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978-1-107-08318-9 - Opposing the Rule of Law: How Myanmar's Courts Make Law and Order

Nick Cheesman

Excerpt

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INTRODUCTION

In early June 2012, a group of people in the west of Myanmar stopped a bus carrying Muslim pilgrims. They beat ten passengers to death and torched the vehicle. According to news reports, they killed in reprisal for the rape and murder of a young Buddhist woman a few days earlier, allegedly by three Muslims. Not long after the attack, demonstrators gathered outside a mosque in the centre of Yangon, the country's former capital. Speakers called for justice. Some carried photographs of the bus passengers' mutilated bodies, along with placards bearing the term in Burmese for 'the rule of law', *taya-ubade-somoye*.

In the following days, violence spread and worsened. Meantime, Daw Aung San Suu Kyi, symbol of political resistance to the previous two decades of dictatorship, went on her first major overseas tour since her release from house arrest in 2010. While abroad, she referred to the rule of law as a prerequisite to address the violence. 'We have said again and again rule of law is essential. . . . Without rule of law, such communal strife will only continue,' she told a gathering in Geneva.¹ In Oslo, London, and Paris, she emphasised that her country's future prospects would depend on the rule of law. She mentioned it so often that one commentator quipped the trip should have been called the Rule of Law Tour.²

Nor did the tour end in Europe. In September, it continued in the United States. At Yale University, Aung San Suu Kyi said that her

¹ CNN 14 June (2012), 15 Nov. 2012 www.cnn.com.

² *Asia Sentinel* 26 June (2012), 25 Nov. 2012 www.asiasentinel.com.

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National League for Democracy had put the rule of law at the top of the party platform, ahead of resolving ethnic conflict, because 'we can't put an end to ethnic conflict unless there is rule of law'.³ In San Francisco, she again spoke to its importance. The calibre of judges and lawyers in Myanmar had fallen, she said, and to create a culture of rights the country would 'have to start from scratch'.⁴

Returning home from her European trip, Aung San Suu Kyi accepted an offer from the national legislature, to which she had been elected in May, to head a new committee on the rule of law and tranquility. The first item on its mandate was 'alerting, urging and enabling' of legislators, prosecutors, civil servants, the government, media, and other people and institutions to obey the law.⁵ At its inaugural meeting in September, Aung San Suu Kyi articulated a vision for the rule of law that went well beyond the narrow confines of the committee's mandate:

For the rule of law it is insufficient merely to have laws. It is insufficient that the laws are just. How the designs of laws are realised is also important. To put it simply, our view is that in a society bound by the rule of law everybody has faith that the law will protect one's individual security and liberty, that the law is capable of protecting every citizen's freedoms and security, and that it does so. Where it can do so and where confidence in it exists, we can say that a society is bound by the rule of law.⁶

Given that army officers arbitrarily confined her to her house for over a decade, Aung San Suu Kyi's stress on the rule of law is understandable. In one classic formulation, the rule of law is nothing if not a bulwark against arbitrary exercise of authority to deny people their individual liberties.⁷ Its bottom line is its capacity to prevent the sort of detention Aung San Suu Kyi endured. Yet the rule of law apparently means more to Aung San Suu Kyi than just this. Her rule of law also helps put an end to communal conflict, and to ethnic warfare. It bolsters democracy. It has a big agenda.

³ *Yale News* 27 Sept. (2012), 25 Nov. 2012 <http://news.yale.edu>.

⁴ *KQED* 28 Sept. (2012), 8 Dec. 2012 <http://blogs.kqed.org>.

⁵ Pyithu Hluttaw, 'Rule of Law and Tranquility Committee', 2012, www.pyithuhluttaw.gov.mm, 25 Nov. 2012 (in Burmese).

⁶ *Weekly Eleven* 19 Sept. 2012: 3.

⁷ Albert V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (Indianapolis, IN: Liberty Fund, 1982) 110–22.

