

## The role of law in the Rule of law, the contribution of academics in Lao PDR\*

### Résumé

*Cet article traite des rapports entre formation juridique et État de droit au Laos, notamment à travers l'expérience du projet de coopération interuniversitaire entre l'Université du Luxembourg et l'Université Nationale du Laos. L'étude revient d'abord sur le cadre théorique et concret dans lequel intervient cette coopération en s'intéressant au concept d'État de droit et à son lien avec l'aide au développement, à la transplantation du concept d'État de droit dans le droit laotien ainsi qu'à sa mise en œuvre. La contribution propose ensuite un état des lieux de la situation universitaire au Laos en mettant l'accent sur la contribution de l'assistance internationale à l'élaboration d'une Faculté de droit. Enfin, l'article souligne les paramètres culturels et politiques qui viennent limiter les travaux universitaires, particulièrement la difficulté d'accéder à des sources et ressources juridiques. En conclusion, l'auteur insiste sur la nécessité de forger une culture juridique laotienne via l'université pouvant permettre de soutenir une transition effective vers l'État de droit.*

### Zusammenfassung

*Dieser Beitrag behandelt das Verhältnis von Juristenausbildung und Rechtsstaat in Laos, insbesondere im Zusammenhang mit den Erfahrungen des interuniversitären Kooperationsprojektes zwischen der Universität Luxemburg und der Nationalen Universität Laos. Die Untersuchung geht zunächst auf den theoretischen und konkreten Rahmen dieser Kooperation ein, indem sie das Rechtsstaatsprinzip und seine Verknüpfung mit der Entwicklungshilfe, die Transplantation des Rechtsstaatsprinzip ins laotische Recht sowie seine Umsetzung genauer in den Blick nimmt. Der Aufsatz bietet sodann eine Bestandsaufnahme der universitären Situation in Laos mit einem Fokus auf den Beitrag der internationalen Hilfe für die Entwicklung einer juristischen Fakultät. Schließlich hebt der Aufsatz die kulturellen und politischen Faktoren hervor, die das juristische Arbeiten erschweren, insbesondere die Schwierigkeiten beim Zugang zu juristischen Quellen und Ressourcen. Abschließend betont die Autorin die Notwendigkeit zur Bildung einer laotischen Rechtskultur durch die Universität, die es ermöglicht, einen effektiven Übergang zum Rechtsstaat zu unterstützen.*

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## Setting the scene: Rule of Law and Development in Lao PDR

### 1. Rule of law and Development

“Rule of law” has become central to development policy making, if not “*a necessary ingredient in any development strategy*”.<sup>1</sup> Aid agencies which in the past focused primarily on building roads and dams now increasingly emphasise the importance of the Rule of law leading to a proliferation of law reform projects and programme. Lao PDR is no exception with several agencies running similar programmes in the legal sector.<sup>2</sup> Despite the omnipresence of this concept in the development sector, various visions of the Rule of law have emerged, making both its rationale and content somewhat unclear. “Rule of law” as a goal of development policy has in the past often been seen *as a tool* to bring about economic growth, leading to a narrow vision of the Rule of law only necessary to create the institutional conditions for markets and foreign investments and largely synonymous of an efficient court system.<sup>3</sup> This instrumentalist conception has given way in the current era to a broader conception: the Rule of law has grown *as an end* itself meaning that it does not need to be tied directly to growth.<sup>4</sup> This shift is best illustrated by the inclusion of Rule of law among the Sustainable Development Goals (SDGs) set by the United Nations under the goal 16 “*Peace, justice and strong institutions*” clearly acknowledging the importance of providing access to justice for all and for building effective, accountable institutions at all levels as an autonomous objective of development.<sup>5</sup> Yet, making it an objective does define its content.

Turning to legal theory, where the concept originates from, Rule of law is inextricably linked to constitutionalism and separation of powers and commonly relates to judicial review and the link between the existence of a legal norm and its protection by

- 1 D. M. Trubek, “The ‘Rule of Law’ in Development Assistance: Past, Present, and Future”, in D. M. Trubek and A. Santos (eds.), *The New Law and Economic Development. A Critical Appraisal*, Cambridge University Press, 2006, pp. 74-94, sp. p. 74 and p. 81. In 2006, the World Bank reported having supported 330 “rule of law” projects and spent \$2.9 billion dollars on this sector since 1990.
- 2 See the “Citizen Engagement for Good Governance, Accountability and the Rule of Law” (CEGGA) funded jointly by the EU, Germany and Switzerland; the “UNDP’s Strategic Support to Strengthen the Rule of Law in Lao PDR” (3S-RoL); the Japan International Cooperation Agency (JICA) project; The Asia Foundation’s “Law and Justice” programme; the new programme of the Agence Française de Développement (AFD) and the two Luxembourg’s Rule of Law projects (the project LAO/031 of LuxDev entitled “Support Project to Legal Teaching and Training and to the Promotion of the Rule of Law Concept in Lao PDR” and the “Inter-University Cooperation Project” (University of Luxembourg) dedicated to strengthening the Rule of law through higher legal education).
- 3 See also in the same book A. Santos, “The World Bank’s Uses of the “Rule of Law” Promise in Economic Development”, pp. 253-300.
- 4 D. M. Trubek and A. Santos, “Introduction: The Third moment in Law and Development Theory and the Emergence of a New Critical Practice”, in D. M. Trubek and A. Santos (eds.), *The New Law and Economic Development. A Critical Appraisal*, Cambridge University Press, 2006, p. 9. The doctrine describes a shift in the rationale of development since the 90’s, described as the “Third moment” in Law and Development theory.
- 5 See <https://www.un.org/sustainabledevelopment/peace-justice/>.

a court.<sup>6</sup> The Rule of law “*signifies that all persons (natural or juridical), including organs of the state, should comply with laws adopted through prescribed constitutional procedures. Its essence is the prohibition of the exercise of arbitrary power*”.<sup>7</sup> However, despite this common understanding, two conceptions are generally distinguished: a “thin” and a “thick” Rule of law.

