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CHAPTER ONE

INTRODUCTION

I had travelled to *Hpa-an*, the capital of Myanmar's[1] eastern Karen state, for a chance to meet with a local lawyer who worked for several of the foreign-funded initiatives of rule of law assistance – defined here as foreign actors' transnational 'project' of supporting legal systems in fragile settings – that were initiated in the country after its political opening in 2011. While usually based in Yangon, the lawyer was in *Hpa-an* for one of his regular training sessions with local activists and lawyers. On my way to our meeting, I walked through the pitch-black streets of the small town in a country I still did not know much about to meet a person whom I imagined would have little patience with a foreign researcher asking questions about his work. As I walked into the tiny shed of a restaurant where we were meeting, I saw Zaw Win Thein's[2] dazzling smile, and I felt a sense of instant relief. His personality was inviting and friendly.

Zaw Win Thein is a fluent English speaker with definite views on human rights and what is needed for rule of law development in his country. He was one of the most sought-after persons when representatives from foreign organisations came to Myanmar to assess the rule of law situation and plan activities as part of new assistance packages in the donor frenzy that emerged as the military-led country opened up to

[1] I use the official name of the country, which was changed to 'Myanmar' after 1989, unless writing about the period before that when the official name was 'Burma'.

[2] All names used in this book have been modified to protect the identity of my research participants. Myanmar names (except those of some ethnic minorities, see Skidmore 2003:6) often consist of several syllables, none of which would be classified as a 'surname' as in naming structures found in some other countries.

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political change in the aftermaths of elections in 2010. Zaw Win Thein also ran his own non-governmental organisation (NGO) and worked to attract funding to local rule of law projects in his home town. His role changed depending on the task he was faced with: sometimes he did 'lawyer work', which he preferred to 'handling money matters'. He needed to translate foreign concepts and terms so that they made sense to national and local counterparts. Often, he found himself in situations where he needed to mediate when the involved actors did not share the same values and understandings (or worldviews) – a position he was not comfortable with. Sometimes, Zaw Win Thein confused the foreign organisations he was contracted by, who were puzzled as to why certain people were invited to the development activities they funded while others were not. Donors also felt as if peculiar translations took place during meetings. At the same time, these development actors from abroad confessed that they were wholly reliant on people like Zaw Win Thein to carry out their rule of law assistance activities. Zaw Win Thein would also upset local counterparts, who believed that he distorted messages and kept information from them. They claimed that he did not have any real influence but still got much attraction from, and was loyal to, the 'internationals'. Zaw Win Thein, on the other hand, explained that the upset feelings were due to the distrust local actors had towards international law and foreign interests and that he was just trying to explain the international framework as part of his work on translating rule of law to the local level.

Local lawyer Zaw Win Thein illustrates the role of rule of law intermediaries – actors (individual or collective) who play a critical function as mediators, translators, or brokers 'in between' counterparts – in the field of rule of law assistance. In general terms, they are persons who occupy ground from where they broker ideas, models, and templates for change. They oscillate between different roles, depending upon what the circumstances call for. More particularly, rule of law intermediaries work as interlocutors between foreign donors and domestic institutions (see Nicholson and Low 2013). They are not neutral go-betweens but people who stand to gain or lose from different transactions and capital (see Long 1975; Silverman 1965).

Intermediaries matter because they appropriate and adapt ostensibly global ideas and strategies by vernacularising them (Levitt and Merry 2009). They are influential when they successfully navigate struggles that accompany transnational development, where multiple forms of

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power and influence overlap (Koster and van Leynseele 2018). They also shape transnational law through their understanding of how institutional conventions, knowledge, and practices diverge from conditions where they work (see Berger 2017; Berger and Esguerra 2017; Zimmermann 2017).

