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Theories of law and development: Asian trajectories and the salience of judicial reform in Myanmar

Andrew Harding

This article examines critically the phenomenon of judicial reform in the context of law and development and with special reference to Myanmar¹ as a current example of a locus for judicial reform efforts. Judicial and court reforms are seen almost universally as a cornerstone of law and development (LAD) (Newton 2008: 40ff). The argument is regularly voiced that, if we wish to give the rule of law pride of place in development and to assist the reform process in those states that try to develop their institutions along those lines, then judicial reform is an essential underpinning for that project. This view is very widely held amongst LAD writers and practitioners, and is subscribed to by numerous government and development agencies (Bergling 2006: 88; contra Humphreys 2010: 202). This article claims to the contrary that judicial reform is not a given, but rather that its salience will be contingent upon the history and present situation of law and its numerous institutions in a given society. Myanmar is referred to here in order to illustrate the problems involved and to argue a case for emphasising other areas of LAD. In a previous publication I have referred to LAD's 'Burmese moment' (Harding 2014), indicating that after more than half a century of the LAD movement, we should be in a position to say what we have learned and how to apply it. Unhappily we are not in such a position and continue to make elementary mistakes. Emphasising judicial reform, I argue here, is potentially one of those mistakes.

Law and development: A brief history of its trajectory

This section will act as background to the critique of judicial reform that follows.

Although one might imagine that law has always, at least since the enlightenment, aimed at the general betterment of society, the term 'law and development' is usually used to indicate the activity of law reform in developing countries, led by the United States and national and international development agencies, including international, multilateral, financial institutions such as the World Bank and the International Monetary Fund (Trubek 2001). The 'law and development movement' indicates this activity and the scholarly activity and discussion around it. The consensus around the rule of law as a guiding principle for legal reform of course goes both deeper and wider than LAD (Krygier 2011). It was, for example assumed to be part of the justification for British rule in Myanmar (Furnivall 1948; Stanton 2014), despite the lack of any obvious fit between English law and Burmese society; likewise it is assumed by the current NLD government in Myanmar and its international partners to be a large priority amongst the many calls on their attention vis-à-vis reform

¹ In this chapter I generally use 'Myanmar' as the current official name of the country (1990-date) and recognising the resonance of 'Burma' in the international and diasporic communities, looking, as it were, beyond 'Myanmar' in chronological, geographical and political senses.

agenda generally; indeed Daw Aung San Suu Kyi herself has consistently espoused the rule of law since Myanmar's opening in 2011. The idea of Weber that capitalist development depends on a modernised legal-rational state (Fukuyama 2011: 245ff) has dominated LAD thinking in spite of the twists and turns that will be set out in this section (Newton 2008). It appears to be orthodox thinking also in Myanmar (Turnell 2014)

An international consensus around the desirability of the rule of law as an aspect of development has largely persisted over the last 70 years, despite the twists and turns of the LAD movement. We are just not very clear as to how to implement it, and whether the rule of law is a cause or an effect of development. Lawyers and legal scholars are largely of the view that the rule of law is valuable as 'unqualified human good' (Thompson 1975: 263) irrespective of its development potential, in that it is required for fulfilment of social justice and stability (Van Puymbroeck 2001). Economists on the other hand are largely of the view that the rule of law and the institutions it drags along with it are part of the institutional arrangements that are essential for sustained economic growth (Haggard, MacIntyre and Tiede 2008). This view holds that the rule of law guarantees property rights and the security of contracts, thereby encouraging investment. Scepticism has nonetheless been expressed since the early 1970s, and is still expressed by some, as to both the efficacy and the underlying purposes of LAD (Humphreys 2012). The rule of law in particular is seen by some as a form of legal colonialism (Nader 2007).

LAD has been through several phases or 'moments', as the guardians of its history and theory call them (Trubek 2001, Rittich 2006, Newton 2008,). These moments display sequence: in effect they spell a particular trajectory of thought and experience (Tamanaha 1995), reflecting the ideas of the time, but not so often, unhappily, the actual lived experience of LAD itself. It may be seen that in this field there is an unusually large gap between theory and practice. This might indeed be a hint to social scientists to investigate this field further than socio-legal scholars have managed so far to do. The field is so large that proving anything about it conclusively is particularly challenging.

The LAD movement was inaugurated by President Kennedy in 1961, announcing the 'decade of development' at the United Nations.² LAD proceeded to work on law reform in South America and Africa, on the assumption of a direct linkage between law reform, economic progress, and political and social cohesion. In due course this was extended to Asia, with Indonesia and later China, Vietnam and the Central Asian republics attracting much international attention (Rose 1998, Bergling 2006: ch.4). 'Legal technical assistance' (LTA) was the phrase used to describe the activity of organising and carrying out projects in this field, funded by international development agencies, and delivered from 'donors' to 'donees' (Newton 2008). Judicial and court reform was a major part of LAD efforts during this 'inaugural moment'.

