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ETHNIC ARMED ACTORS AND JUSTICE PROVISION IN MYANMAR

Brian McCartan and Kim Jolliffe

Policy Dialogue Brief Series No.17

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Yangon

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BRIAN MCCARTAN AND KIM JOLLIFFE

POLICY DIALOGUE BRIEF SERIES NO.17

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ONE: INTRODUCTION

The justice systems of ethnic armed actors (EAAs)¹ have a major impact on the lives of many people in Myanmar's ethnic areas. Depending on the location, they provide either an alternative to the government's justice system, or the only justice local people have ever known. In the context of the ongoing peace process, understanding the role of EAA justice systems is key for discussions of future governance arrangements in conflict-affected areas.

Examples from other states demonstrate that one of the first elements established by armed organizations is a force capable of policing the population. This is often the leadership's highest priority, and may determine if the organization is able to develop a state-like governing structure. The second feature is the creation of a dispute-resolution mechanism or legal system. This may have a formal judicial structure or be a more ad hoc system. In order to be seen as legitimate, the system needs to be useable by civilians in disputes with each other as well as with the armed organization. Armed organizations that provide systems of justice differ greatly in the extent to which they do so informally or through formally established rules. These organizations adapt elements of existing justice institutions and bring them into line with the organization and local norms.

EAA in Myanmar have often maintained their own parallel justice systems, even where they cooperate with the state. Some organizations have established relatively organized and complex justice institutions, with legal codes, police forces, a court system, and jails. Others have merely laid a thin veneer of organization over traditional village justice. Even in areas where EAAs have strong judicial administration, village justice is largely left up to village heads.

Some EAA legal systems originate from the common law of British India, but in practice, EAA legal codes are more akin to civil law, with laws codified into a referable system. Judiciaries are

often not empowered to make, review, or amend current laws. This function is typically reserved either for the organizations' executive bodies or for separate departments.

EAA tend to make clear distinctions between criminal and civil law. Most organizations have their own legal codes defining crimes and stipulating punishments. Some also have codes for civil disputes, though cases involving civil disputes or petty crimes are dealt with in the villages. Meanwhile, more severe crimes such as murder, rape, and narcotics offenses can be referred directly to EAA justice systems.

Village-level mechanisms, particularly the continued use of customary justice, are crucial to the administration of justice in EAA areas. Anecdotal evidence from justice-focused organizations with experience in both ethnic and Bamar areas of Myanmar suggests that customary justice practices are commonly used throughout the country, particularly in rural areas. Customary laws and practices at the village level differ from ethnic group to ethnic group, and often from village to village. None of the EAAs surveyed in this report have sought to replace customary village justice practices, instead typically grafting their justice systems onto existing procedures. Villages are allowed to continue customary adjudication of civil disputes and minor crimes, with the option to appeal to EAA systems. All of the EAAs in this report had stipulations that serious crimes such as rape, murder, and narcotics trafficking go directly to the EAO justice system. By allowing village-level justice practices to continue, EAAs provide a sense of continuity and "normality" that likely enhances their local legitimacy.

This policy brief presents research into the justice systems of Myanmar's most prominent EAOs and state-backed paramilitary organizations, including both Border Guard Forces (BGFs) and People's Militia Forces (PMFs), and the associated rule-of-law dynamics in their areas of influence.

¹ For the remainder of this policy brief, the term ethnic armed organizations (EAOs) is used for armed resistance organizations that maintain political opposition to the state, as has been agreed by these organizations and the government in peace negotiations. The term ethnic armed actors (EAAs) will be used to refer collectively to EAOs and state-backed ethnic paramilitaries, which include Border Guard Forces, People's Militia Forces, and other forms of government-organized militias. For more on state-backed paramilitary organizations in general, see John Buchanan, *Militias in Myanmar* (Yangon: The Asia Foundation, 2016).

TWO: THE MYANMAR JUSTICE SYSTEM AND INFLUENCES ON EAO JUSTICE

Myanmar's current judicial system: Myanmar's current judicial system was established under the 2008 Constitution and the 2010 Union Judiciary Law. The Supreme Court of the Union is the highest court, under which are state and regional courts. Below these are the district courts, self-administered area courts, and township courts. The Supreme Court's role, however, does not infringe on the powers of the Constitutional Court or the courts martial of the Tatmadaw.

On paper, there are specific regulations and procedures for judicial issues. Cases are heard before a judge or a panel of judges and argued by advocates or pleaders. Civil litigation is governed by the Code of Civil Procedures, and the appropriate court is determined by the value of the claim, the location of the parties, and where the act in question was committed. In criminal cases, judges are supposed to comply with the Code of Criminal Procedure and the Law of Evidence.

The Myanmar Police Force (MPF) is the only state police force in the country, and falls under the jurisdiction of the Ministry of Home Affairs, whose minister is constitutionally required to be a serving Tatmadaw officer effectively selected by the commander in chief. Organizationally, the MPF has a national headquarters, state and region police forces, four special departments, five training centers, and up to nineteen police security battalions and several small auxiliary forces. State and region police forces are organized with police at district, township, and sometimes village levels, with over 1,200 police stations throughout the country. The strength of the MPF as of 2011 is believed to be close to 80,000. The MPF is becoming more modern and civilianized, and is gradually being recognized as an increasingly powerful institution. Standards for officers have risen, and specialized instruction at all levels has increased. Police doctrine and training programs have been changed to place greater emphasis on "community-based policing."

