Rule of Law

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Sponsored by the Programme on Modern Burmese Studies at St Antony’s College and the International Gender Studies Centre at Lady Margaret Hall, University of Oxford
Myanmar has taken another important step toward democratization, following the 2015 election victory of the National League for Democracy (NLD), led by Daw Aung San Suu Kyi. But decades of military repression, ethnic conflicts, political exclusion, abuse of natural resources and the environment, neglect of health, education, and infrastructure, and mismanagement of the economy, have left serious challenges for this new government.

On Monday 15 February, 2016, the Programme on Modern Burmese Studies at St Antony’s College and the International Gender Studies Centre at Lady Margaret Hall convened a workshop entitled “Towards Democracy and Reconciliation: Challenges Facing Myanmar’s Incoming Government.” Co-organized by Dr Daw Khin Mar Mar Kyi and Dr Matthew J Walton, the workshop brought together over a dozen UK experts on Myanmar, drawn from academic, advocacy, and activist communities.

Presenters focused on the challenges facing the new NLD-led government, identifying key stakeholders, persistent and emerging impediments, and potential policy responses. Subjects considered included military legacies, governance concerns, social issues, land and resource management, and conflict and displacement.

With the success of the event, the co-organizers saw an opportunity to effectively channel the insights of the participants into policy-making conversations in Myanmar’s government, civil society, and other political institutions. They also sought to contribute to the developing public discourse on political reform in the country. Participants were asked to transform their presentations into short policy briefs that could be of use to ministries, parliament, and other decision-making bodies in Myanmar. The collected briefs were edited by the co-organizers and translated into Burmese.

Please note that the views and positions presented in these briefs represent the authors and are not necessarily the views of the Programme on Modern Burmese Studies, St Antony’s College, the International Gender Studies Centre, Lady Margaret Hall, or the University of Oxford. In some cases, the views of different authors may diverge or conflict. We believe that including multiple different perspectives in a collection of policy briefs is valuable in fostering public debate in Myanmar.

We intend for this to become a regular event and policy brief series, which can draw on existing expertise among those studying Myanmar, including increasing numbers of scholars and advocates from the country. These and future briefs will be available electronically at the Programme on Modern Burmese Studies website (www.sant.ox.ac.uk/research-centres/programme-modern-burmese-studies) and the Oxford Feminist E-Press (theoxfordfeministepress.wordpress.com/). Please feel free to contact us with any questions or feedback.

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The ‘rule of law’ has long been touted as one of the areas which the National League for Democracy and Daw Aung San Suu Kyi herself wish to prioritise for Myanmar. It was the in the title of the Hluttaw Committee of which Daw Aung San Suu Kyi was chair from 2012 (the “Rule of Law and Peace and Tranquility Committee”) and since the election, the President, State Counselor and many new Chief Ministers have stated that their aim is to introduce rule of law. However, what exactly the NLD means by the term is unclear.

Rule of law is generally understood as guaranteeing two things: that no one is above the law; and that everyone has equality before the law. In Burmese, the term taya ubadei somoe-ye covers this understanding, including law as both statutes promulgated by Parliament and an idea of ‘natural justice.’ However, as Nick Cheesman has pointed out, the understanding of rule of law as used by previous governments is encompassed in the term ngyein wut pibya-ye, literally ‘keeping the peace’ or preservation of law and order. As pibya means to press or hold down, this interpretation carries with it the idea of force and the use of law as a tool of suppression serving the interests of the state, not as the guarantor of individual rights. As Daw Aung San Suu Kyi has said in other contexts, the challenge is not only of changing the appearance of things through technical fixes, but also of changing mindsets.

A further complication is what counts as law. It needs to be recognised that “law” in Myanmar includes not only statute but also customary laws and practices in ethnic areas; this is especially important in regard to land use and ownership. With statute laws, it is also important that they are well-drafted and compliant with international standards and conventions, especially those the government has signed up to. There are many laws currently in force in Myanmar that do not meet these standards and require repeal or reform. The new government has already made a good start, with U Shwe Mann’s “Commission for the Assessment of Legal Affairs and Special Issues” announcement that it is reviewing 142 laws (though which ones is not yet clear).

