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Conceptions of Justice and the Rule of Law

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After half a century of military rule, Burma's legal system exists as an exploitative institution designed to maintain order, police politics, and extract resources from those swept up in it.¹ As a result, it is a sphere that Burmese subjects take pains to avoid. This does not mean, however, that subjects do not make justice claims or seek redress, but rather that (1) these occur in "informal" spheres and (2) the modes for redress and conceptions of justice may not be coincident with Western liberal conceptions that are increasingly taken as universal.² Little scholarly work has been done on these respective domains.³ Thus, drawing on introductory fieldwork, this chapter attempts to sketch some of the contours of the Burmese justice universe and some of the methods by which lived conceptions of justice in Burma may become perceptible. Specifically, this means attending to the idioms through which claims are made, the political values that are transmitted, and the kinds of potentially justiciable claims that are elided. Much of this chapter must be speculative at this stage and is designed to advance a number of hypotheses, some of which may be rejected or advanced by others' future research. Speculations will focus on two spheres, the first more architectural (defining how the system looks) and the second more conceptual (discussing its concepts and their consequences). Specifically this includes:

- How do certain extra-legal social institutions prevent certain individuals from accessing formal justice?
- How do these institutions construct certain individuals as subjects without legitimate or actionable claims to justice—in other words, which subjects have the opportunity to have "rights" and which do not?
- How are moral economies constructed in which certain events—forced labor, for instance—are not seen as per se unjust?

In order to convey some of the realities of this universe and the values that animate it, I will convey findings from introductory fieldwork with lawyers and legal aid professionals working in Yangon. These professionals daily play an intermediary role—as they mediate between the global cosmopolitan regime of international legal norms on one hand, and their clients and the Burmese courts on the other. Given this, they stand as particularly capable of reflecting on and providing insight into the disjunctures in thought that exist between the two spheres. Such thoughts might be missed by others too deeply enmeshed in a particular life context.

This Burmese informal justice universe will be mapped with an eye to those Western liberal conceptions of justice indexed above, ones that are only relevant because an explosion of discourse surrounding the so-called rule of law (RoL) has emerged in discussions about Burma's potential political transition. For these RoL endorsers (including Aung San Suu Kyi and a cadre of international rights activists), RoL is being utilized both as a substitute for substantive politics and a way to avoid engaging the informal system. Indeed, "bringing the rule of law to Burma" seems to mean simply transplanting the Western liberal tradition: formal checks and balances through judicial review, institutions that ensure (ill-defined material articulations of) human rights, and so on.⁴ While transplanting formal mechanisms *prima facie* provides the opportunity to infuse those procedural institutions with values and politics that will speak to issues, such as resource allocation and conflicting normative values, that matter to normal people, the proponents do not seem to entertain this opportunity. Instead they seem to *de facto* endorse the *substantive* values that attend the Anglo-American rule of law ideology and that are tied up in the RoL procedural forms. Not only is this troubling given the way such a rule of law privileges, for instance, narrow property rights over collective values (the institution of which may entrench inequality), but it may also build a system that remains irrelevant for many Burmese.⁵ Indeed, a system that formalizes these foreign conceptions of procedural and substantive justice may not "pull in" individuals currently avoiding the formal system. Moreover, it may alienate those who see in it the hypocrisy or blindness of a formal success but a material failure—an inability or unwillingness to deliver on the promise of justice.⁶

This chapter will conclude by reflecting on the collective desire for the rule of law,⁷ and will present it as both a demand for an end to impunity (and hence an index for a more complete—but as yet unrealized—public discussion of political justice), but also as an impulse to safety during a time of deep social uncertainty.

Burma's Informal Justice System

Toward Research on Lived Conceptions of Justice in Burma

For most of the military period, Burma's legal system remained largely opaque—to external observers and those caught within it alike—given the insularity of the regime and the legal system's arbitrariness. That said, a number of Burma scholars have been chipping away at that opacity, using court texts and interviews with lawyers to map the physics of the system. This work fills in a sizeable blind spot in Burma studies, illustrating what “law” actually looked and felt like under the military regime's despotic political rule. Among many critical points, one of the most essential is that this work allows us to see that there was a legal system at all, one that heard cases, dispensed judicial decisions, allocated punishments, accepted appeals, and so on. To a certain extent, it is hard to imagine otherwise—the mechanistic nature of bureaucracy, however attenuated by extrasystemic political demands, meant that policemen continued to arrest, judges continued to adjudicate, lawyers continued to defend the accused. And yet, the general avoidance of the legal realm by mainstream discourse and most scholarship may have sent the symbolic message that there was nothing here worth exploring: only despotism and abuse obtained.⁸

While the arbitrary exercise of unrestrained power certainly predominated in Burma's legal system, recent research illustrates the particular ways the respective functions (police, defense/prosecution, adjudication) have become distorted from the ideal-typical image of how a system of “law and order” is supposed to work—wherein laws describe rules to be followed and punishments for their violation—in general or in Burma. These works show how politically generated conviction quotas imposed from above compelled judges and lawyers to conspire to search for and create criminals, how many forms of politics (speech, assembly) themselves were criminalized, and how elites used the courts for petty vendettas. Various documents explored by these scholars (cases, interviews, internal legal commentaries authored by apex courts) present not only the rationalizations and justifications for decisions, but provide insight into the undergirding logics that animated both them and the political regime behind them. For instance, Myint Zan shows how the bar has been continually deprofessionalized as the importance of actual legal knowledge was obviated within the context of an increasingly politicized system.⁹ Andrew Selth's research on Burma's police force outlines the connection of that institution with the military, and hence its central role as a frontline coercive apparatus.¹⁰ Nick Cheesman's thorough research, achieved through the translation and analysis of hundreds of court logs, demonstrates how market and political logics have conflated within the formal legal system to create a danger-

ous zone that average Burmese attempt to avoid.¹¹ To wit, Cheesman's path-breaking work shows how the executive branch has imposed political imperatives on the legal system, dictating that courts maintain the *perception* of order. This has created incentives for judges and lawyers to conspire against defendants, both by punishing political activists with extreme prejudice and by generally keeping conviction rates high to signal a commitment to "law and order." However, because these imperatives are political, and so in nonpolitically adversarial cases only the aggregate percentage of convictions have really mattered, actors are able to insinuate market logics into the system, making conviction and sentencing functions of the availability of extractable resources (through bribes and favors).

Taking these accounts as a whole, Burmese formal justice looks increasingly nightmarish. But the question then becomes the following: What is at stake in all this? Isn't this merely part of the old system that is being swept away by political transition? Perhaps not. First, as protesters continually arrested can attest, it is unclear that things have qualitatively changed.¹² More importantly for this chapter, even if the legal system were to be fully "reformed" (in line, let us say, with international standards of political liberalism), the vestiges and legacies of this system may be long-lasting. I say *may* be long-lasting because there is simply little known about the effects of this legal system (and the broader political system out of which it emerged) on the polity's collective (if diffuse) conceptions of justice.

Two sets of questions emerge from this line of inquiry. Logistically, if the law was something to avoid, how present was it in the daily lives of Burmese during the military period? Given the generally blunt and even obtuse nature of control under the military state, was the law avoidable?¹³ Rather than a predator descending on subjects to police every move, was it more of a metaphorical Venus fly trap, a reactive and receptive institution that subjects could fly around if they could deploy effective strategies to that end?¹⁴ Determining the strategies for circumventing the courts encourages seeing the "formal" and "informal" legal domains as both consubstantial but also distinct; tracing the "politics of passage" that leads to someone ending up in the courts can tell us a great deal about the way justice, conflict resolution, and moral economies function on the ground.