How EAA justice systems have been influenced by the state:

Colonial and state influences can be detected in many current EAA justice systems. The colonial-era divide between the Bamar-majority "Burma Proper" and the relatively autonomous, ethnic Frontier Areas, including today's Kachin, Chin, and Shan States for example, had significant influence on the extent to which different EAAs inherited practices. In Burma Proper, where ethnic minority communities were generally more interspersed with those of the Bamar, colonial law was applied more strongly, and a more formal justice system existed.

Upon independence in 1948, Myanmar adopted almost wholesale the British colonial codes of justice. Some of the early EAO justice systems took with them those same experiences and examples.

Burma Proper included the main Karen and Mon areas, which would later see the formation of the Karen National Union (KNU) and the New Mon State Party (NMSP) – two EAOs with perhaps the most comprehensive justice systems. The KNU was then instrumental in the formation of the NMSP, the Karenni National Progressive Party (KNPP), and the Pa-O National Organization (PNO), which also included officials with varied colonial government experience. Additionally, the armed, insurgent Communist Party of Burma (CPB) was formed by members of Burma's Bamar-dominated independence movement, some of whom had experience working in the colonial and interim governments.

Initially, the first EAOs were too busy fighting to organize extensive justice systems, but as control of territory became more stable, they organized more formal systems. In the case of the KNU, this happened in the 1970s with the creation of law books and judicial and policing procedures based heavily on British texts.² From the 1960s and 1970s onwards, trained lawyers with experience practicing law in the state system went underground and joined some of these ethnic movements, bringing further influence from that system.³ Other EAOs in the southeast of Myanmar, the NMSP and KNPP, also appeared to invest increasingly in their justice systems, retaining heavy influence from the colonial system.

Meanwhile, traditional power structures in Kachin and Shan States retained far greater autonomy during the colonial era, and to some extent through 1962. As a result, when EAOs and militias formed in these areas, they often simply placed a layer of governance atop traditional structures. In the case of justice, this involved a formal justice structure on top of village-based practices of customary justice. Most ethnic Shan EAOs and militias in both states have been military formations first and foremost, with relatively thinly organized justice systems, preferring the use of village-level militias for arrests, in addition to customary, village-based law practices. On the other hand, EAOs formed from the ranks of the CPB when it collapsed in 1989 – including the United Wa State Party (UWSP), the National Democratic Alliance Army (NDAA), and the Myanmar National Democratic Alliance Army (MNDAA) – were influenced primarily by the justice system of Communist China and, to a degree, by the Bamar intellectuals who formed the party and much of its leadership.⁴

The justice system of the Kachin Independence Organisation (KIO) appears not to have been heavily influenced by the colonial state. The KIO itself was formed by students and traditional chieftains, *duwa*, who had little direct interaction with the state justice system. Therefore, traditional Kachin practices retain significant influence in KIO areas.

² This was carried out by a group of lawyers who had previously practiced in government-ruled Myanmar and later chose to join the KNU. They included Saw Htoo Htoo Lay, Saw Reginald, and Saw Benjamin.

³ These include the former KNU general secretary and current advisor, Saw Htoo Htoo Lay, and the Pa-O National Liberation Organization's former chairman, Hkun Okker.

⁴ Their systems were perhaps more strongly influenced, however, by communist ideas of justice, through their strong connections to China, and by Chinese Red Guard volunteers who assisted the CPB in the late 1960s.

THREE: EAA JUSTICE SYSTEMS IN SOUTH-EAST MYANMAR

Karen National Union/Karen Liberation Army

The KNU maintains varying levels of influence in communities across much of Kayin State, parts of Mon State, and Bago and Tanintharyi Regions. The KNU is led by a Central Executive Committee (CEC), which is elected at a quadrennial congress by representatives from all of the organization's seven districts.

Institutions and structures: The KNU's justice system includes three main institutions: the Justice Department, a judiciary, and the Karen National Police Force (KNPF). The Justice Department and the judiciary are separate entities, but work together closely. The KNPF falls under the Interior and Religious Department. Both the Justice Department and the Interior and Religious Department exist only at the central level, and fall under the Central Executive Committee alongside twelve other line departments.

The Justice Department: The KNU Justice Department is responsible for making laws, reviewing current laws, and updating them. It also supports legal decisions by providing comments to judges in legal cases. The Justice Department is responsible for disseminating legal codes down to the village level, and local trainings.

The judiciary: The judiciary is a separate and independent body consisting of a Supreme Court, district courts, and township courts. Village heads have the authority to deal with minor criminal cases and civil disputes. The number of judges, the process for their selection, and the length of their terms are stipulated in the KNU Constitution. Judges are not appointed, but rather elected from within the party. The Supreme Court has three judges, and there is one judge per district and township, elected at local congresses for two-year terms. Judges make independent decisions, although perspectives are sought from other officials. Judges may have other duties in the KNU, and they have their own staff. As with other KNU members, they do not typically receive formal salaries. Current KNU judges do not have any formal, university-level legal training.

The Karen National Police Force: The KNPF was established in 1991 to maintain order, make arrests, and conduct investigations in criminal cases. Guidelines for the KNPF are set forth in the Code of Legal Procedure. The KNPF has a presence in all seven districts of the KNU, and claims to have over 600 personnel, including female police personnel in each district.

The KNU's main defense bodies, the Karen National Liberation Army (KNLA) and the Karen National Defense Organization (KNDO), are not supposed to perform police functions except in particular situations, such as to arrest accused individuals when there is no KNPF available, or to provide security during KNU public events. The KNPF continues to train new personnel, and KNU officials explained that they feel the KNPF is not yet able to fulfill its responsibilities, due to inadequate numbers and training.

