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Trends in Southeast Asia

THE SIGNIFICANCE OF EVERYDAY
ACCESS TO JUSTICE IN MYANMAR'S
TRANSITION TO DEMOCRACY

HELENE M. KYED AND
ARDETH MAUNG THAWNGHMUNG

ISEAS YUSOF ISHAK
INSTITUTE

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FOREWORD

The economic, political, strategic and cultural dynamism in Southeast Asia has gained added relevance in recent years with the spectacular rise of giant economies in East and South Asia. This has drawn greater attention to the region and to the enhanced role it now plays in international relations and global economics.

The sustained effort made by Southeast Asian nations since 1967 towards a peaceful and gradual integration of their economies has had indubitable success, and perhaps as a consequence of this, most of these countries are undergoing deep political and social changes domestically and are constructing innovative solutions to meet new international challenges. Big Power tensions continue to be played out in the neighbourhood despite the tradition of neutrality exercised by the Association of Southeast Asian Nations (ASEAN).

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The Significance of Everyday Access to Justice in Myanmar's Transition to Democracy

By Helene M. Kyed and Ardeth Maung Thawngmung

EXECUTIVE SUMMARY

- Legal pluralism in Myanmar is a reality that is not sufficiently recognized.
- A lack of recognition of and clear mandates for the informal justice providers, along with the absence of coordination between these providers and the judiciary, present critical challenges to local dispute resolution and informal legal systems.
- This results in a high level of unpredictability and insecurity concerning the justice outcomes and in the underreporting of cases. The lack of jurisdictional clarity represents an even greater challenge in areas of mixed control and where numerous armed actors are present.
- Discussion of reform of the justice sector in Myanmar and debates surrounding peace negotiations and the role of the ethnic armed groups in service provision are separated. This situation reinforces the divide between ceasefire areas and the rest of the country and raises concern that the improvement of justice systems will leave conflict-affected populations behind.
- Recognition of and support for community-based dispute resolution are crucial to reducing the escalation of conflict at the local level. Justice systems like those of ethnic armed groups can contribute significantly to stability and order at times when the official system has limited territorial reach and is mistrusted by civilians.

The Significance of Everyday Access to Justice in Myanmar’s Transition to Democracy

By Helene M. Kyed and Ardeth Maung Thawngmung¹

INTRODUCTION

A wide range of justice providers, co-existing with the official legal system, operates in Myanmar.² While the state’s is legally the only court system in the country and customary laws and ethnic justice systems are not recognized, it does not enjoy a monopoly in the actual resolution

¹ Helene M. Kyed is Senior Researcher at the Danish Institute for International Studies. Ardeth Maung Thawngmung is Chair and Professor of the Political Science Department, University of Massachusetts.

² Helene M. Kyed, “Introduction to Special Issue on Everyday Justice in Myanmar”, *Independent Journal of Burmese Scholarship* 1, no. 2 (May 2018): 1–16; Helene M. Kyed, “Community Based Dispute Resolution: Exploring Everyday Justice in Southeast Myanmar”, 2018, <https://reliefweb.int/report/myanmar/community-based-dispute-resolution-exploring-everyday-justice-provision-southeast> (accessed 23 April 2019); Saferworld, *Justice Provision in South East Myanmar: Experiences from Conflict-affected Areas with Multiple Governing Authorities* (London: Saferworld, 2018); Saferworld, *Security, Justice and Governance in South East Myanmar: A Knowledge, Attitudes and Practices Survey in Karen Ceasefire Areas* (London: Saferworld, 2018); Lisa Denney, *William Bennett, and Khin Thet San*, “Making Big Cases Small and Small Cases Disappear: Experiences of Local Justice in Myanmar”, https://www.myjusticemyanmar.org/sites/default/files/My-Justice_16th-Dec-2016.pdf (accessed 24 April 2019); MyJustice, “Searching for Justice in the Law: Understanding Access to Justice in Myanmar. Findings from the Myanmar Justice Survey 2017”, 2018, https://www.myjusticemyanmar.org/sites/default/files/MJS%20Report_FINAL_online.pdf (accessed 24 April 2019); UNDP, *Access to Justice and Informal Justice Systems in Kachin, Rakhine and Shan States* (Yangon: UNDP, 2017).

of most cases. Ordinary people distrust and fear the official system and perceive courts as expensive, slow, distant, intrusive, and therefore the least preferred option in efforts to seek justice.³ As a result, village elders, religious leaders, and such local administrators as ward, village or village tract leaders are the main providers of everyday justice. In ceasefire and conflict-affected areas, the justice systems of ethnic armed organizations also play a pervasive role.

Recognizing this pluralism is particularly important because the vast majority of people across ethnicities and in both rural and urban areas of Myanmar prefer seeking solutions to disputes through local informal mechanisms, and between 70 and 90 per cent of respondents in recent surveys say that disputes are best resolved within their own communities.⁴ But be that as it may, systems of justice at the community level have not received much attention from scholars and the policy community.

