

## Briefing on the Rule of Law in Myanmar

Melissa K. Booth, Enlightened Myanmar Research Foundation (EMReF), June 2016

### Introduction to the Rule of Law

Over the five years of Myanmar's evolving democratic transition, the notion of "rule of law" has played a central role in discussions about the country's reform agenda. Particularly since 2012, the term has been heard regularly in political speeches and civil society campaigns. Described as essential to peace and development goals, rule of law was regularly emphasized by Daw Aung San Suu Kyi, former President Thein Sein, and Thura U Shwe Mann, former Speaker of Myanmar's Pyithu Hluttaw and current head of the Union-level Commission for the Assessment of Legal Affairs and Special Issues. In 2015, language in the Nationwide Ceasefire Agreement referred twice to "the rule of law," and the recent, ambitious Strategic Plan released by the Union Attorney General Office is entitled simply, "Moving Forward to the Rule of Law." Across sectors, almost every element of the rule of law and the judicial system in Myanmar has been under review and up for debate.<sup>1</sup>

Despite this rhetorical commitment and swift pace of legal reforms, Myanmar continues to earn dramatically low marks in global rule of law and governance indicators. In 2015, The World Justice Project placed Myanmar at 92 out of 102 countries ranked due to poor ratings in open government, absence of judicial corruption, and fundamental rights. The same year, the World Bank gave Myanmar one of the lowest scores possible in rule of law, along with meager rankings in other public sector governance issues.<sup>2</sup> Overall, rule of law reform in Myanmar is just beginning to take root.

The concept of "rule of law" is generally understood to be an important building block in Myanmar's democratic transition, but the specifics of *why* it is important and how it is achieved are often more complicated and less familiar. Political leaders, civil society activists, and members of the international community regularly invoke "the rule of law" as a necessary part of the country's reform agenda, but these rally cries may not be accompanied by a clear articulation of what rule of law looks like in practice or who is responsible for its application.

At the same time, there can be widely diverging interpretations of "the rule of law" among different groups. For example, recent studies conducted in Myanmar indicate that government officials and lawmakers may associate the term with security priorities and conformity to law and order, while civil society groups and the general population view rule of law as promoting rights and enhancing their access to justice.<sup>3</sup>

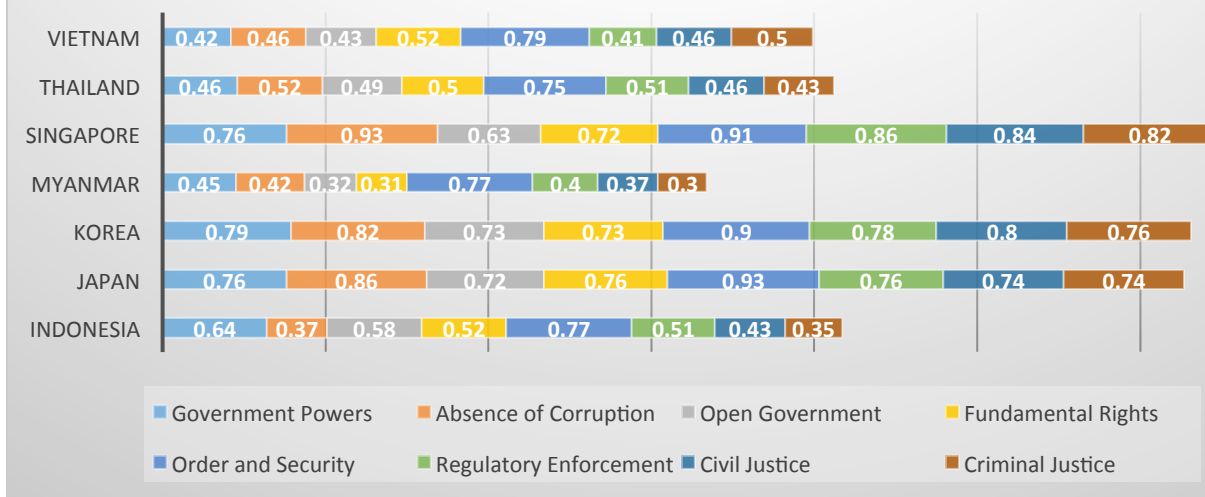
---

<sup>1</sup> ICJ 2013, p. 10.