This is an argument for understanding "access to justice" in a more nuanced way, in which actually accessing justice can mean avoiding *injustice*, by way of avoiding the courts. Barriers to the formal justice sphere hence can be recoded as protections against it; actors can have access to barriers that allow them to be rerouted away from police and courts. The question is whether outside of the courts they are able to access material justice.

Such an inquiry can also inform existing and forthcoming external interventions. The current assumption in the outpouring of funding and

focus for rule of law projects and programs is that the RoL will simply and smoothly “fix” the sclerotic and rapacious legal sector, pulling in justice consumers, hence rationalizing Burma’s legal system.¹⁵ But this assumes an image of Burma’s current “universe of justiciable events”—interactions in which one or more parties may have a reason to seek some sort of redress facilitated at least in part by a third party—that is generally coincident with the cases that are heard in Burma’s respective courts (the formal universe). To the extent that there is a gap between the formal and informal domains, these reform projects believe it exists because citizens are not demanding justice from formal mechanisms that are in place. Further, they believe that people are not making such demands because they do not find courts efficient, just, accessible, legible, and so on, but rather exploitative, capricious, usurious, and to be avoided.

Such assumptions may obscure the size and composition of this entire universe of justiciable events. Reform projects seem to often underappreciate the fact that if the formal system is transformed into something that people might objectively want to utilize, other distortions still can exist to prevent people from attaining something that they might call justice, or at the very least, improved life outcomes and opportunities. In other words, the cases heard by Burmese courts may continue to only occupy a minute and sociologically relatively insignificant percentage of the entire universe of justiciable events.

Building on this is the second line of inquiry, the conceptual one. If courts were or are avoidable, what concepts of positive justice were fashioned and implemented in the informal sphere during the military period? Were the logics of the courts merely duplicated in the informal settings?¹⁶ Or were alternative forms of justice articulated and performed in opposition to, or independent of, the “unjust justice” of the formal sector? The following subsections will present early research (conducted by the author and other legal aid nongovernmental organizations [NGOs] working in Burma) that helps map these issues in turn.¹⁷

“Access to Justice” Barriers

One of the most striking findings encountered while talking with defense lawyers at two different legal aid NGOs during 2013 fieldwork was how rarely the lawyers won cases for their clients. I had expected a low percentage, but the actual reported numbers were shocking: some defense lawyers had never won cases; others had only a handful of acquittals. Said one lawyer, “Our only hope in representing the cases is to reduce the sentence because we know the [client] will always be convicted.” Another lawyer, laughing ruefully, described herself as a broker and a purveyor of “bribery advice.” Continuing, she described the different tactics involved and issues that must be considered:

The point of the lawyer is to serve as a broker between the defendant and the judge. The defendant doesn't know who to go to. If the party is the state it is very easy to give bribes to the judge and the prosecutor. But for example in a rape case where there is a victim, it is difficult for the defendant to pay . . . [as] the victims will not negotiate. . . . If the defendant has a large criminal record the judge will not dare to take a bribe to reduce. Political cases are off limits. Sometimes if there is publicity in the media, they cannot acquit.¹⁸

Rather than knowing anything about the substantive law—they told me that such details were largely irrelevant—the lawyers become masters in everything *around* it, advising on a host of tactics. To their clients, they suggest which character witnesses are the most sympathetic to a judge, and coach the accused on how to make their final appeals. Defense lawyers talk directly with the prosecutor and make pleas for leniency. Because they know the levers of power and because they can access key figures, they often deliver the bribes to the various parties involved. In situations in which the reduction of a sentence appears impossible (because perhaps the complainant appears richer than the defendant), lawyers will often suggest that defendants keep what money they have so they can later bribe prison guards for better treatment.

Setting aside for now the potential lines of inquiry into how this behavior influences clients' conceptions of real, accessible justice, a number of immediate logistical questions are suggested by the operations in the courts. For instance, while market logics within the legal process become apparent, this is certainly not a pure market where justice simply goes to the highest bidder. Rather, cases almost always end in conviction. Even if the accused effectively negotiates a release, they are often convicted and sentenced to time served, something that Cheesman documents extensively and reports as termed "sentence-release" by Burmese lawyers.¹⁹ Mass conviction can be partially explained by the combination of political-economic incentives and political pressures shaping a judge's decisionmaking opportunities, but there seemed something beyond these variables. Indeed, the lawyers described how judges "always assume defendants are guilty." I became interested in what shaped that perception. Further questioning about how a person made it into the court—what processes she has to navigate to avoid it—made me speculate on the judge's propensity to convict. In looking closely at how a conflict becomes a case, it appears that much work is done to siphon off the innocent, or rather the unconvictable, as defendants flow into courts. Indeed, there appear to be quasi-formal gatekeepers that act as sieves, preventing or facilitating access to courts. Whether the judge realizes it or not, it appears that significant "legal" work has been conducted prior to adjudication. By the time the body reaches the court, the accused has already been deemed eminently condemnable.

What does this politics of passage look like? A useful place to start is with the figure of the ward administrator, long an implicit part of the state apparatus and recently made an elected position, with regulations enumerated by the 2012 Ward Administrators Act. The ward administrator (WA) occupies a quasi-formal legal position in Burma, being generally tasked to oversee informal governance systems (in the figures of the 100-household head and the 10-household head) at the village and village tract levels, respectively. An informal survey conducted by a Yangon-based legal aid organization has determined that the WA was regularly reported as the most important government figure in the lives of those surveyed.²⁰ This importance varies with location (in urban areas WAs appear to be less important), but it warrants mentioning that the WA's importance appears to cut both ways. Because the WA *purchases* his position (despite the formal election, legal aid professionals relay that the winner is the one who pays approximately US\$2,000 to the township administrator for the opportunity to rule), the WA exists to extract bribes and charge for services so as to make a return on his investment. In this regard, the WA stands as a liminal figure—occasionally an extracting force, occasionally a potential (if inadequate) resource for avoiding the clutches of the courts and police.²¹

As the position pertains to formal justice, the WA brings this liminality to bear by preventing interactions between citizens and formal juridical and police institutions.²² In so doing, the WA is a quasi-legal figure acting both with and against the formal law—“against” in the sense that the WA prevents the abuse that the law does to the accused, and “with” the law in the sense that his role stabilizes the whole system.

In this role, it is noteworthy that respondents reported that WAs “never use the law to solve the problem. They solve the problem socially, and they make some settlement. If one of the parties is not satisfied, then you have to go through the courts.”²³ According to others, WAs themselves highlight the fact that they know little of the law itself. Rather, they see their task as that of solving conflict and reducing collective social embarrassment. The Burmese expression “Don’t make one shame into two shames” (*tiq sheq ga nay niq sheq ma pyit say neh*) encapsulates this ethic and was mentioned by the legal aid project workers as a sentiment they found in these interactions.

All this said, there are significant limits to the scale and scope of the potential interventions of WAs. According to lawyers and legal aid professionals, the ability of the WA to prevent an incident from becoming a case depends on the type of infraction. A paralegal at a different legal-aid group illustrated this point as follows: “For a drug case you have no chance. The WA and the police pass the [arrested] IDU through to the courts. But if a CSW [commercial sex worker] is arrested, they will first be sent to the [WA], and at that point [our] paralegal can intervene to help prevent it from going into the courts.”²⁴

This limitation on the WA suggests that only certain kinds of “criminals” make it through to the courts: those who commit a certain kind of offense or those who are too poor (or without immediately mobilizable networks necessary) to pay the appropriate bribe. It also suggests that there is a significant world of conflict resolution and avoidance that is occurring through and below the WA. Research can further explore the idioms or concepts used in this domain, perhaps using this as the base, both in terms of values and institutions, for legal reform. The following subsections elaborate on some methods for teasing out those values and how they relate to those who might have reason to claim redress.