This paper draws information and data from research undertaken as part of the “Everyday Justice and Security in the Myanmar Transition” (EverJust) project between 2016 and 2018.⁵ This was based on interviews

³ Denney, Bennett, and Khin, “Making Big Cases Small and Small Cases Disappear”; Kyed, “Introduction to Special Issue on Everyday Justice in Myanmar”; MLAW (Myanmar Legal Aid Network) and EMR (Enlightened Myanmar Research), *Between Fear and Hope: Challenges and Opportunities for Strengthening Rule of Law and Access to Justice in Myanmar* (London: Pyoe Pin/DFID, 2014); Justice Base, *Behind Closed Doors: Obstacles and Opportunities for Public Access to Myanmar’s Courts* (London: Justice Base, 2017).

⁴ On Kachin, Rakhine and Shan States, see, for example, UNDP, “Access to Justice and Informal Justice systems in Kachin, Rakhine and Shan States” (Yangon: UNDP, 2017). In the survey conducted by the EverJust project in Yangon and in Karen and Mon States, the percentages of respondent preferences for community level justice rather than seeking justice in the official courts were similarly high: 61 per cent in urban areas and 80 per cent in rural areas. In areas not administered by the Myanmar government, the percentage was around 90 per cent.

⁵ The EverJust project is a partnership between the Danish Institute for International Studies, the Department of Anthropology of Yangon University, the Enlightened Myanmar Research Foundation, and Aarhus University. It is funded by the Danish Ministry of Foreign Affairs.

with more than 400 people on observation of dispute resolution and on a quantitative survey of 602 respondents in selected villages and wards of Yangon, Karen State and Mon State. These include non-conflict areas administered by the Myanmar government, areas under the de facto governance of the main ethnic armed organizations in Karen and Mon States, and areas that are conflict-affected or under mixed governance.

LEGAL PLURALISM NOT SUFFICIENTLY RECOGNIZED

Access to justice is crucial to the attainment of peace and development, according to the UN and other international agencies.⁶ If people believe that adequate mechanisms are in place to provide such access, they are more likely to trust and approve of the post-conflict ordering of their society.⁷ The need for access to justice not only means addressing flagrant large-scale injustices, such as past atrocities and the deprivation of rights; securing access to justice in the everyday—understood here as remedies and reparations for grievances, crimes and disputes—is also necessary. Judicial reform can advance good governance, promote economic development, and sustain peace by providing mechanisms for the peaceful management of conflicts. Yet critics have branded mainstream rule-of-law assistance to transitional and conflict-affected countries as top-down, state-centric, and technocratic. They argue that it focuses on resurrecting official judicial systems without taking the justice needs of the poor as the starting point for its interventions. A focus only on state institutions, according to critics, is also flawed because these institutions are usually corrupt, inefficient and remote from most people,

⁶ UNDP, “Programming for Justice: Access for All-A Practitioners Guide to a Human Rights-Based Approach to Access to Justice”, (Bangkok: UNDP Regional Centre, 2005).

⁷ United Nations, “Report of the Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”, UN Doc. S/2004/616, 23 August 2004, <https://www.un.org/ruleoflaw/files/2004%20report.pdf> (accessed 23 April 2019).

if not seen as dangerous and repressive.⁸ This critique argues for a more holistic approach that takes into account customary, non-state and non-judicial mechanisms that are mainly used by poor and conflict-affected populations to realize their rights, solve disputes, obtain remedies and preserve social peace.⁹

These reflections are relevant to the Myanmar situation. A major area of lack of trust in the Myanmar state relates to the lack of proper justice in the official system, which undermines state legitimacy and fuels resentment towards and avoidance of the state. In conflict-affected areas, this lack of justice also fuels widespread scepticism in the peace process. A strong disconnect exists in Myanmar today between official avenues to justice and the reality of accessing justice for the majority of people. Many EverJust interviewees, including local leaders, expressed the view that only those with powerful connections and financial means received justice from the official courts. They argued that such people would win their case, whatever the actual evidence. Corruption is rampant, and despite the political transition in Myanmar, the legacies of military and authoritarian rule mean that most people still feel intimidated in the official courts. And so, they seek justice through alternative avenues and thus sustain a situation of de facto legal pluralism. This possibility of access to justice in the everyday through various local mechanisms contributes to peace and order at the local level, but is a situation that remains insufficiently recognized at the union level.

⁸ See Neil J. Kritz, “The Rule of Law in Conflict Management”, in *Leashing the Dogs of War: Conflict Management in a Divided World*, edited by Chester A. Crocker, Fen Osler Hampson, and Pamela Aall (Washington, D.C.: United States Institute of Peace Press, 2007): 401–24.

⁹ Ewa Wojkowska, *Doing Justice: How Informal Justice Systems Can Contribute* (Oslo: United Nations Development Program – Oslo Governance Centre, December 2006); Peter Albrecht and Helene M. Kyed, “Justice and Security: When the State Isn’t the Main Provider”, *DIIS Policy Brief*, December 2010, http://pure.diis.dk/ws/files/811082/PB_Justice_and_Security_web.pdf (accessed 11 December 2018); Stephen Golub, “The Rule of Law and the UN Peacebuilding Commission: A Social Development Approach”, *Cambridge Review of International Affairs* 20, no. 1 (2007): 47–67.