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Aung San Suu Kyi's invocations of the rule of law, like countless others in Myanmar following the country's return to electoral politics after more than twenty years of unmediated military rule, could be evidence of the ideal's continued ascent worldwide.⁸ A decade and a half after one expert pronounced that the concept was 'suddenly everywhere – a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization', its run shows no sign of coming to an end.⁹ To the contrary, as another long-time observer of the concept has noted, 'Once a quasi-technical term of interest only to lawyers and legal philosophers, [the rule of law] appears all over the globe these days, at ease in the company of such unassailably Good Things as democracy, equality, and justice . . . an international hurrah term, on the lips of every development agency, offered as a support for economic growth, democracy, human rights, and much else.'¹⁰

Aung San Suu Kyi's faith that the rule of law is the solution to her country's troubles evidently rests on the belief that not only does it belong in the company of these unassailably Good Things, but that it will help to deliver them as well. Nor is she alone in this belief. Practically every development worker and government official in Myanmar seems to share it, as do noodle vendors, bus conductors, and schoolteachers. But is this Southeast Asian country just the latest corner of the globe where the rule of law has suddenly appeared with a hurrah, or is there more to it than that? And why does the rule of law matter to Myanmar, or Myanmar matter for study of the rule of law?

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Well might we cry, 'Hurrah for Myanmar!' Over six decades since wresting political independence from British colonial rule, its roughly fifty-two million occupants situated between China and India have enjoyed neither the growing prosperity of one nor the personal

⁸ As discussed in Nick Cheesman, 'What Does the Rule of Law Have to Do with Democratisation (in Myanmar)?' *South East Asia Research* 22.2 (2014): 217–21.

⁹ Thomas Carothers, 'The Rule of Law Revival', *Foreign Affairs* 77.2 (1998): 95.

¹⁰ Martin Krygier, 'Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?' *Getting to the Rule of Law*, ed. James E. Fleming, vol. V, *Nomos* (New York and London: New York University Press, 2011) 64.

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freedoms of the other.¹¹ Stymied from the beginning by economic devastation and war, mired in civil conflict, and thwarted by successive military despots, their achievements have been despite the work of government, not because of it.

But impressive advances beyond army-dominated politics notwithstanding, we ought to be wary of crying 'hurrah' for the rule of law in Myanmar. Television or newspaper reports might give the impression that people there had just heard of 'the rule of law' when Aung San Suu Kyi began uttering the term following her release from house arrest. We need not look far for evidence to the contrary. 'The rule of law' is no stranger to Myanmar. It has long been a part of the Burmese political lexicon, common to the language of democrats and dictators alike.

For decades, soldiers, bureaucrats, and politicians in Myanmar have professed concern for the rule of law. Parliamentarians in the 1950s invoked it to justify emergency regulations to combat insurgency.¹² Ten years after the country's independence, the military ran an interim government under the banner, 'Peace and the rule of law first'.¹³ In 1974, a one-party government cited the rule of law when it imposed military administration on the capital city following widespread anti-government protests.¹⁴ Four years later, the government portrayed violence that accompanied its attempt to expel tens of thousands of alleged foreigners to Bangladesh as wanton illegality in the face of legitimate efforts to enforce the law.¹⁵ Decrying news reports abroad about the persecution of Muslims, an editorialist in the state press wrote, 'The sense of justice and fairness which governs our relations with other nations extends to a sense of justice in our internal affairs with the Rule of Law a principal criterion in our human relations, economic affairs and in all other fields of human endeavour.'¹⁶

¹¹ Population estimates vary. In 2014 the government undertook a census and released provisional results in August; however, exact numbers will remain elusive for a host of political and procedural reasons discussed in Mary Callahan, Christoph LeFranc, and Nancy Stiegler, *Documentation of Risk Mitigation Report: 2013 Pilot Census, Myanmar* (n.p.: UNFPA, 2013). See also TNI/BCN, *Ethnicity without Meaning, Data without Context: The 2014 Census, Identity and Citizenship in Burma/Myanmar* (Amsterdam: Transnational Institute and Burma Centrum Nederland, February 2014).

¹² Maung Maung, *Law and Custom in Burma and the Burmese Family* (The Hague: Martinus Nijhoff, 1963) 25.