Conceptions of Legitimate Claimants to Justice and Different Conceptions of Justice Itself

“Where do people go when there is a dispute?” is a common question posed by legal reform projects seeking to understand how people seek justice.²⁵ However, it also works to limit the universe of justiciable claims to that of situations in which there is a dispute. Yet often in a situation that might be deemed justiciable—where one party (an individual or system) may be seen as exploiting another—the exploited party does not muster opposition or a claim to redress. The “violated actor” (in quotes because the conception of victim is itself what is at stake) may perceive such treatment as unjust or undesirable, but may assess that there are no manifest channels for raising the issue to the level of dispute. Or channels may exist, but the actor for whatever reason disqualifies himself as capable of standing as a legitimate disputant. Finally, it is possible the abused may not believe that an injustice has occurred—that the moral system of the particular community deems these interactions as acceptable rather than as violations.

One of the most relevant idioms here is that of *rights*, and the way that many Burmese experience power has meant that rights are, as a political concept, always contingent and contested rather than durable and guaranteed.²⁶ This is in contrast to the Western liberal concept that holds that rights mediate the contractual relationship between citizen and state such that when subjects “choose” to relinquish “some” liberty in exchange for security, the state cannot wholly violate that liberty.²⁷ Many Burmese subjects do not have such a conception of a transcendent right, a right that could exist outside of the context of realizing it. Rather, early fieldwork suggests that in Burma the respective Western concepts of *rights* and *opportunities* blur together, and tend to index an appeal to power rather than a demand for a restoration of what one already “has.”

What would it mean for *right* to be inseparable from *opportunity*? It might say something about the realities of power and the modes for “legitimizing” (if that can even be thought of as the correct word) that power. While there is not space here to explore the *longue durée* of power in

Burma, scholars have long described precolonial Burmese kings as presenting their power as “self-justifying.”²⁸ Burmese legal scholar Myint Zan sketches the history of how power articulated itself in Burma’s legal system, showing how Burmese kings traditionally governed subjects based on divine authority, creating a system of natural law borrowing from Buddhist cosmology and traditional authority rather than on the rights of the governed.²⁹ Such a system appears similar to forms of power tracked by Benedict Anderson and Clifford Geertz in Java and Bali, respectively, wherein power was substantiated in its performance, and hence legitimated itself through its very existence.³⁰

Where Myint Zan, Geertz, and Anderson look at this power apparatus from the inside, James Scott looks at it from the outside, reading court documents not as texts that describe reality, but rather as descriptions of what kings *would have liked* to have been true.³¹ Buttressing this revisionist view, Burmese jurist E Maung points to a number of historical cases in which kings themselves deferred to rules that existed outside of their own desires, caprices, and whims. Many of these rules were inscribed in *dhammathat*, something that Burmese legal scholar Andrew Huxley describes as falling somewhere between law report and legislation,³² and which he endorses as evidence that the king was not wholly sovereign but constrained by law. Huxley highlights how “a dhammasat [sic³³] written just after King Badon (1781–1819) came to the throne ... was written specifically to instruct the new king in the rights and duties of kingship.”³⁴ However, just as a king’s chronicles overstate the power of the king, dhammathats can equally understate it. Moreover, just because kings delegated *some* of their tasks does not mean that their sovereignty was in any way constrained; abdication could have been done for convenience, a version of control that has long characterized feudal regimes.³⁵ As Maung Maung Gyi argues, “From the historical accounts it will be seen that precept and practices never do tally and it would be folly to interpret the behavior of the king from the ten moral precepts that he was bound morally to follow.”³⁶ Of course, Maung Maung Gyi substantiates his claims by invoking suspect sources: the historical record, written after all by elites; he notes that a Burmese word for history (*yazawin*) means “chronicle of kings.” But the ultimate point is that power presented itself as limitless and without need of sanction by logics external to it, a fact that became sociologically real. For instance, Matthew Walton, scholar of politics and Buddhism in Burma, points out how fear of the king, and the figure’s metonymic association with uncontrollable blights such as disease, flood, and fire, is reperformed every day in Burma: “The Lawkaniti, a Burmese collection of folk wisdom lists kings as one of the ‘five enemies,’ along with water, fire, thieves and disease. Many Burmese Buddhists still pray for protection from these ‘enemies’ as part of their daily practice.”³⁷

In this context, it is not surprising to see to the legal domain drained of autonomous power. In a different article, Myint Zan highlights a brief moment during the constitutional period (1947–1962) where judicial independence³⁸ may have internalized in elites the idea of “rights,” but this conceptualization did not diffuse into general society.³⁹ Since the military government’s installation in 1962 through the present day when some reforms may be occurring, Myint Zan shows how substantive legal ideas have been effectively removed from legal education. This produces lawyers with little sense of “the law” as a domain of professional or expert knowledge, let alone as a sphere of rule-making power that exists autonomously (i.e., separated from the state’s ability to arrogate the ability to act in the exception).⁴⁰ Across this history, the common denominator is the absence of “rights.”

This does not mean laws did not exist in Burma. Laws were simply instantiated and effected by fields of governance (from dynastic kings to various iterations of military regimes) in ways that crafted a normative political relationship between governor and governed that deviated from that of the Western liberal tradition’s normative imaginary about itself. The law delineated actions that were forbidden without creating any reciprocal “rights” allowing subjects to make claims against the state.⁴¹ David Steinberg has argued that “law is not a protection of rights but rather an arbitrary set of regulations promulgated to support the state establishment and to prevent dissidence.”⁴² Even when the state’s law articulated privileges or opportunities that citizens may have enjoyed, these were not absolutes designated by any compact (either *de jure* or *de facto*), and hence could be violated at any time. Everyone was aware of this and as a result a “right” literally only existed as an opportunity, with all the contingency that that latter word implies. The “contract” written between the governed and the state was always contextual and contested. It was subject to one’s ability to marshal other resources (symbolic, material, social), subject to luck or contingency, and subject to the conflation of variables (state agent whim or risk profile, the extant political conditions in the country, etc.) that may remain opaque to those on both sides of the interaction. What mediates the relationship is not “rights,” argues Burmese scholar Ko Ko Thett, “it is Burmese cultural institutions (a set of norms and practices) that ease the encounters.”⁴³ When decisions were made, because they did not require explanation or justification, any information flowing through the feedback loop was blurred, made translucent rather than transparent. As a Burmese informant puts it, “We have to go back and see [that] the basic word [for right is] *khwint*, which is ideally subject to permission/approval/consent of the other parties or circumstances.”⁴⁴

Observe how this plays out in daily sociopolitical practice. For instance, a member of one of the wealthiest real estate and business families in Burma told a group of visitors learning about Burma’s political economy

that there are rights and that: "The rule of law is actually fine."⁴⁵ He went on to argue that "there has never been a legal judgment against us that is unjust." These actors capitalize on their position of social privilege while thinking that such leveraging is a simple exercising of rights, a fact that comes through when contrasted with experiences of those *without* billions of kyat at their disposal. For instance, an NGO worker holding a workshop on rights related to me a story about such relative power relations. When she asked the participating non-upper class Burmese whether they, hypothetically, would still own their house if their vindictive in-laws kicked them out of it, most responded that they would still have a "right" to it. However, when asked about the status of ownership if the government kicked them out, the answer was quite different. In this case many did not use *akwint-a-yeh* (the common word for "right") to describe their claims. It of course did not cease to be immoral or unjust that they were expropriated, and Burmese are in the process of employing a number of creative protest and negotiation strategies to regain land and property currently being lost to the military and its cronies.⁴⁶ It just ceased to be a right.