The following four areas ought to be priorities for reform:

1. **Reforming implementing agencies**
   No laws are perfect, and few are implemented perfectly, but in Myanmar implementation is the bigger challenge. For the NLD this is especially true since the implementing agencies remain under the direct control of the military, through the Ministry of Home Affairs. These include the police, civil servants in the judicial system and the General Administration Department, who are likely to resist change. Engagement with and retraining of the police will be critical. At the local level there is evidence that many police, including senior officers, would like to become a more professional, trusted, public body. However, the reported failure of the Home Minister to agree on the extension of an EU-funded police reform program does not bode well.1

2. **Equality before the law**
   There are many examples of inequality being written into the laws of Myanmar, the most obvious being the 1982 Citizenship Law. This law (which is unlikely to be among the 142 being reviewed) requires amending if rule of law is to be achieved; by creating different classes of citizens with different legal rights, it prevents equality before the law being applied in Myanmar. It also fails to meet international standards, especially rules preventing government from denying rights and creating statelessness. Recent examples of other discriminatory laws include the “Religious Protection Laws” passed in 2015 that discriminate against women, against religious minorities, and most specifically against Buddhist women.2 Amending or repealing these laws would send a strong signal that the NLD government does indeed believe in equality before the law and thus the rule of law. Not to do so would be to allow the movement of nationalist Buddhist monks whose vociferous popular campaign led to their introduction, to continue to act as if they are above the law.

3. **No-one is above the law**
   To ensure no-one is above the law, it must be possible to hold individuals, companies, the military and other authorities accountable. Members of the military have impunity for actions taken in the course of their duties, a major impediment to rule of law, and the police have only rarely been prosecuted for acts of violence. In particular, no one has been held to account for the police violence in the Letpadaung protests, including the killing of Daw Khin Win in December 2014. Some Myanmar

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2 These are the 2013 Religious Conversion Law; the Population Control and Healthcare Law, the Buddhist Women’s Special Marriage Law, and the Monogamy Law.
companies have also used or provoked violence in land demonstrations, often with police collusion.

In light of the NLD’s stated desire to increase foreign direct investment (FDI), provisions of the proposed Investment Law and bilateral treaties such as the draft EU Investor Protection Treaty that could make it impossible to enforce national laws against investors are of particular concern. These provisions give investors the right to sue the state for any actions that damage their interests through investor-state dispute settlement (ISDS) mechanisms at international tribunals. The would also deny citizens an equivalent right to challenge investors on non-compliance with the law, effectively placing investors beyond the reach of Myanmar law. The fact that these laws apply only to some investors also undermines the principle of equality before the law. The NLD will need to focus on strengthening the domestic legal system rather than allowing the use of ISDS if they want to fully implement the rule of law.

4. **Corruption**

Corruption has become endemic in Myanmar and in the legal system it is a huge obstacle to establishing the rule of law. As anyone who has had ever been on the wrong side of the law, or the victim of a criminal act will know, the legal system can seem like a casino, where good money chases bad until an end is reached. Corruption begins at the point of arrest, and continues throughout a case, with law officers, witnesses and judges all willing to take payment—in many cases demanding it—for their services. Most Burmese prefer to pay off the police and settle out of court rather than risk further payments during a lengthy trial. Corruption is so engrained that it will be hard to wipe out, and doing so will require a massive public information and exposure campaign as well as actions targeted to change the management of police investigations and court procedures.

**Recommendations for immediate action:**

1. **Appoint new members of the Supreme Court.**

   The Court currently has seven members, of whom five are former serving army officers. The Constitution allows for a maximum of eleven members. The President should appoint four experienced independent civilian lawyers as additional members.

2. **Conduct an inquiry to recommend solutions to end corruption.**

   Rather than focusing on punishing individuals or raising the salaries of law officers and court clerks, an open approach is needed that looks at all possible causes and remedies to end corruption. One option would be to establish a parliamentary commission of inquiry to thoroughly research the problem in collaboration with key stakeholders and make recommendations. The inquiry should seek to raise the status of lawyers and the justice system, rather than further denigrate it to the public, by considering areas where best practice is followed, which can be replicated through the system. Relevant examples include the juvenile justice system, where some progress has been made to improve the treatment and rehabilitation of young offenders, with assistance from the international community. Making the inquiry’s findings public and giving the public the means to report incidents of corruption will build confidence.

