

Reading between the lines of criminalized assembly in Myanmar

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All public assemblies that power holders have not themselves organized or endorsed pose them some kind of political challenge. In a democratic system, unauthorized public assemblies are part of the political process. The ruling group is obliged to accommodate such assemblies and not resort to needlessly coercive methods in dealing with them. The political symbolism of an authoritarian system, by contrast, carries with it, as James Scott has written, an implicit assumption that subordinates gather only when they are authorized to do so from above.¹ Where subordinates defy this assumption, they threaten the political order, and risk juridical sanction.

The British authoritarian regime in its Asian colonies assigned public assembly an inherently criminal quality. A full chapter of the Indian Penal Code, which it brought with it to Burma, sets out offences against public tranquillity and their punishments. The terms used in the code evoke the innate criminality of unauthorized gatherings: "criminal force", "rioting", "affray". The colonial-era police and courts read between these lines so as to enable liberal use of violence. Police and magistrates responded to unauthorized assembly under cover of the empire's criminal codes with lathi charges and rifle fire. When they failed to keep things under control, behind them came the army. And so, a template was set for what historian Mary Callahan has described as the "coercion-intensive" state in Burma.²

¹ James C. Scott, Domination and the Arts of Resistance: Hidden Transcripts (New Haven & London: Yale University Press, 1990) 61.

² Mary P. Callahan, "State Formation in the Shadow of the Raj: Violence, Warfare and Politics in Colonial Burma," Southeast Asian Studies 39.4 (2002): 521.

But the colonial template has, as the years have passed, become less and less familiar. Whereas the coercive parts of the criminal juridical apparatus in Burma, now officially Myanmar, have expanded in size and strength under successive military or military-established governments, the authority of the courts has greatly diminished. Whereas the criminal codes have remained in force, the manner of their application has changed markedly. And meanwhile, other ill-defined elements that were not part of the original template have also entered the mix.

In this paper, I briefly explore the shifting character of the containment and criminalizing of unauthorized assembly in Myanmar through a case study of the juridical and extrajudicial response to large-scale protests in 2007. I argue that the criminalizing of unauthorized assembly and its participants was, compared to earlier periods, highly ambiguous, because the juridical and extrajudicial elements of the response were throughout purposefully intertwined. The ambiguity was, I think, paradigmatic of how power has in recent years been exercised through the criminal juridical system of Myanmar, such that today we can only talk of the juridical and extrajudicial in the singular, as a composite of practices rather than two contrasting sets of practices.

The paper proceeds in three parts. In the first part, I read the criminalizing narrative in 2007 and compare it to two other large-scale public movements of people in 1974 and 1988. The narrative has remained relatively consistent; however, I find that the moment of criminalization and manner of criminalization has over the three periods become less precise, indicating a weakening of the juridical frame for the control and containment of protestors.

In the second and third parts, I concentrate on the events in 2007.³ In the former, I look at the policing response to the protests, and in particular, at the ambiguous manner in which people were arrested, detained and processed before being released or sent to court. In the latter, I move between the lines in the criminal records of cases brought against alleged protestors, to examine how the courts served as gatekeepers between juridical and extrajudicial zones.

³ These contents are based on records of 79 cases heard before 27 courts; confidential official documents, news reports, interviews and other materials on events in 2007 collected during research conducted from 2008 to 2011, as well as some collected in the course of the events themselves. The cases cited in this paper have already been publicized elsewhere, and most concern political activists. All translations from Burmese-language sources are mine.

I conclude by reviewing events in 2007 with reference to Giorgio Agamben's influential work on zones of anomie. I ask to what extent the particular blurring of the juridical and extrajudicial in Myanmar is consistent with his analysis; and what, tentatively, it might tell us about the use and abuse of power through juridical systems in different authoritarian settings.

Reading the lines of criminalization

In December 1974, the United Nations returned the body of its deceased former Secretary General, U Thant, to Rangoon for last rites. Students snatched the body and took it to a university campus, where members of the public and some of the Buddhist clergy, the *Sangha*, soon joined them. The Council of Ministers later presented a summary of findings on the events as follows:

What happened was that as U Thant passed away on 25-11-74, from the time that it was put forward that his remains would be brought to Rangoon, the Rangoon Division People's Council coordinated with U Thant's younger brother U Khant and in accordance with his wishes arranged that the remains could be kept at the Kyaikkasan Ground before obsequies, and the relevant people's councils discussed all aspects of the funeral affairs with concerned departments. Although the Rangoon Division People's Council assisted in all aspects, students, Sangha and some troublemakers stole U Thant's remains on the day of the obsequies, 5-12-74, and took them to the university campus. A group of troublemakers, students and Sangha even designated the university campus as a liberated area. Acting in the manner of a rival government, they shouted slogans, gave speeches, distributed documents and generated disturbances for the removal of the state authorities whom the working people had elected and appointed to office. Although a place was prepared for the obsequies of U Thant's remains in the Kandawmin Park in accordance with the wishes of U Khant and U Thant's family, at 1pm on 8-12-74 a group of troublemakers opposed the wishes of the majority and entombed the remains on the university campus. Therefore, at 2am on 11-12-74 People's Police under direction of the Rangoon Division People's Council, carrying only tear gas canister-firing guns to use as necessary, were sent in and cleared the university campus. The Defence Services were sent not far behind as back up to be used only depending on circumstances. It could be clarified that apart from the firing of tear gas canisters, there was no firing. There was no bloodshed. The people found on the university campus were taken and held for questioning.⁴

I have cited this passage at length because it contains much from the template on the criminalizing and containing of protest in Myanmar.⁵ The protestors engage in

⁴ ပထမအကြိမ် ပြည်သူ့လွှတ်တော်၏ ဆောင်ရွက်ချက်များ အကျဉ်းချုပ် (ပြည်သူ့လွှတ်တော်ရုံး၊ ပြည်ထောင်စု ဆိုရှယ်လစ်သမ္မတ မြန်မာနိုင်ငံတော်၊ နှစ်မရှိ၊ တ ၂၄၆၊ [Digest of Undertakings of the First Pyithu Hluttaw (Pyithu Hluttaw Office, Socialist Republic of the Union of Burma, n.d.), 246.]