And yet, negotiation strategies such as these can be mischaracterized as rights claims by external observers, something that may signify the difference in political ontology between liberal political logics and the different understanding deployed by many Burmese. For instance, researcher Jill Davison has outlined many of these negotiations, but labeled them "rights" claims, perhaps because there is a reflexive tendency on the part of Western political analysts to assume any protest is a "rights" claim.⁴⁷ Indeed, when Davison writes that "villagers attempt to prevent displacement or secure some form of tangible redress through informal rights-claiming strategies like negotiation, non-compliance, complaint and open protest," what is obvious is the incongruence between tactics and her description of them. None of those tactics is actually a *rights* claim, which we could rather imagine as the ability to say "no" to land confiscation or at the very least a "right" to (1) get specific compensation, (2) appeal for independent arbitration, or (3) enact some mechanism that seems to transcend, or exist independently of, the specific interaction.⁴⁸ Nick Cheesman makes a similar move in his thesis. When he records speech that challenges the regime, he paints the claims in rights terminology, even though there are no explicit mentions of rights, and very little can be found of implicit rights either. Indeed, the norms that actors assert are of course potentially multiplicitous.⁴⁹ When scholars only recognize "rights" claims as existing in that contesting space, they foreclose on other meanings. It is certainly possible to think of a host of types of claims that can be marshaled in that adversarial position and that do not require or rely on rights. For example, the responsibility of the state and the good conduct of divine kings are conceptions of justice that can be mobilized without rights.

Ultimately, those under or fleeing the state for decades have a different experience with power, and hence different understandings of words that describe it. The subaltern cannot afford to think of these two words—rights and opportunities—as being always different. Many Burmese people make claims and aspirations—as all people often will—but they may have no illusions about any grounding in a transcendent regime that somehow exists despite the fact that it manifestly does not deliver what it claims to guarantee.⁵⁰

Conversations with lawyers help illustrate the way this concept functions. For instance, lawyers rarely used rights language when appealing for their clients. This in itself does not necessarily signify anything; the lawyers could simply be deemphasizing something they believe in (rights) in favor of idioms they believe would work on police or judges. For instance, lawyers described the need to appeal to the pity of the leader, or to make subtle, but never direct, references to how a good leader has a certain responsibility to uphold *vis-à-vis* subjects. These lawyers also reference how the goals of the government (“to a more peaceful and developed nation”) can be achieved by treating people in certain better ways.

Rather, it is the particular *way* that rights were discussed that signifies a different meaning in the concept. The intermediary status mentioned earlier is again relevant here. On one hand, lawyers were able to report how their clients did not only not know their rights—in other words knowledge of the law—but did not have a concept of rights themselves. On the other hand, lawyers themselves seemed to engage the perilous nature of rights in the Burmese context. One lawyer, when describing how she works for the rights of her clients, mentioned that without her organization’s intervention, those rights would simply not exist. It is here we see quite clearly the radical immanence and contingency of the rights concept in some Burmese political contexts: rights did not exist until they did, and if resources were withdrawn to buttress them, they would disappear again.

It is in this context that an ethnographic anecdote is worth relaying. An international lawyer was brought to Yangon to give a training on a key legal concept to a number of lawyers and legal aid professionals. The trainer ultimately argued that Burma should sign a certain international legal statute, as it would provide the lawyers leverage and legitimacy in their arguments against particular state practices inconsistent with this statute. After some murmuring from the audience, a Burmese lawyer raised his hand and ventured that the signing of international laws is not really the issue, for Burma has lots of laws that are sufficient, they are just not respected. The trainer maintained that signing the law would give an extra impetus for the government to respect it. The training moved on to the next topic.

The point here is not that the trainer was completely incapable of understanding the Burmese context. Further, the point is also not that the

Burmese lawyers completely rejected the specific advice, and certainly not the entire training. Many of them actually expressed how they found the trainings invaluable and, while many did not precisely explain why, it seemed that knowledge of standards forged by “the international” were seen as an essential touchstone for putting the Burmese context into critical relief and for contemplating the proper role of law. What does come through from this interaction between trainer and Burmese lawyers is that the former seemed to assume that *knowing* the law and thinking that a right flows from the law are coincident, but the lawyers reflected the Burmese political reality that seems to perceive a gap between them and cannot take advantage of that gap.⁵¹ In other words, the law making a declaration and the concept of being an actor who can access the opportunity that the law guarantees in that declaration are not the same. One must qualify, or must get lucky, perhaps, in order to be protected rather than assaulted by the law.

Exploring Who Has the Opportunity to Have Rights, and Why

The task then becomes to identify who qualifies, who gets lucky? Classic critical legal work from respective Marxist political economy, critical race, and feminist perspectives have identified respective class, racial, religious, and gender variables as predicting differentially degraded access to justice outcomes.⁵² While all these likely hold in Myanmar, and need to be explored, inadequate access to justice may not be a simple one-to-one function of those (or other) relevant positions. Different conceptions of justice as well as diverging conceptions of the role of various actors (courts, administrators, local leaders, etc.) in facilitating that justice are all relevant here. Access may be denied for other reasons. First, current understandings of justice may disqualify certain populations as legitimate justice claimants. Second, systems may not perceive as “justiciable events” certain interactions that other legal systems might see as such as a matter of course.⁵³

Taking the issue of claimants first, beginning with “dispute” (as outlined previously in the question “Where do people go when there is a dispute?”) may effectively restrict the universe to those with equal standing to actually dispute one another. A methodological way around this would be to develop a set of questions about hypothetical wrongs: your in-laws steal your land, versus your neighbors steal your land, versus the state steals your land, and see how different groups of people respond to it. Do they see each as wrong? Do they see each as justiciable? If so, where would they go for some sort of rectification?

Moreover, examining the lawyers’ cases allows us to perceive not only how courts function but what kind of claims are considered legitimate or worthy of the justice system or the state itself. The interviews identified property (loans, land), family law, public order (gambling, drunkenness),

and assault as legitimate claims. In such cases, citizens are conflicting with other citizens. But in the universe of issues that bother people, all of these seem relatively mild. Health, education, the struggle to survive are all absent from these discussions, which suggests that either (1) people do not see these issues as pertaining to the law or (2) they do not see the discussion of law as bringing in issues of the state, but only see it as pertaining to interpersonal issues. Early research has only begun to touch on these issues. One respondent replied, "If the state steals your land, then you cannot rely on the court. You will only become the defendant."

Finally there is the question of what mechanisms have created moral economies that prevent certain events from entering the justiciable universe? For instance, forced labor may be perceived by both those insisting upon it and those participating in it as a necessary and mutually beneficial method for mobilizing collective resources (labor) to attain collective goods (roads, for instance) or even individual/collective karmic benefits.⁵⁴ From these methods, laborers ultimately benefit. Within this structure, actors still assert moral claims, for instance, opposing the fact that some participants may be disqualified from forced labor (monks) while others (Christian pastors) are not.⁵⁵

As one interviewee put it, "Not everything should go to court . . . [people] should resolve many matters socially, not legally, so that their time and money is spared."⁵⁶ This suggests that courts are costly, an access-to-justice barrier as outlined previously. However, it also suggests a different perspective on law and conflict resolution—that some sort of "social" redress (and it remains to be seen what this word *social* signifies or how it works) can lead to better outcomes. Research can ascertain whether these social mechanisms are providing justice that is satisfactory to the least empowered of the community members and work to improve those systems where they are lacking.

