

# Thin Rule of Law or Un-Rule of Law in Myanmar?

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The government of Myanmar has responded to worldwide dismay over the May 2009 criminal trial of democracy icon Daw Aung San Suu Kyi for allegedly violating the terms of her house arrest by characterizing it as a simple and unavoidable matter of law. State-run media outlets have rebutted arguments that the charges are baseless, erroneous and politically motivated. The Ministry of Foreign Affairs responded to criticism from the United Nations Security Council by saying that the case would “not have any political impact” and that it was being “considered and carried out as the task [sic] relating to the rule of law.”<sup>1</sup>

The government’s recourse to the rule of law in justifying the case, which is aimed at keeping the party leader under lock and key ahead of a planned general election in 2010, is not surprising. Like coup-makers around the world, the army in Myanmar predicated its 1988 takeover on maintenance of the rule of law.<sup>2</sup> One general after the next has stressed the rule of law as a prerequisite for Myanmar becoming modern and developed. The regime has joined the nine other member states of the Association of Southeast Asian Nations in signing a regional charter that includes among its purposes and principles the enhancement of and adherence to the rule of law. Myanmar’s officialdom acknowledges the rhetorical force of the rule of law at least as much as its counterparts elsewhere, and like others, uses it for a variety of ulterior purposes.

International lawyer Hilary Charlesworth has remarked that the rule of law has “a worthy resonance that no one can plausibly reject and yet it is malleable enough to accommodate many types of legal system.”<sup>3</sup> This worthy resonance is problematic, because it encourages authoritarian regimes of

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<sup>1</sup> “Ministry of Foreign Affairs Releases Press Statement in Response to Press Statement on Myanmar Issued by UNSC,” *The New Light of Myanmar*, 28 May 2009, p. 16.

<sup>2</sup> Announcement No. 1/88 of the State Law and Order Restoration Council began with, “1. In order to take timely control of the deteriorating situation in all parts of the country for the sake of the entire people, the Armed Forces from today assume full responsibility for every state power so as to carry out immediately the following: (a) rule of law; regional peace and tranquility... .” The term used in the original is “rule of law” as opposed to the official English translation of “to restore law, order, peace and tranquility.” It is also distinct from the “law and order restoration” in the junta’s name, which in Burmese contains no reference to law at all.

<sup>3</sup> Hilary Charlesworth, “Human Rights and the Rule of Law after Conflict,” *The Hart-Fuller Debate Fifty Years On*, John Fleming Centre Colloquium, 17–19 December 2008, p. 3.

every shape and size to insist that they also subscribe to the principle, in the apparent belief that they too can bend it to accommodate whatever legal arrangements they have made. Around Asia, governments have turned the rule of law into an instrument not with which to protect citizens' rights, but to expand state power.<sup>4</sup> Some, such as the former New Order regime in Indonesia, have gone to lengths to articulate a particular variant of it.<sup>5</sup> Others, such as past and present governments in Myanmar, have loosely associated it with law and order without explicating it.

The rule of law may be malleable enough to accommodate many types of legal system, but if it is flexible enough to extend to *any* type of legal system, if it can be stretched to the point that any dictator can lay claim to it for no other reason than he or she makes the laws, then it is meaningless. Although the rule of law is a contested concept, there need to be some standards against which the rhetoric and records of governments can be contrasted, not only for the purpose of analyzing specific countries' policies and practices, but also for the sake of conceptual and normative clarity.

In this article I examine the rule-of-law language and practices of the state in Myanmar in terms of the "thin" rule of law, which is sometimes described as "rule by law." I am not advocating this type of rule of law. Rather, I am interested in how it can be used to explore the sort of authoritarian legality found in Myanmar, and to advance more critical study of Asian governments' stated commitments to the rule of law. "There is a growing scholarly interest in the nature and structure of authoritarian regimes," Bruce Matthews has correctly noted with regards to Myanmar, "in their internal contradictions and in the dynamics of change they are likely to encounter."<sup>6</sup> This growing interest still needs to be extended into comprehensive research about the nature and structures of courts, police and judicial bureaucracies in authoritarian settings across Asia, and how the workings of these agencies reflect and contribute to regimes' internal contradictions and dynamics.

To proceed, I briefly remark upon some of the legal language and institutions in British colonial and post-colonial Burma before turning to the current period. I unpack the particulars of a court case arising from a recent historic event, the September 2007 antigovernment protests, as a

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<sup>4</sup> Kanishka Jayasuriya, "The Rule of Law and Governance in the East Asian State," *Australian Journal of Asian Law*, vol. 1, no. 2 (1999), p. 112. On rule-of-law discourse in Asia see further, Randall Peerenboom, "Varieties of Rule of Law: An Introduction and Provisional Conclusion," in Randall Peerenboom, ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (London & New York: Routledge Curzon, 2004); David Clark, "The Many Meanings of the Rule of Law," in Kanishka Jayasuriya, ed., *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (London & New York: Routledge, 1999).

<sup>5</sup> Daniel S. Lev, "Judicial Authority and the Struggle for an Indonesian Rechtsstaat," *Law and Society Review*, vol. 13, no. 1 (1978), pp. 37-71.

<sup>6</sup> Bruce Matthews, "The Present Fortune of Tradition-Bound Authoritarianism in Myanmar," *Pacific Affairs*, vol. 71, no. 1 (1998), p. 9.

means of evaluating the government's rule-of-law talk. To do that, I begin with a few words on the concept of the thin rule of law itself.

### **The Thin Rule of Law**

Over the last century, theorists of the rule of law have fallen into two very broad camps: those articulating a substantive, or thick concept of the rule of law, which is associated with liberal democracy and human rights, and those theorizing a formal, or thin, type, which is concerned with how laws are enacted and enforced rather than with their substance.

