Introduction to the Special Issue on Everyday Justice

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Myanmar/Burma is a country characterised by a high level of legal pluralism with the co-existence of different norms, practices and actors that are involved in resolving disputes and providing justice. This plurality becomes apparent once we examine justice provision from an everyday and empirically grounded perspective, which is the topic of this issue. The essays explore everyday justice from different topical angles: land disputes, poor urban migrants, ethnic armed organisations' justice systems, and the role of religious leaders and spiritual beliefs. They draw on ethnographic research respectively in Yangon and in Mon and Karen States during 2015-2017.[1] Based on a legally pluralistic perspective, the essays together bring insights into the complexities of justice provision and the plurality of authorities in the current Myanmar transition where changes co-exist with important continuities.

[1]All the contributors to this issue are part of a 4-year research project on 'Everyday Justice and Security in the Myanmar Transition' (EverJust) (2015-2018), which constitutes a partnership between the Danish Institute for International Studies (DIIS), Yangon University's Anthropology Department, the Enlightened Myanmar Research Foundation (EMReF) and Aarhus University. The project primarily does in-depth qualitative research, but also includes a survey across all fieldwork sites.

In anthropological studies, the concept of legal pluralism captures the existence of more than one set of binding rules and normative orders within a social field. This provides for a non-state centric and non-legalistic approach to justice, which allows for alternative norms and actors than those associated with the state to be included within definitions of law and order making (Griffiths 1986; von Benda-Beckmann 1997; Merry 1988; Moore 1978). Therefore, the concept of justice is understood in a more open-ended way, allowing for *emic* perceptions, justice defined in their own terms, not necessarily in accordance with state-legal norms or international human rights, but which may follow local, customary, religious and other perceptions of just, adequate and sufficient resolutions to disputes and crimes.

In Myanmar, the official judicial system, governed from the country's capital, is legally the only official court system, but in practice, it constitutes only one among many avenues for seeking remedies in criminal and civil cases. In addition, the official law does not enjoy a monopoly in the actual decision of many cases. In fact, from the perspective of ordinary people the official system is seldom the preferred option. Most people perceive the courts as expensive, slow, distant and intrusive. There is a widespread fear and distrust in the official system (Denney et al. 2016a; Kyed 2017; MLAW and EMR 2014; Justice Base 2017). A minority of cases end in court. Instead, village elders, religious leaders, local administrators, including ward, village and village-tract leaders, and/or the justice systems of the ethnic armed organisations (EAOs) are the main providers of everyday justice. There is great variety across Myanmar in the composition of everyday justice providers, which depends on the socio-political context. Gender, ethnicity, religion and place of origin in addition affect people's actions when they face civil disputes or are victims of

crime, and they affect how those who resolve cases treat different people. Newcomer migrants and religious minorities are particularly reluctant to report cases to official authorities as well as to local leaders (Denney et al. 2016; see also Than Pale and Harrisson's contributions to this volume).

Despite these differences, there is a widespread preference for resolving disputes at as low a level as possible, within familiar structures of the village or the neighbourhood. In a survey conducted in 2016, no less than 70 per cent of the respondents believe that cases are best resolved locally. (Kyed 2017) This commonly involves some form of community-based dispute resolution, which is focused on negotiating a mutual agreement that ends the conflict, reconciles the parties and in many instances ensures some form of compensation to the injured party. Simultaneously, in such dispute resolution it is common to observe the use of a mixture of customs, common sense, experiences, beliefs as well as references to written laws and the use of state bureaucratic artefacts. Such mixtures are conceptualized as 'hybridity' or forms of 'hybridisation' in the newer literature on legal pluralism. (Santos 2006; Kyed 2011) These concepts challenge previous, and largely colonial-period, understandings of legal pluralism as confined to the co-existence of two distinct systems, namely the state and the traditional or customary systems. (Merry 1988) Today it is common to observe various overlaps and combinations of norms and practices of dispute resolution among a plurality of institutions and actors, some of which are part of or partly recognized by the central state and others, which are not. (Kyed 2011; Tamanaha 2008) The same applies to present-day Myanmar, as shown by the essays in this issue.

