

RULE OF LAW INTERMEDIARIES

Scholars puzzle over the conditions that make rule of law development in authoritarian settings successful. In this significant contribution, focusing on the decade of Myanmar's political transformation, Kristina Simion explores rule of law assistance through the practice and experience of intermediaries, their capital, strategies and challenges. How do intermediaries influence the field, and the ways in which the rule of law is brokered transnationally? And why do they matter? Simion relates her research to law and sociology to bring to light these neglected players, focusing on who they are, the influence they have, their double agency and their crucial importance in establishing trust and translating rule of law. Relying on rich empirical data collected in Myanmar, the book shares the voices of the individuals that help to steer societal change within authoritarian confines. This socio-legal work offers some insights into why rule of law change in authoritarian settings often does not go expected ways, one of the development field's long unresolved issues.

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RULE OF LAW
INTERMEDIARIES
Brokering Influence in Myanmar

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Cambridge University Press
978-1-108-83086-7 — Rule of Law Intermediaries
Kristina Simion
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India
79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781108830867

DOI: 10.1017/9781108914345

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First published 2021

A catalogue record for this publication is available from the British Library.

ISBN 978-1-108-83086-7 Hardback

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For Mattias, Carl, August, and Ingrid

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PREFACE

This book was researched during a time of optimism. As one of the ‘last frontiers’, Myanmar underwent a transition after elections in 2010 that came to excite investors and development practitioners from all over the world: ‘internationals’ who travelled across the globe to offer their services to a military-led authoritarian government transitioning to democracy. Yangon circa 2014 was a town where new met old. Small trendy cafés and hidden bars were popping up in the most unexpected locations. Young and eager development practitioners were confident about their possibility to contribute, businesspeople were certain about the economic return on their investments in a new emerging market, and local activists were hopeful about development potentials finally brought to their country. As I experienced the year leading up to elections in 2015, optimism about the future was especially vibrant.

When I return to Yangon in early 2020, I stroll through new, luxurious shopping malls and walk past KFC outlets. I have fresh doughnuts at Krispy Kreme during a visit to the re-opened Secretariat building, a place that once housed the parliament dissolved by former military leader Ne Win and where national hero General Aung San was brutally murdered, now a definite stop for tour buses, although still partly a construction site. I stay at what used to be the sleepy old Thammada hotel, now renovated beyond recognition into a trendy boutique chain with a gym and a French restaurant.

I am eager to catch up with local friends and leaders in the rule of law development field with whom I spent time during the transition period (most foreigners I knew back in 2014 have long since left for other places) to get an update of the situation today. I quickly get a sense of their despair and lack of optimism about the future. By now, friendships have ended, well-known rule of law organisations have been dissolved, and new factions have been created. Improvement in rule of law then? My friend, a local lawyer, shakes his head: only on paper but nothing new in practice.

PREFACE

Democracy icon, Nobel laureate, and de facto head of government Aung San Suu Kyi has recently appeared before the International Court of Justice in the Hague to testify in defence of her country facing charges of genocide committed against the mainly Muslim Rohingya minority group. Across town, a huge billboard bears Aung San Suu Kyi's picture accompanied by the message 'We stand with you'. Although by now, notably, not the democratic leader previously expected, Aung San Suu Kyi and her National League for Democracy are still considered by many to be the only alternative to authoritarian rule under military control.

Before she became the de facto head of a civilian government in 2015, Aung San Suu Kyi was the main advocate for rule of law. Yet, although she threw the term around during the early transition period as though it were a panacea for everything problematic in the country, since her own coming to office after elections in 2015, her uses of the term lack the substantive aspects one would expect. A repeated mantra towards rebels and trouble-makers breaking 'the law of the land' is that they will be dealt with by a political leadership that is committed to restoring peace, stability, and rule of law. When Aung San Suu Kyi appeared before the International Court of Justice, her statements on rule of law, described as practical measures to end violence, were mixed with the latest global discourse on sustainable development; she described Myanmar as a peaceful country nourishing a spiritual mindset of unity, harmony, and peace to end cycles of inter-communal violence.