Theorists of the thin rule of law, very generally, are concerned with how laws are promulgated, whether or not they are sufficiently clear to guide the conduct of persons subject to them, and whether or not they are prospective rather than retrospective.<sup>7</sup> According to F.A. Hayek, "it is more important that there should be a rule applied always without exceptions than what this rule is."<sup>8</sup> Similarly, H.L.A. Hart in his influential article on law as it is rather than as it ought to be argued that, "Rules that confer rights, though distinct from commands, need not be moral rules or coincide with them."<sup>9</sup> This approach excludes the law's content from criteria for the rule of law.

Following from Hayek and Hart, legal scholar Joseph Raz has argued provocatively that, "A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies."<sup>10</sup> For Raz, whether laws are good or bad is irrelevant to the rule of law. What matters is whether or not they are able to provide effective guidance to citizens by being prospective, open and clear; guided by open, stable, clear and general rules; protected by an easily accessible independent judiciary working on the principles of natural justice and with limited review powers, and with crime-preventing agencies not allowed to pervert them.

Myanmar has a non-democratic legal system based on the denial of human rights and its populace suffers extensive poverty. Raz argues that in principle these circumstances are not obstacles to it upholding the rule of law, as Myanmar's government claims that it does. So can there be found in Myanmar a stripped-down rule of law, one compatible with gross abuses and inequality?

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<sup>7</sup> Paul P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework," *Public Law* (Autumn 1997), p. 467.

<sup>8</sup> F.A. Hayek, *The Road to Serfdom*, 50th anniversary ed. (Chicago: University of Chicago Press, 1994), p. 88.

<sup>9</sup> H.L.A. Hart, "Positivism and The Separation of Law and Morals," *Harvard Law Review*, vol. 71, no. 4 (1958), p. 606.

<sup>10</sup> Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), pp. 218.

Or is there only what a former United Nations expert on the country once described as the “un-rule of law”?<sup>11</sup> To attempt to answer those questions requires a little background on Myanmar’s criminal justice system, past and present.

### **Law and Rule-of-Law Rhetoric from Burma to Myanmar**

“The British did not come to Burma to introduce Western ideas of liberty and freedom; those and other ideas,” Josef Silverstein has remarked, “entered Burma as a by-product of their authority and concern for the rule of law, property rights and order.”<sup>12</sup> These by-products were some time in coming. For the first decade or so after the fall of the kingdom at Mandalay, the colonial regime’s concerns lay with ending civil war and widespread unrest. It prosecuted the aims of empire and protected both its own interests and those of its personnel vigorously, inflicting legally endorsed violence on entire populations. It broke into pieces the remaining institutions indigenous to the defeated kingdom, made martial law a permanent fixture, and introduced terror as policy. Only in 1905 did the government separate the judiciary from the executive, although some administrative officers retained judicial powers, and continued to serve as magistrates. And the regime remained ready to delimit or suspend procedural guarantees at any time. Even from 1923, when the pressure of local opinion forced the establishment of a high court and provincial assembly, the governor retained prerogative to override them.

But within the authorities’ utilitarian frame for the exercise of their powers lay a concern for restraint, for the prohibiting of needless abuse in mundane affairs. To the extent that the raft of codes imported from India offered justice of any sort, it was procedural: the demarcating of the permissible from the impermissible, the demand on a police officer to first obtain a search warrant before entering a house; to present a detainee before a magistrate within 24 hours. If within this firm despotism there were traces of the rule of law, then they were not in any remote ideals but in irksome details, which once learned by a growing corpus of pleaders and barristers were increasingly used against the regime. Lawyers took on key roles in the nationalist struggle of the 1920s and 30s, alongside those in India, contesting colonial authority through the delineated structures and regulated spaces that had been formally provided to them.

With national independence in 1948 the principal question was not so much, as legal historian Andrew Huxley has characterized it, over how much

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<sup>11</sup> Paulo Sérgio Pinheiro, “Report on the Situation of Human Rights in Myanmar” (United Nations Economic and Social Council, Commission on Human Rights, 27 December 2002), p. 3.

<sup>12</sup> Josef Silverstein, “The Idea of Freedom in Burma and the Political Thought of Daw Aung San Suu Kyi,” *Pacific Affairs*, vol. 69, no. 2 (1996), p. 215.

of this baggage to jettison but rather, as in many other former colonies, how much of it to retain.<sup>13</sup> In its chaotic early days the embattled new government literally fought for its survival any way it could. It hung tightly to what Mary Callahan has described as the “rickety yet repressive architecture” of colonial rule in the face of violence from all sides.<sup>14</sup> Political “pocket armies” proliferated; parts of the police force joined one or another. Arbitrary arrest and preventive detainment were commonplace. Party politicking and litigating were fierce. There were many challenges to the authority and credibility of the courts, and criticism of individual judges, but the superior judiciary held its ground against the legislature, and the subordinate judiciary in many areas kept working in the face of widespread insurgency and criminality.