In the early to mid-1970s (the timing was not unconnected with the military debacle in Vietnam) it was realised that LTA had not succeeded in delivering on its optimistic promises, despite enormous efforts and expenditure, especially on judicial-reform-related LTA

² See <https://www.unicef.org/sowc96/1960s.htm> (accessed 22 May 2017).

(Trubek and Galanter 1974, Gardner 1980). LAD went under a cloud and funding for LTA activity declined, although it was not terminated. Judicial reform was nonetheless still seen as valuable in itself, irrespective of the larger picture of LAD. This is known as the 'critical moment'.

When the cold war ended in 1989 and many countries previously under communism or one-party states embraced multi-party democracy and/or a market economy, LAD revived and many of the assumptions of the inaugural moment were once more in the ascendant (Carothers 1998). However, this 'revivalist moment' was different from LAD's earlier iteration in that there was less emphasis on political reform or societal transformation, and more on purely economic issues, which were seen as technical in nature and unrelated to society at large or to the particularities of local politics (Rittich 2006). This moment was defined by the developments we know as globalisation, which has in the early 21st century met some now-familiar and severe challenges that impact on the theory of LAD. In particular the neo-liberalism of the revivalist moment is critiqued as neglecting the social elements or consequences of 'development' (Trzcinski and Upham 2014). This has led to renewed emphasis on 'good governance' and social justice issues such as access to justice. The Sustainable Development Goals of 2015, in contrast with the Millennium Development Goals of 2000, make much mention of law and social justice.³

The period since 2000 has been labelled as a 'post-moment' (Newton 2008) or 'third moment' (Trubek and Santos 2006: ch.1), indicating first that the previous neo-liberal revivalist moment no longer defines LAD, but that LAD has also become complex and multi-faceted, or pluralistic in nature. Accordingly, it is hard to find a description that fits the present phase other than to say that it goes beyond the neo-liberalism of the revivalist moment. Part of this pluralism has been to take LTA and related projects away from the dominance of development banks and international development agencies so that there are now multiple LTA players, including local and international NGOs, universities, bar associations, and others. It is often overlooked in discussion around LAD in this moment that actual projects and strategies are determined and led by national governments and essentially nothing can be imposed on donees.

So prominent is judicial reform in LAD that the word 'judicialism' is often used to refer to the belief that judicial reform is of paramount importance in LAD. Typically, judicialism incorporates judicial training, reform of court administration and judicial support, installation of case management systems, creation of new specialist courts (Harding and Nicholson 2010) (for example for bankruptcy, intellectual property cases), and, failing these, it seems ever safe to resort to the construction or repair of court buildings, training in public-relations skills for court personnel and judges, and the installation of computers and other IT devices (Newton 2008: 40ff). Throughout the changes in LAD thinking judicial reform has always been a strong feature of LTA as delivered to developing countries. Even during the critical moment there was still some funding for judicial reform. Belief in the value of judicial reform runs deep in the LAD community, along with a belief that the rule of law is doomed

³ See <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (accessed 22 May 2017).

to failure without a reliable and competent judiciary as the ultimate cornerstone of the system. Of course judicialisation does not exhaust LTA, which has embraced many other projects such as legislative drafting, legal education, public administration and good governance reform, and others (Bergling 2006, Newton 2008).

By an extreme irony of history, the coup that brought General Ne Win to power in 1962 marked both Myanmar's closing to the world (Williams 2008-09: 1657) and, outside Myanmar, the beginning of the law and development movement, as we have seen. Half a century later, two previously diverging forces – Myanmar's politics and the general aspiration towards international development – have found themselves in an unexpected embrace, like speed-daters unexpectedly thrust together without any previous knowledge of each other. Myanmar considers it is in urgent need of, and it is in fact receiving, a good deal of international assistance and much of that is LAD assistance (Harding 2014). But the approach taken, and the emphasis within, these LAD initiatives represents a signal test for LAD as well as for the NLD government. After more than half a century of LAD, what have we learned that is useful? In what ways can we, or should we (the international community), assist countries like Myanmar, that are trying to move away from military to civilian rule, or trying to construct or reconstruct the state, or simply trying to galvanise a chronically lagging economy? My particular sub-question is, how important is judicial reform in this context?

Asian perspectives on law and development

In this section I wish to stand back from these questions, to which we will return shortly, and look at LAD from an Asian perspective.