¹³ Revolutionary Council, *Burma: Administrative and Social Affairs, 1962–63* (Rangoon: Office of the Director of Information, 1965) 34 (in Burmese).

¹⁴ Govt. of the Socialist Republic of the Union of Burma, *Digest of Undertakings of the First Pyithu Hluttaw* (Rangoon: Office of the Pyithu Hluttaw, n.d.), 278 (in Burmese).

¹⁵ *Botataung* 30 Apr. 1978: 1–2, 7; 7 May 1978: 1–3.

¹⁶ *Working People's Daily* (WPD) 12 May 1978: 4.

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In 1988, a new junta that described itself as a council for law and order stated in its first announcement that the rule of law was topmost among its major tasks.¹⁷ It referred to the rule of law when it imposed martial law countrywide in 1989.¹⁸ Its members lost few opportunities over the next two decades to reiterate their concern for the rule of law. Among them was General Thein Sein, who as prime minister in 2009 said that ‘constant measures are to be taken to ensure the rule of law in order to thwart any disturbances’ to the state.¹⁹ In his inaugural speech as president in 2011, having retired from his military commission, Thein Sein again stressed that the government had to ensure the rule of law so as to build a modern, developed, and democratic nation.²⁰ In 2013, the same topics came up for discussion at the White House during his trip to the United States.²¹

Given the frequency that successive governments in Myanmar have linked state stability to the rule of law, it is not surprising that when in 2012 people on the western seaboard went out armed with knives and sticks Thein Sein concurred with Aung San Suu Kyi that the violence was in one way or another a problem of the rule of law.²² Establishing a commission to investigate, he declared, ‘There occurred unrests [*sic*] and killings in Rakhine State in May and June 2012, which undermined peace and stability and rule of law.’²³ In a broadcast, he urged the public to obey the law, so the rule of law could be maintained.²⁴ Hundreds of women marched in the capital city of Rakhine State to demand the Citizenship Law specifically be obeyed, so as to get rid of ‘Bengali illegals’.²⁵ The commission of inquiry for its part found the rule of law had declined to a point where not only had alleged illegals successfully infiltrated the country in large numbers, but also that some had succeeded in infiltrating the new legislature as elected members.²⁶

In sum, the language of the rule of law is not new to Myanmar. It is language with precedent. Far from having arrived with a hurrah and a mood for democratisation, the rule of law is a fixture of the political

¹⁷ State Law and Order Restoration Council (SLORC) Announcement 1/88, 18 Sept. 1988.

¹⁸ SLORC Order 3/89, 27 June 1989. ¹⁹ *New Light of Myanmar* (NLM) 15 Sept. 2009: 1, 6.

²⁰ NLM 1 Apr. 2011: 7–8. ²¹ *Voice of America* (VOA), 21 May 2013.

²² On rule-of-law language in response to the violence, see Cheesman, ‘What Does the Rule of Law Have to Do with Democratisation?’ 225–31.

²³ Office of the President, Notification 58/2012, 17 Aug. 2012. ²⁴ NLM 11 June 2012: 8.

²⁵ *Biweekly Eleven* 12 Oct. 2012: Supp. C1.

²⁶ ICSVRS, *Report of the Inquiry Commission on the Sectarian Violence in Rakhine State* (Naypyidaw: Republic of the Union of Myanmar, 2013) 80 (in Burmese).

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lexicon to which everyone has had recourse at one time or another. Its tone is precautionary rather than triumphant: look what happens without the rule of law.

Obviously, what happens without the rule of law depends on what one means by it. Like other political concepts its meaning changes as it moves around.²⁷ It obtains political 'logics' from specific contexts, and by actions learned, reproduced, and repeated over time.²⁸ And like other political concepts, it resonates in peculiar ways, conveying different things to different people, and different audiences. As Daniel Lev once said of Indonesia, the rule of law there may well have had its origins in a continental European idea, but it took on new meanings when imported to a Southeast Asian archipelago.²⁹ The idea changed through the political actions and usages of Indonesians.