After ten years, the military staged a constitutional coup in which its commander, General Ne Win, took the prime ministership. He too refrained from interfering directly in the work of the courts and reported to parliament on the rebuilding of peace and the rule of law through army-administered executive councils around the country. Jurists and political commentators alike commended the general for stepping down in 1960 and allowing the former incumbent to be reelected, two observers writing at the time that, “General Ne Win has long been known in Burma as a supporter of constitutional government, and his record in restoring law and order and giving the country honest elections should come as no surprise, except to those who based their expectations on the performance of military-led governments in other countries.”<sup>15</sup> Maung Maung, who was later to become Ne Win’s chief jurist and right-hand man, wrote that the “virtues of the rule of law are most highly extolled today, and kept alive ... in the constitution and the laws.”<sup>16</sup>

A second coup in 1962 did away with the constitutional ruse that the military had used to obtain support for its earlier involvement in politics. The junta cited defects in the administering of justice as one of the primary reasons for its takeover, along with economic collapse and the insistence of some ethnic groups on federalism. Ne Win railed against the judiciary in speeches over subsequent years, blaming the 1947 Constitution for granting senior judges too much power, lambasting self-interested and manipulative lawyers, and berating canny politicians for using the courts to personal advantage. At a 1969 seminar he drew obligatory laughter from his audience

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<sup>13</sup> Andrew Huxley, “The Last Fifty Years of Burmese Law: E Maung and Maung Maung,” *LAWASIA*, 1998, online, cited 23 July 2008, available from <[http://burmalibrary.org/docs/The\\_last\\_50\\_years\\_of\\_%20Burmese\\_%20law.htm](http://burmalibrary.org/docs/The_last_50_years_of_%20Burmese_%20law.htm)>.

<sup>14</sup> Mary P. Callahan, “State Formation in the Shadow of the Raj: Violence, Warfare and Politics in Colonial Burma,” *Southeast Asian Studies*, vol. 39, no. 4 (2002), p. 535.

<sup>15</sup> Richard Butwell and Fred von der Mehden, “The 1960 Election in Burma,” *Pacific Affairs*, vol. 33, no. 2 (1960), p. 146.

<sup>16</sup> Maung Maung, *Law and Custom in Burma and the Burmese Family* (The Hague: Martinus Nijhoff, 1963), p. 24.

by recounting the story of a woman who so as to attend a beauty contest abroad obtained a document from a judge to the effect that she was still single, even though she had been married to an army officer for three or four years. “I have no faith in this type of judiciary and its law courts,” he concluded to applause.<sup>17</sup>

After 1962 national security and economic modernity took precedence over the rule of law. Later it reentered the language of state couched in vague socialist terminology. The new bureaucracy had a penchant for defining and classifying terms to fit its stated ideology, but what a socialist rule of law meant was not made explicit, other than that it was supposed to be a system of law that involved and served the interests of peasants and workers, as opposed to the earlier one that had served those of moneyed feudalists and landlords.<sup>18</sup> What it meant in reality was far less ambiguous. The executive in a series of steps swallowed up the judiciary: first, reorganizing the superior courts and personnel; second, establishing a special apparatus of military-run criminal tribunals that gradually eclipsed the ordinary ones in importance; third, farming out judicial functions to administrative bodies; and fourth, placing final appellate powers in a one-party legislature that was itself subordinate to the executive.<sup>19</sup> The 1974 Constitution rolled the rule of law together with security, defence and the maintenance of discipline as a responsibility of the Council of Ministers, and People’s Councils at all levels.<sup>20</sup> Panels of untrained ideologues administered justice through “people’s courts.” The government directed new judges to engage in what Mirjan Damaška has classed as an activist legal process, in which “proceedings must be structured so as to permit a search for the best policy response to the precipitating event,” rather than to resolve a dispute between parties through careful regard for doctrine, precedent and the like.<sup>21</sup> For this reason, a demonstrated commitment to policy, not knowledge of law, was the key criterion for appointment.

The collapsed authority of the judiciary under the Ne Win regime can be

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<sup>17</sup> Patisi:joun:jei: Bahou Komiti [Central Organising Committee], 1969 khu.hni’ Pati hni:hno:hpahlebwe:—Ou’kahta.kji:i. mein.gun:mja:hmin. ahtweidwei atwin:jei:hmu:i. nainganjei: asijinkhanza [Party Seminar 1969: Speeches of the Great Chairman and Political Report of the General Secretary] (Myanma Socialist Lanzin Party, 1970), pp. 66-67.

<sup>18</sup> An outline of the theory can be found in Maung Tin Ohn, “Hsosheli’ taja:u.badei so:mo:jei:” [“Socialist Rule of Law”], *Myawaddy*, vol. 14, no. 9 (1966), pp. 161-164.

<sup>19</sup> For an overview of legal changes in this period see Myint Zan, “Judicial Independence in Burma: Constitutional History, Actual Practice and Future Prospects,” *Southern Cross University Law Review*, vol. 4 (2000), pp. 31-44.

<sup>20</sup> Constitution of the Socialist Republic of the Union of Burma, 1974, articles 87(e), 132(c). The Constitution was explicit, including in English translation, about the term “rule of law” rather than “administration of law” or similar. The 2008 Constitution has retained the same terminology in Burmese, but “rule of law” has in its English version been consistently translated as “prevalence of law and order.” Constitution of the Republic of the Union of Burma, 2008, articles 21(c), 219, 250, 278, 354, 376, 413(b), 432. In state media the two are used interchangeably.