It was only very recently that government and international actors began to acknowledge the reality of legal pluralism in Myanmar. In March 2018, participating in a “Conference for Justice Sector Coordination”, State Counsellor Daw Aung San Suu Kyi declared that her government was willing to find ways to recognize community-level justice.

It is my observation that at the community level, the majority of people continue to use long-standing local methods for solving disputes and are reluctant to take cases to the formal or official justice system of the State [...] Therefore, in formulating our national justice strategy, we should take into consideration the use of mediation in resolving disputes systematically and the development of various modes of alternative dispute resolution to settle disputes.¹⁰

While this statement may be a significant deviation from a view of justice provision being a solely state-centric affair; laws, policies and justice sector programming still fail to reflect the reality or the desirability of community-level justice provision. Very little international support targets customary, community-based and informal justice provision, and most funding is directed towards reform of the formal justice system.¹¹ In addition, the justice systems of the ethnic armed organizations are not acknowledged by the state. Rather, the government tends to undermine them. To grasp the significance of local and alternative justice mechanisms, it is crucial to understand their importance to people in their everyday lives, and to be aware of how they operate and how they serve access to justice.

¹⁰ Speech by Daw Aung San Suu Kyi, Conference for Justice Sector Coordination, Naypyitaw, 7 March 2018, p. 6.

¹¹ Exceptions include support to community-based dispute resolution by a number of international NGOs working with local partners, like SaferWorld and Mercy Corps. In addition, the EU funding programme, MyJustice, run by the British Council also engages with local justice institutions.

INFORMAL MECHANISMS IN DIVERSE AREAS

The research on which this paper draws explored the justice preferences and pathways of people at village and ward levels in handling crimes and social disputes rather than the larger injustices associated with violent conflict, oppression and the deprivation of rights and resources.¹² A core of those findings was that the majority of cases—including those involving theft, physical fights, domestic violence and disputes related to marriage, land and debt—were resolved by village or ward leaders. These leaders primarily applied compensational justice and tried to reach consensual agreements through negotiation and mediation. In these regards, their approach was akin to community-based dispute resolution in other contexts. It had a strong focus on reconciliation and avoiding the escalation of conflict, rather than on punishing perpetrators. The research found that a majority of village and ward residents, across urban and rural areas and in conflict as well as non-conflict settings, preferred such non-judicial mechanisms.

In non-conflict areas of Karen and Mon States administered by the Myanmar government, ward, village tract and village administrators are the main actors in the resolution of disputes and crimes. These locally elected actors may be part of the state administrative system, but they are detached from the official judiciary. They are part of no system of appeal and referral, and they have no clear official mandates for dealing with cases. Although local administrators may refer to the official system as an important back-up, usually in the form of a threat to send disputing parties or perpetrators to the police if they do not agree to accept these officials' decisions, they share a distrust of the courts and the police and avoid turning to them.

Local officials often warn people that going to the official system is time-consuming and costly, and that it may not serve their justice needs. They do not believe that the official system effectively supports their

¹² See Kyed, "Introduction to Special Issue on Everyday Justice in Myanmar".

local-level decisions. Rather, it may escalate problems. Local residents consider the official system intimidating, because it requires those who turn to it to face higher level official authorities and unfamiliar formal institutions. For ethnic minorities, language is also a challenge as the court proceedings are held only in Burmese.

When ward or village leaders cannot successfully resolve cases, parties tend to have recourse to a variety of informal actors or facilitators. The latter do not play an explicit role in justice provision, but they can give advice, help to put pressure on the opposing party to agree to a solution, or provide spiritual remedies and rehabilitation. In a land confiscation case in a ward in Hpa-An, Karen State, for example, the victim received help from a monk in securing both the return of some of the land in question and compensation from the new occupants of the remainder of the land.¹³ In a theft case in the same ward, the failure of the ward administrator and the police to help retrieve stolen goods led the victim to seek advice from spirit mediums and monks, who helped to identify the perpetrator. In the end, when the victim realized that she would not receive remedy, she sought to be at peace with the problem through prayer and support from a monk. Individual ethnic armed actors can also play a facilitating role, as in an adultery case in rural Hpa-An District in which an armed actor helped the victim by pressuring the perpetrator to pay compensation and agree to divorce. Various local elders, educated persons, women's groups, and political parties also from time to time act as justice facilitators. Residents seldom obtain justice in the official courts, but rather deal with matters informally through negotiated settlements or some form of spiritual and social rehabilitation.