From such a perspective the history and assumptions of LAD seem quite puzzling. Asia has not proceeded according to the grand theory, as we might call it, of LAD, according to which the rule of law leads securely to development via the protection of property rights in a legal-rational state. Indeed in many ways Asia has contradicted the grand theory: at least neither grand theory nor Asian development has consistently or prominently taken the other into account, as has been argued from the case of Singapore (Harding and Carter 2003), which happens to be the most consistent rule of law advocate in the region (Menon 2013, Shanmugam 2012). Indeed, if one considers that since the 1960s Asia has experienced, and in fact deliberately engineered, the most rapid growth in general prosperity in the whole of human history, one could argue that this experience has not just been inadequately absorbed by LAD, but has been deliberately ignored.

How then has Asia achieved such striking growth without (or before espousing) the rule of law?

The answer that explains the Asian experience seems to lie in the emergence of the developmental state, whose classic proportions may be seen in Japan, South Korea, Taiwan, Singapore and then China and Vietnam, during the 1960s to 1990s (Johnson 1995, Woo-Cummings 1999). Economic theorists have extrapolated this experience to other parts of the world, based on the Asian model; yet LAD has not undergone a similar kind of rethink. One

can see elements of the Asian developmental state (ADS) also in Indonesia, Malaysia and Thailand during a similar or slightly later period, as the ADS idea spread from North East to South East Asia (Booth 1999). The clear assumption and starting point for the ADS is that for development one needs a strong state and a flourishing market economy, and, moreover, that one of the prominent purposes of a strong state is to create the conditions for a flourishing market economy. As to the need for rule of law from an economic perspective, it needs to be noted that property rights can be guaranteed in practice without the rule of law. A strong state that consistently and prominently encourages investment can actually guarantee property rights either without the rule of law, or with a very 'thin' approach to the rule of law (Wang 2004), or with a legal system that does not comply with Weber's rather German idea of legality. Fukuyama notes that the emergence of the strong state in Europe post-dates the emergence of the rule of law, whereas in Asia the strong state *pre-dates* the rule of law – in fact it still largely struggles to firmly establish the rule of law in spite of having already achieved economic development (Fukuyama 2011: chs.17-20). This is not surprising given that the emergence of the rule of law in Europe took many centuries and was conditioned by a common religion. Singapore is probably an exception, having strongly adhered to rule-of-law thinking ever since independence in 1965 (Shanmugam 2012).

From an Asian perspective the LAD movement is therefore mistaken as to one key issue. The rule of law is conceived in the West as a crucial device for limiting state power so as to create a moderate and rational state observing constitutional norms and protecting property rights. This conception insufficiently takes account of the need first to have a modern state that is both strong and effective and thereby capable of being restrained. At some points in history (during state-building) the strong but limited state looks like a rank contradiction; at others, where the state has reached the position that Fukuyama calls 'Denmark' (Fukuyama 2011: 14 ff, 431ff), it seems uncontroversial. Asia has always seen the need for a central power and a strong, well-organised bureaucracy. In fact China was the first state anywhere to achieve this. It has also been willing to surrender trust to the strong leader (Tan 2002, Leelapattana 2017). The United States, and to a lesser extent Europe, have seen the essence of law as the prevention of a powerful and intrusive state, and the preservation of liberty. From an Asian perspective the essence of law is seen as social control and a strong state under which trusted leaders are required in order to deliver such control (Pye 1985).

But what would a theory of LAD from the ADS perspective look like? Where does law, or where does the rule of law, find its place if at all in the ADS?

First of all, the theory would emphasise the importance for development of the construction of a strong state, embodying political stability and a highly competent public administration. Such strong states have existed in Asia since long before the West discovered the value of competence, meritocracy and legitimate use of force in administration. Indeed according to one point of view, the West learned this from Asia only in the 18th century; Europe discovered that China had spent a thousand years constructing a strong state by means of meritocratic officialdom via imperial civil service examinations (Teng 1943). The value of strong central authority is practically taken for granted in Asia, whether one is talking of China, an ancient civilisation-state of 1.4 billion people, or a small island city state of 5.5 million (Singapore) (Pye 1985).

It is of course also of interest that Asia has not evolved politically around a single political model despite the prevalence of the ADS. It has had multi-party democracies, patrimonial, oligarchic or otherwise; military dictatorships of left and right; dominant-party and one-party states; presidential strongmen; and even absolute monarchy; or some combination of these systems. The role of law here would be to structure the state on a rational basis and maintain a hierarchy of officialdom, whatever happens politically at a higher level; this Asia has largely done. Thailand is an example of a state that has had chaotic multi-party politics but strong bureaucracy (Harding and Leyland 2012). Asia has not attempted (at least until recently⁴) to control the powers of strong leaders, whatever political system has been in operation, even elected leaders under multi-party democracy. A survey of constitutional review across East Asia will reveal this (Bui 2016: 158ff). One can see in Asia a quite different cultural attitude to power compared with the West; powerful leaders are the object of awe, approval and support, or at least tolerance, not dislike and distrust. Asian political systems appear to contain a default position that those in power must be trusted to be right until proved wrong (Tan 2004).