During my visit in 2020, the newspaper reports that the new home minister, a lieutenant general and former head of the Office of Military Security Affairs, pledges rule of law in the country as a tool for combating crime in relation to conflicts with ethnic armed groups and drugs. As the Home Affairs Ministry oversees the country's police force, the minister stresses the need for people's co-operation in solving crimes to ensure the rule of law together with the police. Rule of law as a concept that embraces substantive rights, rather than a tool for upholding law and order, still seems a hope for an uncertain future for the countless donors from abroad that spend big money on projects and programmes to its end and local activists who make their living as development partners and implementers on the ground.

The current rule of law position in Myanmar is considerably more pessimistic than many donors would have hoped for in the transition period when the empirical material for this book was collected. It is not yet a country where the rule of law is flourishing nor where it is

a concept understood with reference to its substantive features. Endless foreign funding and initiatives for legal and institutional reform have highlighted problems of access to justice, corruption, and institutional constraints, and still everyday experiences of rule of law and justice remain much alike. Foreign promoters expected an increased understanding of substantive justice and human rights expressed in real change, while activities instead came to focus on planning, with few results in practice. When state counterparts have seemed unwilling, the focus has shifted towards regional solutions, where customary and informal justice systems have been mapped and analysed in ways that are reminiscent of colonial practices. The most contrasting aspect of rule of law development in the country remains that of a perhaps general increase in justice provisions for the ordinary citizen, while some areas of the country are still undergoing heavily armed violence, ethnic discrimination, and crimes against international law. Knowing what we now know about the country (and particularly the backlash against Aung San Suu Kyi's approach to the Rohingya question), Myanmar's 'transition' is looking more and more delayed.

This book is about a time in history that has vanished, a time of unprecedented optimism in the era of liberalisation after the 2010 elections up to those of 2015 when large parts of the population and an elected government struggled to leave its authoritarian past. Its main findings of how rule of law intermediaries broker influence remain relevant for any setting where foreign aid has become an ingrained way of life. Today, intermediaries may come in wider varieties as more people have learned how to capitalise on opportunities to promote change and about the benefits involved in work supported by foreign funding, though they remain a central feature of rule of law development assistance.

Since finishing the bulk of the research for this book, I returned to working on bilateral rule of law development in Myanmar. Similar to the topics discussed in this book, I got to experience, from the inside and not just as an outside observer, the challenges of identifying partner organisations, local beneficiaries, intermediaries, and translators. I have felt the frustration of colleagues struggling over what terminology to use and who have a hard time grasping why local partners refrain from direct critique or voicing an opinion and why one translator interprets sentences differently from another. In the middle of this, I find myself clarifying messages between counterparts, suggesting answers when local facilitators are shy for fear of stepping on somebody's toes, and outlining aspects of culture and history that suggest a need to switch

PREFACE

approaches. Amidst all, there are also issues of Covid-19, travel restrictions, and closed borders, internet connections, Facebook, Viber and data security, and ultimately problems with Unicode and Zawgyi conversions that make messages indecipherable. While this book was researched during the transition period, in many ways, it presents an extended case study from then to the challenges of today.

Two days after I receive the proofs for this book, I am struck by news that the Myanmar military have once again ended civilian rule as it arrests Aung San Suu Kyi, the President and other Union-level and state/regional level political leaders, declaring a State of Emergency, purporting to be acting consistently with the 2008 Constitution. The number of arrests increases in parallel to a growing civil disobedience movement that gathers people on the streets across the country. People go into hiding and delete NLD party affiliations from their Facebook accounts and try to stay connected amidst repeated shut downs of the internet and social media.