Different culturally and religiously informed perceptions also support peoples' preference for local access to justice and for social harmony and reconciliation. There is a shared cultural notion that the purpose

¹³ See Lue Htar, "Everyday Justice and Plural Authorities. Insights from Karen State about Land Disputes", *Independent Journal of Burmese Scholarship* 1, no. 2 (May 2018): 181–210.

of justice is to “make big cases small and small cases disappear”. Bringing one’s dispute into the public realm by turning to a third party is associated with conflict escalation and thus causes feelings of shame. Such feelings grow when parties’ failure to settle a dispute through a village or ward leader requires the involvement of a higher authority. Religious perceptions of problems and injustices deemed to be the result of fate and, for Buddhists, past-life deeds may also inform the tendency not to seek formal remedies. Some people prefer to internalize problems and make peace with them, sometimes also seeking spiritual remedies to ease their suffering.¹⁴ These perceptions also influence the practice of non-reporting, despite the existence of different informal avenues and the resolution of many cases by ward and village leaders. Underreporting is particularly high in areas of multiple and competing authority.¹⁵ It is also higher among women and vulnerable groups like informal migrants and ethnic or religious minorities, because fear of authority and of the escalation of conflict, as well as the costs of seeking justice, affect these groups more.¹⁶

Access to justice is particularly important in ceasefire and conflict-affected areas, which have experienced rampant extrajudicial killings, a lack of transparency and confusing arrays of authorities. In these areas, the official justice system is even more mistrusted than in the areas under Myanmar government control. The fact that hardly any efforts have been made to address major injustices despite ceasefires and peace talks ongoing since 2015 only exacerbate this lack of trust. Yet here, we

¹⁴ Helene M. Kyed, “Justice Provision in Myanmar: Reforms Need to Consider Local Dispute Resolution”, *DIIS Policy Brief*, March 2017, http://pure.diiis.dk/ws/files/821103/Justice_Provision_in_Myanmar_for_web.pdf (accessed 24 March 2019).

¹⁵ See Saferworld, *Justice Provision in South East Myanmar*.

¹⁶ On the tendency for lower reporting among women, see Thang Sorn Poine. “Gendered Aspects of Access to Justice in Southern Mon State”, *Independent Journal of Burmese Scholarship* 1, no. 2 (May 2018): 1–25. See also Denney, Bennett, and Khin, “Making Big Cases Small and Small Cases Disappear”.

found that grassroots populations use a variety of mechanisms to resolve everyday disputes and crimes. As in government-controlled areas, people prefer community-based dispute resolution. An important difference was, however, evident in Mon and Karen areas controlled by the main ethnic armed organizations, the Karen National Union (KNU) and the New Mon State Party (NMSP). In those areas, village residents and leaders displayed confidence in transferring cases from the village level to upper-level systems—not those of the Myanmar government, but rather those of the ethnic armed organizations. The KNU and the NMSP have their own justice systems, which include central, district and township justice committees at different levels that are in turn institutionally linked to the village and village tract levels. In areas under KNU and NMSP control, possibilities and procedures in place allow for appeals and referrals from the village levels to ethnic armed organization justice committees. As de facto parallel justice systems, the NMPS and the KNU apply their own law, including criminal and civil codes, to deal with disputes and crime.¹⁷ Our research shows that these systems play an important role in justice provision, alongside and often in coordination with local customary and religious practices. The organizations also support the codification and implementation of village rules. Village residents frequently turn to their systems when village leaders fail to resolve disputes or when cases are too big for them to deal with. Such instances may include those in which perpetrators disobey village leaders, commit repeat offences, or are involved in serious crimes like murder. After the perpetrator repeated the offence twice and the case became too difficult for it to handle, in one example, a village leadership committee transferred a physical assault

¹⁷ For a more in-depth analysis of these areas see Kyed, “Community-Based Dispute Resolution”; Helene M. Kyed and Myat The Thitsar, “State-Making and Dispute Resolution in Karen ‘Frontier’ Areas”, *Independent Journal of Burmese Scholarship* 1, no. 2 (May 2018): 29–55. Brian McCartan and Kim Jolliffe, *Ethnic Armed Actors and Justice Provision in Myanmar*, The Asia Foundation, October 2016, https://asiafoundation.org/wp-content/uploads/2016/10/Ethnic-Armed-Actors-and-Justice-Provision-in-Myanmar_EN.pdf (accessed 11 December 2019).

case from a village in northern Karen State to the KNU, which sentenced the perpetrator to two years' imprisonment.

A survey conducted by Saferworld and the Karen Peace Support Network in 2017 showed that 87 per cent of people residing in KNU-controlled villages preferred the KNU justice system; only 1 per cent preferred the Myanmar government's system; while the rest did not know which system they preferred or they had no preference.¹⁸ The EverJust research found a similar tendency in other KNU-controlled villages and in NMSP-controlled areas.¹⁹ According to qualitative interviews, respondents viewed the ethnic armed organizations' systems as both more legitimate and more effective in providing justice than the Myanmar government courts. They did not associate those systems with corruption and high costs, and they also considered them more approachable, as they used ethnic languages and had more flexible procedures, which often permitted negotiated settlements. Respondents viewed the KNU's and NMSP's justice systems as a viable option for the resolution of more serious cases and of cases when social disputes escalated; they thus contributed to peace and order within the villages. Village leaders also felt more secure and confident in settling disputes, because they had institutional support from the ethnic armed organizations. They viewed the organizations' justice committees as trusted venues to which to refer cases that had escalated or proven difficult to resolve.

The situation is more complicated in areas of mixed control. According to the Saferworld-Karen Peace Support Network survey, respondents in such areas still have a stronger preference for seeking justice through the

¹⁸ Saferworld, *Security, Justice and Governance in South East Myanmar*, p. 48.