Secondly, the theory would emphasise that it is the business of the state to interfere in the operation of the economy, not to keep out of it. The creation of a flourishing market economy has not in Asia entirely conformed to the idea of free trade and free competition. Indeed the state has been responsible for growing sectors and orchestrating, steering, or manipulating the market. This has created powerful *chaebols* (South Korea) or their equivalents elsewhere, which are now regarded as a problem for the states that created them. Their prominence in developing Asia cannot be denied. The role of law here has been to give latitude to the state in its economic function, and to protect property rights; this, again, it has largely done, even if there has been some variation with regard to the protection of property rights.

Thirdly, the theory would not allow the rule of law pride of place in development, but rather an efficiently supporting role. Thus on this theory the judiciary under the ADS does not act as a check on the powers of government, except perhaps for the most obviously irrational or intrusive instances. Its public law role is not absent, but certainly attenuated (Matsui 2011). A prominent example of this is the way in which the Japanese state has issued administrative guidelines to corporations in pursuit of public policy, with the acceptance of the courts (Ohnesorge 2012). In Malaysia and Singapore, a range of organisations has furthered public policy and economic development, including not just government departments, but statutory boards and government-linked companies (Wigdor 2013: chs.6,7). In this model the judiciary is independent but does not play a very significant role in the economy; it is passivist rather than activist. It de-emphasises human rights and constitutional norms to the extent that in Japan, for example, the Supreme Court has only ever struck down eight statutes in 70 years (Matsui 2010: ch.5), and in Singapore none in 50 years (Neo 2015: 9). In both cases courts have the power of judicial review of legislation, but

⁴ 'Park Geun-hye, ousted President of South Korea, is indicted', *New York Times*, 17 April 2017, https://www.nytimes.com/2017/04/17/world/asia/park-geun-hye-south-korea-president-indictment.html?_r=0 (accessed 23 May 2017).

are notably reluctant to make use of it even in cases with no economic significance.⁵ Like judicial independence, the rule of law, constitutionalism, democratic accountability, and human rights are all read down to a minimum in the ADS. Most of these principles are nonetheless in evidence in most of the Asian states; and in some cases such as South Korea and Taiwan have become the norm rather than the exception (Yeh 2016).

The ADS does not therefore support the notion that judicial reform is of paramount importance in the trajectory of development. Judges have been the escorts of development, not its drivers. Moreover, the ADS does not necessarily support the idea that the rule of law leads inevitably to development. It might be somewhat more accurate to say that in Asia the causation is more likely considered to be exactly the other way round - that development leads to entrenchment and improvement of the rule of law. At least the complex relationship we can discern between development and the rule of law does not indicate that the assumptions of LAD have been shown to be correct (Peerenboom 2009).

To refer back to the orthodox history of LAD, one wonders indeed why this history of LAD does not include an 'Asian moment'. Yet perhaps in effect it does. The World Bank famously recognised 'The East Asian Miracle' in its 1993 report bearing that title (World Bank 1993). However, the report's title is misleading in that Asia did not develop due to a miracle but in an entirely rational and predictable manner; moreover the World Bank can fairly be accused of failing to understand the true nature of Asian development even in its report on that very subject (Wigdor 2013: 16). Perhaps also amid the confusing pluralism of the 'post-moment' there is a realisation that the idea of a 'moment' of universal validity simply does not reflect the variety of actual experience. Are we perhaps in a moment in which we realise that there are actually no more moments, but only a flux of ideas, contingencies, and contexts, in which one size will never fit all? This is not to say that the ideas that appeal to LAD are unchangingly irrelevant to the ADS. Given the enormous and dynamic development in Asia during the last half century, it would be surprising if the ADS itself had not evolved and its attitude to law had not changed over the span of years. As we have seen, Asia has in fact developed the rule of law; but it has done so as a consequence, not a condition, of development.

Let me now proceed to outline how this view of LAD might be relevant to Myanmar.

Law and development in Myanmar in the post-moment

Myanmar's long history of military, authoritarian government from 1962 to 2011 was one of striking under-development. It was ameliorated only to a certain extent by the embracing of market forces by the State Law and Order Restoration Council (SLORC)/State Peace and Development Council (SPDC) government from the early 1990s, subject to international sanctions (Ewing-Chow 2007). Authoritarian government suppressed the democracy movement of 1988, and the country remained still largely closed to the outside

⁵ See, e.g., *Lim Meng Suang v Attorney-General and Others* [2014] SGCA 253.

world, as it had been since 1962, when it turned along the ‘Burmese path to socialism’ (Nang Mo Kham Hom 2000, Myint Zan 2000).