3. **Have the Attorney General’s Office instruct courts to follow existing codes to reduce the length of trials.**

   One of the drivers of corruption, and a serious impediment to justice, is the fact that judges habitually adjourn hearings for two weeks, forcing witnesses and their lawyers to attend court on a fortnightly basis and meaning cases take years to complete. This practice is allowed under the Criminal Procedure Code only in exceptional cases, but has become the rule.

4. **Prevent law officers and judges from duplicating charges.**

   The law is clear that where an offense has been committed that can include other offenses or where the same offense took place in several locations, the perpetrator should only be tried for one offense. This means that authorities cannot issue multiple charges for demonstrations that move through the jurisdiction of two township level courts, or against a farmer who ploughs land as part of a demonstration while also causing damage.

5. **End police use of torture or inhuman treatment to extract confessions.**

   Police frequently use beatings and other inhuman treatment to extract confessions in political and criminal cases, despite laws making involuntary confessions inadmissible.

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3 See Cheesman, https://www.academia.edu/2266441/
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4 CPC 344 allows for adjournments of up to 14 days if there is “reasonable cause” but the judge must sign an order to that effect.

5 Criminal Procedure Code ‘71. Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.’ Criminal Procedure Code ‘71. When it is uncertain in which of several local areas an offence was committed, or where...an offense continues to be committed in more local areas than one, or where it consists of several acts done in different local areas, it may be inquired into or tried by a court having jurisdiction over any of such local areas.” (emphasis added)
The reasons for this include laziness, lack of training in investigative skills and procedures (including forensic science labs), and pressure on the police to meet case completion rate quotas. Under Myanmar law, police use of torture is illegal, and defendants can only make confessions to the judge. Lawyers should be reminded of this, and object to the inclusion of confessions that may have been given after torture. While the police remain under the control of the military, the government should signal their desire to end the use of torture by ratifying the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Attorney General’s office could request that the Independent Lawyers Association of Myanmar (ILAM) collect data on forced confessions as a first step.

6. **Establish mechanisms for settling land disputes at state and regional levels, based on the new National Land Use Policy.** Conflict over land is one of the biggest challenges in Myanmar and the government must demonstrate its commitment to justice or it will face continued protest. Drafting a new comprehensive Land Law will, and should, take time; meanwhile farmers will continue to lose land. Farmers currently have no access to the courts to resolve land disputes. The previous government passed the new and comprehensive National Land Use Policy in January 2016 and it should be used as a basis for the settlement of disputes until any new laws are introduced. The government has the power to establish Land Commissions (to include co-opted lawyers) in the State and Regional Hluttaws that would be empowered to not only investigate claims but also decide on cases.

7. **Encourage and protect civil society.** Civil society will be the government’s best ally in trying to change mindsets. Citizens need to understand their rights and responsibilities, how the courts and police service should work and how to make complaints. The draft Right to Information Law tabled in the Hluttaw in February 2016 should be opened to public consultation, and once amended and agreed, civil society should be encouraged to assist with raising awareness about the law and how to make use of it.

Although the 2014 Associations Registration Law is one of the most liberal in the region, amendments introduced in July 2015, requiring organizations to seek Ministerial approval before they can register, was a step backwards. This needs to be reviewed and altered as necessary.

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6 Penal Code Section 33, Police Act section 34, para 1060; Evidence Act Section 26; Criminal Procedure Code Section 162 (1).

7 Existing land laws (2012) do not include provisions relating to judicial review of land use decisions made by the administrative departments so it would not be in contradiction of the law to grant Hluttaw Commissions this power.
မြန်မာ့အစိုးရမြို့ရိုးရွစ်ခြင်းမှာ တွင်းရောက်သော ထွေထောင်မှုများနှင့် ဗုဒ္ဓဗေဒအာဟာရအခြေခံ အချက်အလက်များကို လေ့လာခြင်းဖြစ်သည်။ စိုးမိုးမိုးေရးအတွက် လူမှုအရေးများကို ကိုးကွယ်ပေးပါသည်။

(၂) လူမှုအရေးများကို ကိုးကွယ်ပေးခြင်း

မြန်မာ့အစိုးရမြို့ရိုးရွစ်ခြင်းကို လေ့လာရာတွင် အခြေခံအချက်အလက်များကို လေ့လာခြင်းဖြစ်သည်။ စိုးမိုးမိုးေရးအတွက် လူမှုအရေးများကို ကိုးကွယ်ပေးပါသည်။