The “thin” or formal concept relies on the virtue of procedure: it requires that government officials be bound by the law and that the law be clear, general, certain, public and applied equally to all through effective and independent legal institutions.<sup>8</sup> These principles reflect L. Fuller’s eight principles of “the inner morality of law” (generality, publicity, prospectivity, intelligibility, consistency, practicability, stability and congruence).<sup>9</sup> Regulating the process rather than the substance, this thin conception relates to how governments should act but not to specific output, regardless of whether the system is part of a democratic or non-democratic society.<sup>10</sup>

The “thick” or substantive conception builds on these requirements: laws should not only be made in a certain way but they should also adhere to specific normative standards of rights and fairness. This broader stance is embodied in the United Nations’ approach describing the Rule of law as “*a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards(...)*”.<sup>11</sup> This approach has also inspired several Rule of law “check-lists” used to measure compliance with Rule of law.<sup>12</sup>

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- 6 L. Heuschling, “‘État de droit’: Why Import the German Term ‘Rechtsstaat’?”, in J. Meierhenrich and M. Loughlin (eds.), *The Cambridge Companion to the Rule of Law*, Cambridge University Press, forthcoming, <https://orbilu.uni.lu/handle/10993/35733>, p. 6.
  - 7 B. S. Chimni, “Legitimizing the international rule of law”, in J. Crawford and M. Koskeniemi (eds.), *The Cambridge Companion to International Law*, Cambridge University Press, 2012, pp. 290-308, sp. p. 290.
  - 8 Among the extensive literature on the topic, see: J. Waldron, “The rule of law and the importance of procedure”, J. E. Fleming (ed.), *Getting to the rule of law*, New York University Press, 2011 pp. 3-31; B. Tamanaha, *On the rule of law: History, politics, theory*, Cambridge University Press, 2004.
  - 9 See L. Fuller, *Morality of law*, Yale University Press, 1969. See also J. Raz, “The Rule of Law and Its Virtue”, in *The Authority of Law*, Oxford, Clarendon Press, 1979, pp. 210-229.
  - 10 R. Peerenboom, “Varieties of rule of law: An introduction and provisional conclusion, in R. Peerenboom (ed.), *Asian discourses of rule of law: Theories and implementation of rule of law in twelve Asian countries, France and the US*, New York: Routledge, pp. 1-53, sp. p. 2.
  - 11 Report of the Secretary-General, “The rule of law and transitional justice in conflict and post-conflict societies”, *United Nations*, S/2004/616, p. 4. It follows: “*It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency*”. The concept of the Rule of law is embedded in the Charter of the United Nations as one of the aims of the UN (see the preamble).
  - 12 See for example the World Justice Project WJP’s “Rule of Law Index” using 8 criteria: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice, <https://worldjusticeproject.org/news/wjp-rule-law-index-2019-global-press-release>; the “Rule of

Whatever conception best suits sustainable law development in practice is debatable. If the requirements of a “thin” Rule of law are widely shared and provide a certain degree of universalism, this universalism is very fragile when it comes to the “thick” Rule of law.<sup>13</sup> At the same time though, the failure of transplants and top-down law reforms stemming from a formalistic approach has been largely documented.<sup>14</sup> One of the major reasons put forward is the lack of *knowledge* with respect to the legal, social and political structures of the recipient country making “copy-paste” law reforms prevailing while the necessary indigenization of concepts is largely disregarded,<sup>15</sup> as well as how change in the Rule of law occurs and enables legal effectiveness.<sup>16</sup>

## 2. Transplanting the Rule of law in Laos

Law reform in Laos is quite a recent and lengthy process. From the proclamation of Lao People’s Democratic Republic in 1975 until 1986, the Party and the State were based on the policies of the party and mostly ruled by decrees and orders; no legislative procedure existed.<sup>17</sup> The turning point is 1986 with the introduction of the “New Economic Mechanism”, which marked the transition to state capitalism when the Lao Revolutionary Party introduced its new policy “*to administer the State and socio-economic development through the Constitution and Laws (...) in order to be able to protect and develop the Nation, under the condition of market economic expansion and international integration*”.<sup>18</sup> In 1991, the adoption of Lao PDR’s first constitution formalized this transition. Amended in 2003 and 2015, the Constitution – although not referring explicitly to “Rule of law” – now clearly sets that “*(t)he State manages the society through the provisions of the Constitution and the laws. Party and state organisations (...) and all citizens must function within the bounds of the Constitution and*

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Law Checklist” elaborated by the Venice Commission of the Council of Europe using 6 criteria: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law, [https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule\\_of\\_Law\\_Check\\_List.pdf](https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf). See also “The United Nations Rule of Law Indicators, Implementation Guide and Project Tools”, [https://www.un.org/ruleoflaw/files/un\\_rule\\_of\\_law\\_indicators.pdf](https://www.un.org/ruleoflaw/files/un_rule_of_law_indicators.pdf).

