

What Is the Rule of Law? Perspectives from Myanmar

Commentary on *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order* by Nick Cheesman

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Abstract What is the rule of law? This much celebrated concept serves as the basis for policy advocacy, reform movements, and rankings. Yet it remains very difficult to define. In *Opposing the Rule of Law*, Nick Cheesman takes a new approach. Instead of asking what the rule of law is, he asks what it is not. His deep historical and contextual analysis of the way the law works in Myanmar shows both that the concept of rule of law blurs with ideas of law and order and also that understanding how it works requires examining how it is embedded within political and ideological systems.

Keywords Rule of law · Myanmar · Law and order · World Justice Project · Rankings

Nick Cheesman's *Opposing the Rule of Law* is a masterful study that provides new insights on the distinction between the rule of law and law and order through a detailed sociolegal analysis of ideology, power, and practice. Cheesman's thoroughly researched and clearly written book tacks back and forth between what law does and what it says as a way to examine what the rule of law means. In the end, one of the major contributions of this important book is to show how varied the meanings of rule of law are, how it is ideology as much as an ideal type, and that it is deeply infused by politics. Ultimately, the book shows that the concept has a fundamental normative dimension and cannot be described only in terms of procedure. It concludes that the rule of law is a system based on the idea of equality. It seems to me that this study shows that also ideas of justice, fairness, and human rights emerge as key principles.

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Opposing the Rule of Law takes a novel approach by defining the rule of law by contrasting it to law and order. It is intriguing that the words for the rule of law and law and order in the Burmese language are quite different. The phrase for rule of law includes words for fairness, justice, and natural law. The phrase for law and order combines words that refer to stillness and calmness as well as being flattened or pressed. It seems that this striking linguistic difference, not found in English, could have inspired Cheesman to develop the contrast as a key analytic argument. Indeed, it follows much anthropological scholarship that argues that the way we see the world is shaped by the words we use to describe it.

Following this insight, the book begins by clearly delineating the distinction between law and order and the rule of law in theory. Drawing on Foucault, Cheesman points to the distinction between police actions and the rule of law. The former is an administrative system, linked to a state's specific order, while the latter is a juridical system with 'general and permanent prescriptions'. Foucault distinguishes between a police model of government and a rule of law state. Police here is based on maintaining order and working to abolish disorder through the use of state forces, referring very broadly to an administration intended to secure order. When the administration of policing expands to include all aspects of society, it becomes a police state, in which the population is subjected to an ever expanding 'array of habitual interference'. It is this distinction that Cheesman traces in the colonial and post-colonial history of Myanmar. His historical narrative of law and politics in Myanmar shows that there is continual slippage, both in ideology and practice, between the rule of law and law and order.

Much of the book describes the ideology of law and order as it is enacted in Myanmar. The law and order model promotes quietude and immobilization as social ideals. It makes it hard for the population to move from place to place or to shift positions—obstacles justified as the control of 'restlessness'. Intriguingly, Cheesman sees that this approach to law and governance originated in British colonial governance, which similarly sought order and quietude in its management of Burma. When a military government took over in Myanmar, it picked socialism as an ideology but still pursued the creation and maintenance of a law and order state. In the postsocialist period, after the second takeover by the military, the police increasingly became part of the governing system. It was still focused on maintaining order. A need for order was used to legitimate the police use of torture of the accused in order to generate a confession, the acceptance of money exchanges in case handling in courts (although with some restrictions about how it was done), and the management and control over public assemblies and protests. The system was governed by the goals of efficiency and accuracy.

The rule of law is now much talked about in Myanmar and highly valued as an ideal to promote. However, Cheesman points out that systems of law and ordering do not change quickly or easily. For example, British colonial law was expressed through codification, and these codes, with their universal claims, persisted up to the present. So did colonial legal differentiation, the practice of treating different segments of the population differently. This strategy, opposite to that of the rule of law, continues into the present as well. Thus, although the current system looks like one ruled by law, the focus of legal intervention in Myanmar is still on maintaining

order. To some extent, it builds on British colonial legal practices, as well as more recent socialist and military government policies.

The model of law and order and its enactment in Myanmar is, Cheesman argues, fundamentally different from the rule of law. Although it may include law and order, in Myanmar history these are fundamentally opposed ideas. Showing the contrast is an essential part of his argument, since law and order is often incorporated into rule of law ideology and not viewed as distinctive.