Ways Forward

This does not mean that certain Burmese are doomed to always believe that forced labor is acceptable, if not desirable, policy, or that rights as such do not exist (although, in the case of rights, the Burmese might be better off with their current ontology). Instead, the early point is that if the formal legal system is reformed but does not connect with these diverging conceptualizations to both substantive and procedural conceptions of justice, which are currently extant, then even people who might otherwise benefit from the formal domain, and who are not otherwise prevented from it, may not seek it out. More importantly, if institutions are declared "reformed" and yet do not address the structural impediments that prevent average Burmese actors from achieving what they consider to be justice, they may view these reforms as hypocrisy or callous dismissal of their realities. The

way the Letpadaung protesters in Sagaing Region resoundingly rejected an empty rule of law, even when it came from the long-revered Aung San Suu Kyi,⁵⁷ demonstrates that Burmese may not be fooled by the new common sense. Against such an RoL divorced from daily political struggle, they may be even more receptive to movements expressing alternative forms of redress. It is certainly reasonable to surmise that the current flourishing of exclusionary and violent sectarian political movements in Burma could be buttressed by tepid elitist reform.⁵⁸

These outcomes certainly are not inevitable. Rather than focusing all resources on the formal sector—as law reform projects tend to pursue their own versions of justice—law reform projects may deem what justice mechanisms people are using instead of the formal system. These projects can then work to improve those actually functioning systems to bridge the formal with the informal.⁵⁹ The next section will turn to the ideology of rule of law—and the constellation of institutions that its proponents create to effect it—that may prevent such a proportionate consideration of the informal sector of Burmese law.

Rule of Law Police

Burma's legal and political spheres have long been sites of arbitrary intervention.⁶⁰ Burmese yearn for a system that attempts to adjudicate conflicts fairly, and the phrase “rule of law” has become a signifier for invoking that desire. In fact, a deeper historical study could likely profitably trace how “rule of law” has been used across the decades to index a long-standing anxiety about arbitrary exercise of power in Burma.⁶¹

But invoking the rule of law and creating a system that responds to the particular needs of Burmese citizens are not necessarily the same project. Moreover, it is possible that the first could militate against the second. It is here that the RoL must be deconstructed, so that we can explore what effects it has when deployed as such, and whether, as designed now, RoL interventions can take the informal sector seriously.

What Is the Rule of Law?

When Aung San Suu Kyi came to Yale University in late 2013 to speak and ask the university to assist in Burma's transition period, she spoke the phrase “rule of law” over thirty times. She presented the concept as already-decided: every time rule of law was mentioned it was prefixed with the definite article *the*. Hence, rather than saying, for instance, that “we need to develop *a* Burmese rule of law,” Aung San Suu Kyi invoked rule of law as a universal standard that exists not “in the West” as it were, but rather simply “out there” for every political-legal tradition to draw upon: “we need the rule of law,” she said again and again. Perhaps because she assumed the

issue already decided, Aung San Suu Kyi never paused to clarify what particular values animate the rule of law; while she added once that laws had to be “just,” she did not define the substance of that justice, implicitly asserting that all Burmese (or even all humans) share, or should share, a common understanding of the values that should regulate conflict between people and groups. Such lack of clarity regarding such details has attended all of her discussions of RoL that I have surveyed, something that is not unique to Aung San Suu Kyi. As legal theorist Brian Tamanaha puts it, “The rule of law . . . stands in the peculiar state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means.”⁶²

What, then, is the rule of law? Is it an outcome, or a process? Is it a universal standard of conduct or is it highly specific to given political formations? How to even define it? A central debate over its meaning has been waged between what could be respectively called proceduralists and substantivists.⁶³ The former distill the rule of law into a framework of basic procedural conditions in which the law is sovereign, is knowable by subjects, and treats those subject to it equally. In such a conception, the RoL provides a platform for many different substantive legal regimes—from the republican to the authoritarian. The substantivists for their part reject such a “thin” conception, insisting on an additional substantive dimension running through and animating the procedural infrastructure of the law: the justness invoked by Aung San Suu Kyi. Tamanaha argues that while theorists find the latter version more vexed and often agree only on the former, this is not the case for its understanding in policy circles and in general common sense understanding: “While formal legality is the dominant understanding of the rule of law among legal theorists, this thick substantive rule of law, which includes formal legality, individual rights, and democracy, likely approximates the common sense of the rule of law within Western societies (assuming a common understanding exists).”⁶⁴ Because I am interested in the effective version of RoL being deployed in Burma, I will use this latter version (as it tends to be the dominant one exported abroad, as will be seen later in this chapter).

But are the distinctions between thick and thin meaningful? Political philosopher Jürgen Habermas argues that they are—that law can be assessed as “neutral” in procedural ways in societies that can nonetheless never agree on values: “The neutrality of the law vis-a-vis internal ethical differentiations stems from the fact that in complex societies the citizenry as a whole can no longer be held together by a substantive consensus on values but only by a consensus on the procedures for the legitimate enactment of laws and the legitimate exercise of power.”⁶⁵ But by this Habermas denies the fact that conceptions of “justice” are immanent to the processes themselves. Let us explore “equality before the law,” a fundamental “rule of

law” tenet. While it appears straightforward, the idea is open for significant interpretation, interpretation so broad as to allow the tenet to attach to radically different political systems. For instance, the US legal system in practice implicitly asserts that governing a legal services by market logic—wherein poor US citizens are afforded only overburdened public defenders while the wealthy can utilize their resources to purchase expertise of many kinds—does not violate equality before the law.⁶⁶ The system draws upon an ideological commitment to a strain of political libertarianism that privileges “liberty” (the freedom to purchase unequal access to justice) over “equality” (wherein an adversarial system is only fair if there is a level playing field for the adversaries to contest each other).⁶⁷ Alternative systems, on the other hand, present such differential access as inimical to justice, and hence restrict such marketization.⁶⁸ The outcomes of the US system have led analysts to argue that such discrepancies are responsible for those 98 percent of legal cases ending in a plea bargain, as under-resourced defendants, fearing the outcome of a trial in which they face a better-resourced state, avoid the stacked game.⁶⁹ These analysts question the equality both in terms of procedures and outcomes of such a system. By treating all of its citizens equally under a grossly unequal system, this rule of law reinforces brutal inequality.⁷⁰

The point is that procedures are inevitably informed by the society’s visions of justice or normative conceptions of the good—or, rather, what outcomes are rendered acceptable and normal. When the jurisprudential processes themselves convey those conceptions, any distinction between “thick” and “thin” RoL becomes blurry to the point of collapse.

Hence, even if RoL activists formally establish checks and balances, officially codify “human rights,” provide mechanisms for judicial review in Burma, and somehow animate these concepts so that they affect sociological reality there, these institutions still have to be invested with specific political meanings. Without such political intervention, the RoL can merely serve the existing vested interests. As British colonial officer John Furnivall said in 1948 about the colonial-era regime, “The rule of law becomes, in effect, the rule of economic law.”⁷¹ Furnivall went on to argue that the rule of law “naturally expedites the disintegration of the customary social structure.”⁷² Legal scholar David Kennedy reminds us that this is still true today, stating that

the idea that building “the rule of law” might itself be a development strategy encourages the hope that choosing law in general could substitute for all the perplexing political and economic choices that have been at the center of development policy for half a century. The politics of allocation is submerged. Although a legal regime offers an arena to contest those choices, it cannot substitute for them.⁷³

The International Rule of Law Machine

Yet, warnings about the potentially silencing or obfuscating content of the RoL remain, as is said, somewhat academic. The global RoL advocate Thomas Carothers elides them entirely, asserting that the RoL indexes a system that ensures access to universal human rights values: "The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century."⁷⁴ This universality has allowed the RoL to achieve a postideological status:

For . . . political, economic, and social [reasons] Western policy makers and commentators have seized on the rule-of-law as an elixir for countries in transition. It promises to remove all the chief obstacles on the path to democracy and market economics. Its universal quality adds to its appeal. Despite the close ties of the rule of law to democracy and capitalism, it stands apart as a nonideological, even technical, solution. In many countries, people still argue over the appropriateness of various models of democracy or capitalism. But hardly anyone these days will admit to being against the idea of law.⁷⁵

Carothers is part of a second generation movement in RoL that now sees the importance of embedding political liberal values along with the formal reforms. RoL promoter Rachel Kleinfeld enumerates the distinction:

So, for instance, a first-generation contractor might work with local educators to develop a curriculum for a magistrates' school to make it look like a Western judicial curriculum. A second-generation contractor would work to create a curriculum that is focused on helping judges see their role as an independent check on the power of parliament and the president or prime minister, giving them the skills to be both trained judges and upholders of a more balanced power structure.⁷⁶

Any meaningful distinction between the two generations is difficult to ascertain; if there is any difference it seems to be merely tactical: whereas the initial strategy was communicated in dogmatic and univocal ways, the new strategy devotes time to enrolling recipients into the logics of liberalism.