13 R. Peerenboom, *op. cit.*, p. 45.

14 See D. M. Trubek, “The ‘Rule of Law’ in Development Assistance: Past, Present, and Future”, *op. cit.*

15 M. Kryeger, “The Rule of Law: Legality, Teleology, Sociology”, in G. Palombella and N. Walker (eds.), *Re-locating the Rule of law*, Hart, 2008, UNSW Law Research Paper n°2007-65, <https://ssrn.com/abstract=1218982>; M. Trubek, *op. cit.*

16 T. Carothers, “Promoting the Rule of Law Abroad: The Problem of Knowledge”, *Carnegie Endowment for Int’l Peace Rule of Law Series*, Working Paper n°34, 2003.

17 “Master plan on development of the Rule of Law in the Lao P.D.R toward the year 2020”, Ministry of Justice, Office of the Supreme People’s Prosecutor, People’s Supreme Court, Ministry of Security, August 2009, [https://www.undp.org/content/dam/laopdr/docs/Reports%20and%20publications/2018/LSMP\\_\\_Sep\\_2009\\_.pdf](https://www.undp.org/content/dam/laopdr/docs/Reports%20and%20publications/2018/LSMP__Sep_2009_.pdf), p. 4.

18 *Idem.*

the laws”.<sup>19</sup> Although several provisions of the Constitution appear difficult to reconcile with even the “thin” conception of the Rule of law,<sup>20</sup> Laos has recently officially committed to move towards a “Rule of Law State” (*lat haeng kotmai*) with the adoption in 2009 of its “Master plan on development of the Rule of Law in the Lao P.D.R toward the year 2020”.<sup>21</sup> According to the Master Plan, a State that respects the Rule of law is a State administered “through the Constitution and Laws (...) that regards laws as supreme governing rules above all”.<sup>22</sup> Rule of law is not defined as such, but the reader is reminded that ensuring “full, deep and true democratic rights of the citizens on the basis of provision of Laws is a growing trend (...) in the international arena” to which Lao PDR belongs, which should be balanced with the “deepening of Marxism-Leninism theory” and the “preservation of strong state power”.<sup>23</sup> At the same time, the Master plan also states that the “main objective of the development of the Rule of Law State is to secure the extension of ownership of Lao and Ethnic People, rights of citizens, rights and interests of children, equality between men – women, ethnic groups, as well as for ensuring the implementation of obligations under international treaties to which Lao is a party”.<sup>24</sup> While the latter reference seems to endorse a more thick or substantive version of the Rule of law, reference to the preservation of strong state power lean towards a “thin” approach closer to “rule by law”. This ambiguity is also reflected in the ASEAN’s recent commitments to Rule of law:<sup>25</sup> there is strong “rhetoric-action gaps” meaning that it has been rhetorically accepted but not implemented.<sup>26</sup> Scholars have asserted this is because ASEAN political elites have

19 Article 10. [http://www.vientianetimes.org.la/Laws%20in%20English/1.%20Constitution%20\(2003\)%20Eng.pdf](http://www.vientianetimes.org.la/Laws%20in%20English/1.%20Constitution%20(2003)%20Eng.pdf).

20 Beyond a separation of powers in principle (Chapters 5-7 and 9 set separate responsibilities for a National Assembly, the President and Government as well as the People’s Courts and Public Prosecutor), the one State-Party (*phak lat*) takes precedence over the different institutions. Article 56 of the Constitution provides for example that the National Assembly can interpret the Constitution and the laws and appoint, transfer or remove judges of the Supreme Courts. The Lao PDR follows closely the Vietnamese Leninist model, based on earlier models from the USSR and the People’s Republic of China. See S. Creak and K. Barney, “Conceptualising Party-State Governance and Rule in Laos”, *Journal of Contemporary Asia*, 2018, Vol. 48, n°5, pp. 693-716, p. 698.

21 “Master plan on development of the Rule of Law in the Lao P.D.R toward the year 2020”, *op. cit.*, p. 1.

22 *Idem*.

23 *Idem*. The Master plan also states that the “main objective of the development of the Rule of Law State is to secure the extension of ownership of Lao and Ethnic People, rights of citizens, rights and interests of children, equality between men – women, ethnic groups, as well as for ensuring the implementation of obligations under international treaties to which Lao is a party”, pp. 1-2.

24 *Ibid.*, pp. 1-2.

25 The ASEAN Charter adopted in 2007 contains some provisions including, among the purposes of ASEAN, the strengthening of democracy, good governance, the rule of law and the promotion of human rights.