In Myanmar, legal pluralism and hybridity are further complicated by the context of political transition and by the fact that not all areas are administered by the central state.

Due to the protracted years of armed conflict, some areas remain partly or fully administered by alternative state formations constituted by EAOs. (Jolliffe 2015) Legal pluralism is in this sense at least partly reflective of a plurality of authorities that *de facto* seek to govern different territories and groups. However, pluralism and hybridity also exist *within* the specific territories, especially, but not exclusively, where there is a mixture of state and EAO governance.

In areas fully or partly administered by EAOs, and their political wings, like the Karen National Union (KNU), there are what can be termed 'parallel justice systems', which are not officially recognised by the central state. (McCarten and Jolliffe 2016; see also Kyed and Thitsar this volume) The main EAOs have their own judges and/or justice committees at central, district and township levels, which can resolve any kind of civil and criminal case. EAOs like the KNU and the New Mon State Party (NMSP) have their own written laws, legal procedures and prisons, and the KNU also has a police force. (Harrisson and Kyed 2017) When village leaders in EAO-governed areas give up on resolving disputes or when crimes are too severe to deal with, they forward the cases to the EAO justice system. There is a relatively institutionalised system of referrals and appeals from the village level to the EAO courts. The KNU and the NMSP grant a large jurisdiction to the village level, which can make by-laws, apply customary rules and issue punishments, like communal labour and fines. In general, the ethnic minority populations view the EAO justice systems as having greater legitimacy than the official state courts, albeit villagers in EAO areas also prefer village-level resolution. (see Kyed and Thitsar this volume; Harrisson and Kyed 2017) EAO courts are not associated with high costs and they use procedures and languages that ethnic people can identify with. A core weakness of the EAO systems is human resource constraints

and institutional instability, which creates large variety in how cases are tried and reported. In some KNU areas, for instance, courts are mobile or convened without the required judge and committee members. (see Kyed and Thitsar this volume) There is an inconsistent use of law and legal procedures, often mixed with common-sense and negotiated settlements. These matters can work positively to ensure flexibility, but also imply unpredictability in case resolutions. (Kyed 2017) The greatest challenge for the EAO systems, and the village leaders, is the overlapping jurisdictions that exist in the areas with mixed governance, which can be politically sensitive because different and competing extra-local authorities and laws can apply. Whereas overlapping jurisdictions with the central state is the most challenging, there are also other competing authorities like EAO splinter groups or influential religious leaders, as Mikael Gravers (this issue) shows for Karen State. It is also difficult for the EAO systems to handle cases that involve litigants with another ethnicity than the ethnic group that the EAO represents.

In areas administered by the central state, it is not the official courts, but the village and ward administrators who mainly settle disputes and minor crimes, often with advice from local elders. Today these administrators are elected within the village or ward and they constitute the lowest level of the state administrative system (Kyed et. al. 2016; Kempel and Aung Tun 2016). However, their extensive role in dispute resolution is vaguely recognised by the state. Unlike in the EAO systems, village dispute resolution is detached from the official

judiciary with no system of appeal and referrals.[2] The village and ward leaders primarily enforce compensational justice and try to reach consensus-based agreements through mediation, but although they do not apply written law in any literal sense, they do make references to articles in the law and use official stamps as part of enforcing informal solutions. A common practice is also to refer to the official system as a kind of authoritative back up, usually in the form of a threat to send people to the police if they do not agree to local decisions. This hybridisation of local and state mechanisms by village and ward administrators, who are themselves neither fully state nor non-state, co-exists with other informal actors who people turn to in order to get help to resolve disputes and crimes.