(၃) သေဘာတူညီချက်များပေးခြင်း

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2 ဘာရိုးနှင်း ကြည့်ရှုရာ မြန်မာ့အစိုးရမြို့ရိုးရွစ်ခြင်းမှာ တွင်းရောက်သော ထွေထောင်မှုများနှင့် ဗုဒ္ဓဗေဒအာဟာရအား လေ့လာခြင်းဖြစ်သည်။
ရဲအဳကမ္းဖက္မုအတၾက္ မည္သူႚကိုမ႖ တာဝန္ယူခိုင္းေစဴခင္းမရႀိပၝ။ အခဵိႂႚေသာ ဴမန္မာကုမၯဏီမဵားသည္ ေဴမယာဆႎၬဴပပၾဲမဵားတၾင္ အင္အားသံုးဴခင္းလႄာရႀားေနခင္းကုိ ခၾင့္ဴပႂရာေရာက္ပၝမည္။

လႄာရႀားေနဴခင္းကုိ ခၾင့္ဴပႂရာေရာက္ပၝမည္။

လူထုလုပ္ရႀားမႀားဴဖင့္စတင္ခဲ့ေသာ အမဵိႂးသားေရးစိတ္ဓာတ္ ဴပင္းဴပသည့္ ဗုဒၭဘာသာရဟန္းေတာ္မဵားမႀ ဥပေဒအထက္တၾင္ရႀိသကဲ့သိုႚ ဆက္လက္လက္ခံ၍ ထုိသိုႚလက္ခံသဴဖင့္ တရားဥပေဒစိုးမိုးမႀားကုိလည္း လက္ခံေဳကာင္း ခိုင္မာစၾာအခဵက္ဴပရာေရာက္ပၝမည္။

ထိုသိုႚမႀားပႂပၝက ဴပင္းထန္သည့္တရားရံုးဴပင္ပတၾင္ အမႀားလိုဳကပၝသည္။ အကဵင့္ပဵက္ လာဘ္စားမႀားမႀာအဴမစ္စၾဲေနလၾန္းသဴဖင့္ ေခဵမႀာန္းရန္ခက္ခဲမည္ဴဖစ္ဴပီး ေခဵမႀာန္းရန္အတၾက္ ဥပေဒစနစ္မႀာ ေကာင္းေရာင္းေကာင္းဝယ္ဴဖင့္ ရလာေသာေငၾဴဖင့္ ေငၾဆိုးေနာက္လိုက္ရင္းအဆံုးသတ္သၾားသည့္ ေလာင္းကစားကာစီႎိုႎႀင့္ယႎၨရားမဵားမႀတဆင့္ ရင္းႎႀီးဴမႂပ္ႎႀံသူမဵားသည္ ၄င္းတိုႚ၏အကဵိႂးစီးပၾားကုိထိခုိက္သည့္ ေဆာင္ရၾက္ခဵက္မဵားအတၾက္ ႎိုင္ငံေတာ္အေပၞ တရားစၾဲဆိုခၾင့္ဴမန္မာႎိုင္ငံတၾင္ အကဵင့္ပဵက္လာဘ္စားမႀားအတၾႚရေလ့ရႀိဴပီး ၄င္းမႀာဥပေဒစနစ္အတၾင္း တရားဥပေဒစိုးမိုးမႀား တည္ေဆာက္ရာတၾင္ ဳကီးမားေသာမည္သူမ႖ဥပေဒအထက္တၾင္မရႀိေစရန္ လူပုဂၢိႂလ္္မဵား၊ ကုမၯဏီမဵား၊ တပ္မေတာ္ႎႀင့္အဴခားအာဏာပိုင္မဵားအား တာဝန္ယူခိုင္းေစႎိုင္ရပၝမည္။

သီးဴခားရပ္တည္ေသာ အရပ္ဖက္ေရႀႚေနေလးဦးကုိလည္း ႎိုင္ငံေတာ္သမၳတမႀ ေနာက္ထပ္အဖၾဲႚဝင္မဵားအဴဖစ္ ခန္ႚအပ္ရပၝမည္။