<sup>2</sup> Asia Foundation 2015, p. 33.

<sup>3</sup> EMR and MLAW 2014; USIP 2013; IBAHRI 2012.

## Rule of Law Indicators for East Asia and the Pacific



In light of these varying perspectives, this brief report aims to introduce the basic principles of rule of law to contribute to a shared understanding of its meaning. It is also hoped that the concept of rule of law can be lifted out of academic theory to be used as a practical tool when strategizing about real social and political aspirations.

### What is rule of law?

“Rule of law” can seem like an abstract concept or political buzzword, but there are some internationally recognized definitions that lay the foundation for a relatively clear and uniform understanding of the term. At its core, rule of law is a principle that enshrines equality for everyone before the law. Instead of a governance system in which laws are enforced at random and legal institutions are used as tools for control and intimidation, sometimes called “rule *by* law,” the principle of rule *of* law designates that no person is above the law, including state and legal actors themselves.

The term “rule of law” first appeared on the international stage in 1948 as part of the preamble to the Universal Declaration of Human Rights (UDHR), affirming “that human rights should be protected by the rule of law.”<sup>4</sup> But the fundamental rights and safeguards that rule of law seeks to preserve have a much longer history, dating back hundreds of years to philosophers who saw that people could not always be trusted to govern, but fair and impartial laws could.<sup>5</sup>

<sup>4</sup> IBAHRI 2012, p. 13.

<sup>5</sup> Venice Commission 2011, p. 3.

Rule of law can also be practically viewed as an “end state,” an ideal set of conditions reached once laws are consistent with human rights standards, developed through public participation, and applied fairly to all.<sup>6</sup> A report released by the Venice Commission in 2011 identified six common features of rule of law that are helpful when considering how this end state might look:<sup>7</sup>

- 1) laws are upheld, enforced, and developed transparently and accountably
- 2) laws are clear, legal institutions are accessible, and law-making is inclusive
- 3) arbitrary decisions are prohibited and abuse of power is prevented
- 4) universal access to justice is guaranteed before independent and impartial adjudicators
- 5) respect for human rights is fundamental
- 6) each person is ensured non-discrimination and equality before the law

In discussions and even in practice, rule of law can sometimes be presented as an individual reform goal, seemingly separate and isolated from other strategic governance planning. Unfortunately, this is not an effective way to imagine or design rule of law initiatives. Instead, achieving rule of law requires comprehensive justice sector reform and collaborative, inclusive efforts between local, state, national, and international actors. The rule of law protects and promotes the rights and responsibilities of the government and the people, and therefore necessitates an interconnected approach.<sup>8</sup> Rule of law is also situated alongside the other pillars of a democratic society, including access to justice, gender equality, human rights, free speech, fair and open elections, and accountable and transparent governance. To this end, the United Nations General Assembly asserted that “human rights, the rule of law and democracy are interlinked and mutually reinforcing.”<sup>9</sup>

The “rule of law” [...] refers to 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.

■ Report of the UN Secretary-General Kofi Annan on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 2004.

### **Why is rule of law important?**

While each society may determine, for itself, whether a particular governance system would enhance its political and social landscape, the core features of rule of law are esteemed in many countries due to their close ties to universal values of human rights, fairness and equality. The preamble to the Universal Declaration of Human Rights states that “the advancement of the rule of law at the national and international levels is essential for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms.”<sup>10</sup>

<sup>6</sup> USIP 2009.

<sup>7</sup> Venice Commission 2011.