26 K. Gerard, “ASEAN as a “Rules-based Community”: Business as Usual”, *Asian Studies Review*, Vol. 42, n°2, pp. 210-228, sp. p. 211; See also M. Curley, B. Dressele and S. McCarthy, “Competing Visions of the Rule of Law in Southeast Asia: Power, Rhetoric and Governance”, *Asian Studies Review*, 2018, Vol. 42, n°2, pp. 192-209.

emulated global norms as a legitimising tool and a means of deflecting criticism.<sup>27</sup> Furthermore, the rationale behind the will to move towards a “Rule of law state”, or for states like China and Vietnam towards a “socialist law-based state”,<sup>28</sup> is often motivated by efforts to build a modern economy requiring “rules of the game”, a relatively predictable institutional environment for investment, and appears closely related to the accession to the ASEAN free trade zone as well as the accession to the WTO.<sup>29</sup>

This being said, by identifying major deficiencies of the Lao legal system as regards judicial institutions, law enforcement and human resources in the legal and judicial sector, the 2009 Master plan is ambitious and provides a solid starting point for – academic – discussions and theorisation of Rule of law in Laos and numerous law reforms.<sup>30</sup> Whereas the mould was planned towards 2020, the current situation is far from reaching the objectives set.

### 3. Rule of Law situation in Laos

“While Lao PDR has made steady progress towards establishing rule of law, significant challenges remain”.<sup>31</sup> A significant number of laws has been adopted since the amendment of the Constitution in 2003 – on banking, judgment enforcement, anti-corruption, criminal procedure, family law, etc.<sup>32</sup> – by the National Assembly and published in the Lao Official Gazette.<sup>33</sup> International obligations have increasingly

27 K. Gerard, *op. cit.*, p. 211.

28 This concept has been used to describe the legal and political discourse on Rule of law in Vietnam. See T. Bui, “Dilemmas in the construction of a socialist law-based state in Vietnam: Electoral integrity and reform”, *Asian Studies Review*, 2018, Vol. 42, n°2, pp. 1-18, sp. p. 4.

29 J. Weidong, *Building the Rule of Law in China: Procedure, Discourse and Hermeneutic Community*, Vol. I, Abingdon/New York, Routledge, 2017.

30 One teacher from the Faculty of Law and Political Science, will start his PhD in September 2019 on the integration of the concept of Rule of law in Lao PDR in the University of Laval (Canada).

31 “Country Analysis Report: Lao PDR Analysis to inform the Lao People’s Democratic Republic- United Nations Partnership Framework (2017 2021)”, *UNDP*, 2015, [http://www.la.one.un.org/images/Country\\_Analysis\\_Report\\_Lao\\_PDR.pdf](http://www.la.one.un.org/images/Country_Analysis_Report_Lao_PDR.pdf), p. 17; see also the 2018 Progress Report, *UNDP*, 2019, [http://www.la.one.un.org/images/publications/UNPF\\_ProgRep\\_ort\\_2018\\_FINAL\\_Website\\_Medium.pdf](http://www.la.one.un.org/images/publications/UNPF_ProgRep_ort_2018_FINAL_Website_Medium.pdf), pp. 55-58.

32 In 2018, Laos adopted a new Criminal Code as well as a new Civil Code. Lao PDR has a total of 144 laws since the enactment of the Constitution in 1991.

33 <https://www.laoofficialgazette.gov.la>. The Official Gazette was started in 1993 with the support of the Swedish International Development Cooperation Agency (SIDA) as the official publication to share new laws. Originally scheduled for publication in Lao, English, and French, the French version was discontinued in 1994, the English version in 1996, with total suspension since May 2001 because of a lack of skilled translators and lack of funds according to the Government. SIDA’s assessment however reported the poor logistics and the Ministry’s lack of interest regarding the printing and dissemination of the Gazette as the main reasons for its failure. Nowadays, the Gazette restarted but new laws are not systematically published, even less translated. See “Evaluation of the implementation of the Rule of law in Lao PDR, 1997 – 2003 Lessons and challenges”, *UNDP*, 2003, p. 25.

being integrated in domestic laws while the Government has also enhanced its engagement as regards UN human rights mechanisms in the framework of conventions signed by Laos such as the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child or the Convention on the Elimination of all Forms of Discrimination against Women.<sup>34</sup> Furthermore, Laos welcomed for the first time in March 2019 the Special Rapporteur of the UN Human Rights Council and committed to invite one of the special procedures mandate holders to visit the country each year.<sup>35</sup> The Special Rapporteur has underlined growing openness to discuss issues once considered off-limits such as corruption and land issues, as well as the growing auditing role of the National Assembly.<sup>36</sup> Yet, he also emphasised – besides listing high profile human rights violations<sup>37</sup> – how “(m)eaningful implementation of many of the impressive pieces of legislation and policies is all too often lacking”, largely due to rampant corruption and barriers to access to justice, partly due to the paucity of lawyers as well as qualified and independent judges.<sup>38</sup> This finding is nothing new. Laos ranks 132<sup>nd</sup> of 180 on Transparency International’s corruption perceptions index for 2018<sup>39</sup> and is often characterised as a “*weak state*” where a “*culture of corruption*” is well established, including in education where teachers expect to be “rewarded” for raising marks, or awarding diplomas.<sup>40</sup>

Education in the legal sector has been identified by the 2009 Master Plan as one of the pillars to build a transparent, clear and inclusive legal system.<sup>41</sup> The University seems a natural entry point to bring change: to have a good – efficient – legal systems and good laws, you need good lawyers which in turn need a good training. Legal knowledge indeed needs to be shared by donors and recipients to enable the develop-

34 See the 2018 Progress Report, *UNDP*, 2019, *op. cit.*, p. 56.

35 “Report of the Special Rapporteur on extreme poverty and human rights on Lao PDR”, *UNHRC*, 24 June 2019, [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents/A\\_HRC\\_41\\_39\\_Add.2.docx](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents/A_HRC_41_39_Add.2.docx), p. 4.