Although ward and village leaders handle the majority of reported disputes, people equally seek help from what can been termed 'informal justice facilitators'. (Denney et al. 2016a; Kyed 2017) These facilitators have no explicitly recognised role in justice provision, but they can give advice, connect people to justice providers or pressure the opposed party to pay compensation or come to an agreement. Informal facilitators include religious and spiritual leaders, including Buddhist monks, astrologers, and spirit mediums. Elders, household leaders, educated persons, women's groups, political party members, and individual armed actors are also used as facilit-

[2]The ward and village tract administrators have the official duty to carry out a range of security and law and order functions, according to the 2012 law that regulates these local authorities. Out of 32 functions, 10 functions relate to security, discipline, order and community peace. However, the terms dispute resolution or justice provision are not used in the law and there is no specification of what kinds of cases the ward and village tract administrators may deal will, hear or resolve, with the exception of thieves, gamblers and people who fail to report overnight guests (The Republic of the Union of Myanmar 2012; See Kyed forthcoming 2017).

ators. For instance when people face politically sensitive issues like land confiscations, which the local leaders fear to settle, victims may try to get their land back by seeking help from people believed to have powerful connections, like monks, educated persons or individual armed actors (see Lue Htar this volume). In theft cases, some victims also address spirit mediums who they believe can help identify the perpetrator. Some female victims also report first to the local women's group which then assists them to resolve the case with the village leader. (see Kyed and Thitsar this volume) In marriage disputes, for instance involving adultery, or other kinds of cases requiring compensation or payment, like debt cases, the aggrieved party also sometimes reports to individual armed actors to enforce a decision taken with a village leader or another justice provider. 'Informal justice facilitators' can both substitute for and help facilitate a third-party resolution. The use of justice facilitators is a strong illustration of the complex pathways that people use to get some form of satisfactory solution. As illustrated by Lue Htar (this issue), it is common for people to address several informal justice facilitators and providers in one single land dispute.

The hybridity of norms and the multiplicity of dispute resolution actors reflect the prevalence of plural authorities in Myanmar at large, and across the ethnic nationalities states. Simultaneously, a core insight from the essays in this issue is that many people either prefer to resolve cases locally or to not report their cases at all, not even to village and ward leaders. Rather than seeking remedies and third party solutions, many prefer to internalise the problem and make peace with it. (Denney et al. 2016a; Kyed 2017)

What accounts for these justice preferences and practices in Myanmar? The answer to this question lies in a combination of political-historical and socio-cultural factors (Denney et al.

2016a: 11). Many decades of military rule, conflict and corruption have caused a distrust in and fear of formal state institutions, including the courts and the police, which despite the political transition and efforts to reform the justice sector still prevail in Myanmar. Yet the mistrust in the official system only partly explains the preference for local solutions and the tendency to not report cases. Important are also the particularistic forms of belonging as well as the cultural and religiously informed perceptions of justice, misfortune and disputes that prevail across different localities and groups.

The National League for Democracy (NLD) government, which came into power in March 2016, under the *de facto* leadership of Daw Aung San Suu Kyi, has made the rule of law one of its top priorities. This includes a justice sector reform that ensures equal access to fair trial and desirable justice outcomes for all citizens, as well as efforts to combat corruption. Reform of the justice sector is ongoing, and receives increasing support from international organizations, but is still in its early stages. Many legacies of the past remain in force. Myanmar has a long history — from pre-colonial to military-rule — in which governance was not premised on equality and fairness before the law. (MLAW and EMR 2014: 5) The justice system was largely used as a tool to enforce law and order, rather than to address the justice needs of the population and enhance the rule of law. (Cheesman 2015) For long periods, the judiciary was not independent from the military and the executive, and was focused on prosecuting political opposition. Officially, this has changed now, but the judiciary remains *de facto* influenced by the military and is affected by corruption. (Justice Base 2017) The transition has also seen a process towards amendments of outdated laws from the colonial and military periods and for the passing of new laws that are more in tune with democratic reform, including a legal aid law and

the setting up of Human Rights and Anti-Corruption Commissions. However, many laws of the past — including colonial-era ones — still remain in force. For many citizens, a general perception remains that those with powerful connections and financial means will win cases in the official courts, irrespective of the evidence. (MLAW and EMR 2014; Kyed 2017) There is also a general fear of formality and of highly bureaucratised procedures. Entering a formal court setting, displays of official documents, and use of formalistic language are experienced as intimidating. Such fear is usually higher among people with less education and for those ethnic minority citizens who are not fluent in Burmese, the official language, and who historically have felt most discriminated against by the Burmese dominated state apparatus. (Walton 2013) These aspects give insights into the historical relationship between citizens and the state more generally, but it is also important here to consider shared as well as particular cultural and religious perceptions.