Writers who talk up the rule of law as a global political ideal tend to play down how its meaning changes across time and space. Of course, nobody fails to acknowledge that its meaning is contested – perhaps essentially contested.³⁰ But the tendency is to assume, or insist, that everyone must be talking about basically the same thing. Introducing a well-known study on the rule of law's history and modern relevance, for instance, Brian Tamanaha has described it as 'the preeminent legitimating political ideal in the world today, without agreement upon precisely what it means'.³¹ For Tamanaha, the rule of law might be a contested concept, but it is still *the* concept with which modern political discourse is concerned.

This book challenges such assertions. It rejects the assumption that because people use the rule-of-law nomenclature, they are referring to approximately the same thing. Not only might they be referring to

²⁷ Carol Gluck, Introduction, *Words in Motion: Towards a Global Lexicon*, eds. Carol Gluck and Anna Lowenhaupt Tsing (Durham, NC, and London: Duke University Press, 2009) 5. See also Frederic C. Schaffer, *Democracy in Translation: Understanding Politics in an Unfamiliar Culture* (Ithaca, NY, and London: Cornell University Press, 1998) ch. 1.

²⁸ Lisa Wedeen, *Peripheral Visions: Publics, Power, and Performance in Yemen* (Chicago: University of Chicago Press, 2008) 15.

²⁹ Daniel S. Lev, 'Between State and Society: Professional Lawyers and Reform in Indonesia', *Making Indonesia*, eds. Daniel S. Lev and Ruth T. McVey (Ithaca, NY: Cornell University Press, 1996) 148.

³⁰ See, for example, Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' *Law and Philosophy* 21.2 (2002): 137–64; David Collier, Fernando Daniel Hidalgo, and Andra Olivia Maciuceanu, 'Essentially Contested Concepts: Debates and Applications', *Journal of Political Ideologies* 11.3 (2006): 211–46.

³¹ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) 4.

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different versions of the same concept, they might be referring to different concepts: even opposing concepts. The 'apparent unanimity in support of the rule of law' is neither as apparent nor as unanimous as Tamanaha makes it out to be.³²

PURPOSE, ARGUMENT, AND SCOPE

The purpose of this book is to bring opposing ideas to the rule of law back to the study of politics: to challenge the monism dominating contemporary literature on the concept, by reintroducing one of the rule of law's opposites to the debate.

Opposing ideas enrich the study of politics. They expand the corpus of concepts used to explore and analyse what happens, and why. They deepen our analysis of specific places, institutions, and events. They also cast light on the ideas they oppose, sharpening analytical distinctions between antithetical concepts, offering clarity not attained by studying concepts in isolation. Thus, Judith Shklar chose to examine liberalism through the study of injustice.³³ When Shklar talks about injustice, she does not mean simply the absence of justice, positively defined. Her concern is with varieties of injustice as wickedness, each with distinctive contents, with unique animating ideas. For Shklar, justice only makes sense if understood through study of how people and institutions can act cruelly. Similarly, when Avishai Margalit asked what a decent society is, he answered the question not by exploring the notion of decency, but rather, the notion of humiliation.³⁴ Philip Pettit argued that to grasp the concept of liberty requires an appreciation of what it means to be dominated.³⁵ And Hannah Arendt in her study of violence opposed it with power, with which, she said, it is wrongly likened: 'it is not correct to think of the opposite of violence as nonviolence; to speak of non-violent power is actually redundant', she wrote.³⁶

Each of these authors recognised that if they were to get at the political idea mattering most for them, they had to do more than just single it out for study. Nor could they simply contrast it with conditions

³² Tamanaha, *On the Rule of Law* 3.

³³ Judith N. Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990).

³⁴ Avishai Margalit, *The Decent Society* (Cambridge and London: Harvard University Press, 1996).

³⁵ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford and New York: Oxford University Press, 1997).

³⁶ Hannah Arendt, *On Violence* (New York: Harcourt, 1969) 56.