Senior KNU leaders say they recognize the limitations of the KNPF that have led to mistakes over the years.

The Myanmar government has complained in recent years about the increasing strength of the KNPF, their training, and their recruitment. However, the KNU asserts that the continuation of the KNPF is in line with interim arrangements provided for in the Nationwide Ceasefire Agreement (NCA) that call for the continuation of the governance roles of EAOs in the period prior to a political settlement.⁵

Laws and forms of crime: The KNU's laws were first codified in 1948, but they were very basic. During the 1970s, the legal code was a reorganized and expanded, and new laws were devised, which were codified in four law books including a book on procedure.

The KNU has four legal books, which cover criminal law, civil law, "magic" law, and legal procedure. The Code of Legal Procedure is concerned with how to implement the law, while the criminal law book lays out different crimes and punishments. The civil law book deals with disputes between private individuals. The book of "magic" law is concerned with otherworldly interventions and the actions of shamans – crimes that are considered very real by many Karen people.

Ceasefires between the KNU and the government have given the organization space to develop its formal legal procedures. The KNU recently created a Karen Legal Affairs Committee under the Supreme Court, responsible for promoting rule of law and legal awareness, and it seeks to reform the legal system, strengthen knowledge of legal issues, and train judges.

Chains of referral: When a crime occurs or there is a dispute between villagers, the case is usually taken to the head of the village or village tract, though people may bring their case directly to the KNU authorities if they have the necessary connections. KNU law determines that cases must be referred to the KNU system by village or village tract heads if they concern specific severe crimes, such as murder or rape, while less serious cases may be referred to the KNU system if the village or village tract head feels unable to handle them. Such cases are initially referred to township authorities. KNU law then stipulates at which level each crime should be tried, with more severe crimes being dealt with at the higher levels.

Investigation and trial procedures: Village- or village tract-level cases do not undergo the formal investigation and trial procedures mandated by KNU law. The village or village tract head will typically bring both sides together and discuss the case. When trials are held at the village or village tract level, village heads and other influential, informal leaders decide the punishment.

Village or village tract heads sometimes call on people known as "mobile judges." These are people who are considered particularly knowledgeable but are not part of the KNU judicial system. Additionally, monks have a role in local-level judicial and arbitration procedures in many Buddhist villages. In some areas,

their moral authority makes them more powerful than village or village tract heads. Christian pastors do not seem to have a similar role, and are largely uninvolved in judicial issues.

If a case cannot be handled at the village or village tract level, the normal procedure is for the security chief of the village tract to contact the township KNPF. The police then report their findings to the judge. Trials are conducted through judicial committees headed by a judge. The judicial committee is selected by the judge, and its composition changes depending on the situation and the circumstances. Defendants are asked to plead “guilty” or “not guilty,” and the judge then questions the victim, the defendant, and witnesses. The KNPF officers, the plaintiff, and the defendant are all able to call witnesses, present evidence, and testify. There are no lawyers, primarily because there are no trained lawyers available. In practice, cases are not always handled according to approved procedure.

Punishments: The KNU is supposed to have jails at district and township levels, and a central jail at its headquarters. Currently, there is no central jail; four districts have jails, and no townships have jails. Following the 2012 ceasefire, the Justice Department has been requesting districts to construct their own jails. Separate compounds are maintained for civilian and military prisoners, with security provided by KNLA soldiers. Leg stocks are also used as a form of punishment at the local level.

Crimes by KNU personnel: Charges may be brought against KNU officials and soldiers of the KNLA and KNDO, although such cases are rare. Since 2014, these cases have been submitted to the KNU judicial system, albeit after first being referred to the military.

Reforming the justice system: KNU leaders who were interviewed recognized flaws in the justice system, but felt that it was as strong as possible given that it was formed during armed struggle. A critical problem is the KNU’s shortage of human resources, with many people already performing several jobs across different departments. There is a recognized need for more judges, with better training in law and judicial procedure.

Klohtoobaw Karen Organization/ Democratic Karen Benevolent Army The Democratic Karen Buddhist Army was formed by a large splinter group from the KNU in 1994. After fighting alongside the Tatmadaw against the KNU for 15 years, the organization split in 2010 amid demands from the Tatmadaw to transform into BGFs. A large faction defaulted and formed 12 BGFs, numbers 1011 through 1022,⁶ while another faction realigned with the KNU and entered conflict against the Tatmadaw. The latter faction signed a ceasefire with the Thein

Sein government in 2011, renamed itself the Democratic Karen Benevolent Army (DKBA), and set up a civilian body called the Klohtoobaw Karen Organization (KKO) in 2012. Its area of control is concentrated in southeastern Kayin State, south of the Hpa-an-Myawaddy road, and is divided into an East Daw Na zone and a West Daw Na zone.

The KKO/DKBA is primarily a military organization and does not have a separate structure for governing civilians. The KKO was intended as the administrative arm of the organization, but has yet to achieve much traction, and currently exists only as a five-man secretariat concentrated on developing basic political policy, mostly involving relations with the KNU. The DKBA leaves local administration to village heads, and prefers to concede township- and district-level administration to the KNU. This includes the administration of justice.⁷

Judicial process: The handling of justice is largely the same as in other areas where the KNU has an established governance system. Typically, most minor issues are handled at the village level, potentially with the involvement of local monks or other influential persons. However, more serious or unresolved crimes are referred to the KNU. The DKBA’s territory also overlaps with that of the NMSP, numerous Karen BGFs, the Karen Peace Council, and the government. According to the DKBA, it does not refer cases to the government’s justice system, although there have been cases where the government has advised the DKBA on how to handle a case.

