

COMMENTARY

The 'Rule of Law' in Burma

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Wednesday, February 1, 2012

Over the past several months, Burma's pro-democracy icon and opposition leader Aung San Suu Kyi has constantly repeated the refrain that the government must establish the "rule of law."

That's a worthwhile goal, as well as a necessary achievement if Burma is going to raise the quality of life and standard of living for its 54 million long-oppressed and impoverished people.

In the words of William H. Neukom, the president of the World Justice Project (WJP), "The rule of law is the foundation for communities of opportunity and equity—it is the predicate for the eradication of poverty, violence, corruption, pandemics and other threats to civil society."

But what does the "rule of law" mean?

The answer is important, because if Suu Kyi cannot articulate, communicate and get general agreement on what the "rule of law" means to the Burmese people, it threatens to become just a political slogan rather than a tangible goal towards which objective progress can be measured.

This is easier said than done, however, because just like the term "democracy," there are many different interpretations of the "rule of law." As a result, for Suu Kyi to both define and gain a shared understanding of the rule of law may be the political equivalent of rounding up a school of fish with her bare hands. But it is important that she try.

Even legal scholars and political scientists cannot agree on the meaning of the rule of law. On a macro level, the people wishing to nail down the concept fall into two camps: the proponents of a "thick" definition and the proponents of a "thin" definition.

A thick definition of the rule of law would include both adequate procedures to ensure that Burma is "a government of laws and not of men," as well as substantive laws that protect fundamental human and democratic rights.

The UN secretary-general's definition of the rule of law provides an example:

The rule of law is “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.

It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

This is a good definition, and if broken down could be one useful way of measuring Burma's progress towards the rule of law.

But the problem with adopting a definition which is too “thick” is that it allows a great deal of discretion by both authorities and citizens, uses terms that are vague and difficult to define, and therefore runs counter to important aspects of the rule of law.

The risk is that anyone who believes a law is unfair or was not democratically adopted could choose not to abide by it and argue that the action is justified.

For this reason, the advocates of a “thin” definition say that the term “rule of law” should apply to procedures only—i.e., that a law must be prospective, well-known and have characteristics of generality, equality, and certainty, but the content of the law and how it was adopted are irrelevant.

The “thin” definition, however, would allow the Burmese government to argue that the rule of law exists even if democracy and individual rights do not, which is clearly problematic.

The former chief justice of South Africa, Arthur Chaskalson, had a persuasive response to those who argue for a strictly “thin” definition.

He pointed out that the apartheid government was accountable in accordance with laws that were clear, publicized, and stable, and were upheld by law enforcement officials and judges. But the process by which the laws were made in South Africa under apartheid was not fair because only whites, a minority of the population, had the right to vote, and the laws themselves were not fair because they institutionalized discrimination, vested broad discretionary powers in the executive and failed to protect fundamental rights.

Without a substantive content, Chaskalson said, there is no answer to the criticism that the rule of law is “an empty vessel into which any law could be poured.”

Even the US could be used as an example of what happens when a definition that is too “thin” is adhered to. Before the Bill of Rights was adopted, could it really be said that the US had the rule of law?

In any event, even if certain fundamental rights are not technically within the definition of the “rule of law,” they are still factors worth striving for, and so measurement of them should go hand in hand with measurement of the rule of law and should not be dismissed on a legal technicality.

It remains important, however, to understand the competing concepts of the rule of law, because if members of Burma’s political opposition fail to understand the debate, they risk being manipulated by those with personal vested interests on one side or the other.

The WJP has endeavored to strike a fair and measurable balance between the two definitions, and has fleshed out the components and meaning of the rule of law in an index that any opposition politician or activist in Burma would be well-served to become familiar with.

The Rule of Law Index developed by the WJP is based on four universal principles that incorporate ten different dimensions of the rule of law, all of which will be critical to Burma’s political, legal and economic development.

The WJP’s first universal principle is that a government and its officials are accountable under the law.

This means that government officials are subject to the law the same as any citizen, their powers are limited by laws, checks and balances, an independent judiciary and the freedom of the press, and they are punished for misconduct.

It also means that the government is not corrupt—i.e. that government officials exercise their functions without improper influence and do not request or receive bribes or misappropriate public funds or other resources.

The WJP’s second universal principal is that the laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property.

If the factors making up this second principal are in place, the general public knows what the law is and what conduct is permitted and prohibited.

In addition, if the rule of law is in place and enforced, then the general public does not fear for their safety or their property. Crime is under control and people do not resort to violence to redress personal grievances.

Finally, the second universal principle says that the fundamental rights of equal treatment and non-discrimination under the law are guaranteed and applied, as well as the right to due process of law, freedom of opinion and expression, freedom of assembly and association, fundamental labor rights and other similar rights that bear an essential relationship to the rule of law.

The principle does not include, however, all of the social, economic, and cultural rights that could be found, for example, in the Universal Declaration of Human Rights. This does not mean these rights are unimportant, just that they should not be included in measuring progress towards the rule of law.