<sup>21</sup> Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven & London: Yale University Press, 1986), p. 87.

illustrated by reference to *habeas corpus*. In his seminal work on the law of the constitution, British jurist A.V. Dicey wrote at length about habeas corpus as a means of enforcing fundamental rights, such that it was “for practical purposes worth a hundred constitutional articles guaranteeing individual liberty.”<sup>22</sup> In British Burma, habeas corpus writs could be lodged in the High Court, and from 1948, also in the new Supreme Court. They were relatively cheap and easy to make, and the court granted orders for detainees’ release under a wide variety of circumstances, the chief justice in 1950 stressing that, “The personal liberty of a citizen, guaranteed to him by the Constitution, is not lightly to be interfered with and the conditions and circumstances under which the legislature allows such interference must be clearly satisfied and present.”<sup>23</sup> From 1962, habeas corpus fell into disuse. Lawyers stopped applying for relief to an army-appointed upper court, where the last reported habeas corpus petition was heard in 1965.<sup>24</sup> The 1975 Law Protecting Citizenship Rights was supposed to offer an alternative avenue for complaints against unlawful custody, but as it was unaccompanied by any procedural guarantees, complaints were either inordinately delayed or ignored. In one case, the apex court reportedly took 17 months to order the release of a father and son whom military intelligence had arrested in 1964 and whose family lodged a petition in the year that the law was passed; it gave the release order only after the public prosecutor repeatedly failed to attend the hearings.<sup>25</sup> When families of detained student protestors in 1988 applied to the chief justice for their release he merely handed the documents over to the attorney general’s office, where they were put on file.<sup>26</sup>

The cabal of officers that seized power in 1988 in the name of the rule of law promptly returned the judiciary to the post-1962 model of a single top court consisting of military appointees watching over a hierarchy of subordinates on its behalf. It stripped the law of its socialist garb, demolished the apparatus of the 1974 Constitution—abolishing the parliament, cabinet, judicial council, lawyers’ council and executive councils at all levels—and reestablished ostensibly independent civilian courts under professional judges, who were appointed from among the judicial bureaucracy.

But whereas the military regime a quarter of a century earlier had to wrest

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<sup>22</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (Indianapolis: Liberty Fund, 1982), p. 118.

<sup>23</sup> Supreme Court of Burma, *Tinsa Maw Naing v. Commissioner of Police, Rangoon & Another*, [1950] B.L.R. 37.

<sup>24</sup> Chief Court of Burma, *U Aung Nyunt v. Union of Burma (Sub-Divisional Magistrate, Tachilek)*, [1965] B.L.R. 578 (in Burmese). Although this case was brought as a habeas corpus petition under section 491 of the Criminal Procedure Code, in fact it related not to a case of alleged illegal custody but to an order restricting the appellant’s movements.

<sup>25</sup> “Father and Son Released after Ten Years’ Detention, *The Working People’s Daily*, 8 November 1976, p. 1.

<sup>26</sup> Maung Maung, *The 1988 Uprising in Burma*, ed. Marvel Kay Mansfield (New Haven: Yale University Southeast Asia Studies, 1999), pp. 47, 60-61.

the courts' independence and authority from them and beat down established practices that were inimical to its interests, now there was no longer any clear difference between the work of a judge and that of an administrator, between a law report and an executive announcement. Nor, despite drawing formal lines between them, has the current regime sought to establish any meaningful difference between the courts and other branches of government. Instead, it continues to expect that they will apply policy as well as enforce law, as a routine speech to intermingled judges, advocates, law officers and army personnel during 2007 of the then-Prime Minister General Soe Win reveals:

In conducting judicial affairs, a concept of ensuring stability of the State, community peace and tranquility and rule of law must be adopted. Courts are required to educate their clients to know the value of the law and the protection of law without giving priority to merely reaching a verdict of wins or failures over their clients [sic]. Only when those responsible for judicial affairs are able to pass a fair judgment will the courts be able to raise their dignity... Moreover, the conducting of judicial affairs must be in consistency with the State policies and existing laws. It is necessary to have political as well as judicial views... If needs arise to solve the issues of community peace and tranquility, and to end misconduct, the courts and local administrative bodies are to cooperate and coordinate each other [sic].<sup>27</sup>

Although stripped of socialist ideology, this oratory does not represent a significant shift from pre-1988 speech-making. The central message is that judges now as in the past must fulfill both executive and judicial requirements. Government councils may no longer have formal authority over the judiciary, but in actuality the courts remain their appendages. Judges oversee adversarial proceedings but are expected to obtain policy outcomes. This causes many difficulties and much inconsistency, as the case of U Ohn Than illustrates.

### **The Case of *Inspector Soe Naing v. U Ohn Than***

On 15 August 2007, without prior announcement, the government of Myanmar hiked the prices of all vehicle fuels by up to five times, depending on type.<sup>28</sup> The greatest increase was in the price of compressed natural gas, which is used in most public transport in the biggest city and former capital, Yangon. As official fuel sales in Myanmar remain a government monopoly,

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<sup>27</sup> "Judicial Sector to Adapt Itself to Reforms Made in Conformity with Forthcoming State Constitution," *The New Light of Myanmar*, 6 February 2007, p. 8. The chief justice, who was the courts' registrar before his appointment in 1988 and who headed the panel that drafted the new Constitution, dutifully echoes policy statements on judicial affairs.

<sup>28</sup> For some background to and analysis of the price hike see Richard Horsey, "The Dramatic Events of 2007 in Myanmar: Domestic and International Implications," in Monique Skidmore and Trevor Wilson, eds., *Dictatorship, Disorder and Decline in Myanmar* (Canberra: ANU E Press, 2008).



the price increase had immediate knock-on effects. Many private busses simply did not run that morning. Those that did multiplied their fares. People who had gone to catch a ride into town with money for a return trip and some lunch suddenly found that they did not have enough to get back home again.

After a few chaotic days, small protests began. They remained isolated until September, when reports of an incident at a monastery in the north triggered the nationwide rallies that captured global headlines for a few days late in the month. But by the time events reached their crescendo, U Ohn Than's brief moment had come and gone. On August 23, the 60-year-old had travelled to the front of the then-United States embassy downtown, facing the Independence Monument and beyond that Sule Pagoda, where tens of thousands assembled a month later. Dressed in a white shirt and sarong to mimic a prisoner's uniform, he stood silently and held aloft a cardboard sheet calling for the United Nations to intervene, and for the armed forces and police personnel to join the people to end dictatorship.