New Mon State Party/Mon National Liberation Army

The New Mon State Party’s administration system divides its areas of influence into a headquarters area and three districts – Thaton, Mawlamyine, and Dawei, which each contain townships. It has control of a few patches of autonomous ceasefire territory, per agreements made with the state in 1995, the largest of which covers most of Mon State’s short border with Thailand. The district boundaries of the NMSP and the KNU overlap significantly, and there remain some areas where territorial claims overlap. Village heads in ceasefire zones consider the NMSP the sole authority, and the Myanmar authorities are barred from entry without prearranged permission.⁸ The Executive Committee of the NMSP oversees three main departments: Defense, comprising the Mon National Liberation Army (MNLA), Party Affairs, and Administration. The Administration Department oversees eight other departments, including the Justice Department.

Institutions and structures: The Justice Department operates judicial committees at each administrative level. At the central level, a seven-member judicial committee is chaired by the NMSP

⁵ Specifically, Section 25A of the NCA makes clear that EAOs “have been responsible for development and security in their respective areas.”

⁶ BGF 1023 was formed at the same time by another KNU splinter group, called the Karen Peace Force.

⁷ Under the original DKBA (1994-2010), before a major faction split to form BGFs in 2010, the Tatmadaw was in charge of administering justice in DKBA areas. The only place where the DKBA could take action in legal cases was within the area of its general headquarters at Myaing Gyi Ngu. At that time, there was little presence of civilian government authorities in the area outside of the major towns. At Waley, the headquarters of the DKBA’s 5th Brigade until November 2010, the DKBA did not take direct action on justice issues, instead leaving them up to community leaders. Serious cases were handled by the Tatmadaw, which prosecuted the cases and issued sentences. At the township level, the Tatmadaw arrested suspects and dealt with them. The DKBA could not interfere at that time.

⁸ Kim Joliffe, *Ethnic Armed Conflict and Territorial Administration in Myanmar* (Yangon: The Asia Foundation, 2015), 56-57. The headquarters area is effectively at district level, but is not considered as such.

joint secretary. At the district level, committee members include the district chairperson, members from the Administration Department and subdepartments, and officials from the MNLA. The local justice-in-charge chairs the district committee. The township five-member committee includes village heads, members of the township committee, and military officers. Township judicial committees act as investigative working committees and do not make judicial decisions. Communities elect village judges, who preside over village judicial committees. The NMSP does not have a police force. The MNLA is responsible for arresting accused individuals.

Laws: The NMSP has its own longstanding legal code, which was developed following examination of the legal code of colonial Burma. The legal code is revised and updated periodically, with experts from areas outside NMSP control sometimes invited for review.

The administration of justice: Crimes or disputes are reported to the village-level judge, and may then be reported to higher authorities if they involve a crime that only specific administrative levels are mandated to handle, if they cannot be solved at the local level, or if the plaintiff or defendant actively appeals. Minor crimes and civil cases are handled at the village level. Most cases are resolved at the district level or lower, with few going to the central level.

Jurisdiction: The NMSP Justice Department will only take cases from areas outside its direct control if authorities in the other area agree. Some “justice shopping” does go on in Mon areas. If people are unhappy with a decision by the NMSP, they may seek a different solution from the government. There is no formal coordination between the government and the NMSP. On occasion, however, the government has requested that the NMSP hand over specific individuals who are suspected of crimes.

In areas of mixed KNU-NMSP control, the KNU tends to deal with cases in Karen villages, while the NMSP handles those in Mon villages. If a crime involving a Karen person and a Mon person occurs in NMSP territory, a KNU official is invited to participate in the judicial proceedings. According to the NMSP, equivalent arrangements are in place for crimes involving Mon individuals in KNU-controlled areas.

Punishments: Criminal punishment at local levels may entail being placed in leg stocks, but never for longer than 24 hours. Common punishments for crimes at the district and central level are jail time, house arrest, being placed in shackles, and fines. The NMSP does not impose the death penalty. For civil offenses, monetary compensation is usually mandated. Jails exist at the district level and central headquarters, and are administered by civilians under the Administration Department of the NMSP.

Crimes by MNLA personnel: According to a senior NMSP official, cases involving MNLA soldiers are taken very seriously and subjected to much the same judicial procedures. These cases are first discussed by a commission made up of Administrative Department and military personnel. This commission may come to a decision, but if the civil and military sides cannot agree, then the case can be sent to the Justice Department. If a soldier is found guilty, he is sent to jail. Offenses committed by one soldier against another are handled by a military committee.

Karenni National Progressive Party/Karenni Army

The KNPP is the most politically active EAA in Kayah State. It has few strongholds, but maintains numerous military bases and a mobile military presence in multiple townships. Additionally, the organization maintains an administrative presence in much larger areas through village-level leadership structures and the provision of social services. There are some areas within Kayah state where the KNPP is permitted to operate by agreement with the government. The KNPP has between eight and ten administrative departments, one of which is the Justice Department.⁹ The KNPP and the government reached a bilateral ceasefire in 2012, which has been relatively stable and has allowed the KNPP to actively engage in the multilateral peace process.