<sup>8</sup> USIP 2013, p. 17.

<sup>9</sup> UN General Assembly Resolution 67/1 2012, p. 2.

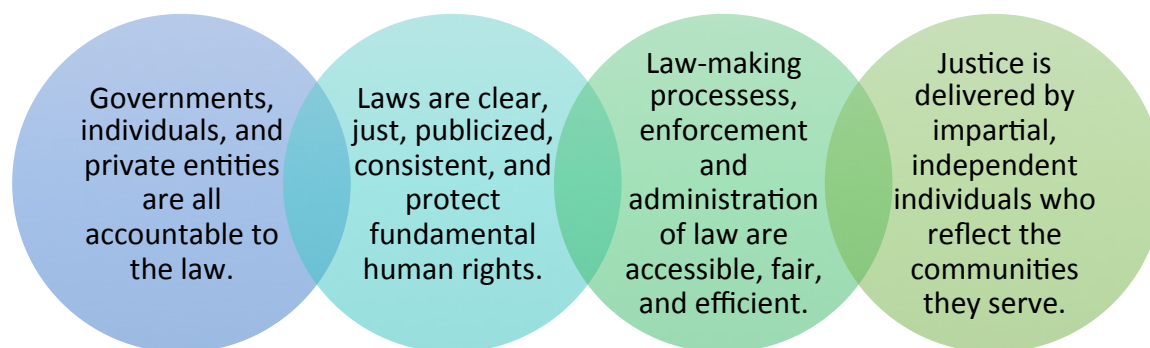
<sup>10</sup> Universal Declaration of Human Rights 1948.

But how can the rule of law be credited with the achievement of such lofty goals? For many, the reason is that rule of law is believed to improve public safety, strengthen access to government services, and boost economic prosperity because spaces for corruption, violent conflict, organized crime, and financial mismanagement are constrained by justice and law. When every person is “treated by all decision-makers with dignity, equality and rationality and in accordance with the law,”<sup>11</sup> societies can escape the cycles of fear and isolation that can affect everything from health and education outcomes to livelihoods development. Similarly, when government officials are subject to the same laws as citizens, limited by checks and balances, and punished for misconduct, the incentives for corruption decrease and trust in government institutions can grow.<sup>12</sup>

There are those who argue that the concept of human rights is not applicable to all cultures. We in the National League for Democracy believe that human rights are of universal relevance. But even those who do not believe in human rights must certainly agree that the rule of law is most important. Without the rule of law there can be no peace.

■ Daw Aung San Suu Kyi, 1996

#### Four Universal Principles of Rule of Law



*Figure 1. Source: World Justice Project*

#### **How is rule of law achieved?**

Many law and governance experts over the years have worked to develop tools that demonstrate how a nation goes about establishing rule of law. There are checklists, frameworks, international standards and regional best practices to choose from, but central to the success of any initiative is 1) its adaptation to the specific political and cultural context, and 2) the recognition that rule of law reform takes time. Many rule of law projects may break down due to an underestimation of the scale of the problem and a failure to achieve both an upgrade to legal institutions and improved access to justice for the entire population.<sup>13</sup> In addition, the absence of a long-term,

<sup>11</sup> Venice Commission Report 2011, p. 5.

<sup>12</sup> The World Justice Project 2015.

<sup>13</sup> San Pe 2014, p. 5.

holistic, and clearly communicated strategy for rule of law reform can present barriers to progress by not accounting for institutional challenges.<sup>14</sup>

Relevant actors who can engage with rule of law reform span public and private sectors, including judges, prosecutors, law professors, bar association members, parliamentarians, civil servants, government officials, security personnel, civil society activists, community members, labor organizations, domestic business representatives, and international legal rights bodies. Activities that aim to improve the rule of law can range from legislative reform and revision to legal frameworks (including public consultations) to skill building for law officers in legal research and analysis, improving baseline data collection in government institutions, enhancing public awareness of and access to laws, expanding legal aid services and free legal counsel, and reforming and strengthening legal education programs nationwide.