¹⁹ When respondents in KNU and NMSP areas were asked whether they found that justice providers treated cases in a fair manner, 61 per cent said that ethnic armed organization judges were fair, 8 per cent said that they were not fair, and the rest said that they did not know. Only 20 per cent said that the Myanmar court judges were fair, 41 per cent said that they were not fair, and 20 per cent said they did not know. Only 8 per cent said the state police treated people fairly. These findings are based on the EverJust survey conducted in August and September 2016, but not yet published.

KNU system (32 per cent) than through the government system (21 per cent), but a majority of respondents are unsure of where they should turn to seek justice (42 per cent).²⁰ These figures reflect not only the existence of a plurality of authorities in areas of mixed control but also the fact that access to justice is more insecure in the absence of a clearly institutionalized system of justice. Qualitative research by EverJust, shows that the resolution of disputes by village leaders is less effective in areas of mixed control and that many people refrain from seeking justice altogether, even through local leaders, because of the insecure political-legal context. This situation is a major challenge, reflecting the need to find ways to support and recognize existing justice institutions and to ensure coordination between them.

CHALLENGES OF ACCESS TO EVERYDAY JUSTICE

Myanmar's climate of legal pluralism in practice provides important alternatives to the official justice system and the low access to justice that it affords. Nevertheless, important challenges remain. Depending on the particular local context, a high level of unpredictability and insecurity affects the justice outcomes that people can expect. Further, many cases simply remain unreported. There is a lack both of recognition of and clear mandates for informal justice providers and of coordination between these providers and the official judiciary.

In government-controlled areas, for instance, the ward and village tract administrators who resolve most disputes and crimes have no clear legal mandate to do so or transparent procedures to follow. The quality of justice at this local level depends very much on the attitudes and capacities of individual leaders and their assistants. Some ward and village tract administrators are fair and do not take bribes, while others behave less fairly or are very weak in enforcing decisions. This variety illustrates the absence of secure safeguards and checks and balances,

²⁰ Saferworld, *Security, Justice and Governance in South East Myanmar*, p. 48.

despite the introduction in 2012 of election for these local leaders. In addition, the lack of institutionalized links between these leaders and the judiciary and of support from above diminishes the capacity of local leaders to effectively enforce decisions in more difficult cases, and to deal with repeat offenders. They have no legal mandate to punish perpetrators, but they are also wary about transferring cases to the official justice system.

Across both government-controlled and ceasefire areas, the influence of powerful external actors presents a core challenge to village- and ward-level dispute resolution and local access to justice. While village- and ward-level actors manage to deal with most disputes and crimes among residents within their villages or wards, they are reluctant to deal with bigger cases, especially those that involve the military, the ethnic armed actors and business corporations. This reluctance is particularly evident in cases involving land confiscation and drug trafficking.

Local justice providers try to avoid dealing with drug abuse and trafficking. The leader of one Karen village in a government-controlled area in Hpa-An District was, for instance, convinced that 80 per cent of residents were using drugs—specifically, highly addictive methamphetamines—and that this problem was the root cause of many disputes in the village. He did not, however, dare to do anything about it.²¹ He did not believe that the Myanmar police would be able to tackle the problem, and he was afraid to approach local dealers because he believed that there were powerful armed actors behind their activities. Similarly, in a government-controlled Mon village in southern Mon state,

²¹ There is a strong sense among village residents that drug production and trafficking have increased in Mon and Karen States during the past five to ten years, in the context of ceasefires. Methamphetamine production is believed to take place in southeast Myanmar in areas under the control of local armed groups; see Ashley South, Tim Schroeder, Kim Jolliffe, Mi Kun Chan Non, Saw Sa Shine, Susanne Kempel, Axel Schroeder and Naw Wah Shee Mu, *Between Ceasefires and Federalism: Exploring Interim Arrangements in the Myanmar Peace Process* (Yangon: Joint Peace Fund and Covenant Consult, October 2018), available at file:///C:/Users/hmk/Downloads/MIARP-Report%20(1).pdf, (accessed 24 April 2019), p. 70.

drug problems were also growing, and village authorities were unable to handle the dealers despite the arrest of some users for being a public nuisance, by the local paramilitary forces and the village tract leader.

In KNU- and NMSP-controlled areas, higher authorities have stronger institutional links and offer more support to authorities at the village level.²² Each of these ethnic armed organizations has introduced anti-drug policies, and their justice committees have prosecuted a number of dealers. The NMSP also engages in drug rehabilitation activities and has even conducted anti-drug campaigns in government-controlled Mon villages, according to EverJust research.²³ However, the two organizations operate insecurely in this domain, because of a lack of government support and restrictions on moving outside of their areas of direct control. This is despite the fact that the Nationwide Ceasefire Agreement, to which both the KNU and the NMSP are signatories, supports collaboration around the eradication of illicit drugs.²⁴ In addition, like the police, the NMSP and the KNU are unable to get to the root of the drug problem. Large producers and dealers are too powerful to catch, because they are commonly linked to armed actors on many sides. Tackling this issue would require that the higher levels of the government and military agree to collaborate on drug eradication with the ethnic armed organizations.