It was the third time in the year that Ohn Than had protested. In February he had joined a group that had walked on a main street calling for reduced commodity prices and better electricity supply. In April he had held a solo demonstration, which was described in a state mouthpiece, *The New Light of Myanmar*:

Carrying a placard bearing slogans; to establish a government representing the people, to invite UN supervisory commission [sic], to implement 1990 election results, and to hold a parliament session, he staged a noisy protest, thus causing a public panic gathering a crowd [sic]. At about 2.45 pm, some people in favour of community peace and prevalence of law and order sent him to local authorities, who then made an enquiry into the case.<sup>29</sup>

An inveterate protestor, Ohn Than is not representative of most criminal defendants before Myanmar's courts. But for the purpose of this short study his case has a number of things to its advantage. First, apart from the trial records there is a variety of material with which to piece it together, including state media reports like the one cited above, and some video footage of his protest and arrest. Whereas researchers of Myanmar sometimes complain of a lack of reliable sources, Ohn Than's case is approachable from a number of informative angles. Second, unlike most criminal accused, there is for Ohn Than no added risk in narrating his story, as he invited arrest and imprisonment, and his trial and punishment have already been publicized. Third, the case touches on events and issues of special importance for any

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<sup>29</sup> "NLD Ohn Than (Ex-Convict) Again Stages Solo Protest in Front of Maha Ordination Hall in Pabedan Township," *The New Light of Myanmar*, 27 April 2007, p. 10.

student of contemporary Myanmar, and is indicative of hundreds, possibly thousands of other cases arising from the 2007 protests. Fourth, it is valuable because if indeed the military regime has established even the slimmest rule of law then it should be possible to discern its features in the case of a veteran demonstrator as much as that of an arsonist or illegal gambler. Fifth and finally, the case is interesting because the accused took up the rule of law in his own defence, and tried to turn it against the authorities to argue for his release.<sup>30</sup>

Returning to what happened on August 23, as previously, after a few minutes a group of unidentified men pulled Ohn Than off the street and threw him into an unmarked vehicle. They did not take him to the local authorities for inquiries, nor a police station as required under criminal procedure. Instead they sent him to a special army camp where, together with hundreds of others picked up in the coming days and weeks, he was held for months without charge and without being brought into a court. Only in December was he handed to the police, whereupon the officers lodged his case and took him before a judge, to have him remanded in custody. From that date onwards, procedure was roughly applied and records kept. Prior to that date, there is silence. In the absence of habeas corpus or any effective equivalent, neither Ohn Than nor anyone else had recourse to the courts.

The state was throughout this time equivocal about the legal status of detained protestors. Government media reported that from August to the year's end demonstrators were being called, interrogated and investigated, rather than formally arrested. These reports did not name the agencies responsible for the calling, interrogating and investigating. From the first week of October, these unidentified authorities released hundreds of low-risk detainees after forcing them to sign documents which had no basis in law. *The New Light of Myanmar* announced that:

Those who led the protests in September and those involved and those who supported the protests were detained and are being questioned. As the persons who unknowingly joined the protests are also violators of the law, the authorities are releasing them after they had signed the pledge [sic]. Up to 4 October, the authorities have already released 692 persons. Altogether 517 persons were released on 5 October and six persons on 6 October after they had signed the pledge. Up to now, 1,215 have been released.<sup>31</sup>

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<sup>30</sup> Although invoking the rule of law as a courtroom defence does not seem to be particularly common in present-day Myanmar, Lev has written that in political cases under Indonesia's New Order regime it was "standard fare." Daniel S. Lev, "The Criminal Regime: Criminal Process in Indonesia," in Vincente L. Rafael, ed., *Figures of Criminality in Indonesia, the Philippines, and Colonial Vietnam*, (Ithaca, NY: Cornell University, 1999), p. 188.

<sup>31</sup> "523 Detainees Involved in Protests Released; 1,215 Have Been Released up to Date," *The New Light of Myanmar*, 7 October 2007, p. 16.

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These pledges contained the personal details of the signatory and an acknowledgment that he or she had committed some unspecified offence, and had promised not to recommit it and to come for further inquiries if instructed. The detainee signed one in the presence of police and local council officials and family members, or if a monk or nun, his or her superior, who also had to sign. As they lacked any legality they also lacked certainty. Some persons who signed were later rearrested.

Ohn Than had in April signed a pledge, but this time he was charged with sedition under section 124A of the Penal Code.<sup>32</sup> This is an article of law that has been on the statute books, along with most of the Code, since the British imperial regime introduced it from India. Maurice Collis, a colonial magistrate, described the section as having been drafted so as to “to cover any eventuality” by making something out of “almost any disagreeable remark aimed at the Government.”<sup>33</sup> Like regimes before it, the current government has expressed intent to revise, update and revoke outdated law but has shown no discernible effort towards these ends, and so this antiquated Code remains the instrument with which the authorities in Myanmar deal with everyone from housebreakers to dissidents. When an editorialist in a state newspaper claimed that there are no political prisoners in Myanmar as there are no crimes defined as political offences in the Code, he was being blatantly dishonest but also putting his finger on one of its original functions, to criminalize and try protest through ordinary law.<sup>34</sup>

The court hearings implicitly or explicitly acknowledged many of the breaches of procedure in Ohn Than’s case. The police investigator’s complaint stated that unidentified security personnel and “members of the public not desirous of a disturbance” put the accused in a car and sent him directly to the Kyaikkasan interrogation camp, rather than to a police station. These facts were recorded in the judgment. Cross-examining the prosecutor’s witnesses, the defendant pointed to the absence of government officers when he was detained. The police insisted that they had been present, but could not prove it. Two witnesses identified themselves as members of a security group with ambiguous status that is attached to local councils, the Swana Shin, whose name translates roughly as “masters of force.” According to the army officer who heads the police, this group consists of fire brigade, Red Cross and council members who give “a helping hand to the tasks of law enforcement and community peace and tranquility.”<sup>35</sup> In this instance, the

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<sup>32</sup> *Inspector Soe Naing v. U Ohn Than*, Felony No. 12/08, Yangon West District Court (Special Court).