While intermediaries are a known feature of development practice, for long they remained silenced in the scholarship that analyses such activities (Bierschenk, Chauveau, and de Sardan 2002; Halliday and Carruthers 2009; Lewis 2005). Intermediaries' role in brokering, making and remaking, rule of law tends to be occluded (Zürn, Nollkaemper, and Peerenboom 2012). Legal scholars who write about rule of law as a field of development sometimes mention that intermediaries are indeed playing their part in transnational relationships; however, they single them out as methodological entry points from which to understand that the interaction between global and local law is yet to be seen (cf. Gillespie 2017). Practitioners who work on rule of law assistance have attended to inputs and outputs, rather than to how projects in its name are intermediated and translated. Official discourse privileges international expertise and elides the parts that intermediaries play. Yet, in brokering the rule of law, intermediaries are also producing some version of it, or at least trading in knowledge about it. By concentrating on them, not only do we get a better sense of how rule of law projects rise or fall but we can also illuminate facets of transnationalism that ordinarily are obscured from view (see Lindquist 2015a).

The intermediary as an agent, occupying Merry's (2006a) amorphous middle space between the global and the local, embodies the interplay between the universal and the particular, the tensions between rule of law as a pre-eminent political ideal versus the vernacularised knowledge necessary for its reception in conditions that are often hostile and always linguistically unique, culturally relative, and historically contingent. If the question is how to build rule of law abroad, then the answers in no small part lie in who these intermediaries are, what they do, and how and why they do it. Intermediaries occupy positions between parties through which others desire to pass, but most cannot. Instead, they have to rely on the intermediaries to smile or frown upon their ideas and make them happen, along with other things that might be incidental to transnational organisations' goals but sometimes also contrary to them.

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Exploring the work of intermediaries casts light on some of the relationships that official donor reports seldom mention (see Hancock 1989). Unlocking intermediaries' knowledge and the 'black-boxes', as per science and technology studies (e.g., Kuhn 2012), of rule of law 'making' in illiberal societies provides insights into how foreign-led interventions can be conducted more effectively and without risking the further strengthening of authoritarian systems of law and order. If the donor community is willing to move away from the predominant tendency to listen to international 'expertise' and knowledge (Crewe and Harrison 1998) and also take into account intermediaries' accounts, interventions may be designed that better benefit people who live in societies where a well-functioning system of rule of law is lacking.

This book moves beyond top-down explorations of the impact of rule of law assistance on Myanmar actors by following a law and society tradition of nuanced and contextual analyses (see, e.g., Chua 2014) of the ways in which intermediaries broker influence, which in turn contributes to a socio-legal framework that can be applied in other settings where development assistance takes place, to explain how rule of law making at new sites involves and requires contestation and adaptation.

1.1 A LAW AND SOCIETY APPROACH TO THE STUDY OF RULE OF LAW INTERMEDIARIES

Rule of law intermediaries are found across various institutional roles; some are lawyers, some are not. They move within central and peripheral domains of the law while drawing on various forms of capital in a dynamic yet problematic struggle of allegiance and distrust. While some intermediaries are connected to the government, others are closer to local communities and build on their work as activists. They may represent themselves as individual consultants or as leaders of NGOs and be both an intermediary and a counterpart to a foreign development organisation at the same time. These are not fixed roles because intermediaries wear different hats and oscillate between assignments and institutions which enable them to obtain multiple influences at different levels. Most are engaged in intricate networks and embody various forms of expertise. Some have actively sought out a position as an intermediary; others have become involved by chance or as a consequence of their social position.