The ethnic armed organizations face additional challenges associated with the insecure political-legal situation. Although the National Ceasefire Agreement recognizes the role of signatory organizations in “security and the rule of law”,²⁵ the government does not in fact recognize the

²² See *ibid.*, p. 71.

²³ Annika P. Harrison and Helene M. Kyed, “Ceasefire State-Making and Justice Provision by Ethnic Armed Groups in Southeast Myanmar”, *SOJOURN: Journal of Social Issues in Southeast Asia* (forthcoming).

²⁴ *Ibid.*

²⁵ This is recognized in Chapter 6, article 25, of the Nationwide Ceasefire Agreement, dealing with “Interim Arrangements”. Apart from “security and the rule of law”, the article also recognizes the roles of signatory ethnic armed groups in the fields of health, education, development, environmental conservation and natural resource management, preservation and promotion of ethnic cultures

organizations' justice systems, and there is no coordination between these systems and the official courts or police.²⁶ The provision in the agreement recognizing ethnic armed organizations' service provision awaits implementation, and dialogue about coordination in the field of justice has not yet occurred. In addition, on the ground in southeast Myanmar, official justice sector actors have very little knowledge of the NMSP and KNU justice systems, and the Mon and Karen State governments have tended to restrict rather than support law enforcement on the part of those organizations—for instance in relation to drug eradication and land disputes.

The operation of the ethnic armed organizations' justice systems in southeast Myanmar has improved since the 2012 ceasefires, as fighting has ended and the KNU and the NMSP have been able to work more freely and to make some internal reforms. However, they still suffer from constraints on human capacity and material resources.²⁷ In addition, the lack of recognition of their justice systems challenges their everyday justice provision on the ground, particularly when disputes or crimes occur along the blurred boundary lines between areas controlled by the government and those controlled by the ethnic armed organizations, or when they involve people of ethnicities other than those represented by the KNU and the NMSP—Karen and Mon, respectively. For instance, the leader of an NMSP-controlled village felt insecure about handling cases of domestic violence and debt that involved Bamar persons. Likewise, although he transferred the cases to the NMSP, its justice committee felt uncomfortable in handling cases with non-Mon people, as it lacked a

and languages, and illicit drug eradication. See Ardeth Maung Thawngmung, “Signs of Life in Myanmar’s Nationwide Ceasefire Agreement? Finding a Way Forward”, *Critical Asian Studies* 49, no. 3 (June 2017): 379–95. See also Ashley et al., *Between Ceasefires and Federalism*, p. 6.

²⁶ Ibid; Saferworld, *Justice Provision in South East Myanmar*.

²⁷ Kyed and Myat, “State-Making and Dispute Resolution in Karen ‘Frontier’ Areas”; McCartan and Jolliffe, *Ethnic Armed Actors and Justice Provision in Myanmar*.

clear mandate to do so from the Myanmar government. A KNU judge also said that it was risky and precarious to keep non-Karen convicts in KNU prisons, but at the same time he did not trust that the Myanmar police and courts would provide sufficient justice in cases that occurred inside KNU areas.

The lack of jurisdictional clarity is even more challenging in areas of mixed control and in areas in which a number of armed actors are present—including for instance the Tatmadaw, the major ethnic armed organizations, ethnic armed organization splinter groups and the Border Guard force. People can bring cases to any of these groups, and yet are also insecure and wary about going to one authority rather than to another. As the leader of a village under the mixed governance of the KNU and the Myanmar government in Karen State remarked, “We have a lot of teachers [superiors]. There cannot be more than one tiger in a cage, but our village has a lot of tigers.”²⁸ Similarly, one elderly man in the same village said, “Our village is not a village with a single government. The cow and the animal govern the village. The cow is the KNU and the animal is the government. The villagers are feeling the bad effect of both.”²⁹ These sentiments explain the village leader’s insecurity about making decisions and deciding on crimes and disputes. They also explain continuous internal leadership disputes between competing leaders and elders with allies and backers on different sides. Consequently, while the KNU justice system may be the preferred justice option in such areas, it is difficult for the KNU to have an institutional presence, and village leaders are insecure about referring cases to the KNU because of the influence and interference of powerful competing actors.

Land confiscations are another area in which access to justice is severely hampered. Village and ward actors are often able to resolve minor land disputes among village residents without much friction. But problems arise when the perpetrators of land confiscations are powerful

²⁸ Interview, village leader, central Karen State village, 27 February 2016.

²⁹ Interview, male village elder, central Karen State village, 26 February 2016.

military or corporate actors. The Tatmadaw has confiscated much land in the past, leading ethnic villagers to lose their land during the armed conflicts. And confiscations continue to happen today; various armed and business actors number among the perpetrators. Some village residents have since the political transition in Myanmar tried to claim their land back, but the officially established land committees are too weak or disorganized to address their claims and many previous owners do not have official documentation to prove their past ownership in cases that reach the courts.³⁰

The 2012 government land law poses a key legal challenge to efforts to reclaim land, as it focuses on land use and occupation, and does not sufficiently protect customary land tenure rights and the local customary land management practices of ethnic groups.³¹ For this reason, claimants who lost their land many years ago, and thus have not used it, have no means to legally claim their land back. The residents of a Karen village currently under KNU control, for instance, lost land to the Tatmadaw in the 1990s.³² Bamar people to whom the Tatmadaw sold the land now occupy it. The original Karen owners tried to get their land back through the township administration, but were told that this was impossible, because the new occupants now have official land documents. The local branch of the KNU wants to help the Karen village residents, but it has

³⁰ On the difficulties of reclaiming rights to land in Karen State, see Lue Htar, “Everyday Justice and Plural Authorities: Insights from Karen State about Land Disputes”, *Independent Journal of Burmese Scholarship* 1, no. 2 (May 2018): 181–210.