Many ordinary citizens also feel uncomfortable and shameful in taking cases to court, because it is associated with the escalation of conflict and social disruption. This can be linked to a culturally-informed understanding of justice as the capacity to 'make the big cases smaller and make the small cases disappear' (in Burmese: *Kyi te amu nge aung, nge te amu pa pyauk aung*), shared across ethno-religious communities in Myanmar. (See also Denney et al. 2016b: 1) When a case is reported to a third party this is perceived in the first instance as conflict escalation, which is associated with feelings of shame and loss of dignity. Such feelings are stronger if parties fail to resolve a dispute *within* their own village or neighbourhood, through a consensus-based agreement. Going to a higher authority, like the police or court, equals escalation of conflict and more shame. There is also a common saying, *Kot paung ko*

hlan htaung (equivalent to the English saying: you do not air your dirty laundry in public), which underscores a disincentive to report a case, because it would draw a dispute into the public realm, which causes loss of dignity. This underscores a preference for 'making cases disappear' and avoiding conflictual and confrontational dealings with disputes, which supports a preference for reconciliation. Sometimes it also means that people refrain from reporting cases at all, not even to an informal facilitator or a local justice provider. Religious and spiritual beliefs also influence how people act and what solutions they seek when they face a dispute or a crime.

Religiously informed perceptions of problems and injustices as the result of fate, misfortune, or past life deeds increase the tendency not to seek secular remedies. Many prefer to make internal peace with a dispute or crime. This is sometimes combined with seeking spiritual remedies to ease the suffering, for instance through prayer or by addressing a religious or spiritual actor to pray or give *Ye Dar Yar* (spiritual protection) to litigants. Doing so is a highly private affair that does not involve direct reconciliation between the involved parties.

Theravada Buddhist beliefs, which are widespread across Myanmar, strongly influence understandings of injustices and victimhood. Many Buddhists understand problems as the result of misfortune, which can only be resolved within oneself by coming to peace through detachment. (Schober 2011, in Denney et. al 2016b: 2) Acceptance of problems is understood as a way to pay off past life deeds, thereby ensuring good karma in the future. If a person is robbed, for instance, this can be understood as a result of the victim having robbed someone in a past life. Not seeking a remedy means that the victim of theft can pay up for past life misdeeds. There is also a belief that those who cause harm in this life will be punished in their

future lives, which makes a third-party resolution unnecessary. Injustice in this way can be understood as a deserved and almost inevitable consequence of fortune that must be personally endured, rather than externally resolved. (Denney et. al 2016b: 3) Among Christian Karen, there is also a prevalent understanding that problems are associated with a person's fate, which, however, is not linked to notions of past life deeds. Victims have a strong preference for forgiveness over seeking redress and punishment. Religious beliefs imply a low desire for secular punishments (prison, compensation, fines, communal labour). When a third party is addressed, this means a preference for reconciliation through a consensual agreement.

These cultural and religious norms are widespread among female and male residents in areas of Yangon and Mon and Karen States dealt with by the contributors to this issue. However, they tend to influence the practices of vulnerable groups like poor migrants or newcomers, religious minorities and women more strongly. A plausible reason for this is that the cultural and religiously informed perceptions of problems and justice often are reinforced by other factors, such as fear of authority and formality, lack of belief in just outcomes, and consideration of financial costs, which affect vulnerable groups more. Combined, these factors support the preference for local level dispute solutions or for not reporting cases at all. Shared ethnic or religious identity between people and the dispute resolvers or justice providers, like the village or ward leader, also plays a role in making people feel more comfortable with reporting cases and resolving their disputes at the local level. Denney et al. (2016b) found that Hindus and Muslims living in villages or wards where the leaders are Mon, Karen or Burmese, prefer to resolve their cases with their own religious leaders. Discrimination of ethnic and religious minorities by

justice providers may be more or less explicit, and more or less politically driven, but as Harrisson and Gravers' contributions to this issue suggest there is a tendency for especially Muslims to experience lower access to justice, including in local and informal arenas, than other groups in present-day Myanmar.