In August 2010, the government announced the holding of elections, which duly took place in November 2010. The election resulted in the appointment of former general U Thein Sein as President in the first civilian government since 1962. The 2008 Constitution (Constitution of the Union of Myanmar 2008) had been in the drafting process in various ways for most of the period of the SLORC/ SPDC government before it was finally passed in 2008 and brought into effect in 2011 (Saffin 2017). During 2010, commentators were largely sceptical about the notion that holding elections in itself represented anything like a sincere attempt to move the country towards democracy, let alone the rule of law. Constitutional restrictions had appeared to be designed specifically to prevent Daw Aung San Suu Kyi from participating in the elections: indeed her party, the NLD, refused to lend to the elections the legitimacy of its participation. Aung San Suu Kyi herself was kept under house arrest throughout the campaign. The parties actually participating, the Union Solidarity and Development Party (USDP) and several much smaller parties, were in effect sponsored by the military regime. Despite this, signs emerged that real change might be possible.

Aung San Suu Kyi was released from house arrest after 15 years, and was persuaded by the President to agree to participate in by-elections in April 2013. These were prompted by a need to fill parliamentary positions vacated by those MPs forming the government. The NLD won almost all of the 44 seats filled in the by-election, changing the nature of politics and Parliament overnight (Taylor 2012). Trade sanctions began to be progressively reduced by Western governments in response to the progress of the reforms. Efforts were made to end the conflicts with ethnic minorities in the country’s peripheral areas; these continue to be a focus of discussion.⁶ Special Economic Zones were announced following the passing of the Dawei Special Economic Zone Law 2011, and the Myanmar Special Economic Zone Law 2011, in an attempt to replicate China’s economic growth strategy of the 1980s. In November 2012, following a tortuous 10-month legislative process, a new Foreign Investment Law 2012 was passed. Since then many new laws have been passed to open the country to foreign investment and to yield rights in the newly democratised polity (Turnell 2014).

In 2013/14 it began to look as though the reform process could not be reversed. The international community, at least, clearly felt it appropriate to renew its interest in Myanmar, and it has done so with great energy. While the US government under President Obama included Myanmar in its ‘pivot’ towards Asia, China, India and SE Asia have also been re-evaluating their stances towards their neighbour.

In November 2015 the second set of general elections was held under the 2008 Constitution, and the NLD obtained a large parliamentary majority. In March 2016 the NLD saw its candidate successful in the presidential (electoral college) elections, with Aung San Su Kyi (disqualified from holding the presidency under section 59(f)) eventually occupying

⁶ Nyan Hlaing Lynn ‘Panglong then and now, and the promise of peace’, *Frontier Myanmar*, 9 March 2017, < <http://frontiermyanmar.net/en/panglong-then-and-now-and-the-promise-of-peace>> (accessed 23 May 2017).

a new office of State Counsellor in the President's office. Previously she held the position of chair of parliament's Rule of Law Committee. She has constantly stressed the need to develop the rule of law; the NLD historically suffered grievously from the lack of rule of law during the military government. There is a notable tendency to see the rule of law as being at the heart of every issue, including the inter-communal violence between Buddhists and Muslims (New Perimeter, Perseus Strategies and JBIHR 2013, Saffin 2017, Clapp 2017).

Inheriting a forbidding range of problems, the NLD has been trying to find a path through the complexity of Myanmar's situation. Establishing priorities on a rational and objective basis is extremely challenging in this situation, the issues being interdependent to such a high degree. A 'rush to Yangon' since 2011 brought to Myanmar many international organisations, national development agencies of Western states, international NGOs, diasporic NGOs and activists, academic institutions, and law firms, among many others working in a law and development or analogous or related mode. There was no method of ascertaining who was doing what, with the attendant risks of unhelpful competition, overlapping and confusing messages, and lack of coordination amongst the international players, and decision-making overload within the Myanmar government. Difficult choices have had to be made regarding to what and to whom the government should respond (Pedersen 2012).

Naturally enough attention was focused on the legal system and the courts. One obvious concern was the sheer lack of accurate and up-to-date legal information. The *Burma Code* in 13 volumes represents a version of the common inheritance of former British colonies such as India, Pakistan, Bangladesh, Malaysia and Singapore, and therefore, at a doctrinal level, variations from these other common law countries' laws will likely be minimal, subject to subsequent, post-1940s, legislative changes. This makes assistance by other common law countries especially appropriate.

According to Myint Zan, there is a link between the decline in judicial independence and the absence of apex court judgments in English since 1969. The well-known jurist Dr Maung Maung, previously a defender of judicial independence when he became Chief Justice under Ne Win, effectively abolished (or at least attempted or purported to abolish) the doctrine of precedent, substituting it with government policy as the guide to resolving legal issues (Myint Zan 2000). During the period from the 1962 coup until today, the rule of law had in essence not existed (Huxley 1988-89). When General Ne Win, by a decree of 30 March 1962, announced the abolition of the Supreme and High Courts of Burma and the termination of the tenures of both Supreme and High Court justices, there was very little coverage in the international media or the academic and professional community outside Burma. Similarly, when on 13 November 1988 five out of six Supreme Court judges were 'permitted to retire' by the SPDC, there was a palpable lack of interest on the part of the international community (Cheesman 2011).