³¹ This law is called the Vacant, Fallow and Virgin Land Law. It was passed in 2012 and amended on 11 September 2018 by the Pyidaungsu Hluttaw. It is referred to as Law No. 24. See Jason Gelbort, “Implementation of Burma’s Vacant, Fallow and Virgin Land Management Law: At Odds with the Nationwide Ceasefire Agreement and Peace Negotiations”, *TNI Commentary*, 10 December 2018, <https://www.tni.org/en/article/implementation-of-burmas-vacant-fallow-and-virgin-land-management-law#1> (accessed 22 April 2019).

³² Field notes and interviews with various village residents, northern Karen State village, 11–16 May 2016.

no mandate and authority to do so at an official level. Meanwhile, the situation has led to a violent clash between a previous and a current occupant of the land. The village leaders do not dare to address these tensions.

While failure to resolve land confiscation cases occurs across all areas of Myanmar, such cases are particularly sensitive in ceasefire and conflict-affected areas. If a lack of coordination between the government and the ethnic armed organizations in handling these matters continues, there is a real risk that conflicts will re-emerge or escalate and that a lack of trust in the country's peace process will increase.³³

A final challenge to local dispute resolution is that there are no clear safeguards against discrimination. Gender dynamics is one area of concern, as women are rarely represented among local justice providers and tend to be reluctant to report cases, even to their local leaders.³⁴ There is also a tendency for justice provision to follow ethnic identity at the local level across areas controlled both by the government and by ethnic armed organizations. That is, village leaders often feel unequipped to deal with cases that involve members of minority groups in their area or cases in which a resident of their own village is in dispute with an outsider of another ethnicity.³⁵ This difficulty has led to unresolved cases and discrimination against outsiders in the resolution of cases. This matter is particularly challenging in villages with mixed populations, and increasingly common in Myanmar, since the ceasefires and the political transition have led to high rates of mobility. In urban areas, ward leaders tend to treat unfairly informal migrant settlers with no official household

³³ Karen Peace Support Network, "Burma's Dead-End Peace Negotiation Process: A Case Study of the Land Sector", 2 July 2018, <https://progressivevoicemyanmar.org/wp-content/uploads/2018/07/Eng-Burmas-Dead-End-Peace-Negotiation-Process-KPSN-report-web.pdf> (accessed 11 December 2018), p. 16.

³⁴ Mi Thang Sorn Poine, "Gendered Aspects of Access to Justice in Southern Mon State", *Independent Journal of Burmese Scholarship* 1, no. 2 (May 2018): 1–25.

³⁵ Saferworld, *Justice Provision in South East Myanmar*.

registration papers in cases with formal residents; sometimes, informal settlers are not invited to make complaints through ward leaders at all.³⁶

LINKING THE PEACE PROCESS TO THE JUSTICE SECTOR

Reforming the formal justice sector and improving the rule of law are crucial dimensions of transition currently underway in Myanmar. The country must tackle corruption, improve transparency, ensure ethnic and linguistic representation inside the formal legal system, foster greater flexibility, and change militarized and paternalistic attitudes among court personnel. However, reforming the official justice system will be a long-term process; change cannot be expected to occur rapidly. The situation thus calls for simultaneously supporting and engaging with existing community-level mechanisms and ethnic systems that already work and that ordinary citizens see as legitimate. To do so requires a deep understanding of actual practices in particular settings, rather than preconceived normative ideas about what justice is, how it ought to be provided, and by whom.³⁷ The clear preference among people in Myanmar for community-based dispute resolution, and thus for what one might call non-judicial justice, should be taken seriously—as should the cultural values and norms that influence this preference. On the one hand, both international and local civil society organizations must continuously lobby the government to recognize and include community-based dispute resolution in justice sector reform. Such recognition and

³⁶ See Than Pale, “Justice-seeking Strategies in Everyday life: Case Study Among Urban Migrants in Yangon”, *Independent Journal of Burmese Scholarship* 1, no. 2 (May 2018): 151–79; Helene M. Kyed, *Migration and Security Challenges in Yangon’s Informal Settlements: The Case of Hlaing Thayar Township* (Copenhagen: Danish Institute for International Studies, 2017), p. 9.