Institutions and structures: The KNPP’s Justice Department is active at the central, district, and township levels. In accordance with the KNPP Constitution, a judicial committee within the Justice Department appoints three judges at the township level and three at the district level. Township and district judges are independent of the KNPP Justice Department or other KNPP administrative departments, and work full time as judges. However, judges at the central level may be from the Justice Department. The Justice Department contains a body called the Karenni Legal and Human Rights Committee, which provides training to KNPP personnel and communities in human rights, rule of law, democracy, and constitutional matters. The KNPP does not have a police force. Instead, the KNPP’s Interior Department has its own soldiers independent of the Karenni Army (KA). These soldiers are under the authority of the district- and township-level KNPP administrations and have the power of arrest in criminal cases. In contrast, the soldiers of the KA are primarily responsible for defense.

Laws: Minor crimes and civil disputes are left to village-level authorities and are typically handled through customary practices and laws, while serious crimes are tried under the KNPP’s own criminal code. According to a member of the Justice Department, Karenni customary laws predate the KNPP, and while not written, have been passed down from generation to generation and are known by most rural Karenni people.¹⁰ These laws form the basis for punishment of minor crimes and arbitration of disputes

⁹ Jolliffe, *Ethnic Armed Conflict*, 57-58.

¹⁰ It should be noted that the Karenni nationality as understood by the KNPP includes Kayah, Kayan, and other subgroups. It is not clear if there are universal customary laws practiced by all of these subgroups, or if they vary between groups and from place to place.

between members of the community. They are usually administered by the village elders, and villagers are expected to respect them.

The KNPP has a book of criminal law that lays out the different types of civil disputes, the types and seriousness of various crimes, and prescribed punishments. Drug offenses, rape, and murder are considered serious crimes. The laws in the book were drawn up by the KNPP Justice Department, and KNPP leaders with legal experience. Periodically reviewing them is a duty of the Justice Department, and new laws are sometimes proposed to the KNPP Central Committee in consultation with civil society organizations and community-based organizations.

The administration of justice: As in other EAO regions, community members usually approach village heads and other influential persons when there is a dispute or petty crime. If the case involves a serious crime, as prescribed by KNPP law, or cannot be solved at the village level or village tract level, then KNPP township authorities are informed. When a serious crime is reported, township officials have the accused arrested, and investigate. The KNPP judges usually work by establishing temporary committees on a case-by-case basis. A typical township-level committee will comprise township judges, village heads, village elders, and township administrative staff.

Jurisdiction: In some townships, the KNPP has township administrators but no permanent office. The KNPP has offices in the government-controlled towns of both Loikaw and Demawso for township administrators, who are responsible for administering the surrounding KNPP areas, but they are careful to not interfere in legal matters in these towns. These offices are separate from the KNPP's liaison offices. Townspeople may go to a KNPP township administrator in one of these offices for advice on where to seek legal assistance, but their cases may not be tried there. People may also go to the liaison offices for legal advice.

Punishments: Punishments vary depending on the severity of the crime, which is a key reason that certain crimes have to be dealt with at certain administrative levels. Township judicial committees are authorized to issue punishments ranging from payment of compensation up to MMK 500,000, to a jail sentence of up to five years. At the district level, judicial committees are authorized to impose compensation up to MMK 1 million or jail up to 10 years. Punishment at the central level can consist of any range of compensation or imprisonment. The KNPP previously used the death penalty, but it is no longer authorized. According to a Justice Department official, there are no jails at the village level, and stocks are no longer authorized, although they were common in the past. During the current ceasefire with the government, and at other times of low military activity, jails have been located at townships, districts, and central headquarters. During previous periods of high military activity, all prisoners were taken to a central jail near the border with Thailand. The stability brought by the 2012 KNPP-government ceasefire has given the KNPP an

opportunity to plan a new central jail farther inside Kayah State.

Military justice and planned reforms: If Karenni Army personnel are involved in a crime, the same procedure is followed as for civilians, and the offense is handled by the Justice Department. If the crime is serious, then it is sent directly to the central administrative level. An emergency law in the mid-1990s covered legal issues involving soldiers, but this law has been rescinded. The KNPP's Justice Department claims that it tries to follow international standards for process and structure, but accepts that in its present situation it is unable to meet all the requirements of international law. The Justice Department would like to receive advice from international experts to improve its system, but the current political situation, which restricts travel by foreigners in Kayah State, was said to make this difficult.

FOUR: EAA JUSTICE SYSTEMS IN SHAN (SOUTH) AND SHAN (EAST)

Restoration Council of Shan State/Shan State Army

The Restoration Council of Shan State/Shan State Army (RCSS/SSA) maintains strongholds along Shan State's border with Thailand, particularly in Mongton and Langkho Townships, as well as strong relations with rural populations throughout much of Shan State (South) and Shan State (East), and parts of Shan State (North).

The RCSS/SSA does not have parallel political and military wings. The highest organ is the Central Committee of the RCSS, made up of military officers, which determines policy and elects the chairman and an Executive Committee. The RCSS has fourteen main departments, with the Civil Administration Department organized into more than twenty "administrative battalions," composed of soldiers given special training in civil administration. These work alongside the Defense Department's "operational battalions." Battalions are spread across five RCSS regions, with staff stationed at village, village tract, and township levels. Most other departments are primarily located at the central headquarters and work through the administrative battalions.

Institutions, structures, and basic procedures: The RCSS Justice Department operates at the township and central levels, but it is unclear exactly what its role is, or whether it oversees judges or makes specific laws. At the central level, there are no judges, and all decisions reportedly come from Yawd Serk, currently lieutenant general and de facto RCSS/SSA leader. Given the militarized structure of the RCSS/SSA, it is likely that soldiers are involved through the administrative battalions.

