law problem as one of a gap between principle and practice to be rectified by more training, better laws, and larger funding, when the problem is of an altogether different nature, then we are also likely to be confused when training programs go awry, laws fall short of expectations, and money gets misspent.

Given that the rule of law in Myanmar is both empirically and ideationally absent from existing institutional arrangements, the only plausible way to talk and act about it is as a signifier of some other political imaginary, and to work backward from substantive understandings of what the rule of law might conceivably mean as an alternative to law and order: as a desire to combat impunity, to end arbitrariness, to stop the domination of some people by others; a desire for equality, or whatever. Rather than lecturing the public on the meaning of the rule of law, as Aung San Suu Kyi's Rule of Law and Tranquility Committee (2013) proposes we do, advocates for the rule of law ought to be listening more and instructing less. Instead of didactics, we should be attending to semantics; to the promise of a radically different type of politics and law—a promise unlike any-

thing promised by the current rearrangements of political power in Naypyidaw.

In the closing pages of his seminal text on rural resistance in eighteenth-century Britain, E. P. Thompson remarks on how some of the plebs hauled up on the gallows for violating the Black Act "had the impertinence, and the imperfect sense of historical perspective, to expect justice" and would "actually complain" if they felt they had been legally wronged (Thompson 1975, 268). I am reminded of this passage when people in Myanmar gather to insist that land stolen from underneath them be returned, when someone being dragged in handcuffs from a courthouse demands justice, or when a letter signed by an aggrieved citizen urges the president to make good on his commitments to the rule of law.

Currently, people with such demands have nowhere to turn in Myanmar, or at least, nowhere effective. Technical interventions to reform institutions that oppose the rule of law by increments are unlikely to provide them with what they need. But the dearth of avenues for effective redress is precisely why their calls are represented in the rule-of-law idiom, and why the rule of law as a signifier of desire is important to people in Myanmar. The rule of law in this setting signals the possibility for a different kind of politics, one that challenges fundamentally how political and economic power is exercised—in Myanmar, and across much of the world today. The politics of the rule of law neither permit tranquility nor encourage quietude. They stir people to react, push them to object to the politics of law and order and its analogues, and work for something better.

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