Returning to Burma, a question is whether in the face of this RoL machine, the meanings of RoL can be expanded and adapted to the needs of this particular polity and political economy. A lack of consideration can be at least partially attributed to the "some reform is better than the system we have" theory of transition, in which Burma reformers seem ready to transplant externally generated solutions because these solutions appear (at first glance) to be vastly superior to the current system. But without considering

what precepts of justice are being (sometimes silently) inscribed in the new system, Burma risks naturalizing rather than transforming existing structures of domination and exclusion.⁷⁷ RoL will have to be made real to people in Myanmar given their own particular experiences, values, and visions for the future.

Conclusion: Rule of Law as Police Against Rule of Law from Below

Rule of law ideology as conceived and currently utilized may end up operating in Burma as a way of reinscribing social control after despotism, a way of creating a new regime of regulation—what philosopher Jacques Ranciere calls “the police”—that not only contains unruly politics but forecloses on the plurality of heterogeneous and irreconcilable claims that could be performed through such politics.⁷⁸ Ranciere stresses that police is not a repressive form of silencing, but rather a creation of a condition of impossibility for political contention (which he calls dissensus). Aung San Suu Kyi’s use of rule of law regarding violence in Arakan State and protests in Sagaing Region stand as the exemplars: she has used RoL to deflect, contest, and combat collective political and moral action by recodifying the conflicts as issues redounding upon administrative legal reforms. This utilization of RoL compels us to perceive RoL and politics as adversarial and opposed. RoL appears poised to become part of a diffuse and nebulous regime of control that entrenches extant hierarchies and justifies the status quo against social movements working for particular local conceptions of justice that bring alternative and even transformative demands.

Indeed, RoL tells the people, in essence, that there is a certain perfect and prescribed way to do things that can come readily packaged from the outside, and that hence the role for the people in politics is as silent partner. Rule of law here is the method of effectively containing unruly politics, as clean, quiet, tranquil, and disciplined (the ever-present *sii-gaan*—the discipline in Myanmar’s “disciplined democracy”).⁷⁹ What is underestimated is the extent to which *breaking* the law is necessary to change a society, the way they might miss the fact that law can get in the way of justice. Increasingly scholars are looking at the way justice social movements are actually nomothetic—or generative of law; these researchers argue that law *only* bends toward justice if there are people in the streets violating earlier instantiations of it.⁸⁰ This may help explain why postcolonial states with de jure progressive legal regimes do not realize those rights in practice; these laws remain a dead letter when they are not compelled into existence by social movement action.⁸¹

We must ask, then, what is the appeal to the discipline within rule of law? After enduring a regime that thrived on illegibility, inconsistency, and

plausible deniability, is the search for the rule of law a search for the safety of stability? Such a framing suggests that Burma's ongoing political transition will be framed by this battle within a schizophrenic Burmese polity: the need for legibility against the desire for uncaptured politics; the need for organization and hierarchy against the desire for a horizontal and hence unpredictable polity; the need to maintain the unity of the nation against the desire to experiment with more inclusive forms of belonging; the need to keep the country stable (during this unpredictable time) versus the desire to transform it now (because during transitions is the only time that such fundamental changes can occur). This is not meant to pit regressive and reactionary molar forces against the anarchic and progressive molecular ones. It seems instead that both sides of the equation are necessary.

Aung San Suu Kyi herself is an exemplar of this internal division. At times she polices politics and follows the dogmatic global rights ideology. At other times she engages the politics of daily struggle. In a 2012 speech at Harvard University's Kennedy School of Government, Aung San Suu Kyi discussed Burma's changes through the optic of the challenges that villagers face, and mentioned that political attitudes were malleable and shifting.⁸² Moreover, in a 2013 speech at the East-West Center in Hawaii, Aung San Suu Kyi demonstrated that the constitution might not be her ultimate goal.⁸³ While she remained vague, this implies that Aung San Suu Kyi is leaving space for real politics. This vagueness suggests that she and other democrats in Myanmar are attempting to find their way in a new political landscape.

In this vein, Cheesman quotes activist farmers who make sure they contrast RoL in its hegemonic form with one that is attuned to justice. He writes,

a 2011 complaint by over forty cultivators against land confiscation is signed off as "farmers together seeking implementation of just rule of law." Their rule of law is not the rule of law of the police state: it is the rule of law based on an explicit claim to justice. It implicitly challenges the rule-of-law as law-and-order idea by distinguishing it from the rule of law with justice that the farmers seek.⁸⁴

Here justice (the political) is inserted into the rule of law (the organized framework). The rule of law is *opened* by the farmers' intervention—there is necessarily more discussion to come after such statements, as farmers and those who hear them are now compelled to think through their (potentially contrasting) senses of justice, including how they can be generalized to others and how they can interface with the rule of law as a codified system. The continuation of this debate, rather than the cessation of it through the current RoL discourse, may be central to the Burmese truly directing their political transition.

Notes

1. See scholar Nick Cheesman's Ph.D. dissertation for groundbreaking work on the internal logics of this system: "The Politics of Law and Order in Myanmar" (Canberra: Australian National University, June 2012).

2. While it is admittedly impossible to identify a single definition of liberalism, as it contains many strains, I mean by it the political ontology founded on a self-contained, self-reflective, rights-bearing subject, and deployed in a global regime of rhetoric, political interventions, and biopolitical noninterventions (along the lines of the Rule of Law programs being witnessed now in Burma). For an elaboration of this imagined subject and the regime in which it fits, see Elizabeth Povinelli, *Economies of Abandonment: Social Belonging and Endurance in Late Liberalism* (Durham, NC: Duke, 2011).

3. See Ardeth Maung Thawngmung, *Behind the Teak Curtain: Authoritarianism, Agricultural Policies and Political Legitimacy in Rural Burma/Myanmar* (London: Kegan Paul, 2004) for a rare example.

4. For an exemplar of this rationale, see Ellen Wiles, "In Defence of the Rule of Law," *Democratic Voice of Burma*, 20 March 2013, and for programming seeking to implement it, see Colette Rausch, Susan Hayward, Leanne McKay, and Kay Spencer, "USIP Burma/Myanmar Rule of Law Trip Report," US Institute of Peace Rule of Law Center, June 2013.

5. Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law Is Illegal* (Malden, MA: Blackwell, 2008).

6. Although, as Richard Horsey's work with the International Labour Organization (ILO) shows, formal reforms can lead to substantive changes. Richard Horsey, *Ending Forced Labour in Myanmar: Engaging a Pariah Regime* (Hoboken, NJ: Taylor & Francis, 2011); see also Matt Shissler, "Changing Dynamics of Forced Labour: The International Labour Organization and Local Responses to Abuse in Eastern Myanmar," Masters dissertation (Oxford: Oxford University, 2013). These are empirical questions, which must consider the relevant political-economic factors influencing the likelihood of formal reform to effect better real outcomes. For instance, the entrenched collusion between economic and political elites and the rising value of land are rendering current land-grab victims unable to gain redress in court; more often they end up becoming the defendants, indicted on unlawfully congregating or defaming the state. See Asian Human Rights Commission, "Burma/Myanmar: Courts, Cops, Cronies—The Three C's Driving Farmers to Ruin, and Jail" (Hong Kong: Asian Human Rights Commission, 13 May 2014).