36 “Preliminary findings, Statement by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights on his visit to Lao PDR”, *UNHRC*, 18-28 March 2019, [https://www.ohchr.org/Documents/Issues/EPoverty/EOSVisitToLao28Mar2019\\_EN.pdf](https://www.ohchr.org/Documents/Issues/EPoverty/EOSVisitToLao28Mar2019_EN.pdf), p. 19. The National Assembly has a “hotline” since 2008, allowing citizens to ask questions about legislative actions but it only operates when the assembly is in session this is to say only eight weeks a year.

37 Including the disappearance of Sombath Somphone, prominent civil society leader. See the Preliminary findings, *op. cit.*, pp. 19-20 and the references to FIDH and Human Rights Watch Reports.

38 Final Report, *op. cit.*, p. 16.

39 “Laos: Corruption Perceptions Index 2018”, *Transparency International*, [www.transparency.org/country/LAO](http://www.transparency.org/country/LAO).

40 M. Stuart-Fox, “The Political Culture of Corruption in the Lao PDR”, *Asian Studies Review*, 2006, Vol. 30, pp. 59-75, sp. pp. 63-64. See also the “Master plan on development of the Rule of Law in the Lao P.D.R toward the year 2020”, *op. cit.*, p. 57; see also “Preliminary findings”, *op. cit.*, p. 15.

41 Master plan, *op. cit.* Reference to the four pillars of the Lao legal system can be found in “The law-making process in Lao PDR – A baseline study”, *UNDP/Lao Ministry of Justice*, 2015, [http://www.la.undp.org/content/lao\\_pdr/en/home/library/democratic\\_governance/law-making-process-baseline-study.html](http://www.la.undp.org/content/lao_pdr/en/home/library/democratic_governance/law-making-process-baseline-study.html), p. 10.

ment of a legal culture and a successful transplant of the Rule of Law. This is the concrete path the Luxembourg's cooperation is following since 2017 through its Inter-University cooperation between the University of Luxembourg and the National University of Laos, specifically targeting the Faculty of Law and Political Science, aiming at contributing to the on-going building of a 'Law School'.

## Contributing to the on-going building of a "Law School"

### 1. Emergence of (legal) higher education in Laos

Whereas Lao PDR is still struggling with access to primary education and child labour,<sup>42</sup> higher education is not the first priority. After 1975, although the Government built numerous primary and secondary schools to eradicate illiteracy, most qualified teachers fled the country in fear of the "Pathet Lao" (renamed "Lao People's Revolutionary Party").<sup>43</sup> As noted by scholars, "[t]he effect on the country was catastrophic, setting back development by at least a generation".<sup>44</sup> As a result, the quality of basic education is still currently low<sup>45</sup> and teaching methods have often been described as inadequate, the dominant one being rote memorization.<sup>46</sup> This indeed impacts higher education. Tertiary education remained strictly limited until the early 1990 s. For a decade and a half after 1975, more than 10,000 Lao students were sent for training abroad in Soviet Bloc countries.<sup>47</sup> The fall of the Soviet Union as well as the cut of its cooperation and aid in higher education led to the establishment of the first university in Lao PDR – the National University of Laos (NUOL) in 1995 – and

42 See in particular, "Lao PDR Economic Monitor. Building Human Capital for Poverty Reduction", *World Bank*, January 2019, <http://documents.worldbank.org/curated/en/818841549314902040/pdf/134324-REPLACEMENT-PUBLIC-LEM-2019-January.pdf.pdf>, p. 51ff; "Understanding Children's Work, "Understanding Children's Work and Youth Employment Outcomes in Laos, Country Report", *Understanding Children's Work (UCW) Programme*, 2014, [https://www.dol.gov/sites/dolgov/files/ILAB/research\\_file\\_attachment/GLO%2008%20Lao%20inter-agency.pdf](https://www.dol.gov/sites/dolgov/files/ILAB/research_file_attachment/GLO%2008%20Lao%20inter-agency.pdf), p. 6-7.

43 G. Evans, *The politics of Rituals and Remembrance: Laos since 1975*, Silkworm Books, 1998, p. 158; M. Stuart-Fox, *Buddhist Kingdom, Marxist State, the making of modern Laos*, White Lotus, 2<sup>nd</sup> ed., 2002, p. 233. The country lost 90% of its educated population.

44 M. Stuart-Fox, *Buddhist Kingdom, Marxist State, the making of modern Laos*, op. cit., p. 233.

45 "Preliminary findings", 2019, op. cit., p. 18.

46 J. R. Hutchison, "The Law of Bo Pen Nyan (No Worries): Understanding the Rule of Law and the Role of Law in Modern-Day Laos", Vanderbilt University Law School, JD's dissertation (unpublished), 2006, p. 4. The author also notes – based on interviews – that "copy-copy" or "read-copy" instruction is prevalent, where the teacher reads from a textbook or writes on a board and the students copy to their notes.