The way the military throw the term ‘rule of law’ around to justify their actions, amend legislation, and bend the Constitution to their benefit is an absurd spectacle to follow. Deterioration into lawlessness is frantically ongoing as I have to submit my manuscript.

Once again, we face men in power that dramatically worsen the protection of human rights, potentially throwing the country back into its ‘dark ages’. If the military tries to go into isolation again, what they forget is the power of the transnational relationships that were formed with people in Myanmar during its decade of transition. In many ways, this book offers insights as to how large the gap between rule of law and local realities actually was: relationships through intermediaries will become ever so influential as they maintain and strengthen the linkages from the outside-in during the continued struggle for rule of law in Myanmar.

ACKNOWLEDGEMENTS

The idea for this book started as I was working in the field of rule of law assistance. During a training course at a run-down conference hotel in Berlin's southernmost locality, the city of Schmöckwitz, I chatted with a lawyer from Uzbekistan about his work challenges. The lawyer worked on a large European Union funded rule of law project and told me how he often felt stuck with important information between the project counterparts – the national government and the large foreign donor. He said with frustration: 'One part says it means this, and that, and the international part says, "In our practice it means this" ... It's a very small thing but it is so important to get it right. ... I hear both sides and they are very frank to me but not to each other.' The lawyer's story sparked my interest in the topic of this book: the intermediary, a person or organisation positioned in a middle space or place, between international and national norms, ideas, and development objectives. This book is the result of that conversation.

I continued to research and write the book at the School of Regulation and Global Governance (RegNet) at the Australian National University (ANU) where I was generously supported by an International Student PhD Scholarship and an HDR Merit Scholarship. I am deeply grateful for the opportunity that such generous funding gave me. I was fortunate enough to get to know many inspiring scholars during my years at the ANU. Robyn Holder, Therese Pearce Laanela, Imelda Deinla, Ben Authers, Emma Larkin, and Kate Henne provided advice when I needed it the most.

At RegNet, I was introduced to the idea of studying the work of intermediaries during Myanmar's ongoing transition, which pretty much coincided with my candidature. Ma Khin Mar Mar Kyi, Chit Win, Naing Ko Ko, Oo Kyaw Maung, and Jaqueline Menager provided me with excellent introductions to the country and offered me great support ahead of the fieldwork that was an integral part of my research. To my research participants in Myanmar, I am humbled by the fact that you took time to take part in my project. This book would not have

ACKNOWLEDGEMENTS

been possible without your openness and generous contributions. Friends in Yangon provided invaluable advice and support and made this project a truly memorable experience.

From my supervisors, I got all the support I needed. Martin Krygier, thanks for always showing interest and positive support throughout. Morten Pedersen, I enjoyed our talks and drinks in Yangon when I was frustrated with everyone and everything. Without Veronica Taylor's demanding supervisions my work would not have been as polished and well prepared for future publication. Thanks to Nick Cheesman for remaining a mentor and friend after the formal supervision ended and for pushing me to think of my research from new perspectives.

Thanks to Terry Halliday for advice that helped move my research forward. A heartfelt thanks to Mary Callahan and Bryant Garth who provided great advice, excellent reviews, and encouragement to move my project towards publication.

I am grateful to Thomas Bierschenk for inviting me to the 2014 Summer School on 'Conceptualising Brokers Engaged in Translation' in Halle, Germany, where I got the chance to engage in fruitful discussions about my project. The opportunities I had to present my work at the Law and Society Association's annual meeting in Seattle in 2015 and in Mexico City in 2017, at Harvard Law School's Institute for Global Law and Policy Conference in Boston 2015, and at the Australasian Aid Conference in Canberra in 2015 and 2017 greatly enriched my project. I also benefited greatly from discussions with peers at the 2017 Asian Regional Graduate Student Workshop organised in Bangkok by the Harvard Law School's Institute for Global Law and Policy.