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where it is absent. Each tackled the idea through other ideas, including rival concepts. Likewise, I contend that to get at the rule-of-law idea scholars sometimes need to come at it through opposing ideas. To take the rule-of-law ideal seriously, there must be genuine concern not only for how it is embodied in action, as Philip Selznick would have it, but also for how opposing ideals are likewise embodied.³⁷ We need to take seriously places where the rule of law is in practice and *in principle* denied, and treat them not as rule-of-law negatives, or caricatures, but as places animated by different ideas, perhaps opposing ones, to the rule of law.

Often, the rule of law is not studied in relation to its rivals because it is conflated with them. Conflation of opposing concepts constitutes a peculiar problem for the study of politics, one different from study of the gap between principle and practice, between the rule of law present and the rule of law absent. Where the problem consists of the denial in practice of a principle to which political institutions subscribe, something may be learned from study of the gap between aspiration and reality. Where principles are conflated, the problem goes beyond the contrast between life with the rule of law and life without it. The question is not just, as Martin Krygier has posed it, 'What can one learn about the rule of law from its absence?'³⁸ The absence of the rule of law is not a vacuum. It is not a negative, not un-rule of law.³⁹ It is a space that competing ideas about political organisation occupy. To appreciate how the rule-of-law ideal animates politics we must also consider how its opposites animate politics.

Studies of the rule of law in context tend to concentrate on countries associated with strong rule-of-law traditions. This book comes at the concept from another direction so as to explicate opposing ideas and practices, and through them, to understand better the rule-of-law ideal

³⁷ Philip Selznick, *TVA and the Grass Roots: A Study in Politics and Organization* (New Orleans: Quid Pro, 2011) viii.

³⁸ Martin Krygier, 'Marxism and the Rule of Law: Reflections after the Collapse of Communism', *Law and Social Inquiry* 15.4 (1990): 640.

³⁹ Previously, I explored and used the 'un-rule of law' idea, drawing on work by the then United Nations Special Rapporteur on human rights in Myanmar, Paulo Pinheiro. Nick Cheesman, 'Thin Rule of Law or Un-Rule of Law in Myanmar?' *Pacific Affairs* 82.4 (2009): 597–613. See also Juan Méndez, Paulo Sergio Pinheiro, and Guillermo O'Donnell, *The (Un)Rule of Law and New Democracies in Latin America* (Notre Dame, IN: University of Notre Dame Press, 1998). I became dissatisfied with this approach for reasons set out in this book. For a short critique identifying a number of weaknesses in my earlier argument, see Wilson Tay Tze Vern, 'The Rule of Law in Myanmar: A Response to Professor [sic] Cheesman', *Comparative and Non-US Constitutional Law eJournal* 8.82 (2013), 10 Oct. 2013.

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itself. It does so via research into a country where ideas opposed to the rule of law have animated political practices for much of its modern history: Myanmar, or Burma.⁴⁰

If cruelty opposes justice, humiliation opposes decency, and domination opposes freedom, what concept in Myanmar opposes the rule of law? My answer is that the political ideal opposed to the rule of law in Myanmar is law and order: in Burmese, *ngyeinwut-pibyaye*. But if ideas and practices of law and order in Myanmar oppose the rule of law, they are also conflated with it. In this respect, Myanmar has wider relevance. Had successive governments pronounced unambiguously a commitment to law and order, excluding the rule of law, then the country would be much less interesting to scholars of these ideas. Instead, just as law and order has become a synonym for the rule of law worldwide, in Myanmar too it has semantically occupied its antonym, albeit in distinctive ways. Much of this book is concerned with how these two concepts are conflated.

While my purpose in writing the book is to interrogate the rule-of-law idea through an opposing concept, it is also to make Myanmar's courts central to analysis of its politics and to bring Myanmar into the burgeoning comparative literature on the politics of courts. However, I do not intend to privilege courts and, much less, judges. Courts matter to me not because they occupy a special place in legal imagination, but because they transmit and realise political ideas through what Lisa Wedeen calls 'performative practices' – actions learned and repeated over time that produce particular kinds of social beings.⁴¹

Other studies of courts in politically repressive settings concentrate on the role of the judge.⁴² This book tells a story not of adjudication

⁴⁰ On 'Myanmar' versus 'Burma', see Gustaaf Houtman, *Mental Culture in Burmese Crisis Politics: Aung San Suu Kyi and the National League for Democracy* (Tokyo: Tokyo University of Foreign Studies, 1999) 43–54; Ian Holliday, *Burma Redux: Global Justice and the Quest for Political Reform in Myanmar* (New York: Columbia University Press, 2011) 4–10.