47 B. Siharath, "The Higher Education in Lao PDR and Roles of International Cooperation for Its University Development-National University of Laos", 2010, <https://www2.gsid.nagoya-u.ac.jp/blog/p.2>. Students were sent to such as Vietnam, the Soviet Union, Poland, Hungary, Bulgaria, East Germany, etc.

of new partnerships.<sup>48</sup> The Law School was originally created by the Ministry of justice in 1986 as a middle level law school, then integrated in NUOL as the Faculty of Law and Political Science (FLP) in 1997 under the supervision of the Ministry of Education and Sports.<sup>49</sup> The FLP benefited early from international assistance with a Swedish programme “*Strengthening of Legal Education and Training in the Lao PDR*,” from 2000 until the first Luxembourgish project – LAO/23<sup>50</sup> – came into play in 2010, later replaced by the project LAO/031 “*Support Project to Legal Teaching and Training and to the Promotion of the Rule of Law Concept in Laos*”. When the first development project started at the FLP, the Law School was hardly an institution. As described by a donor agency official, there were no textbooks, teachers were not qualified, and lectures were basically based on notes taken by students in the 1980’s.<sup>51</sup> Donors’ have supported the elaboration of legal textbooks in Lao,<sup>52</sup> the construction of lecture rooms and dormitories in addition to numerous activities aiming at fostering curricula,<sup>53</sup> competencies of teachers as well as management and governance of the FLP. Knowledge and quality of teaching have improved during the last two decades and the FLP is by far the best “Law School” in the country, nonetheless it is still way behind ASEAN and Western university standards.

The findings of the Rule of law Master plan are still largely applicable: “*most of the lecturers are generally inexperienced and have not received training in pedagogy*”, a limited number have a “*Masters Degree from abroad, and at the same time, the Law students who have completed their studies during the new market economy within the country lack experience, and many are not able to prepare adequate teaching materi-*

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- 48 *Ibid.* For a detailed historical description, see K. Ogawa, “Higher Education in Lao PDR” in Y. Hirotsato and Y. Kitamura (eds.), *The Political Economy of Educational Reforms and Capacity Development in Southeast Asia*, 2009, pp. 283-301, p. 284ff. At present, higher education in the Lao PDR comprises four public universities: NUOL; Souphanouvong University (Luang Prabang); Champasak University, and Savannakhet University in the province of Savannakhet which opened in 2009. Only NUOL, Savannakhet and Champasak have a “Law School”.
- 49 Other “Middle level schools” offering a Law diploma have been opening by the Ministry of Justice as part of a “National Institute of Justice” with the aim to build capacity of legal officials. See the 2019 Master Plan, *op. cit.*, p. 27. For J. R. Hutchison, *op. cit.*, p. 7: “*Blurred responsibilities have led the middle level law schools and the National University FLP to compete by criticism and cannibalize each other rather than cooperate and establish natural niche markets*”.
- 50 Programme of LuxDev, LAO/023 “Strengthening the Rule of Law through Legal University Education” 2010-2015, replaced by LAO/031.
- 51 J. R. Hutchison, *op. cit.*, p. 7.
- 52 *Ibid.* 36 legal textbooks in Lao have been supported by SIDA and LAO/023, consisting of theory and legislation outlines. Thai textbooks are also used to fill the gaps.
- 53 The Faculty offers nowadays five Bachelor Degree (in Civil law, Administration law, International Relations, Business Law and Criminal Law) and four Master Degree (in Law, Political Science, International Law and Business Law). The International Law Master is offered in collaboration with the University of Lyon 3 (France). Some other four “special courses” called “Associate Curriculum” are offered. For these, students are not selected from university entrance examination results but sit for entrance examinations of specific faculties; they are charged tuition and registration fees. See B. Siharath, *op. cit.*, p. 7. Curricula are currently under revision to comply with ASEAN standards with the support of LAO/031 (LuxDev).

als nor to use teaching methodology, and thus they are not able to transfer knowledge effectively”.<sup>54</sup> If a greater number of FLP teachers have a master from abroad,<sup>55</sup> they have rarely majored in law or political science. In the same vein, there are currently four teachers holding a PhD, nonetheless often in other domains than their supposed major/area of teaching – so that the Faculty is still missing advanced teachers in law or political science. Generally, there is no clear understanding of the distinction between law and political science, particularly in terms of what it implies for research and methodology. Legal research is by the majority of teachers understood as “field research” based on interviews and collection of quantitative data, clearly conflicting with the dominant conception of legal research as “black letter” law research using primary sources (statutes, treaties, cases) supplemented by secondary sources (doctrine). This has also repercussions on the teaching: law teaching is mostly relying on theory and hardly incorporates case studies or practical exercises; students as a result are often unable to analyse law properly, develop any independent or creative thinking, write essays or legal memoranda and examinations are also not conducted in a scientific way.<sup>56</sup>

## 2. A concrete Inter-university cooperation

The ambition of the University of Luxembourg is to fill the gaps at the Law School through an autonomous inter-university cooperation aiming at fostering a culture of knowledge and in the long run at developing an academic legal tradition currently non existing. Complementary to the aforementioned project of LuxDev (LAO/031), which focuses rather on management and governance,<sup>57</sup> the Inter-University Cooperation which started in 2017 reflects the new strategy of Luxembourg’s Development Cooperation of creating multi-actor partnerships<sup>58</sup> and intends to boost the capacity of the FLP’s academic staff by building long-term bridges with academic peers that are recognised legal experts. Such a cooperation goes beyond “development as usual” by its focus – building legal knowledge and impulsing academic law research – and its concrete step by step approach. A Liaison Officer, Doctor in Law from the University of Luxembourg, is full-time based in Vientiane to implement the project. This allows a smooth cooperation and all year long capacity building but also a real understanding

54 Master plan, *op. cit.*, p. 27.

55 In 2019, out of around 80 teachers (for around 1600 students), approximately 60 have a masters from abroad (mostly from Thailand for language reason, from Japan, Vietnam, and the Philippines) and around 10 have a masters from Laos. Around 10 teachers only have a Bachelor degree. Two teachers are currently finishing their PhD, one of them in law at Nagoya University in Japan.