7. Although it is impossible to make a dispositive assertion as to how collectively shared is the endorsement of Rule of Law, this author's ongoing research on grassroots movements against landgrabs—movements that cut across class, ethnic group, and area of the country—has found that most utilize Rule of Law discourse as part of their oppositional protest repertoires. See Elliott Prasse-Freeman, "Grassroots Protest Movements and Mutating Conceptions of 'the Political' in an Evolving Burma," in Renaud Egreteau and Francois Robbigne, eds., *Contemporary Burma: What National Reconstruction?* (Bangkok: Research Institute on Contemporary Southeast Asia [IRASEC], forthcoming).

8. The caveat being that it was admittedly difficult to study this topic.

9. Myint Zan, "Judicial Independence in Burma: No March Backwards Towards the Past," *Asian-Pacific Law & Policy Journal* 1, no. 5 (2000); Myint Zan, "Legal Education in Burma Since the 1960s," *The Journal of Burma Studies* no. 12 (2008): 63–107.

10. Chapter 2 of this volume.

11. Besides his dissertation, see also Nick Cheesman, "Thin Rule of Law or Un-Rule of Law in Myanmar?" *Pacific Affairs* 82, no. 4 (Winter 2009/2010): 597–613.

12. As of mid-2014, a perverse cycle of protest and arrest continues to punctuate Burmese news reports: see, for instance, Khin Min Zaw, "Protesters Arrested After Appealing for Latpadaung Activist's Release," *Democratic Voice of Burma*, 17 February 2014; Paing SXoe, "Three Farmers Sentenced to Three Years for Plough Protest in Sagaing," *Democratic Voice of Burma*, July 2014; and Mamg Mya Nadi, "Tavoy Farmers Jailed for 'Disturbing' Officials," *Democratic Voice of Burma*, 17 July 2014.

13. Elliott Prasse-Freeman, "Power, Civil Society, and an Inchoate Politics of the Daily in Burma/Myanmar," *Journal of Asian Studies* 71, no. 2 (May 2012): 372–397.

14. I use *subject* rather than *citizen* here to highlight the fact that many individuals who are functionally Burmese—live in the country, speak the language, participate in Burmese modes of dress and commensality—are nonetheless denied citizenship.

15. USAID has devoted US\$5–7 million to rule of law programs from 2013 to 2017; UNDP has announced an Access to Justice program. Japan, Australian, and UK aid organizations (JICA, AUSAID, and DFID, respectively) are also reportedly working on similar programs.

16. While it is beyond the scope of this chapter, future inquiries may explore whether religious figures (monks, imams, pastors, etc.) and logistics play roles in conflict resolution.

17. I am currently doing participant observation fieldwork with a legal aid NGO in Yangon that works explicitly on access to justice and legal reform. Many of the early conclusions here have been derived from its work and from my own research through their networks. Due to the continuing sensitivities of legal aid work in Burma, the organization will remain anonymous here.

18. Interviews, Yangon, July 2013.

19. Cheesman, "The Politics of Law and Order," 175.

20. I accessed this internal report July 2013 and discussed its findings with the research team.

21. These figures appear to operate in similar fashion to the *daik* and *myo* authorities who acted as intermediaries between villagers and the British during the colonial period. See Robert Taylor, *The State of Myanmar* (London: Hurst, 2009), 16–17. But whereas those roles were based on political-economic power, the ward administrator was often described by informants as a more entrepreneurial figure. I thank an anonymous reviewer for identifying this connection.

22. It is not just courts that are potentially unjust and dangerous, but police also are nearly always exploitative, and since one must go through the police in order to access courts, the WA prevents potential exploitation from both of those institutions. If this is the case, law reform will not be particularly effective without police reform as well.

23. Interview with legal-aid worker, August 2013.

24. IDU and CSW are acronyms used by Burmese-speaking paralegals to describe intravenous drug users and commercial sex workers, respectively.

25. This question framed the survey form of one legal-aid NGO I worked with.

26. While space constraints here prevent the thorough exploration that it deserves from being achieved, I would like to use this section to introduce and sketch the contours of the diverging conception of rights in Burma.

27. There is an extensive literature on “rights”; for one of the most famous defenses of them in their dominant liberal conception, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977–1978).
28. For a review of this literature, see Matthew J. Walton, “Politics in the Moral Universe: Burmese Buddhist Political Thought,” Ph.D. dissertation (Seattle: Department of Political Science, University of Washington, 2012), especially chapter 2, “Burmese Buddhist Perspectives on the Nature of Politics.”
29. Myint Zan, “Position of Power and Notions of Empowerment: Comparing the Views of Lee Kuan Yew and Aung San Suu Kyi on Human Rights and Democratic Governance,” *Newcastle Law Review* 2, no. 1 (1997): 49–69.
30. Benedict Anderson, “The Javanese Idea of Power,” in *Language and Power: Exploring Political Cultures in Indonesia* (Ithaca: Cornell University Press, 1990); Clifford Geertz, *Negara: The Theatre State in Nineteenth-Century Bali* (Princeton, NJ: Princeton University Press, 1980).
31. James C. Scott, *The Art of Not Being Governed* (New Haven, CT: Yale University Press, 2009), chapter 4.
32. Andrew Huxley, “Burma: It Works, but Is It Law?” *Journal of Family Law*, Vol. 27 (1988–1989): 23.
33. *Dhammasat* is another transliteration from the Pali of the same word labeled *dhammatha* here.
34. Andrew Huxley, “Pre-colonial Burmese Law: Conical Hat and Shoulder Bag,” *International Institute for Asian Studies Newsletter*, no. 25 (2001), www.iias.nl/iiasn/25/theme/25T7.html.
35. See Michael Mann, “Autonomous Power of the State: Its Origins, Mechanisms, and Results,” *European Journal of Sociology* 25 (1984).
36. Maung Maung Gyi, *Burmese Political Values: The Socio-Political Roots of Authoritarianism* (New York: Praeger, 1983), 21.
37. Walton, “Politics in the Moral Universe,” 72–73.
38. Myint Zan, “Judicial Independence in Burma.”
39. While Nick Cheesman asserts that rights conceptualizations took hold during this same period, he is never able to demonstrate that these ideas existed outside of a narrow swathe of elites, or how democratic life actually incorporated rights orientations. For an elaboration of the counterargument (that the constitutional state and its rights frameworks may not have penetrated average village life), see Prasse-Freeman, “Power, Civil Society, and an Inchoate Politics.”
40. Myint Zan, “Legal Education in Burma.”
41. As opposed to the West’s “rights without responsibilities,” Burmese have “responsibilities without rights.”
42. David Steinberg, *Burma: the State of Myanmar* (Washington, DC: Georgetown University Press, 2001), 41.
43. E-mail, 20 November 2011.
44. E-mail interview, 19 November 2011.
45. Conversation occurred 8 January 2013.
46. See Elliott Prasse-Freeman, “Grassroots Protest Movements.”
47. Jill Davison, “Rights-Claiming in a Rule of Law Vacuum,” *Democratic Voice of Burma*, 11 March 2013.
48. Philosopher Jacques Ranciere has outlined how actors perform into being the rights that they do not have (see Jacques Ranciere, “Who Is the Subject of the Rights of Man?” *South Atlantic Quarterly* 103, no 2/3 [Spring/Summer 2004]: 297–310). and is useful for theorizing the way that rupturing political acts lead to new conceptions of rights. But his work is specifically located in the West, and it is common for activists influenced by this tradition to hence see the actions of those com-

ing from other political traditions to be essentially making similar moves: that these are protoliberals in the villages of upland Burma demanding the rights they do not have. But claiming rights as rights can only exist if actors are appealing to a field that recognizes rights as such. Absent such a context, different demands are being made. Partha Chatterjee's anthropology of subaltern demands makes it clear that often actors are pleading for exceptions that are not codified as durable or permanent—which are not rights—and hence that continue to be left open to erosion or sudden elimination. See Partha Chatterjee, *Politics of the Governed* (New York: Columbia University Press, 2004).