⁴¹ Lisa Wedeen, 'Ethnography as Interpretive Enterprise', *Political Ethnography: What Immersion Contributes to the Study of Power*, ed. Edward Schatz (Chicago and London: University of Chicago Press, 2009) 87–88.

⁴² See, for example, David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon, 1991); Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge: Cambridge University Press, 2005); Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge and New York: Cambridge University Press, 2007); Mark J. Osiel, 'Dialogue with Dictators: Judicial Resistance in Argentina and Brazil', *Law and Social Inquiry* 20.2 (1995): 481–560; Anthony W. Pereira, *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (Pittsburgh, PA: University of Pittsburgh Press, 2005); Sebastiaan Pompe,

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but of interaction. It tells a story of policemen, prosecutors, lawyers, complainants, and defendants. As such, it is emphatically not a book about *the* courts, or the judiciary as a distinctive institution. Nor is it about the judicialisation of politics in Asia.⁴³ Rather, it is a study of courts' personae, of courts' representations of a larger political order, and of courts as spaces for political language and practice.⁴⁴ It is a study of how the texts that move into, through, around, and out from courts construct and reconstruct the idea of the state, and of a particular bureaucratic vision, or visions, of society.⁴⁵

Official texts studied with a 'distorting mirror' reveal political ideas and practices they are supposed to conceal.⁴⁶ Their contents at once disaggregate the political ideas and institutions they are constructing. Agreeing with Mary Callahan that researchers of Myanmar have tended to 'overstate the logic, unity, and integrity' of the state, I use court records to disassemble the supposedly coherent entity that is the judiciary reified by diagrammatic schema.⁴⁷ Heeding Philip Abrams' call for demystification of the state by 'attending to the senses in which the state does not exist rather than to those in which it does', I attend to courts *both* in the senses in which they exist, as well as in the senses they do

The Indonesian Supreme Court: A Study of Institutional Collapse (Ithaca, NY: Southeast Asia Program, Cornell University, 2005).

⁴³ See, for example, Björn Dressel, 'Governance, Courts and Politics in Asia', *Journal of Contemporary Asia* 44.2 (2014): 259–78; Shoaib A. Ghias, 'Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf', *Law and Social Inquiry* 35.4 (2010): 985–1022; Tom Ginsburg, 'The Constitutional Court and the Judicialization of Korean Politics', *New Courts in Asia*, eds. Andrew Harding and Penelope Nicholson (London and New York: Routledge, 2010) 145–57; Hootan Shambayati, 'Courts in Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (and Iranian) Politics', *Rule by Law: The Politics of Courts in Authoritarian Regimes*, eds. Tom Ginsburg and Tamir Moustafa (Cambridge and New York: Cambridge University Press, 2008) 283–303.

⁴⁴ In this sense the study also departs from the literature on juridification, in which political contests brought within the domain of the courts are depoliticised under the rule-of-law rubric. See Julia Eckert et al., Introduction, *Law Against the State: Ethnographic Forays into Law's Transformations*, eds. Julia Eckert et al. (Cambridge: Cambridge University Press, 2012) 4–7.

⁴⁵ Pierre Bourdieu, 'Rethinking the State: Genesis and Structure of the Bureaucratic Field', trans. Loïc J. D. Wacquant and Samar Farage, *State/Culture: State-Formation after the Cultural Turn*, ed. George Steinmetz (Ithaca, NY, and London: Cornell University Press, 1999) 55.

⁴⁶ Ranajit Guha, *Elementary Aspects of Peasant Insurgency in Colonial India* (Durham, NC, and London: Duke University Press, 1999) 333.

⁴⁷ Mary P. Callahan, *Making Enemies: War and State Building in Burma* (Ithaca, NY, and London: Cornell University Press, 2003) xii.