Thus, the book argues that rule of law is a very difficult concept to define and needs to be understood in terms of distinct histories, politics, ideological orientations, and ongoing practices by which legal institutions function and people relate to them. I am persuaded that it defies definition, at least in the abstract, and as Cheesman shows well, can only be understood within its ideological, normative, and processual features analyzed in context. The strategy of defining rule of law by showing what it is not offers promise. But the rule of law often overlaps with law and order and they run into each other without a sharp boundary. Ideologically the rule of law is often presented as a simple salvation, but the term gets used in many different ways in different political contexts.

What is distinctive then about rule of law? The book suggests that the difference is normative: there are ideas of equality in the rule of law, and perhaps human rights. The book offers ethnographic examples to support its arguments. One interesting case describes a group of farmers facing loss of their lands to development who assert their rights. They join together with other displaced formers to protest and file petitions. Although they are convicted, their sentences are then reduced significantly. The point is that they claimed rights and that there is a language of rights available to make claims which may have some effect. In other words, the rule of law discourse of rights exists alongside law and order ideology and is not a distinctively different system.

Although Cheesman is primarily interested in defining the rule of law, by focusing on the contrast with law and order, he defines that concept as well. Yet he does not problematize the concept in the same way as he does the rule of law. There are, however, multiple meanings to law and order. It too has an ideology, a set of practices, and laws. The law and order regime in Myanmar is justified by talk about disorder and threats. It too is the product of historical political and sociological forces. Although Cheesman recognizes the socially and culturally situated nature of law and order, it is not emphasized. The model would, I suspect, have appeared in a more nuanced and complex way if he were not using it to define the rule of law through juxtaposition.

Given Cheesman's clear analysis of the distinction between rule of law and law and order, it is noteworthy how often these concepts are merged in everyday discourse and even in sophisticated ranking systems. For example, the World Justice Project, in its effort to rank the countries of the world in terms of their compliance with the rule of law, sees law and order as a dimension of the rule of law.¹ According to the 2014 Rule of Law Index, for example, there are nine factors in the rule of law, two of which are similar to law and order concepts. Factor 5: 'Order and

¹ <<http://worldjusticeproject.org/rule-of-law-index>>. Accessed 26 July 2016.

Security’, ‘Measures how well the society assures the security of persons and property. Security is one of the defining aspects of any rule of law society and a fundamental function of the state.’ It is also described as a precondition for realizing rights and freedoms. Order and security covers three threats to order and security: crime, political violence, and vigilante justice.

Factor 8: Criminal Justice, is described an ‘effective criminal justice system is a key aspect of the rule of law’, and a ‘mechanism for bringing action against individuals for offenses against society’. Other characteristics of this factor are that it needs to be successful and timely in investigating and adjudicating criminal offenses; use a system that is impartial, non-discriminatory, and free of corruption and improper government influence; and protect the rights of both victims and accused. Other factors measure protection of human rights, such as Factor 4, which refers to the absence of corruption, open government, constraints on government powers, regulatory enforcement, civil justice and informal justice.

Although these factors refer to law and order, in contrast to the situation in Myanmar, they do not define it as order at all costs nor do they highlight only efficiency or quietude. Thus, the major effort of the World Justice Project to specify the characteristics of the rule of law and measure them globally incorporates some elements of law and order.

Clearly, distinguishing these concepts is very difficult, particularly if they can only be understood within particular historical and social contexts, and through ongoing and enduring beliefs and practices. I agree with Cheesman that these two concepts cannot be seen as clearly distinct. We need to acknowledge the slippery nature of rule of law: that it refers to many different things and that claims to the rule of law are made politically and ideologically. Ultimately, the distinction is normative rather than structural or procedural. As Cheesman’s initial linguistic distinction between the words in Burmese shows, these terms refer to fundamentally different conceptions of social order. They differ more in cultural conceptions of law and its role in society than they do in rules or procedures; more in everyday practices and beliefs than in institutional arrangements.

This valuable book will not tell us what the rule of law is, but may help us to develop more contextualized ways of understanding the way the concept is thought about and deployed by various groups from international NGO leaders to socialist government officials and local farmers and fishermen. In this way, *Opposing the Rule of Law* has opened up a major new area of discussion about the rule of law which promises to be very productive.