Overall, these insights illustrate that legal pluralism is the result not only of state fragility or inefficiencies associated with the official system. While these are important, legal pluralism is simultaneously shaped by particular beliefs, norms and forms of belonging beyond the nation state. The essays in this issue capture this complexity of legal pluralism from different topical angles and in different localities.

Lue Htar's article zooms in on how people in government-administered areas of Karen State, rural as well as urban, deal with land disputes in hybrid and plural ways, with a particular focus on 2 land confiscation cases. While pointing out the inadequacies of the current land law and official procedures, she shows how victims link up with different actors (monks, ethnic armed persons, the military, educated persons, lawyers), who they believe have the connections and power to give them back their land. She argues that the current political transformation in Myanmar has created insecurity about who has the power to resolve land disputes and this contributes to informality and hybridity. This situation of insecure and plural authorities is also evident in Helene Kyed and Myat The Thitsar's article, which deals with competing state-making processes in frontier areas of Karen State partly administered by the KNU and partly by the central state. They give insights into the operations of the KNU justice system from the perspective of village dispute resolution, and shows how village leadership and the capacity to make decisions in crimes and disputes are affected by the situation of plural external authorities and different laws. Mikael Graver's article is also focused

on Karen State and explores the historical emergence and role of an influential monk, who has established his own moral community in an area where the KNU splinter group, the Democratic Karen Benevolent Army (DKBA) holds sway. The monk's activities provide justice and protection to Karen Buddhist followers, but simultaneously create insecurity and injustice for non-followers, especially Christian and Muslims.

Lwin Lwin Mon also explores the significant role of religious actors as well as spiritual beliefs, but does some from the perspective of everyday justice provision in a village in Mon State inhabited by Mon Buddhists. Although the village remained under Myanmar government administration during the armed conflict, trust in the state system is low and people prefer to have their disputes and crimes resolved locally by the village leader. Yet even at this level, people deal with problems in hybrid ways through a combination of religious norms, spiritual beliefs, law as well as increased use of social media.

Annika Pohl Harrisson's article takes us to an urban ward in Mon state's capital city, Mawlamyine, where half of the residents are Buddhist and half Muslim. She shows how religious identities shape the handling of disputes and crimes, often with the involvement of monks, in ways that exclude Muslim residents from gaining access to justice within the local arena. While there are no open conflicts between the 2 religious denominations, many Muslims have taken on a strategy of 'local subjugation' by avoiding confrontation and accepting biased dispute resolutions.

Than Pale's article on poor urban migrants in Hlaing Thayar, a rapidly growing township on the outskirts of Yangon, also zooms in on how certain disadvantaged groups have a much lower chance of getting access justice not only in the official system, but also through local informal channels. Many poor urban migrants simply do not report the crimes they face.

This is not, however due to their religious identity, but because they live informally, face an insecure economic situation, and because they are newcomers with few or no social connections to local leaders and other persons who can assist them. Overall, this shows that legal pluralism is not parity, but may benefit certain groups more than others.

This issue covers a range of issues related to everyday justice in Myanmar, but is limited by the fact that it has a narrow geographical scope. Due to the multiplicity of ethnic and religious forms of belonging and the plurality of authorities across Myanmar, more in-depth empirical case studies in other states and regions would likely reveal an even higher complexity of legal pluralism in the country. Another limitation is that the essays do not include observations inside the official judiciary, including the courts and the police. With the notable exception of Cheeseman's work (2015), there is a general dearth of studies of the official system, which, as pointed out in a recent report, may be linked to the continued difficulty of gaining access to the courts, even though they now are officially open to the public (Justice Base 2017). In-depth ethnographies of court hearings and everyday case handling by the police would add further richness to the insights on legal pluralism and likely shed light on the challenges facing state officials as well as lawyers in Myanmar. Finally, the essays included in this issue do not look closely at the gendered dynamics of access to justice and they do not explore the growing role of non-governmental organisations (NGO) and community-based legal aid providers, which tend to focus especially on assisting children and victims of gender-based violence to access justice. These 'new' actors add up to a field that is already plural, and will likely expand as part of the growing international involvement in the rule of law and human rights programming that are accompanying the