It is only a few years since a judge in California, Justice Victoria Chaney, in the famous *Unocal* case, faced with contradictory views as to the real nature of law in Burma, held that there was no effective rule of law and that it was 'questionable whether an intact body of law survived the socialist regime of the 1960s and 1970s ... [and] whether Burma has a

functioning judiciary actively interpreting statutes and establishing decisional law'. The law of Burma, she concluded, was 'radically indeterminate' (Huxley 2004, 2008). There was, however, some credible evidence presented in this case to the effect that there was, even after the early 1960s, a functioning legal system; and even that this system belongs genuinely to the common law family (Southalan 2006, Cheesman 2011). From the perspective of 2017, Justice Chaney's view was either overstated or is no longer quite true, given the recent changes. If few changes have occurred, the context in which change can occur is dramatically altered. One would expect in a common law system that the substantive law is recognisable by one trained in the common law; that there exists an independent judiciary; and that the doctrine of precedent applies. None of these conditions is unambiguously inapplicable, at least, even if not perfectly entrenched, and the first seems highly applicable. But where stands the judiciary in all of this and what is being done in terms of 'judicialism'?

The judiciary in Myanmar: a priority?

The common law courts were dealt a devastating blow in the early 1960s when they were effectively replaced by courts specially created by the Ne Win government. Legal education was marginalised, law reporting became much attenuated, and legal practice declined. What was left of the judiciary was deprived of status, information, independence and even litigation to deal with. As one might expect corruption and judicial subservience followed. Getting past this history to a better place for the court system will be a very great job. The question how to achieve this outcome is enormously important.

We have, one must admit, little comprehensive knowledge at this point as to the Myanmar judiciary in terms of its social background, performance, orientation, developmental possibility, and so on.⁷ Nor do we know a lot about the lived reality of the legal system, although gaps in our knowledge are slowly being filled (Yeo et al, Wong 2016)). Like other areas of study in relation to Myanmar, the field is still recovering from half a century of neglect and inaccessibility. This very fact may frame one argument of relevance at the outset: we do not know enough about the judiciary to formulate a really effective strategy for reform.

What then is the current strategy?

Official sources claim, somewhat optimistically, that 'Burma's judiciary system is in accordance with the standards widely practised in democratic countries'.⁸ There is a

⁷ See, however, Crouch 2017. Some research was done by UNDP in the process of developing the Strategic Plan for the judiciary in 2013 (see below). This consisted of interviews with legal personnel and focused on their conception of justice.

⁸ 'Legal experts reject government claims of judiciary reform', The Irrawaddy, 23 March 2017, <<https://www.irrawaddy.com/news/legal-experts-reject-govt-claims-of-judiciary-reform.html>> (accessed 23 May 2017).

Judiciary Strategic Plan 2015-17, 'Advancing Justice Together'.⁹ The document, iterated under the previous USDP government, acknowledges the rule of law as essential for development and acknowledges the efforts of UNDP and USAID in relation to the strategic plan. The core aims to achieve the mission of the judiciary are: to promote the rule of law and regional peace and tranquility; enhance reliability and public trust in the judicial system; adjudicate cases fairly and speedily in accordance with law; and upgrade the integrity of the courts. Strategic Action Areas are therefore identified: protecting public access to justice; promoting public awareness; enhancing judicial independence and accountability; maintaining commitment to ensuring equality, fairness and integrity of the judiciary; strengthening efficiency and timeliness of case processing. The plan prioritises training to improve staff and judges' communication and media relations skills.

There is however little evidence that since 2013 there have been any really significant changes in the judiciary arising from the reforms under the Strategic Plan or otherwise. This leads one to wonder if there is any self-direction amongst the judiciary that would point towards a receptive environment for judicial change in line with heightened expectations, for example the large increase in constitutional-writ filing (Crouch 2014). Litigation is still not an attractive option in Myanmar. Going to law is both expensive and hazardous, and despite an increase in legal-aid and pro-bono activity (Dawkins and Cheesman 2017) the emphasis is not so much on litigation as on finding alternative means of dispute resolution. In any case, from a LAD perspective the importance of judicial reform and developing judicial independence is mainly to ensure that property rights are respected. Even from the point of view of investors, ADR is clearly a more attractive avenue for disputes than the courts.

The judiciary has kept a long reputation for corruption even in spite of the opening of Myanmar. Indeed Crouch refers to its 'structural lack of independence' (Crouch 2014: 142), and Nardi and Lwin Moe state that 'the Judiciary as a whole is widely perceived as lagging behind in the reform process ... [and] the government has not yet developed a systematic approach to judicial reform' (Nardi and Lwin Moe 2014: 99).