The third WJP principle is that the process by which the laws are enacted, administered and enforced is accessible, fair and efficient.

This means that government proceedings are open to the public and official information is reasonably available. It also means that regulations are effectively enforced and applied fairly, equally and without improper influence, and that the government does not expropriate private property without adequate compensation.

This principle does not address, however, the question of whether the laws are enacted by democratically elected representatives, and therefore implies that countries without Western-style democracies can still have the rule of law.

Access to government must still be present, however, and the indications of whether this is the case include whether lawmaking proceedings are held with timely notice and are open to the public; whether the lawmaking process provides an opportunity for diverse viewpoints to be considered; and whether records of legislative and administrative proceedings and judicial decisions are available to the public.

Fairness in the administration of the law includes the absence of improper influence by public officials or private interests, the adherence to due process of law in administrative procedures and the absence of government takings of private property without adequate compensation.

The fourth and final WJP principle is that access to justice is provided by competent, independent and ethical judges and attorneys who are of sufficient number, have adequate resources and reflect the makeup of the communities they serve.

This means that the general public is aware of available remedies and can access and afford legal counsel in civil disputes. It also means that civil justice is impartial, free of improper influence and unreasonable delays, and is effectively enforced.

With respect to the criminal justice system, it means that the system of adjudication is timely, effective, impartial and free from outside influence. In other words, the due process of law and rights of the accused are effectively protected.

The WJP Rule of Law Index provides a series of benchmarks for measuring a government's progress towards the rule of law. While its 2011 Rule of Law Index assessed 66 countries, the WJP has never measured Burma.

The World Bank, however, includes the rule of law in its World Governance Indicators project that assesses the quality of good governance in 213 countries, and has rated Burma in the bottom 5 percent of those countries with respect to the rule of law in every year since 2002.

Even without any outside reports, the clear reality to any Burmese citizen or Burma observer is that the country does not presently have anything approaching the rule of law, and the Burmese government would abjectly fail almost every aspect of an assessment using the WJP's universal rule of law principles and their components.

Blame for this could easily be assessed, and would no doubt lie with many of those currently in charge of Burma's government. But although justice may require an assessment of blame, it is not necessary for the purpose of determining where Burma stands today, what reforms are needed and how much progress the government is making in the future.

As the WJP points out, no country is perfect when it comes to the rule of law, and what is an acceptable outcome for Burma depends on circumstances and cultural factors that its citizens have the right to determine.

Under any definition, however, it is clear that Burma is starting from scratch when it comes to the rule of law, and that practices and habits that are deeply embedded in the government, the military and even the society will have to change if anything approaching the rule of law is to be achieved.

This will be a long and arduous process, but it should begin with as much of a shared understanding as possible among the Burmese people as to what the ultimate goal is and what the benchmarks along the way will be.

For this to happen, Suu Kyi and her opposition colleagues need to educate the public about what exactly they mean when calling for the rule of law in Burma.

Therefore, while effective politics must be concise and not get bogged down in academic nuances, it would be a good idea for Burma's opposition leaders to add a few more details to their stump speeches.

For example, Suu Kyi could explain to her supporters that that her call for the rule of law means that :

- Government officials are accountable to the people, subject to the same laws as everyone else and not corrupt.
- Everyone is treated equally under the law, is given due process of law and is protected by the law.
- The people's freedoms of expression, assembly and belief are protected.
- All laws are clear, public and prospective, and every person has access to the justice system.
- The judiciary is independent and free from outside influence.
- All laws are enacted in a transparent process that every citizen can witness and participate in.

If Suu Kyi fleshes out the rule of law with basic statements such as these and repeats them often enough so that everyone understands what she means by the term, she will have developed a platform for progress rather just a slogan for political victory.

In addition, she will put those in power on clear notice of what the opposition expects from them. Making specific proposals shines a spotlight on the ruling powers, because every proposal that is rejected can be framed as a rejection of the rule of law in Burma's quest for democracy.

In that respect, if President Thein Sein really wants reform, then he would be well-advised to actually invite the WJP into Burma to perform an independent assessment. This would not only demonstrate his commitment to rule of law, but give his government an objective understanding of where Burma stands today.

Although many factors will determine how fast the country can progress towards the rule of law, if power players can be convinced it is in their own best interest, rule of law reforms will move faster. As a result, it may ultimately be the demands of potential investors that spur rule of law reform efforts in Burma.

Care should be taken, however, to ensure that rule of law reforms happen across the board and protect the rights of all citizens, not just the economic rights of the powerful, the elite and the foreign investment community.

It must be also stressed that while democracy is not necessarily a component of the rule of law, it is one of the best ways of ensuring that the rule of law exists. In addition, while it may be possible to have the rule of law without true democracy, Burma cannot have a true democracy without the rule of law.

So if Burmese leaders want to be taken seriously when they say they are on the path to democracy, they must simultaneously be on the path to establishing the rule of law.

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