49. Cheesman, "The Politics of Law and Order," 209.

50. I am indebted to the research by James C. Scott and members of the subaltern studies collective for my conceptualization of this politics of the governed. See James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven, CT: Yale University Press, 1990), and Ranajit Guha, ed., *Subaltern Studies, Vol. 1: Writings on South Asian History and Society* (Delhi/New York: Oxford University Press, 1982).

51. The concept of "rightful resistance" coined by O'Brien and Li shows how such gaps are capitalized upon by resisters in China. The Burmese experience, alternatively, highlights situations where the gap cannot be rectified, but rather reminds the polity of the realities of sovereignty. Kevin J. O'Brien and Lianjiang Li, *Rightful Resistance in Rural China* (Cambridge, UK: Cambridge University Press, 2006).

52. For Feminist Legal Theory see Martha Fineman, "Feminist Legal Theory," *Journal of Gender, Social Policy & the Law* 13, no. 1 (2005): 13–23; for Critical Race Theory, see Derrick Bell, *Race, Racism, and American Law*, 3rd edition (Boston: Little, Brown, 1992); for a seminal Marxist critique of law see his "On the Jewish Question" (1843), <http://www.marxists.org/archive/marx/works/1844/jewish-question>

53. For an overview of the Critical Legal Studies method to which I am indebted in this mode of critique, see inter alia Roberto Unger's book-length article, "The Critical Legal Studies Movement," *Harvard Law Review* 96, no. 3 (January 1983): 561–675.

54. Gustaaf Houtman, "Mental Culture in Burmese Crisis Politics: Aung San Suu Kyi and the National League for Democracy," *Monograph Series* 33 (Tokyo: Tokyo University of Foreign Studies, Institute for the Study of Languages and Cultures of Asia and Africa, 1999): 124–126. I thank an anonymous reviewer for bringing up this additional reason for engaging with forced labor.

55. See Horsey, *Ending Forced Labour in Myanmar*, and Elliott Prasse-Freeman, "Power, Civil Society, and an Inchoate Politics of the Daily in Burma/Myanmar," *Journal of Asian Studies* 71, no. 2 (May 2012): 371–397 for extended discussions of forced labor and justice.

56. Interview conducted by lawyers working for an international legal NGO, 2012.

57. Nick Cheesman, "What Does the Rule of Law Have to Do with Democratization (in Myanmar)?" Paper for the *Myanmar (Burma) Update 2013*, Canberra, Australia, 15–16 March 2013.

58. See Chapter 6 of this volume.

59. First, because fixing formal systems aligns with the normative goals of the respective international lawyers and bilateral patrons who fund the projects, goals that involve replicating their own systems. Second, building rationalized state apparatuses has efficiency appeals: it is much easier to reform one massive bureaucratic system than thousands of informal ones. Third, assuming that for the minimal reason

of increased choice people might want to have the formal system as an option, reforming the formal system can be seen as a collective good; reformers employ a “comparative advantage” argument that they should focus on doing what they do best: working on the formal system. However, for the same reason of increasing choice and options, the informal system deserves proportionate attention.

60. This section is adapted from Elliott Prasse-Freeman, “Animating Reform from Within,” *Democratic Voice of Burma*, 24 January 2012.

61. Gyi, *Burmese Political Values*, 147.

62. Brian Z. Tamanaha, *On the Rule of Law History, Politics, Theory* (Cambridge, UK: Cambridge University Press, 2004), 4.

63. For a more thorough review of this literature, see Cheesman, “The Politics of Law and Order,” chapter 1. Also see Cheesman, “Thin Rule of Law?”

64. Tamanaha, *On the Rule of Law*, 111.

65. Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, Ciaran Cronin and Pablo De Greiff, eds. (Cambridge, MA: MIT Press, 1998), 225.

66. “Report to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System,” *The Sentencing Project* (August 2013).

67. Whether we can call this a “collective” social commitment or an effective social commitment effected through elite capture is immanent to this discussion.

68. Mattei and Nader, *Plunder*, 15.

69. *Ibid.*

70. “The [Supreme] Court shuts down challenges to such policies rooted in evidence of their racially disparate impact, requiring instead that plaintiffs show explicit and intentional discrimination on the part of criminal justice personnel. The colorblindness of the Constitution—once a hallmark of the protections of minority rights in the United States—has instead become a mechanism whereby racial minorities are frequently locked out of the courthouse and into prison cells,” quoted in *The Sentencing Project* (2013), 17.

71. John Furnivall, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India* (Cambridge, UK: Cambridge University Press, 1948), 295.

72. *Ibid.*

73. David Kennedy, “The ‘Rule of Law,’ Political Choices, and Development Common Sense,” in David M. Trubek and Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge, UK: Cambridge University Press, 2006), 186.

74. Thomas Carothers, “The Rule-of-Law Revival,” in Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for Peace, 2006), 4 (article originally published as *Foreign Affairs* 77, no. 2 [March/April 1998]).

75. *Ibid.*, 7. While Carothers’s endorsement of Rule of Law here might seem to rhetorically set up an imminent problematization of the concept, none is forthcoming. Rule of Law is consciously announced as technical, and the only critique is of the methods through which it is brought to those not-quite-yet-civilized places struggling with vestiges of premodern charismatic politics. Noteworthy here is how only pages before, Carothers had insisted that instituting the Rule of Law is a fundamentally *political* problem: “The primary obstacles to such reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law (3). Paradoxically, Carothers can only imagine these political problems as solvable through technical fixes.

76. Rachel Kleinfeld, *Advancing the Rule of Law Abroad*, 2012, Carnegie Endowment for International Peace, 21.

77. This theme is drawn out in comparative context by Fionnuala Ni Aolain and Michael Hamilton, "Gender and the Rule of Law in Transitional Societies," *Minnesota Journal of International Law* 18 (2009): 380–402.

78. Jacques Ranciere, *Dissensus: On Politics and Aesthetics*, trans. Steven Corcoran (New York: Continuum, 2010), 36–37.

79. During an October 2013 speech, Aung San Suu Kyi explicitly asked Yale Law School for help designing Burmese law.

80. B. Rajagopal, *International Law from Below; Development, Social Movements, and Third World Resistance* (Cambridge, UK: Cambridge University Press, 2003). See also Julia Eckert, Brian Donahoe, Christian Strümpell, Zerrin Özlem Biner, eds., *Law Against the State: Ethnographic Forays into Law's Transformations*. Cambridge, UK, and New York: Cambridge University Press, 2012.

81. John Comaroff and Jean Comaroff, "Law and Disorder in the Postcolony," *Social Anthropology* 15, no 2 (2007): 133–152.

82. "A Public Address by Daw Aung San Suu Kyi," Harvard Institute of Politics, published 28 September 2012. Available at www.youtube.com/watch?v=-QnBE5Xsx74&noredirect=1.

83. "Aung San Suu Kyi—Remarks to Hawaii Community Leaders," 25 January 2013, published 28 January 2013. Available at www.youtube.com/watch?v=6fvlttKzCBk.

84. Cheesman, "The Politics of Law and Order," 212.