The RCSS has no police force, but organizes militia units of 10-12 men, authorized to make arrests, for each village tract. Soldiers from the SSA can also be summoned to arrest accused individuals.

The administration of justice: Due to the remoteness of many RCSS/SSA areas, local authorities remain heavily reliant on customary justice practices. This is the case in Shan communities as well as those of other ethnic groups residing in RCSS/SSA-controlled areas. These practices are said to be aimed at maintaining social harmony, but retain a level of legitimacy. Typically, when cases occur in a village, a committee is formed to try the case, with the village head as the chair. These committees broker settlements for minor criminal cases and for cases of divorce. They then may refer more serious cases to the RCSS or traditional leaders at the village tract level. The RCSS requires communities to refer murders to its authorities at the township level, as it does in cases of tax evasion and persons suspected of being government informers.

Punishments: There is little available information on forms of compensation or punishment in RCSS areas. According to one source, traditional laws mandate the death penalty for serious crimes, but enforcement is rare. Claims differ as to whether the RCSS officially imposes the death penalty. Drug offenses are a

major issue in Shan State, and for the first offense, the accused is issued a warning. If there is a second offense, the person is arrested and reportedly given the choice of going to jail or becoming a soldier.

Pa-O National Army

The Pa-O National Army (PNA) is a government-recognized People's Militia Force, falling under the command of the Tatmadaw and operating in the majority of townships in Shan State (South). Its former civilian wing, the Pa-O National Organization, is a registered political party and holds all six seats in the three townships of the Pa-O Self-Administered Zone. While the PNA has no official governance mandate, and is purely a security force, its role in local governance is accommodated openly by the government and appears to further facilitate mutual cooperation.

Laws: The PNA has a number of its own minor regulations, mostly of a social nature, that it applies to civilians in its areas of operation. Where serious crime is concerned, government law is followed. For most minor crimes, communities rely on customary practices.

Judicial process: Village heads handle minor crimes and civil disputes. Solutions to these cases are usually reached through arbitration and customary practices. Buddhist monks are highly revered in Pa-O culture, and have a strong influence on the community and on the PNO/PNA. If cases cannot be solved by the village head or by the monks, they may be referred to the PNA.

According to the PNA, if a criminal case is referred to it, PNA soldiers arrest the accused. The village head, village monks, and community members then provide character-witness accounts. In serious cases, the PNA hands the accused over to the MPF. At this point, the accused enters the government legal system, and the PNA no longer has a role.

In narcotics cases, the PNA works with the MPF and village leadership. Cases involving small-time users are handled locally, but where larger quantities of drugs are involved, the village head will report the issue to the PNA or the MPF. Since 2010, an increasing number of people from the PNO/PNA areas have begun taking their cases directly to the MPF. Numerous sources explained that, in comparison to the PNA mechanisms, the government system is often considered too expensive, time consuming, and not trustworthy enough. However, preference for the government system is apparently increasing. According to a Pa-O civil society worker, this upsets PNA leaders, as they feel that their own system has worked for most justice issues. This change has sparked a feeling among some that the Pa-O sense of community is being lost.

Punishments: Monetary compensation is a common penalty. When a decision is made, the guilty party must pay money and apologize. Monetary penalties are also applied in cases that go before the PNA. For crimes decided at the village level, the highest

form of punishment is leg stocks. For more serious offenses, tried at a higher level, people may be sent to the PNA's jail.

Despite the PNA's claim that it hands serious criminal cases to the MPE, it apparently sometimes imposes the death penalty. According to Pa-O activists, the local community must agree before the sentence can be carried out, but according to local Pa-O businessmen, communities rarely dispute the PNA's decisions.

FIVE: EAA JUSTICE IN SHAN STATE (NORTH) AND KACHIN STATE

United Wa State Party/United Wa State Army

The United Wa State Party (UWSP) and its armed wing, the United Wa State Army (UWSA), control a ceasefire “special region” covering the four government-defined townships of Pangsang, Pangwaun, Mongmao, and Narphan as well as a significant portion of Mongyang Township and some border areas of Hopong Township.¹¹

The UWSP's administrative system is based on that established by the Communist Party of Burma in the 1970s.¹² The region is divided into three districts, subdivided into 24 townships. The party is led by a five-person Politburo, and a 19-member Central Committee that oversees ten bureaus, including the Central Law Enforcement Bureau. Administrative committees govern at the district, township, village tract, and village levels. In practice, the UWSP's governance system is only loosely administered. The UWSP has primarily invested in building up its army, maintaining order, and conducting business, including allegedly trading in narcotics. This means that most bureaus nominally established to provide public goods are not particularly active.

In general, the UWSP's administration is hampered by a high degree of centralization, resulting in administrative units having low capacity and little authority to act on their own initiative. Administrators below the district level are typically part time, receive little or no salary, and have to depend for their livelihoods on agriculture or other activities, potentially including informal taxation and corruption.¹³

Institutions and structures: Upon its formation, the UWSP adopted the Communist Chinese-style system of justice previously followed by the CPB. Its Central Law Enforcement Bureau oversees judicial and police sub-bureaus based in Pangsang, where there is also a jail. While the justice system is supposed to operate in all townships, in reality it has limited capacity outside the region's towns.

The UWSP maintains district-level police forces in Pangsang and

other small towns, but there are no police in rural areas. Instead, rural policing is done by local militia units, called “people's militias”, using the same term as used by the Tatmadaw for its unrelated local level militia. Each village has its own people's militia, organized and led by the village head, who is chosen by the UWSP township authorities. The UWSP has granted people's militias the authority to maintain internal security, and they are equipped and trained by the UWSA.