I enjoyed invitations from Mana Takahashi and Maj Grasten to discuss my research in Nagoya and Copenhagen. At Stockholm University, Johan Lindquist and the Forum for Asian Studies provided generous funding and support that enabled a space for discussions about law, society, and culture in South East Asia. Thanks to Lynette Chua and David Engel for showing interest in my research and letting me join the Training Initiative for Asian Law and Society Scholars (TRIALS).

My colleagues at the International Network to Promote the Rule of Law helped me stay connected to rule of law practice throughout my years of research. My employer and colleagues at the Folke Bernadotte Academy showed great patience and support during several years of leave to work on this project.

ACKNOWLEDGEMENTS

I am grateful to the Department of Political and Social Change, ANU College of Asia and the Pacific, for hosting me as a visiting fellow while I finished this book. Special thanks to Paul Kenny, Helen McMartin, and Maxine McArthur for assistance and support during my fellowship.

My interactions with Cambridge University Press were nothing but positive from start to end. My first email to the series editors was answered within hours, if not minutes, and I was instantly met with encouragement and great advice. My greatest thanks to Mark Fathi Massoud and Jens Meierhenrich for helping me to navigate the world of academic publishing and to Rachel E. Stern, Finola O'Sullivan, and Joe Ng for supporting me in following through on this project. The anonymous readers of initial drafts of this book provided great support and suggestions that helped with its improvement. A heartfelt thanks for your kind and constructive comments.

Copyright acknowledgements are as follows: Chapter 1 contains parts from 'Research Access and Ethics in Myanmar', first published in the *Journal of the Oxford Centre for Socio-Legal Studies*, Issue 2, 2018; Chapter 3 builds on 'Bottom-Up Explorations: Locating Rule of Law Intermediaries after Transition in Myanmar', which first appeared in the June 2019 issue (Volume 23, Number 1) of the *Journal of Burma Studies* published by the University of Hawai'i Press for the Center for Burma Studies.

ABBREVIATIONS

| | |
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| AFPFL | The Anti-Fascist People's Freedom League |
| ANU | Australian National University |
| BABSEACLE | Bridges Across Borders Southeast Asia Community/ Clinical Legal Education |
| BC | British Council |
| BIA | Burma Independence Army |
| CEELI | Central and East European Law Initiative Institute |
| DFID | UK Department for International Development |
| DPKO | United Nations Department of Peacekeeping Operations |
| EU | European Union |
| FNF | Friedrich Naumann Foundation |
| HD Centre | Centre for Humanitarian Dialogue |
| IBA | International Bar Association |
| IBAHRI | International Bar Association's Human Rights Institute |
| ICC | International Criminal Court |
| ICJ | International Commission of Jurists |
| ICTJ | International Centre for Transitional Justice |
| IDLO | International Development Law Organization |
| ILAM | Independent Lawyers' Association of Myanmar |
| ILO | International Labour Organization |
| INGO | international non-governmental organisation |
| ISLP | International Senior Lawyers Project |
| JICA | Japan International Cooperation Agency |
| MLA | Myanmar Lawyer's Association |
| MLAW | Myanmar Legal Aid Network |
| NGO | non-governmental organisation |
| NLD | National League for Democracy |
| OHCHR | Office of the United Nations High Commissioner for Human Rights |

ABBREVIATIONS

| | |
|--------|--|
| OSCE | Organization for Security and Co-operation in Europe |
| PILPG | Public International Law and Policy Group |
| SC | The Supreme Court of the Union |
| SDGs | Sustainable Development Goals |
| SLORC | State Law and Order Restoration Council |
| UAGO | Union Attorney General's Office |
| UN | United Nations |
| UNDP | United Nations Development Programme |
| UNHCR | United Nations High Commissioner for Refugees |
| UNICEF | United Nations Children's Fund |
| UNODC | United Nations Office on Drugs and Crime |
| USAID | United States Agency for International Development |
| USIP | United States Institute of Peace |
| WB | World Bank |