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3 Cheesman ၂၀၁၆ https://www.academia.edu/2366441/Myanmars_courts_and_the_sounds_money_makes
စာလံုးမဵားကို ဖော်စေပါသည်။ ၎င်းအရပ္ေဒသမဵားတိုင်းဆက္လက္ကဵႃးလှန်းသား မပါတော့မဟုတ် ဴပစ္မီးမႀာအရပ္ေဒသအမဵားအဴပားတိုင်း ဴပႂလုပ္ခဲ့သည့္ ဴပႂလုပ္မီး အေဴမာက္အဴမားပြဝင္သောအခိုးများ မည်သည့္အရပ္ေဒသတိုင်း ဴပစ္မီးတစ္ရပ္ကုိ ကဵႃးလှန်းခဲ့ေကာင္း မေသခဵာသည့္အခိုးမဟုတ် မေပးမီးတစ္ရပ္ကုိ ဆက္လက္ကဵႃးလှန်းသော ဴပစ္မီးဖစ္သည့္ အခီးများစွာ တစ္ခုထက္ပိုေသာ ဴမိႂႚနယ္အဆင့္ တရားရံုးႎႀစ္ရံုး၏တရားစီရင္ပိုင္ခြင်းနယ္ေဴမအတိုင္း ဴဖတ္သန္းသားခဲ့သည့္ စံုစမ္းစစ္ေဆး၊ သိုႚမဟုတ္ စစ္ေဆးစီရင္ႎိုင္သည္။

၂) အရပ္ေဒသအမဵားအဴပားအနက္မှာ အရပ္ေဒသအမဵားအဴပားအတွင္းအတွင္း အခိုးအခိုးတိုင္း အလုပ္အလုပ္တစ္ရပ္ကုိ အားေပးဴပီး တရားစီရင္ေရးအတၾက္ ဳကီးေလးသည့္အတားအဆီးတစ္ရပ္ 

၃) သိုႚမဟုတ္ စစ္ေဆးစီရင္ႎိုင္သည္။

၄) မိမိဆႎၬအေလဵာက္ 7) အရပ္ဖက္လူမီးအဖၾဲႚအစည္းကုိ အားေပး၍ကာကၾယ္ရန္။ လူတို႔၏ေတၾးေခၞပံုမားေဴပာင္းလဲေရးတိုင်း အရပ္ဖက္လူမီးအဖၾဲႚအစည္းသည္ 

၅) အမိႂႚနယ္အသံုးဴပႂမီး မူဝၝဒသစ္အေပၞအေဴခခံ၍ ေဴမယာေကာ္မရႀင္မီးကို ဴဖရႀင္းေရးအတၾက္ ယႎၨရားမီးတည္ေထာင္ရန္။

၆) အရပ္ေဒသအမဵားအဴပားအနက္မှာ အရပ္ေဒသအမဵားအဴပားအတွင္းအတွင္း အခိုးအခိုးတိုင္း အလုပ္အလုပ္တစ္ရပ္ကုိ အားေပးဴပီး တရားစီရင္ေရးအတၾက္ ဳကီးေလးသည့္အတားအဆီးတစ္ရပ္ 

၇) သိုႚမဟုတ္ စစ္ေဆးစီရင္ႎိုင္သည္။
ဇာန္နက္တာ ဟဲဘက္သည္ ၁၉၈၈-၁၉၈၉ မႎၨေလးတၾင္ (မႎုႍေဗဒ) သုေတသနေကဵာင္းသူဴဖစ္စဥ္ ၁၉၈၀ ခုႎႀစ္မဵားကတည္းက ဴမန္မာႎိုင္ငံအေပၞ ေလ့လာေနသူဴဖစ္ပၝသည္။ ဇာန္နက္တာသည္ ဴမန္မာစကားက႗မ္းကဵင္ဴပီး ႎိုင္ငံတကာလၾတ္ေဴမာက္ေရး အဖၾဲႚအစည္း၊ UNHCHR နဲ HRW/Asia တိုႚအတၾက္ သုေတသီဴဖစ္ခဲ့ပၝသည္။ အဖၾဲႚအစည္းမဵားစၾာအတၾက္ တိုင္ပင္ခံပုဂၢိႂလ္အဴဖစ္ ေဆာင္ရၾက္ခဲ့ဴပီး၂၀၀၈ ခုႎႀစ္ကတည္းက Partners Asia တၾင္ အဆင့္ဴမင့္အဳကံေပးပုဂၢိႂလ္အဴဖစ္ ေဆာင္ရၾက္ေနပၝသည္။