Laws: According to a former member of the UWSP, the organization has rules and regulations for each administrative level. At the village level, penalties for civil offenses or minor crimes often take the form of compensation. The UWSP has also adopted some Chinese laws for its legal code.

The administration of justice: As elsewhere in Myanmar, the bulk of minor crimes are dealt with at the village level. Village elders are empowered to deal with cases of petty theft and civil disputes, and ultimately rely on the people's militia authority. For serious crimes, the village head is authorized to use the people's militia to arrest suspects and send them to the township authorities.

At the township and district levels, cases are decided by an individual judge, while tribunals are held for crimes that reach the central level. In these cases, a judge presides over a process whereby a “people's jury” is assembled to act as the prosecution and pronounce judgment. Lawyers are not present, although an individual referred to as a “people's lawyer” may be involved in major cases. The people's lawyer is essentially a UWSP-appointed legal advisor, who listens and makes remarks for the jury to consult. In these cases, the judge's input accounts for about 80 percent of the final decision, with the jury accounting for the remaining 20 percent. Judgments are usually rendered within three days; minor cases may be decided within a few hours; while major cases may last longer, but no longer than one week.

Punishments: Little information is available on UWSP punishments. However, it is clear that capital punishment is used at the central level, usually carried out by firing squad as part of a policy of public executions. The UWSA has two jails, one in Pangsang and the other at Ban Yang.

Kachin Independence Organization/Kachin Independence Army The governance structures of the Kachin Independence Organization (KIO) consist of 11 departments under the control of the Kachin Independence Commission. The most important is the Department of General Administration (DGA), the backbone of the government system existing alongside the military at all levels. The KIO divides its areas of influence into six divisions – four in Kachin State and two in northern Shan State – which are divided into districts, then townships, and then various subunits.¹⁴

¹¹ Jolliffe, *Ethnic Armed Conflict*, 78-9. The area was designated Special Region 2 in the UWSP's original 1989 ceasefire, and this name was referred to numerous times in its December 2012 ceasefire agreement with the government.

¹² Ibid. Indeed, this was the only centralized administrative system ever established in the area by Bamar leaders.

¹³ See Tom Kramer, *The United Wa State Army: Narco-Army or Ethnic Nationalist Party?* Policy Studies, No. 38 (Washington, DC: East-West Center, 2007), 39, citing a study carried out in the late 1990s and early 2000s.

¹⁴ The sixth division, and second in northern Shan, was created in 2016.

Institutions and structures: In approximately 2006, the KIO formed a Justice Department to separate these powers from the

DGA, and established its Central Court. Division and district courts followed in 2010, though these systems have few established procedures.

The KIO has police forces in Laiza and Mai Ja Yang that can make arrests. In rural areas, arrests are handled by the DGA, but it may call on the local forces for help in arresting suspects.

The administration of justice: According to the KIO, the majority of cases are typically handled at the level of the village or the *ninghtaw* (similar to a village tract), but are referred to higher levels if they cannot be solved. In some cases, civilians may appeal their cases to a higher level. There appear to be few clear rules for determining what types of cases should be dealt with at which levels. The KIO does not have a formal penal code, as far as the researchers could determine.

SIX: KEY IMPLICATIONS

EAA systems contribute to a certain degree of stability and order, achieved by allowing issues to be handled at the local level. This degree of order and stability may fluctuate with the ebb and flow of armed conflict in an area, but once military activity ceases, order and stability quickly return. This is due to the resilience of EAA governance structures and the continuity of village justice institutions. Particularly in areas where EAAs are well established and are recognized as the local authority, it is significantly more difficult for purely criminal organizations and actors to become established, and this order provides a foundation for other EAA governance institutions such as education and healthcare.

Numerous independent sources have indicated that ethnic populations in some areas prefer EAA justice systems to that of the government. For better or worse, EAA systems are often the primary organs of justice that people in these areas recognize and understand.

The EAAs surveyed generally reported no substantive coordination of judicial inquiries, trials, or other judicial processes with the government's justice system. The exception was the NMSP, which reported occasional cooperation on narcotics issues. In addition to the vast political complications, EAA and government systems have substantively different laws, procedures, and punishments. Cooperation among EAAs is more common, and in overlapping zones of control in southeast Myanmar, the KNU, DKBA, and NMSP coordinate on criminal cases. If a case involves two people of different ethnicities, decisions about jurisdiction depend on the area. These cooperative arrangements are often based on agreements forged between township or district officials of each group, and not on any more comprehensive, EAA-to-EAA agreement.

Civilians in areas of mixed control essentially have access to two or more judicial systems. In some cases, this allows individuals to

“shop around,” choosing the legal system that suits them best. Most of these decisions are based on the individual's personal connections, anticipated costs, and which system is likely to provide a favorable outcome. Sometimes, when the decision of an EAA judge is not to a party's liking, they may take the case to the government system, rather than – or in addition to – appealing the case within the EAA system.

EAA justice systems will operate as the law enforcement and dispute-resolution institutions in their areas of control, or as parallel systems in mixed-control areas, for some years to come. This has significant implications for government attempts to reform its own system in ways that are effective in ethnic areas, and also greatly influences the kinds of international interventions that can be both effective and conflict sensitive.

Key weaknesses of EAA justice systems include the typical lack of dedicated police forces trained in effective investigative procedures, deficiencies in access to justice beyond the village level for many people, and abuse and misuse of the justice systems by EAAs.