### **Rule of Law in Myanmar**

After decades of military oppression, entrenched corruption and armed conflict, Myanmar has achieved notable gains in its rule of law reform in just a few years. Unrestricted spaces for civil society to discuss key issues, conduct research, and mobilize political advocacy campaigns have broadened, and community members have reported “the ability to associate more freely and to speak more openly.”<sup>15</sup> Censorship restrictions have reduced,<sup>16</sup> and forums for reporting rights violations have been created and are slowly gaining public trust. In April, student activists held in detention for over a year without trial were released, just weeks after nearly 50 underage and child recruits were released from the ranks of the Myanmar military. In January, the Parliamentary Committee on Rule of Law and Tranquility, headed at that time by Daw Aung San Suu Kyi, recommended the creation of an anti-corruption body to monitor the courts.

Lawyers in urban hubs have reported an increased sense of their professional independence,<sup>17</sup> and the country’s first national bar association, the Independent Lawyers’ Association of Myanmar (ILAM), was established in January this year. Women’s representation in Myanmar’s parliament more than doubled after the 2015 general elections, now accounting for 13.6% of elected members at the Union level and 12.5% of elected seats at the state and region levels.<sup>18</sup> It is expected that the National Law on the Protection and Prevention of Violence against Women, the first law specifically addressing domestic violence in Myanmar, will be submitted to parliament this year.

Despite these milestones, reports of land grabs near large-scale development projects and military disruptions in civilian communities continue to surface. Perceptions persist that trial verdicts can be bought and that “those with arms are always right.”<sup>19</sup> Many community members assume that corruption will play a role in any interaction with the legal system, and findings from reports on access to justice confirm that, for the majority of people, the formal courts are

---

<sup>14</sup> USIP 2013, p. 6.

<sup>15</sup> USIP 2013, p. 20-21.

<sup>16</sup> USIP 2013, p. 20-21.

<sup>17</sup> ICJ 2013, p. 3.

<sup>18</sup> Minoletti 2016.

<sup>19</sup> MLAW and EMR 2014, p. 5, 13.

not viewed as effective justice delivery mechanisms.<sup>20</sup> In short, the judiciary is still widely seen as corruptible.<sup>21</sup>

These challenges, however, are not cause for despair. The legacy in Myanmar of military rule, systematic destruction of judicial institutions and dismantling of the legal education system, and rampant government corruption is deeply embedded and will take time to uproot. For decades, justice institutions languished and “little was done to keep pace with modern developments in legislation.”<sup>22</sup> Most importantly, one of the greatest challenges to rule of law reform is the crucial task of building trust between the government and the public.

### *The 2008 Constitution*

A constitution that conforms to rule of law principles serves to ensure that legislation meets the standards and obligations it enshrines, protects fundamental rights and provides access to legal recourse, and ensures that executive power is exercised “only on the basis of and within the limits of the law.”<sup>23</sup> Myanmar’s controversial 2008 Constitution defines the basic structure of the government and makes some commitments to the rule of law, including the separation of powers between the three branches of government and setting out five writs available to challenge violations of individual rights. However, although the NLD-led government has a comfortable majority to move laws through parliament without obstruction, passing a proposal for constitutional amendment is more complicated because it requires more than 75 percent approval from a parliament that has 25 percent of its seats constitutionally reserved for the military. In 2015, two constitutional amendment bills were proposed only to be blocked by the military.

Robert San Pe has called the constitutional review process “the acid test” of the government’s commitments to genuine reform,<sup>24</sup> and thus far the process has been rather convoluted. A Constitutional Review Joint Committee was formed in 2013, along with the smaller Parliamentary Committee to Implement Constitutional Amendments, and the Constitutional Court of the Union is legally tasked with review but has displayed some unwillingness to make independent judgements.<sup>25</sup>

### *Decentralization of Governance*

Another key area of rule of law reform in Myanmar is the decentralization of governance, particularly because many community members still view the union government as lacking in transparency and unresponsive to their needs.<sup>26</sup> The process to shift lawmaking and public administration from the union to the states and regions is just beginning, and requires significant capacity building for fragile institutions that could be granted meaningful decision making authority for the very first time.