The Strategic Plan sets out commendable targets and methods but is principally aimed at internal processes, public relations, and communication skills, rather than a more ambitious agenda, expected or hoped-for by some, of creating of a new judiciary for a new society. It is not directed to profound institutional change as such but rather to laudable and useful, but not very far-reaching, improvements. Not surprisingly these efforts have not found great favour with the civil society and lawyers, nor indeed with parliament, as we shall see. The current Supreme Court judges and most of the rest of the judiciary were appointed under the previous military-allied government and hold office until 70 years old. Similarly court staff and enforcement agencies have not changed in terms of personnel. Although one objective of the Strategic Plan is to deal with corruption, its critics remain concerned about this issue and do not think that in practice the reforms have made any difference to the legal system. A former chair of the Myanmar Lawyers' Network (MLN) even claims that the Plan

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<http://www.unionsupremecourt.gov.mm/sites/default/files/supreme/advancing_justice_together_english.pdf> (accessed 23 May 2017).

bears 'no relevance to the situation of the courts', and is 'not effective at reforming' them. A founding member of MLN claims that the judiciary needs to be reformed 'from the ground up'.¹⁰ Parliament, concerned about judicial corruption, voted on 7 March 2017 to exercise oversight over the judiciary, following a severe disagreement with the Chief Justice who cited the separation of powers under the 2008 Constitution.¹¹ The dispute looks very much like a typical one in Myanmar's current situation. The old is dying, but the new struggles to be born.

This all highlights also the common problem in LAD that excellent aims may be contradictory in practice. Judicial independence is rightly encouraged as part of the development of a competent and rule-of-law oriented judiciary. If, however, there are issues of corruption, maintaining strict independence might well be an obstacle in the way of attempts to deal with the problem (Butt 2007). Sequencing becomes of enormous importance. What may be effective and desirable at one stage may not be so at a different stage.

Although since 2011 much effort has been expended on the judiciary, as is usual in LAD contexts, it is not actually clear why this should be an overriding strategy for improving the rule of law. In Myanmar there is little relevant history or experience since 1962 of judicial independence, independence of the bar, rule-of-law oriented legal education, or a sense of constitutionalism and human rights. To the extent that these things exist they are only recently learned and discussed and are a matter for public discussion. It is therefore far from clear that judicial reform and related training programmes would be of any utility given the levels of corruption, knowledge deficit, and lack of real independence in the higher judiciary. Moreover large numbers of higher judiciary are quite elderly and reorienting them might be not just difficult but lacking in benefit given the efforts that would have to be made. Most of the higher judiciary will be retired within a few years. On the other hand, at the other end of the career-development process (I rely on personal experience here in Myanmar) are many young lawyers and activists of good education, outstanding talent, and great energy and enthusiasm. From 2015 small numbers of law students were taken back onto campus at leading universities for a full LLB programme. This new legal education will likely grow rapidly in quality and quantity, producing leading lawyers for the future as legal professionals, judges and magistrates, legal officialdom, and law teachers and researchers.

What needs to be confronted here is therefore the issue of timing or sequencing of reforms. Development thinking based on new institutional economics takes a long view of institutional change as a route to economic development, arguing that institutions take a long time to change (Fukuyama 2011: 16ff). While this is no doubt valid in many circumstances, Asia has generally seen, on the contrary, a very *rapid transformation* of institutions in the last half century. Which of these two positions should we imagine to be applicable to judicial reform in Myanmar?

¹⁰ The Irrawaddy, above n.8.

¹¹ 'Lawmakers vote to fix "corrupt" judicial system', The Irrawaddy, 8 March 2017, <<https://www.irrawaddy.com/news/burma/lawmakers-vote-to-fix-corrupt-judicial-system.html>> (accessed 23 May 2017).

Given the argument I have set out above concerning the ADS, it does not seem likely that a transformation can be effected to institutions in Myanmar in the short term. The ADS elsewhere in Asia could indicate a way forward for Myanmar, but the ADS in countries like Japan, South Korea, Taiwan and Singapore had a longer period of good preparation for the final assault (since 1860 in Japan's case), while Myanmar has had nothing of this kind. What might have been promising in the 1940s was taken into reverse by the military government for half a century; this is especially true of legal institutions as we have seen. In development it is difficult to overcome inertia in any given situation, but reversing a long-established trend is even more difficult.