Most EAAs assign responsibility for internal security to regular military units, military units with specific administrative functions (as in the RCSS and KNPP),¹⁵ or local militia units that are typically subordinate to the EAAs' armed wings. Only the KNU, UWSP, and KIO have standing police forces, and only the KNU's KNPF operates in rural areas. Effective maintenance of order and security requires policing that goes beyond simple arrest and detention. The ethics and principles of a modern police force are largely absent from most EAA security forces.

Additionally, although traditional systems exhibit many strengths and continue to be actively used, they likely have multiple drawbacks and inefficiencies too. For example, they appear to provide few checks and balances, and with their emphasis on the appearance of village stability, may treat individuals unfairly. In particular, as village authorities tend to be predominantly older men, crimes against women and young people – including gender-based crimes – may be mishandled. Young people are also likely vulnerable to worse treatment, as age is central to status in most rural Myanmar communities.

Dissatisfied villagers may be able to appeal to a higher authority, but many do not have the connections to do so in practice. The emphasis on compensation at the village level also makes it possible for people with money to pay to get out of problems. Nonetheless, village justice systems appear to be the preferred justice mechanism in EAA areas, likely due to collective memories of consistently worse experiences with external authorities.

¹⁵ The Pa-O National Liberation Organization also has special administrative units within its military that deal with justice affairs.

SEVEN: CONCLUSIONS AND WAYS FORWARD

It is unreasonable to apply blanket assumptions about EAA justice systems, as each is a product of that ethnic group's social and political culture, the particular EAA's organizational agenda and approach, and the historical ebb and flow of conflict. Instead, each system should be considered individually.

A great deal needs to be done by government and EAAs to ensure that law enforcement and judicial processes are just, equitable, and legitimate. Government actors and EAAs should view reforming EAA systems as crucial, and should explore increased cooperation and coordination where possible.

As the peace process evolves, more research will be needed to find workable policies and programs to increase access to justice for people in EAA areas, particularly by looking at village-based systems, the foundation of all justice practices in EAA areas. Much could be done by government, EAAs, and international actors to engage with existing village practices at this level and improve them for the good of local populations.

For most EAAs, village-level militias and their own armed wings are responsible for providing internal security, arresting alleged criminals, and keeping order. Efforts should be made to improve policing in EAA areas by creating dedicated police forces trained in police procedure, investigative skills, and professional conduct. In the context of ceasefires, cooperation between the MPF and EAAs could be of great practical value, and would represent a critical area of peacebuilding and a possible stepping-stone towards future integration. International actors, too, should support EAAs and recognize that EAA justice authorities will remain the only option for many communities for years to come.

In particular, further work is required on justice administered by state-backed paramilitary organizations. As integral parts of the Tatmadaw, PMFs and BGFs are meant to be counterinsurgency forces, not police forces. Special attention should be paid to the dual role of paramilitary organizations as both lawbreakers – particularly in the narcotics trade – and law enforcement. This is especially important as discussions get underway regarding the future integration of EAO forces as formal security forces.

EIGHT: DISCUSSION QUESTIONS AND FURTHER READING

Discussion Questions

- Given that a key strength of EAA justice systems is the stability that they provide by relying on trusted, local relationships, how can these systems reform in a conflict-sensitive manner that does not cause instability?
- Given the trust deficit in the government's justice system, could increased cooperation between EAAs and the government provide a basis for more effective justice systems in the future?
- What do EAA justice systems imply about the reform of the security sector in the peace process? In particular, what do existing practices teach us about appropriate models for future policing of rural areas, and should EAAs be integrated into the formal justice system either at Union or local levels?
- How can justice reforms in Myanmar build on the existing strengths and entrenched roles of customary justice systems, while also providing more equitable and impartial protection of citizens' rights and property?
- How should donors and international actors look to engage with: (1) formalizing EAA justice systems, and (2) training EAA police forces and other justice institutions?

Further Reading

- Buchanan, John. *Militias in Myanmar*. Yangon: The Asia Foundation, 2016.
- Furnivall, J. S. *The Governance of Modern Burma*. New York: Institute of Pacific Relations, 1960.
- Jolliffe, Kim. *Ethnic Armed Conflict and Territorial Administration in Myanmar*. Yangon: The Asia Foundation, 2015.
- Jolliffe, Kim. *Governance and Myanmar's Karen Armed Conflict* (working title). Yangon: The Asia Foundation, forthcoming 2016.
- Kramer, Tom. *The United Wa State Army: Narco-Army or Ethnic Nationalist Party?* Policy Studies, No. 38. Washington, DC: East-West Center, 2007.
- Mampilly, Zachariah. *Rebel Rulers: Insurgent Governance and Civilian Life during War*. New York: Cornell University Press, 2011.
- Nang Yin Kham. *An Introduction to the Law and Judicial System of Myanmar*. Myanmar Law Working Paper Series, Working Paper No. 001. Singapore: Center for Asian Legal Studies, Faculty of Law, National University of Singapore, 2014.
- Selth, Andrew. "Myanmar's Police Forces: Coercion, Continuity, and Change." *Contemporary Southeast Asia* 34, no. 1 (April 2012): 53-79.
- Selth, Andrew. *Police Reform in Burma (Myanmar): Aims, Obstacles, and Outcomes*. Regional Outlook Paper 44. Brisbane: Griffith Asia Institute, Griffith University, 2013.
- Silverstein, Josef. *Burma: Military Rule and the Politics of Stagnation*. New York: Cornell University Press, 1977.
- Smith, Martin. *Burma: Insurgency and the Politics of Ethnicity*. New York: Zed Books, 1993.



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