Myanmar transition. Despite these limitations, we hope that the articles in this issue will help deepen understandings of everyday justice in Myanmar and that they will generate critical discussion and further research on a very timely topic that is still very much at an explorative level. It is also the hope of the contributors to this issue that the empirical insights of their studies can influence policy makers who are engaged in justice sector reform. Rather than alone focusing on reforming the official justice system, this issue highlights that reform efforts should also take serious the power dynamics and the particular justice preferences, beliefs and practices that exist across the diverse localities of Myanmar.

References

Cheesman, N. (2015): *Opposing the Rule of Law: how Myanmar's courts make law and order.* Cambridge: Cambridge University Press.

Denney, L., W. Bennett and Khin Thet San (2016a): Making Big Cases Small and Small Cases Disappear. Experiences of Local Justice in Myanmar, *MyJustice* report, November 2016.

Denney, L., W. Bennett and Khin Thet San (2016b): Understandings of Justice in Myanmar, *Policy Brief*, MyJustice, November 2016.

Griffiths, J. (1986). What is Legal Pluralism?, *Journal of Legal Pluralism and Unofficial Law*, 24: 1-50.

Harrisson, A. and H.M. Kyed (2017): Ceasefire State-Makings: Justice provision in Karen and Mon armed group controlled areas. Paper presented at the ANU Myanmar Update Conference, Canberra 17-18 February 2017.

Jolliffe, K. (2015): Ethnic Armed Conflict and Territorial Administration in Myanmar. The Asia Foundation, July 2015.

Justice Base (2017): Behind Closed Doors: Obstacles and Opportunities for Public Access to Myanmar's Courts. London: Justice Base.

Kempel, S. and Aung Tun (2016): Myanmar Ward and Village Tract Elections in 2016: an overview of the role, the laws and the procedures. Norwegian People's Aid, Myanmar, January 31 2016.

Kyed, H.M. (2017): Justice Provision in Myanmar. Reforms need to consider Local Dispute Resolution. *DIIS Policy Brief.*

Kyed, H.M. (forthcoming 2017): Community Dispute Resolution. Exploring Everyday Justice Provision in Southeast Myanmar. IRC and DIIS, 2017 unpublished report.

Kyed, H.M. (guest editor of special issue) (2011): Legal Pluralism and International Development Interventions, *Journal of Legal Pluralism and Unofficial Law*, no. 63.

McCartan, B. and K. Jolliffe (2016): Ethnic Armed Actors and Justice Provision in Myanmar. The Asia Foundation, October 2016.

Merry, S. E. (1988): Legal Pluralism, *Law and Society Review*, 22 (5): 869-96.

MLAW (Myanmar Legal Aid Network) and EMR (Enlightened Myanmar Research) (2014): Between fear and hope: Challenges and opportunities for strengthening rule of law and access to justice in Myanmar. London: Pyoe Pin/DFID.

Moore, S.F. (1978 (2000)): *Law as Process. An Anthropological Approach*. Hamburg: Lit Verlag; Oxford: James Currey.

Santos, B.S. (2006): The heterogeneous state and legal pluralism in Mozambique, *Law and Society Review*, 40 (1):39-75

Tamanaha, B. Z. (2008): Understanding Legal Pluralism. Past to Present, Local to Global, *Sydney Law Review,* 30: 375-411.

The Republic of the Union of Myanmar (2012): The Ward or Village Tract Administration Law. Ministry of Home Affairs.

von Benda-Beckman, F. (1997): Citizens, Strangers and Indigenous peoples: Conceptual Politics and Legal Pluralism, *Law and Anthropology*, 9: 1-42.

Walton, M. J. (2013): "The 'Wages of Burman-ness':Ethnicity and Burman Privilege in Contemporary Myanmar." *Journal of Contemporary Asia* 43 (1): 1-27.