³⁷ Peter Albrecht, Helene M. Kyed, Erica Harper and Deborah Isser, *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform* (Rome: International Development Law Organisation, 2011).

inclusion could for instance imply amendments of the 2012 ward and village tract administrator law to strengthen the links between local justice provision and the judiciary and to ensure better downwards accountability. On the other hand, international agencies, in partnership with local organizations, can give support to local justice mechanisms, while also working to identify areas for improvement, such as gender equality, transparent procedures, safeguards against corruption and anti-discrimination.³⁸

In order to improve access to justice, it is also very important to establish links and coordination between the peace process and the policy and legal reforms underway in the mainstream political process.³⁹ Currently, for instance, reform of the justice sector is proceeding with no reference to the debates surrounding the peace negotiations and the role of ethnic armed organizations in service provision. This compartmentalization reinforces a split between ceasefire areas and the rest of the country, and it creates a real risk that conflict-affected populations are left behind as the country improves its justice systems.

A first step towards overcoming this risk would be for the union-level government to recognize in at least a de facto manner the role played by ethnic armed organizations' justice systems in contributing to the resolution of disputes and the avoidance of conflict escalation at the local level. This step could also lead to support for local-level collaboration and coordination between ethnic armed organization and government officials in matters such the combat against drug trafficking. As noted above, the National Ceasefire Agreement makes provision for the recognition of ethnic armed organization service delivery and governance in the "interim period" between the initial ceasefires and the realization

³⁸ For detailed recommendations along these same lines, see Saferworld, *Justice Provision in South East Myanmar*; Kyed, "Community-based Dispute Resolution".

³⁹ Saferworld, *Justice Provision in South East Myanmar*; South et al., *Between Ceasefires and Federalism*.

of a comprehensive political settlement.⁴⁰ It uses the concept of “interim arrangements” to describe both the governance systems of the signatory ethnic armed organizations and their coordination with the government, community and civil society in ceasefire and conflict-affected areas. However, despite the provisions of the agreement, the government has in practice not yet supported such interim arrangements.

Setbacks in the peace process mean that it is likely to be many years before a political settlement leading towards federalism in Myanmar is agreed upon. In this context, a recent report funded by the Joint Peace Fund, argues that support for “interim arrangements” can be a crucial and necessary step towards improving service delivery and governance for vulnerable and conflict-affected communities.⁴¹ This recommendation relates not only to the area of justice, but also to health, education, land and natural resource management, and other domains of governance. Apart from improving access to justice and other services, the recognition of interim arrangements can also bring important peace dividends.⁴² According to South et al., support to the governance systems of ethnic armed organizations can help counter ethnic minority “perceptions of the peace process as a vehicle for [Myanmar] state penetration into previously autonomous areas, displacing existing EAO [ethnic armed organization] authorities”, especially if the rolling out of state services is done through “convergence”—aimed, that is, at merging the ethnic armed organizations’ service delivery with that of the state, rather than through collaboration.⁴³ If existing and trusted actors are allowed to provide justice in a more secure environment, it can also be expected that confidence in the peace process will increase. Simultaneously, support for interim arrangements can also be a key element in building “federalism

⁴⁰ South et al., *Between Ceasefires and Federalism*, p. 16.

⁴¹ *Ibid.*, p. 18.

⁴² *Ibid.*, p. 8.

⁴³ *Ibid.*, pp. 9–10.

from the bottom up”, as it contributes to building the capacity of local ethnic institutions with a degree of self-determination.⁴⁴

It is, however, important to be aware that support for ethnic armed organization systems and local self-determination, not least in the areas of justice and security provision, is a sensitive political matter, as it necessarily raises questions about the distribution of power and the sharing of sovereignty.⁴⁵ In pushing for the recognition of ethnic justice systems, and of legal pluralism more generally, it is therefore of crucial importance to create incentives on both sides of the historical conflict divide between the ethnic armed organizations and the central Myanmar state—not only the civilian government, but also the Tatmadaw. Currently, there is an apparent lack of political will on the part of the government and the military to support the ethnic armed organization justice systems, as noted earlier. The need to dissolve the concern that governance on the part of non-state organizations necessarily poses an existential challenge to the state system persists.⁴⁶ As Sivakumaran has noted with reference to other conflict-affected contexts, states perceive the courts or justice systems of oppositional armed groups fundamentally as an “encroachment on their sovereignty”.⁴⁷ This view means that it is necessary to convince the central state that the justice systems of such groups, like the ethnic armed organizations in Myanmar, can contribute significantly to stability and order at times when the territorial reach of the official state system is limited and civilians mistrust that system.⁴⁸ Recognizing interim arrangements is likely to lead to consolidation of

⁴⁴ Ibid., p. 11.

⁴⁵ Harrison and Kyed, “Ceasefire State-Making”.

⁴⁶ On this general point see Zachariah Cherian Mampilly, *Rebel Rules: Insurgent Governance and Civilian Life during War* (Ithaca: Cornell University Press, 2011), p. 250.

⁴⁷ Sandesh Sivakumaran, “Courts of Armed Opposition Groups”, *Journal of International Criminal Justice* 7 (July 2009): 489–513.

⁴⁸ Ibid., p. 490.

the authority of the ethnic armed organizations, but it can also contribute to security and help build trust in the peace process—two ends that ought to be very much in the interest of the state. Such recognitions would, however, require that both sides are willing to share sovereignty and have a common interest in improving access to justice for vulnerable and conflict-affected populations.

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