It is true that, as the International Bar Association's (IBA) report (IBA 2012) puts it, 'formal changes to Myanmar's laws and institutions will do little in themselves to improve the daily lives of the country's population, but they are an essential precondition to the success of current reforms'. It is also likely that institutional change in Myanmar will take a long time to accomplish, and one has to start somewhere, even in a confusing situation. Yet this might lead us to the conclusion that a longer-term strategy is required. For this reason it would make sense not to prioritise the kind of judicial reform seen in the Strategic Plan, but rather to prioritise measures that would have the most positive longer-term effects. This approach would assume that in the shorter-term only modest improvements might be seen in the judiciary, and therefore ADR should be emphasized along with creating profound changes in public administration, education (including prominently legal education), information and communications technology, anti-corruption strategies, and the organization and independence of the legal profession. It is only upon such foundations that longer-term changes would be possible. The IBA's implication is that we need to concentrate on legal consciousness as much as on formal legal and institutional change.

The fact is that numerous obstacles stand in the way of promoting rule-of-law reform in Myanmar. The epistemic community is still very small. There are capacity issues in terms of language and data collection. The legal community is also presently limited in its ability and perhaps inclination to contribute to the general discussions and debates (Saffin and Willis 2017). This is partly due to the legal education system, in which materials and law exams are in English but neither academic staff nor students generally speak English very well, the legal system itself being conducted entirely in Burmese. All of this speaks of dysfunction and raises many questions; it will also take a long time to change even assuming the right answers can be found.

Conclusion: Judicialism by a longer route?

The view taken in this article is that the LAD orthodoxy of judicialism, while not misplaced in principle, leads to lack of effective rule-of-law reform if it is not nuanced according to the situation of the state in question. In the case of Myanmar it is judged in this article that concentration on judicial reform is lacking in salience. The members of the higher judiciary are generally 60-70 years old and appointed under the military government. Judicial corruption is recognised, although it is not clear whether this is widespread or incidental. Legal education is capable of producing much better results than during the last

30 or 40 years. The judges on the Constitution Tribunal were impeached in 2012, largely on the grounds that they were military appointments (Nardi 2017); parliament made it clear that it had no confidence in the judges, and the same appears to apply currently to the Supreme Court.¹² Judicial reform needs to start lower down in the system and will perform better, it is suggested, if reform is root-and-branch, taking Myanmar back to something like the functional and competent judicial system of the 1950s. The process needs to start with law teachers and law students, who will produce outstanding members of the private bar, which needs to become independent; and of other legal professions (prosecutors, government lawyers, drafters, lower judiciary). In due course this cohort will likely produce an outstanding judiciary. Thought might be given to the process of judicial appointment and training. In the meantime no doubt assistance in some forms to the judiciary as it is, and to the court system as a whole, will be beneficial. But deep rule-of-law reform requires concentration on these longer-term issues.

There are some positive factors to work with. The legal aid community is vibrant. There is widespread interest in legal education and the actual number qualifying, albeit with inadequate knowledge, is quite large (Saffin and Willis 2017). This is promising, in that building the rule of law in practice must depend on the development of a legal complex that is supportive, proactive, skilled, creative, and responsive to popular needs (Saffin 2012). The legal profession, although currently low in capacity (knowledge, skills, and situational endowments) is high in enthusiasm to mould itself into a viable instrument to transform Myanmar. We can add here that there is indeed increased use of courts, as well as complaints to Members of Parliament and the Human Rights Commission – these are evidence of a growing sense of the practical utility afforded by the law and the new institutions.

Currently Myanmar's legal education system is in the poor state to be expected of a country where university education has been seriously degraded over half a century. As a result of the previous military regime's response to student activism, until recently undergraduates have not for two decades been allowed on city campuses but only rural campuses, or have been taught via distance education; only postgraduates have been taken at Yangon and Mandalay Universities. Attention is now needed on finding the right way of improving and reforming legal education. The main thing is that the process of reform should be based on conversation, not on a top-down model imposed on the basis of foreign precedents or broad assumptions. A first step is to collect systematically and analyse information about the legal system, including legal education, in Myanmar.

I hope to have shown in this article that judicial reform is not necessarily a really important plank in LAD processes in countries like Myanmar. Let me be clear that this is not to argue that that judicial reform is not a good thing itself or is irrelevant. However, LTA appears to proceed on the assumption that judicial reform is the cornerstone of LAD and everything else should flow from that assumption in terms of legal education, the organization of the legal profession, access to justice, court reform, and so on. The further assumption that all of this is needed for economic development is simply in my view not borne out in Asian experiences.

¹² Above, n10.

In an Asian context it seems to me that the experience of post-war development indicates that the first requirement is a strong state and that if a strong state is constructed along the basis of a rule-of-law orientation and political accountability, then, when public administration is strong and well-organised, other improvements will follow or can be pursued more successfully. It is not clear that there are examples of the rule of law creating development in the absence of these other desirable conditions. It is however clear that there are examples of development as the product of a strong state and the strong state will be well advised to espouse the rule of law as part of its agenda. Whether the ADS can flourish in Myanmar and create the kind of multi-faceted development that is needed remains to be seen, but it is important to start on the right footing.

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