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The myriad of agents that translate global ideas to local levels within the field of rule of law assistance suggests that the lines between global and local processes and the roles individuals have that inhabit these spaces often blur. A law and society approach – which emphasises the social and cultural contexts in which law operates in practice between places, peoples, institutions, and histories to tell us the full story about how and under what conditions law is produced and reformed (Darian-Smith 2013; Ewick and Silbey 1998) – to studying intermediaries invites us to think broadly about law in society and the agents that make it meaningful. To give a practice example, rule of law actors typically look to lawyers as counterparts or beneficiaries of their work. One reason is that their own staff often have expertise in law – though not so often in the law of the place where they are sent to work, or on the relationship between law and development generally (Nader 2007; Simion and Taylor 2015). Another reason is that, since the early days of the law and development movement, practitioners saw law as an instrument for development, and those who were expert with that instrument became the practitioners of choice, their own progress symbolic of general advancement (see Trubek 2006). Krygier (2017b:135) has observed that rule of law promotion continues to be premised on the (wrongheaded) notion that 'if the rule of law is what you want, it seems obvious that it is lawyers, with their insider knowledge[,] who best understand it and seem best placed to deliver it'. And, in many places, lawyers are indeed important drivers of political and social reform (see, e.g., Cheesman and Kyaw Min San 2014; Dezalay and Garth 2012; Munger 2012a). However, conditions in Myanmar circa 2014 were not amenable to transnational organisations' goals of getting for themselves a local lawyer who could pretty much speak, think, and act the way foreign actors expected. For one thing, legal education had badly deteriorated under military rule (see Khan and Cheesman 2020; Myint Zan 2000a). Lawyers had not had the kind of formal training that transnational organisations were after. For another, successive governments subordinated the legal profession (see Crouch 2020), which had been politically active in the first decade after independence, when law had been a path to a career in politics. The army pulled lawyers from their pedestals. Already by the 1970s there was no longer any such thing as an elite lawyer under its watch (see Dawkins and Cheesman 2021; International Commission of Jurists 2013). So the lawyer-intermediaries whom people from abroad met in the transition period, for the most part, had come from underground

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political struggles and local-level activism. They were not so much formal legal practitioners as they were informal brokers of law: manipulators and strategists adept at working with law but not working within it (Batesmith and Stevens 2019; Prasse-Freeman 2015); and for good reason, since only a fool, or someone with no expectation of winning a dispute, would have tried to work strictly within the law under the country's successive military rule. Yet it was this very thing, which made lawyering viable under those days, that now diminished it in the eyes of newly arrived advisers to foreign organisations and corporations (see Tungnirun 2018). All they saw was an unusually low-quality legal community over which they could claim superiority by emphasising formal training and doctrinal knowledge of rule of law. On the transnational hierarchy of legal credibility, a lack of country-specific expertise or relevant language skills was no obstacle to their professional superiority (see Simion and Taylor 2015). We see from this example that foreign development actors seek to work with local lawyers, regardless of the role being significantly different from what foreign practitioners are used to, which is suggestive of their attempt to replicate institutions as they know them through 'isomorphic mimicry' (Andrews, Pritchett, and Woolcock 2013; DiMaggio and Powell 1983; Pritchett, Woolcock, and Andrews 2012). Such mimicry is a typical example of how forces outside the formal legal sphere are ignored when lawyers put on their formalist glasses as they try to access the legal systems in the countries where they work but remain much excluded from them (Chesterman 2008). If we scratch the surface, we see that lawyers in Myanmar are busy navigating a marketplace of bribes rather than trying to advocate ideas of rule of law development (Batesmith and Stevens 2019).

While I situate the focus on intermediaries within the voluminous literature on rule of law assistance, this is not a study of what happens in the form of rule of law projects and programmes. Following a law and society ideal, the enquiry is based on the assumption that the interface between development actors from various arenas (international, national, local) is the key 'technique' for rule of law making through development assistance. A language that situates actors as local, national, or global and international is uneasy. Often these locations and cultures are overlapping, interrelated, and difficult to distinguish. For example, local actors also operate in global arenas and thus come to apply international discourses in national settings. The inherent bias in such terminology is problematic because international knowledge is