<sup>33</sup> Maurice Collis, *Trials in Burma* (London: Faber & Faber Ltd., 1953), pp. 88, 121.

<sup>34</sup> Naing Myint (Taungthar), “Nainganjei: pyi’hmu., nainganjei: akjin:dha:hnin. Mjamañangan upadeipjatan:che’ mja: (2)” [“Political Crimes, Political Prisoners and Myanmar Law Provisions, 2”], *Myanma Alin*, 23 July 2008, pp. 8-9. The author refers among others to section 124A offences.

<sup>35</sup> “Questions and Answers at Press Conference (7/2006) of Information Committee,” *The New Light of Myanmar*, 3 November 2006, p. 7. Members of this group were used to force back protestors in the early days of September 2007, before the scale of events necessitated open armed police and military involvement.

men testified that they gave their helping hand to ensure that the accused was sent to an army facility, rather than to a police station. The five-month-one-week gap between when they helped out and when the case was brought into court did not elicit comment.

Ohn Than did not have a lawyer. The court documents show that when the hearings against him began inside the central prison on the last day of January 2008 he declined to hire one and chose to represent himself. In other hearings against September protestors, advocates had managed to make police look foolish, revealing that testifying officers did not have evidence or know the facts of the alleged crimes that they had supposedly investigated. But none had succeeded in getting their clients freed.<sup>36</sup> Instead of the arguments of an attorney, it was the manner of Ohn Than's protest that determined his courtroom defence. In January and February 2007, a former student activist, Ko Aye Lwin, had led a government proxy group to stage rallies outside the US Embassy against alleged interference in Myanmar's internal affairs. The state media gave the rallies laudatory coverage. Ohn Than imitated the style of those demonstrators, differing only in the contents of his placard and his dress. According to the court transcripts, when cross-examining one of the police witnesses, he argued that he had not disrupted the workings of the embassy. The record of the proceedings continues:

[Q.] I put it that there was no disturbance to passersby due to my protest.

[A.] Not so.

[Q.] Was action taken against Ko Aye Lwin and crowd who before 12 February 2007 twice protested just like me?

(The Law Officer [prosecutor] submits that she objects to the current question on the ground that it has no direct bearing on the current case.)

(The question does not follow from the contents of the Testimony in Chief [of the prosecution witness]; as it has no direct weight in the current case, the Court disallows it.)<sup>37</sup>

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<sup>36</sup> During October and November 2008 two of these lawyers withdrew their services from defendants who had told a court that they had lost faith in the judicial process. When they submitted a letter to the judge citing their clients' statement, she alleged to the Supreme Court that it was the lawyers themselves who had said this, whereupon they were sentenced to four months' imprisonment. Upon release their licenses to practice were revoked. Two others were convicted of interfering in the judicial process after they had the impertinence to request that the government information minister be called as a witness; one evaded arrest and fled to Thailand.

<sup>37</sup> *Inspector Soe Naing v. U Ohn Than*, cross-examination of Prosecution Witness No. 1, Inspector Soe Naing, 7 February 2008 (translated from Burmese). A charge had originally been framed against Ohn Than under section 505(b) of the Penal Code for upsetting public tranquility. Later it was upped to sedition. Much of the police testimony had been prepared according to the earlier charge and so Ohn Than's cross-examining also followed this line even though it was not relevant to the elements of the charge that had actually been laid against him.

## *Myanmar Thin Rule of Law?*

The police officer may well have answered the question, like his colleagues in other cases, that he simply did not know about Aye Lwin and his fellow demonstrators and that he was not involved in handling those crowds, but the court denied Ohn Than the opportunity to find out. He got no response, but returned to the matter in his own testimony. He stated that as he had done no more or less than those who had protested in front of the embassy earlier in the year and as they had not been charged, then the principle of equality before the law obligated his release too:

What I understand by the rule of law is that all laws transcend everyone in a country, from beggar to president alike. A judicial system proceeding under a law against one person one way and another person another way is unable to implement the rule of law. Furthermore, it has reached the point of encouraging the un-rule of law. In other words, with the administering class abusing its power, the law can be but a means for meddling. It is no longer possible to build independent judicial machinery.<sup>38</sup>

Ohn Than's defence not only turned the state's rule-of-law language against the state, but also stressed a core criterion of the thin rule of law: that the law be consistently applied and enforced. The state could either have him or could have its claim to uphold the rule of law. It could not have both.

The judge neither met Ohn Than's challenge directly nor avoided it completely. His six-page judgment—consisting of a four-page summary of the case, a one-page opinion, which is lengthy when compared to those of other criminal cases in Myanmar, the verbatim section of law under which the accused had been charged, a one-line verdict, and the sentence—acknowledged the defendant's claim that he deserved to be treated the same as other protestors who had gathered at the same place, but concluded that it was the way in which Ohn Than had protested and the contents of his demands, not the act of protest itself, that were seditious. He sentenced the accused to life imprisonment, an exemplary punishment and one resonant with the language on harsh penalties for crime in present-day Myanmar, and not least of all, crimes against the state. A specialized United Nations working group has since given an official written opinion that Ohn Than's imprisonment is arbitrary.<sup>39</sup>

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<sup>38</sup> *Inspector Soe Naing v. U Ohn Than*, testimony in chief of defendant, 20 February 2008 (translated from Burmese).