56 *Ibid.*

57 Faculty’s administration in particular the reform of the curricula, infrastructure and learning facilities.

58 The project started in 2017 reflecting the new strategy of Luxembourg’s Development Cooperation of creating multi-actor partnerships. Luxembourg’s Development Cooperation, Annual Report 2017, [www.cooperation.lu/2017/en/](http://www.cooperation.lu/2017/en/). See also the Inter-University Cooperation with Mali, specifically with the Faculty of Law and Political Sciences of Bamako, <https://coopebamako.uni.lu/>.

of the situation and needs of the Faculty. In a nutshell, this cooperation involves *substance* and *method*. Visiting lecturers from the University of Luxembourg come several times a year to give a series of lectures on important legal topics for Laos and its transition towards a Rule of law state such as International Human Rights Law, Foreign Investment Law, Labour Law, Fair trial rights, etc. Luxembourg's PhDs and Post-docs are also sharing their experience around week-long seminars dedicated to legal research and methodology. This triggers the creation of an informal "network" of young researchers allowing some Lao teachers to obtain guidance on their work as well as specific reading material. The University of Luxembourg also actively encourages "problem-based learning" teaching methods by supporting the moot court competition organized by the International Committee of the Red Cross in the Asia-Pacific region,<sup>59</sup> which is a great way to foster research, problem-solving skills as well as English and oral skills of students, and of teachers assisting in the competition.

Legal research is above all developed through the direct supervision of research projects by the University of Luxembourg. So far, this has taken the form of supporting small scale research implying a grant for a short stay at the University of Luxembourg under the condition to complete and publish an article in English in a law journal. This first step is conceived as a way to identify and enable someone to complete a PhD at the University of Luxembourg. Candidates are selected directly by the University of Luxembourg on the basis of the quality of their research proposal and their interview precluding a "pre-selection" by the FLP. They receive guidance from professors during their stay and from the Liaison Officer while in Vientiane. Whereas our first candidate is successful in publishing in this special edition a paper on "Foreign Investments and Environmental Protection",<sup>60</sup> two new candidates are currently working on research entitled "Towards the development of enforcement mechanisms in the ASEAN. Lessons from the EU experience" and "Critical analysis of the legal framework on combatting corruption in Lao PDR". The latter led to the creation of a new course on corruption at the Faculty<sup>61</sup> and illustrates how research and teaching are imbricated. Such a progress is promising when new-generation researchers have tended to avoid to focus on national sensitive issues.<sup>62</sup> Nonetheless, the path to higher legal education is not straightforward and some challenges are still to be overcome.

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59 This competition is bringing together universities from India to Australia and focusing on International humanitarian law and International criminal law. It is a high-level competition entirely in English. The international round takes place in Hong-Kong every year. See <http://web.redcross.org.hk/moot17/>.

60 See P. Xayyavong, "Foreign Investments and Environmental Protection: the Case of Laos", pp. 220-242.

61 Part of the Bachelor degree on Criminal Law.

62 S. Creak and K. Barney, *op. cit.*, p. 696. The authors emphasise that it is difficult to work on sensitive topics. They mention the case of "a senior academic administrator at the National University of Laos (who) told one of the authors in 2005 that the university would support his doctoral research on the condition that it avoided sensitive issues, such as resettlement of ethnic minorities, human trafficking and human rights".

## The cultural and political parameters limiting academic scholarship

### 1. Lack of access to legal sources

Obviously, the research context is much more open than it was in the past.<sup>63</sup> Nonetheless, the culture of secrecy is still well established and doing legal research in Laos is a challenging task. As regards to primary sources, although the Lao Gazette exist legal acts, laws and other regulatory acts, are not systematically published. *Travaux préparatoires* (preparatory work) and policy documents such as reports and impact assessments are not public. Judgments of domestic courts are not public either and there is no database centralising judgements nor statistics available about how many decisions are rendered per year. Additionally, the administration can always find a reason not to disclose it or ask for some money for it.<sup>64</sup> This makes it tricky and time-consuming for academic staff to have access to judgments. To obtain a judicial decision, teachers have to request it formally through a letter and get the prior approval of their hierarchy at the FLP. No need to say that in the current state of play – without access to jurisprudence – it is almost impossible to introduce practical cases in law teaching or to lead any in-depth legal research. Yet, accessibility, publicity and access to justice are the basic condition of Rule of law.

Access to secondary sources poses different challenges. The first obstacle is that there is no existing Laotian legal “doctrine”, nor law journals in Lao or any commentaries on legislation or case law. The emerging new generation of researchers will have to create a legal literature and initiate a national legal tradition. It follows that secondary resources necessarily rely on foreign doctrine and their academic analysis of the law. The second obstacle is then language barrier and concrete accessibility to foreign law journals. Currently, NUOL does not have any e-library system and the academic staff is not familiar with open access sources either (*academia.edu*, *research gate*, etc.) while this is an essential component of research development. The Luxembourg cooperation is however working on the constitution of a good library documentation and access to electronic databases. The difficulty of accessing information is indeed one of the reasons limiting academic legal scholarship’s emergence.<sup>65</sup> It is a political and cultural issue directly related to the strengthening of the legal system like the support to academic research is.