---

<sup>20</sup> MLAW and EMR 2014; UN Women 2016.

<sup>21</sup> DLA Piper 2013, p. 31; ICJ 2013, p. 3.

<sup>22</sup> UNDP Bridges p. 6.

<sup>23</sup> Brand 2014, p. 3.

<sup>24</sup> San Pe 2014, p. 9.

<sup>25</sup> USIP 2013, p. 6.

<sup>26</sup> USIP 2013, p. 27.

Since 2012, there are now elected representatives at the village tract level, but townships remain the primary administrative units of the Union and the state and region governments.<sup>27</sup> Inclusiveness in local governance remains low, with less than half of local residents across the country participating in village tract or ward meetings, largely because they were not invited.<sup>28</sup>

### *Administrative justice*

Although the 2008 Constitution guarantees fundamental rights and the possibility to apply for writs, it does not clearly define administrative law that would give citizens recourse against unlawful government actions.<sup>29</sup>

For the time being, even though there have been a few successful writ applications the courts are not generally seen as a protector of the rights of people vis-à-vis executive power, due to perceived weakness and lack of independence. This may be one of the reasons why so many non-judicial bodies have been receiving complaints from citizens.<sup>30</sup>

Justice concerns collected from community members also underscore the broad authority that officials from the General Administration Department, Settlement and Land Records Department, and Immigration Department have in making quasi-judicial decisions. This administrative decision-making continues to occur outside of any independent review.<sup>31</sup>

### *Legal aid and awareness*

In several studies on rule of law and access to justice in Myanmar, participants raised as a fundamental issue the lack of legal awareness that adds to the prohibitive environment surrounding formal legal institutions. Additionally, law-making procedures “do not yet allow for adequate coordination between the executive and legislative branches or for sufficient public participation.”<sup>32</sup> Currently, the lawmaking process is mostly unknown among the public, with only the news of initial drafts of introduced bills and adopted bills released.

### *Law reform*

Critical to the rule of law are the laws and legislative reforms themselves.

### *Courts Martial*

The Special Rapporteur on the situation of human rights in Myanmar has repeatedly stated the need for civilian control of the military as fundamental to any democracy that upholds the rule of

---

<sup>27</sup> The Asia Foundation 2015, p. 13.

<sup>28</sup> UNDP 2015, p. 50, 52.

<sup>29</sup> Crouch 2015.

<sup>30</sup> Brand 2014, p. 7.

<sup>31</sup> MLA and EMR 2014, p. ii.

<sup>32</sup> USIP 2013, p. 6.

law.<sup>33</sup>

## **Recommendations for Rule of Law Reform in Myanmar**

As mentioned above, meaningful progress toward rule of law requires different sectors to work together based on a common, communicated vision of strategic reform priorities; rule of law that is truly felt cannot be achieved by a single initiative or institution alone.<sup>34</sup> The following categories outline some basic recommendations that can contribute to rule of law reform.

### *Legal Awareness and Access to Information*

- Provide access to information in real-time about proposed legislation, institutional reform, and policy development to provide the opportunity for feedback that informs these processes
- Improve data collection on judicial procedures, law enforcement, and parliamentary review processes
- Increase transparency in the parliament

### *Transforming the Culture of Corruption*

- Evaluate and enforce separation of the powers of the executive, legislative and judicial branches
- Pursue and support recommendation by the Parliamentary Committee on Rule of Law and Tranquility to create an anti-corruption body to investigate allegations of corruption within the judicial system