<sup>39</sup> Working Group on Arbitrary Detention, Opinion No. 44/2008, 26 November 2008. In its four-page opinion, the group found that the imprisonment of U Ohn Than contradicts articles 8, 9, 10, 11, 19 and 21 of the Universal Declaration of Human Rights.

## **The Un-Rule of Law**

No doubt Myanmar is very remote from a substantive rule of law in which human rights are generally respected and democratic principles valued. But as the case of U Ohn Than illustrates, it also falls a long way short of a minimalist rule of law, in which open and clear rules are evenly applied through an accessible and nonpartisan judiciary, regardless of their contents and purposes. There was no evenhanded adherence to legality in Ohn Than's trial. There was no independent judge. There was no strict formality or administrative efficiency of the sort attributed to some authoritarian states. There was no determined employment of criminal justice to suppress dissent of the type exemplified in Singapore, for example, where the rule of law has been assigned a truncated and narrowed politico-cultural meaning.<sup>40</sup> Rather, despite the government's claims to the contrary, there was the wanton abuse and willful neglect of the very procedures out of which the system has been built. There was an arbitrariness that comes with rule by decree of the sort found in Cambodia, where the prime minister's verbal undertakings can override the written orders of courts.<sup>41</sup> There was carelessness and whimsy that comes with systemic delegating of the type that Ariel Heryanto has described in security cases under the former New Order regime in Indonesia.<sup>42</sup>

It is in this defeat of procedure that even the thinnest rule of law is denied. Randall Peerenboom has remarked on China that the cumulative toll of day-to-day technical deficiencies "is sufficient to deny China's current system the title of rule of law, even allowing that there is sufficient evidence of a credible normative commitment to the principle that law is to bind the state and state actors."<sup>43</sup> Similarly, Otto Kirchheimer has argued that in East Germany defence lawyers experienced their greatest difficulties not from specific curtailments of their powers but from the disregard of criminal

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<sup>40</sup> Li-ann Thio, "Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore," *UCLA Pacific Basin Law Journal*, vol. 20, no. 1 (2002), p. 4.

<sup>41</sup> Lao Mong Hay, "Rule of Law a Better Way to Combat Corruption in Cambodia than Rule by Decree," *Article 2*, vol. 5, no. 5 (2006), pp. 35-37.

<sup>42</sup> Ariel Heryanto, *State Terrorism and Political Identity in Indonesia: Fatally Belonging* (London & New York: Routledge, 2006), pp. 119-22. There was no question of evidence in the case against Ohn Than, as he admitted to what he did, denying only that it was a crime; however, in other September protestors' cases the police have presented charges without supporting evidence. Investigators in the case of *Deputy Inspector Soe Moe Aung v. Ma Honey Oo* (Felony No. 32/08, Yangon East District Court [Special Court], 2008), for example, claimed that the accused had been among demonstrators outside Yuzana Plaza but could not prove it. When cross-examined they denied knowing that she had attended university exams on the same days that she was supposedly protesting. They also showed a lack of knowledge of the basics of criminal procedure, such as the keeping of entries in their station's daily diary.

<sup>43</sup> Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002), p. 140.

procedure by the judge and prosecutor.<sup>44</sup> Where police reports, daily diaries and charge sheets record repeated breaches of the very codes to which they owe their existence, as happens in all sorts of cases in Myanmar, there is no openness, stability, clarity or generality. There can be no effective guidance. Instead, the state is reduced to a rule-of-law doublespeak, in which nobody is above the law apart from anyone who is, and the model for the future is one in which judicial and executive powers are separated only “to the extent possible.”<sup>45</sup> What remains can only be characterized as the un-rule of law.

But if the military in Myanmar has succeeded in overwhelming the courts at the cost of the rule of law, ironically in doing this it may also have averted a worse scenario, one in which the systematic abuse of human rights for which it is well known could be even greater than at present. Anthony Pereira has examined how among the former military governments in South America, it was in the countries where the courts were least incorporated into the structures of authoritarian control that violent excesses were most common.<sup>46</sup> In Brazil, where there was a degree of consensus between soldiers and judges, the regime could rely upon existing arrangements and use less force to contain dissent than in Chile, where its counterpart introduced draconian military-controlled courts and had detainees routinely tortured; or in Argentina, where the security forces abducted and killed opponents on a vast scale because they could not trust the judiciary to do their bidding. Consequently, whereas 23 people in Brazil were tried in court for every one extrajudicially killed, in Chile the number of those murdered and tried was roughly even, while in Argentina only one person was brought to court for every 71 disappeared.

In Myanmar successive military rulers have made the courts into a reliable instrument for authoritarian control. The army is comfortable in using rather than circumventing the judiciary. This was not always the case. In earlier times of unrest and bloodshed it had resorted to tribunals headed with its own personnel to ensure that it got the results it wanted and to send a clear message about who was in charge. Had Ohn Than been arrested for his crime prior to 1974 he would have been brought to one of the special courts and denied his basic procedural rights. Had he been among demonstrators prosecuted after rallies in 1974 or 1988, he would have been hauled before a tribunal established under martial law.<sup>47</sup> In 2008 he was, in the same way

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<sup>44</sup> Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, NJ: Princeton University Press, 1961), p. 274.