63 On research in political science by foreign academics, see I. Baird, “Party, State and the Control of Information in the Lao People’s Democratic Republic: Secrecy, Falsification and Denial.”, *Journal of Contemporary Asia*, 2018, Vol. 48, n°5, p. 1-22, sp. p. 1. The author notes that “*Secrecy, falsification and information management and control have important implications, both with regard to conducting research about Laos and in relation to how outsiders tend to analytically frame the study of Party and state*”.

64 See also I. Baird, *op. cit.* and J. R. Hutchison, *op. cit.*, p. 7.

65 Because research can also foster change, the University of Luxembourg UL is sponsoring a research grant on “Access to legal sources in Lao PDR” open to the FLP lecturers.

## 2. Lack of support to academic research

As observed by a Laotian academic, although there is a growing pressure on Laos to move towards a more knowledge-based economy in our globalised world and to improve the university education, “*the higher education system still lacks a clear vision, policy and strategies, and road map to reach regional and international standards in access, quality, relevance, and competitiveness*”.<sup>66</sup> Whereas research is considered an important university function and it was specifically given importance in the decree establishing the National University of Laos, no specific scheme seems to be established to allow proper academic research to be done. Tailored research funding is rare<sup>67</sup> and due to low salaries the majority of the teaching staff finds parallel jobs outside the university.<sup>68</sup> As a result, research without founding is unthinkable and even for those teachers securing one, time constraints replace economic constraints. Most teachers are requested to teach more than 12 hours a week but also kept busy with administrative tasks as well as family life and therefore rarely manage to devote time to research.<sup>69</sup> In terms of human resources/institutional reforms, in the long term it seems necessary to discharge the teachers from bureaucratic tasks and to formally dedicate less time to teaching and more to research possibly by creating a status for the “lecturer-researcher”. Additionally, and may be as a consequence these economic and time constraints, the importance of improving legal knowledge and critical legal research is not a given. There is no policy or strategies to nudge teachers in improving their academic capacities nor perspective of promotion if they do. Career advancement indeed remains above all political. Public universities have difficulty in retaining skilled and experienced members and are left with staff member under qualified to conduct (legal) research.<sup>70</sup> Long term vision as regards to doctoral studies is for example lacking. At the FLP, people that can currently qualify for a PhD are rare since they do not have adequate (master) degrees in law or political science. A solution to genuinely improve the level of knowledge could be to support them to do a second adequate master, in these majors abroad, so that they could in turn be eligible for a PhD. Beyond scholarships – which do exist – this supposes a clear political incentive to encourage *all* academic staff to apply to existing opportunities, facilitate their replacement during their

66 B. Siharath, *op. cit.*, p. 4.

67 Funding mostly comes from outside Laos through donor’s countries or foundations. Only recently, public funds have been allocated to research. Some limited grants are sponsored by the Government as well as by NUOL.

68 K. Ogawa, *op. cit.*, p. 299. According to the author, to compensate for the low salary and partially resolve the recurrent cost issue, the Ministry of Education encourages NUOL to establish “special programs” held during the evening and students pay a significant amount of tuition to enrol which can be utilized to assume an important part of the operating costs of that faculty. Economical constraints remain important, it is difficult for the universities to assume recurrent costs such as paying guards and cleaners, maintaining buildings and equipment, buying stationery and consumables, etc.

69 According to B. Siharath, *op. cit.*, p. 10: “*University teaching capacities are further constrained by excessive time spent teaching additional fee-based special courses up to 30 hours per week or more*”.

70 B. Siharath, *op. cit.*, p. 10.

training abroad and ensure they newly gained expertise will be used to the benefit of students. Political will is of course key in supporting legal academic scholarship.

### 3. Finding a Lao way forward

As we have seen, Laos has firmly committed to a transition towards a Rule of law state through its “Rule of law Master Plan”, including by acknowledging the role of legal higher education as one of its pillars. Almost 10 years after the adoption of this Master plan, progress have been made but there is still a long way to go to have an effective legal system in Laos, as well as (highly) qualified lawyers. This is partly due to the deficiencies of legal higher education, still emerging and whose development is lagging behind. International aid and concrete inter-university cooperation can foster legal skills and assist Lao PDR through adequate technical support fostering law knowledge and research capacities. Yet, it can only do so to a certain extent. Legal knowledge indeed needs to be shared by donors *and* recipients to enable the development of a law tradition and a successful transplant of the Rule of law. The role of Laotian law academics is of prime importance in materialising a Laotian legal culture, in finding a Lao way to create the conditions supporting an effective move towards the Rule of law. This is indeed challenging in a country where Law is not seen as prestigious field; it requires a vision for legal higher education, access to legal sources and a strong political support. *“On their own, the legal institutional features so often identified with the rule of law are not up to the task. Indeed, they never are, but always need supporting circumstances, social and political structures and cultural supports, which are not always available and are difficult to engineer”*.<sup>71</sup>

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71 M. Kryeger, *op. cit.*, p. 6.