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often perceived as superior to local. Following Rossi (2006:29), I recognise that there are problems 'raised by analyses relying, even figuratively, on the notions of donor and recipient "cultures," or on the opposition between "local" or "indigenous" knowledge and "Western scientific knowledge"'. This book makes a repeated argument for the importance of localised knowledge as opposed to that brought in by foreign promoters. Nevertheless, to completely deconstruct the language of development would not serve the purpose of identifying the key gaps between these distinct worldviews – as my book sets out to do. Rather, the discourse of development can be enriched by adding analysis of processes in the middle of the spectra. Thus, while tending to the technique of construction of development, I am addressing a specific point at which development agents connect: the interfaces. Unlike much scholarship within the field of rule of law assistance, this is an actor-oriented approach (Long 2001) to the study of a phenomenon. Consequently, this is a study not of 'rule of law' (or law) in Myanmar but of the people who, as agents, populate and translate 'technologies of social ordering'; it requires in-depth explorations of linkages and objectives as well as the translation chains that modify the rule of law as it travels in the hands of numerous actors (Behrends, Park, and Rottenburg 2014).

1.2 BROKERING INFLUENCE: CENTRAL ARGUMENTS

How do intermediaries broker influence in the rule of law assistance field? As the example of Zaw Win Thein suggested, intermediaries exert influence by acting as translators of global concepts that sometimes blend uneasily with the political reality faced by foreign promoters on the ground in authoritarian settings, and sometimes with the effect of angering local counterparts, which in turn can lead to greater resentment of foreign interests, especially in settings where trust is low (Latusek and Olejniczak 2016). They mediate conflicts between development counterparts that do not share the same values and understandings in situations where foreign donors resort to simplified storylines in lieu of detailed and nuanced information of the situation on the ground (Autesserre 2012). Intermediaries help assess legitimate partners of foreign aid as they decide where rule of law activities should be allocated and select who is invited to participate in development activities. Their influence springs from a combination of personal charisma, the possession of large networks, and the control of knowledge.

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This book provides a detailed exploration of those individuals and organisations who sprang up as intermediaries in a moment of optimism that surrounded the rule of law activities that were initiated in Myanmar's transition period after decades of aid that was low in intensity and focused on humanitarian and health needs rather than governance and the law (Décobert and Wells 2020). Several sub-questions focus on the way intermediaries came to engage themselves in the development aid field and asks about their backgrounds, motives, methods, and activities. For example: What is the profile of intermediaries? As the example of Zaw Win Thein illustrates, intermediaries have large networks, are charismatic, fluent in English, and have been educated abroad. In addition, many have a background of social or political engagements and experience of working for foreign development actors. How did they come to possess such experience and skills in a country that for decades has been described as isolated from foreign influence and knowledge?

What social processes transform certain actors into intermediaries, and why do foreign promoters seek them out? By highlighting the effect of intermediaries' activities during a historical moment of political transition, this book provides empirical insights into the particular challenges of entering unknown terrain, lacking nuanced and detailed information, as a foreign intervener, which 'is especially the case in closed, authoritarian regimes' (Décobert and Wells 2020:296). Here, donor discourses and global regulatory instruments that stress local ownership and participation are disregarded in practice as foreign actors quite deliberately screen the group that they regard as legitimate partners as well as local owners: donors are particularly cautious not to engage actors too closely connected to the military, or those who do not share their ideas of what human rights constitute (see also ibid.).

Whose expectations and priorities do intermediaries serve, and what are their motives and goals? The answer to these questions also runs throughout this book. In essence, intermediaries have motives, which involve fostering their own networks and transforming the environment, which stretch beyond the work they do for their foreign employers. Intermediaries' personal intentions have implications for how rule of law project activities are steered, how rule of law is translated, and ultimately for development sustainability.