<sup>45</sup> Constitution of the Republic of the Union of Myanmar, 2008, section 11(a).

<sup>46</sup> Anthony W. Pereira, *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (Pittsburgh: University of Pittsburgh Press, 2005).

<sup>47</sup> Under martial law orders in 1974 and 1989 military tribunals were instructed to hand down only sentences of death, life imprisonment or rigorous imprisonment of no less than three years. The orders guaranteed no rights to defendants and instead stipulated that the tribunals were not to hear

as other protestors, tried behind closed doors but otherwise superficially treated like any alleged serious offender.<sup>48</sup>

That Aung San Suu Kyi too has been brought before civilian judges and has been entitled to legal counsel is indicative not of the rule of law, as the foreign ministry would have it, but of the assurance that Myanmar's military has control over the judiciary. With appropriate guidance and timely reminders, judges identify with soldiers' needs and deport themselves according to their interests.<sup>49</sup> As the courts in Myanmar are now more integrated into the army-dominated executive than at any time in their recent history, despite their ostensible separateness, the regime need not resort to extrajudicial killings and forced disappearances to have its way. The apparatus of law is among its sources of confidence.<sup>50</sup>

## **Conclusion**

Myanmar may come nowhere close to the thinnest rule of law, but its repressive system of policing and trial holds more certainty for its victims than what is available to persons caught up in places where police, militaries and vigilante groups take the law entirely into their own hands. The un-rule of law is not lawlessness. Although Ohn Than was, like thousands of others, kept in illegal and undocumented custody before being brought to court, he expected to end up there. He was given a chance to have his defence recorded, not in a parallel and demarcated tribunal, but before a civilian judge. He had the opportunity, as Kirchheimer put it in his work on the use of legal procedure for political ends, to "hurl his defiance against the government and measure the abyss separating him from the official

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"unnecessary witnesses," not to continue a hearing if convinced that an offence had been committed, not to recall witnesses, and in the event that tribunal members were changed during trial not to rehear cases from the beginning. The apex court rejected the appeal of a person convicted in 1975 and who pointed out that the maximum penalty for the same offence under the Penal Code was six months. It failed to address the legal incongruity that his case had raised. It rejected a challenge to the tribunals' authority on the grounds that they were trying offences that allegedly occurred before the government had declared martial law again, without considering the substantive question. Central Court of Burma, *U Kyaw Lin v. Socialist Republic of the Union of Burma*, [1978] B.L.R. 6; *Maung Tint Swe v. Socialist Republic of the Union of Burma*, [1978] B.L.R. 33 (in Burmese).

<sup>48</sup> Supreme Court Order No. 16/08 has reportedly instructed that these defendants are to be tried in special closed courts for security reasons. There is no article of law that permits such an order; however, the requests of defence lawyers in some cases that they be transferred to ordinary courts under section 2(e) of the 2000 Judiciary Law, which allows for trial in open court unless prohibited by law, have been refused.

<sup>49</sup> Failure of a judge to deport herself according to regime interests will at best result in unemployment. In 1998, 64 justices, including five of the Supreme Court, were "permitted to retire" at the same time. The senior ones were removed via an order that simultaneously dealt with the foreign affairs minister, two deputy ministers and five members of the Civil Service Selection and Training board.

<sup>50</sup> On regime "confidence factors" see Matthews, "Tradition-Bound Authoritarianism in Myanmar," pp. 9-16.



doctrine.”<sup>51</sup> He planned for this. Had his act of protest likely ended with someone taking him to a field and shooting him before dumping his body in a river, then he probably would have acted differently. Instead, expecting to go to jail, not to be abducted and killed, he put on his mock prison uniform and made his way to the centre of town. In demonstrating that the rule of law in Myanmar is a figment, he at once proved that the control and use of law and its agents is integral to the durability and persistence of authoritarian government there. In this if nothing else there is a degree of certainty.

This role of law in Myanmar, rather than rule of law, is set to expand further during the next few years as the army attempts to extricate itself from its front-man political role while remaining in charge. The 2008 Constitution, which will take effect when a semi-elected parliament sits, anticipates increased military leverage through use of auxiliary agencies, not least among them, the judiciary. It calls for the setting up of new high courts at the state and regional level, and for expanded Supreme Court powers, including powers to hear writ petitions of the sort provided under the 1947 Constitution. It sees to it that the powers of appointment and removal of superior judges ultimately rest with the army-endorsed president. And it adds a constitutional tribunal into the mix, while obliquely assigning the armed forces the role of main constitutional defender.

A half-century of military rule in Myanmar has had profound and greatly damaging effects on institutions for the rule of law there that are little acknowledged and barely understood. Further research into the country’s criminal justice system and its role in buttressing persistent authoritarianism will provide new insights of comparative relevance and conceptual merit. Prominent jurists have contended that minimalist rule-of-law theories have, in the words of one, “logical force,” but that the real-life workings of authoritarian government preclude them from reality.<sup>52</sup> Affairs in Myanmar give credence to this argument, but are inconclusive unless also accompanied with many more critical and detailed studies of how police, prosecutors and courts are used throughout Asia for authoritarian purposes. The rule-of-law claims of governments across the region need to be held up for careful scrutiny, lest the Asian “rule of law” be reduced to a cynical exercise in papering over the misdeeds and excesses of those who use the law to rule.

*Australian National University, Canberra, Australia, July 2009*

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<sup>51</sup> Kirchheimer, *Political Justice*, p. 97.

<sup>52</sup> Lord Bingham, “The Rule of Law,” The Sixth Sir David Williams Lecture (Faculty of Law, University of Cambridge, 2006), p. 18.