### *Comprehensive Justice Sector Reform*

- Increase access to justice
- Carefully consider in each case whether new laws or legal mechanisms need to be developed, or if existing tools can be revised
- Increase provision of and access to legal aid through public outreach. Fund victim-centered services including psychosocial support, sensitization for legal and security personnel working with minors or survivors of domestic violence or sexual abuse
- Strengthen the legal education system through trainings and courses in legal analysis and drafting, law ethics, and due process
- Develop a policy for a comprehensive legal aid system that is accountable, accessible, and affordable

### *Governance and Public Sector Reform*

- Increase transparency and accountability among judicial and civil service staff

---

<sup>33</sup> ICJ 2013, p. 13.

<sup>34</sup> USIP 2013, p. 40.



- Decentralize administrative functions to sub-national government and improve quality of service delivery at state and region, township, and local levels
- Ensure engagement with underserved communities and meaningful public participation in policy reforms

## References

Arnold, Matthew, Ye Thu Aung, Susanne Kempel, and Kyi Pyar Chit Saw. *Municipal Governance in Myanmar: An Overview of Development Affairs Organizations*. The Asia Foundation, Discussion Paper No. 7. July 2015.

Brand, Marcus. *Exercising Executive Power in Myanmar: Constitutional Options for Safeguarding the Rule of Law in Public Administration*, Bingham Centre for the Rule of Law. November 2014.

Crouch, Melissa. *Access to Justice and Administrative Law in Myanmar*. USAID, Promoting Rule of Law Project. October 2014.

DLA Piper, Perseus, JBI. *Myanmar Rule of Law Assessment*. March 2013.

European Commission For Democracy Through Law (Venice Commission), *Report on the Rule of Law*, Study No. 512 / 2009, March 2011.

Hook, David, Tin Maung Than, and Kim N. B. Ninh, *Conceptualizing Public Sector Reform in Myanmar*, Myanmar Development Resource Institute's Centre for Economic and Social Development (MDRI-CESD) and The Asia Foundation. June 2015.

International Commission of Jurists. *Right to Counsel: The Independence of Lawyers in Myanmar*. November 2013.

International Bar Association's Human Rights Institute (IBAHRI). *The Rule of Law in Myanmar: Challenges and Prospects*. December 2012.

Minoletti, Paul. *Gender (in)Equality in the Governance of Myanmar: Past, Present, and Potential Strategies for Change*. The Asia Foundation. April 2016.

Myanmar Legal Aid Network (MLAW) and Enlightened Myanmar Research (EMR). *Between Fear and Hope: Challenges and Opportunities for Strengthening Rule of Law and Access to Justice in Myanmar*. September 2014.

San Pe, Robert. "Burma / Myanmar: prospects for democracy and rule of law," Bingham Centre for the Rule of Law. February 2014.

The United Nations. *UN General Assembly Resolution 67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, 30 November 2012.

The United Nations. *Universal Declaration of Human Rights*. 1948. Print.

The World Justice Project. *Open Government Index 2015*, <http://worldjusticeproject.org/open-government-index>, last accessed 1 June 2016.

The United Nations Development Programme (UNDP). Bridges to Justice: Rule of Law Centres for Myanmar, A Feasibility Study. March 2014.

The United Nations Development Programme (UNDP). The State of Local Governance: Trends in Myanmar, a Synthesis of people's perspectives across all States and regions. July 2015.

United States Institute for Peace (USIP) Burma/Myanmar Rule of Law Trip Report, USIP Rule of Law Center. June 2013.

United States Institute for Peace (USIP) and Peacekeeping and Stability Operations Institute. "Guiding Principles for Stabilization and Reconstruction." November 1, 2009.

UN Women. Voices from the Intersection: Women's Access to Justice in the Plural Legal Systems of Myanmar. 2016. <http://asiapacific.unwomen.org/en/digital-library/publications/2016/04/womens-access-to-justice-in-the-plural-legal-systems>