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1.3 STATUS QUO AND SHORTCOMINGS: RULE OF LAW AS DEVELOPMENT ASSISTANCE

From a narrow transnational field addressing development, after the end of the Cold War rule of law assistance witnessed 'a tremendous growth in "rule doctors" armed with their own competing prescriptions for legal reforms and new legal institutions' (Dezalay and Garth 2002:1). '[T]he intensive exportation of laws and institutional models around the world' (Humphreys 2010:6) amplified to the extent that it is now referred to as a 'rule-of-law industry' (Taylor 2016). Not only development agencies but also transnational and domestic NGOs, consultants, lawyers, judges and prosecutors are key facilitators of transnational flows of rule of law models, legal institutions, principles, and procedures. A dense network of transnational 'in-between' actors has resulted from this functional expansion.

The field of scholarly enquiry into rule of law assistance has remained largely dominated by legal scholars and practitioners with little recourse to interdisciplinary and socio-legal methods for analysing the field's impact on local and global societies. Although critique and a need for reinvention have repeatedly been voiced, an examination of the field's ideological underpinnings has remained relatively static. It is a field that continues to favour debates and ideas derived from the West while constructing superficial regulatory instruments that stress a need for ownership, partnership, and participation (Bosch 2016). In addition, the results of rule of law assistance efforts have often been deemed disappointing (Taylor, V. L. 2009). The reasons for failure have been explained with reference to the practice of development agencies basing their work on simple models and 'off-the-shelf toolkits' believed to work in all sorts of settings (Peerenboom 2009). Such formalist approaches to rule of law assistance see law as a technology rather than a politics or sociology (Upham 2006) and they miss the mark in terms of conducting reforms that take into account local processes, actors, and plurality (Channell 2006).

The repeated lack of success in supporting improvements in rule of law globally has led to various attempts at repositioning through new 'movements' (Trubek 2006) but often without genuine recognition of the particulars of processes and agents on the ground. Van Rooij (2009) calls the field one of 'trends' because it hastily adopts new approaches and paradigms while dismissing the old, all under the umbrella of doubting the industry's effectiveness. Organisational theorists such as

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Meyer (1996:246) explain this phenomenon as attempts to swiftly turn around 'inefficient mechanisms'. What these attempts at improving operations lack are Western actors taking responsibility for the failures. Instead, it is more often the case that 'Third World' people are blamed 'because something is the matter with them' (de Soto 2001:4) and especially because they lack a 'will to reform' (as suggested by Carothers (1998); for a critique, see Beard 2006).

The founding story, then, of rule of law assistance that scholars tend to reinforce started in the USA in the 1960s with the 'law and development movement' (see, e.g., Trubek 2006). However, as Humphreys (2010) points out, and Massoud (2013) convincingly illustrates, historicising the initiation of rule of law assistance to this 'movement' is not a sufficient narrative because such reform activities were extensively pursued by colonial administrations as a mode of governance. In colonial Burma, the scale of the colonial legal and regulatory intervention was significant and has come to influence the way rule of law, the central ideology of contemporary reforms, is understood and remembered (Callahan 2004). And, as Veronica Taylor shows (2010b), the American-centricity of historicising rule of law assistance (of which, e.g., Kleinfeld 2012 and Carothers 2006a are illustrative) is bolstered by remarkable silence when it comes to recognising the influence of non-Western donors, like Japan and China, that are prominent in Myanmar. In today's aid landscape, non-Western donors are increasingly influential in promoting alternative values and ideas. This is especially the case when aid is blended with economic incentives and foreign direct investment from countries like China that may be able to provide ideals that are more apt to authoritarian rulers and geopolitical reality but that make little demands about human rights, substantive rule of law, or democratisation (Nicholson and Kuong 2014; Reilly 2013).

These relative newcomers in the field of rule of law aid share more similarities with the historical thinking that influenced the law and development movement, including the perceived link between law and economic growth and the belief that other goods (e.g., social development or democracy) would follow once economic growth was a fact. Having defined such evolution as development, an authoritarian rule could be accepted by liberal actors as a stage in the process that would eventually vanish (Trubek 2006). The leading 'technologies' (Behrends et al. 2014) of this movement included legal education and institutional transplants that legally skilled individuals channelled.

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