⁵ I am here concerned with the criminalizing narrative of protest, not with the actual events as recorded by eyewitnesses and documentalists. For an independent comprehensive account of the 1974 protests, see Andrew Selth, *Death of a Hero: The U Thant Disturbances in Burma, December 1974*, Australia-Asia Papers No. 49, ed. Russell Trood (Brisbane: Griffith University, 1989). On 1988, see Bertil Lintner, *Outrage: Burma's Struggle for Democracy* (London & Bangkok: White Lotus, 1990). No comprehensive monograph of 2007 has yet been written; however, the events were extensively documented in a variety of reports by advocacy groups, including: *Crackdown: Repression of the 2007 Popular Protests in Burma* (Human Rights Watch, 2007). *Saffron Revolution Imprisoned, Law Demented* (Hong Kong: Asian Legal Resource Centre, 2008). Human Rights Documentation Unit, *Bullets in the Alms Bowl: An Analysis of the Brutal SPDC Suppression of the September 2007 Saffron Revolution* (National Coalition Government of the Union of Burma, 2008). Academic writings include: Richard Horsey, "The Dramatic

violent and unruly action. The authorities respond with care to ensure that problems do not get worse. They encourage those who have been caught up in the events by accident to come forth. They try to identify and isolate instigators. And, they use restraint and minimal force to resecure control.

These features are again found in official descriptions of events in 1988, when people around the country rose up in protest at the abject failure of the one-party military-organized regime. As in 1974, official narratives of events describe how the authorities operated with minimum force; however, despite their best efforts, saboteurs and other troublemakers spread the violence and unrest elsewhere:

On 21 June 1988, Yangon University (Main) students and Institute of Medicine (1) students went out from the university compound and joined with people desirous of violent disturbances. Then that group committed violent attacks, arson and went to the point of murders in Sanchaung, Kamayut, Hlaing, Mayangone and Insein townships. People's Police Force personnel peacefully and without arms dispersed around 5000 students and persons desirous of violent disturbances who were marching to the Myenigone side of Sanchaung Township, for the purpose of stopping them from going into town. However, violent parties threw stones at the Sanchaung People's Police Station, and making efforts to force their way in through strength of numbers, gave rise to pitched combat with sticks and knives between the people desirous of violence and the People's Police Force personnel. However, since the People's Police Force personnel did not resort to firing, the violent brawlers took advantage and entered and destroyed the police station, stabbing and striking with sticks and knives the People's Police Force personnel whom they captured, and wickedly committing murder... Thus, for the protection of the lives and property of its parents, the people, and for the sake of the rule of law, the Defence Services came to the assistance of the People's Police Force personnel.⁶

As the violence of demonstrators becomes more and more outrageous, the restraint of the police and other officials becomes more and more extraordinary, even to the point of declining to defend their own lives. Only at this stage is the army obligated to enter the fray, when no alternative to its involvement remains.

During 2007, the catalytic incident for mass rallies in September was a melee between some monks and security forces, which according to state media began when the monks, who had gathered without authorization to support calls for the lowering of commodity prices, provoked security forces to fire warning shots. When officials

Events of 2007 in Myanmar: Domestic and International Implications," Dictatorship, Disorder and Decline in Myanmar, eds. Monique Skidmore and Trevor Wilson (Canberra: ANU E-Press, 2008). Kyaw Yin Hlaing, "Challenging the Authoritarian State: Buddhist Monks and Peaceful Protests in Burma," The Fletcher Forum of World Affairs 32.1 (2008). Stephen McCarthy, "Overturning the Alms Bowl: The Price of Survival and the Consequences for Political Legitimacy in Burma," Australian Journal of International Affairs 62.3 (2008). Recent publications with accounts of all three events include: Michael W. Charney, A History of Modern Burma (Cambridge: Cambridge University Press, 2009). Donald M. Seekins, State and Society in Modern Rangoon (London & New York: Routledge, 2011).

⁶ တပ်မတော်သမိုင်း ၁၉၇၄-၁၉၈၈၊ တပ်မတော်သမိုင်း၊ ဆဌမတွဲ (ရန်ကုန်၊ စစ်သမိုင်းပြတိုက်နှင့် တပ်မတော်မော်ကွန်းတိုက်မှူးရုံး) တာ ၃၅၀။ [Defence Services History, 1974-1988, Defence Services History, vol. 6 (Yangon: Military History Museum & Office of the Defence Services Archives, n.d.) 350.]

toured monasteries in the area in an effort to prevent further disturbances, around 50 monks threw stones at their vehicles and tried to roll them over. The monks allegedly trapped the officials inside a monastery and demanded that a local councillor be brought out to them; when the officials refused to comply, the protesting monks burned the vehicles.

Again we see the familiar scenario of authorities showing restraint in the face of provocative unauthorized assembly. As in previous years, the official narrative in 2007 denied that any monks or citizens had been harmed in the course of these events. Over coming days the narrative moved quickly from characterizations of simple defiance into seemingly widespread, random violence. Mobs started to attack government buildings in some towns, as in this account of events in Sittwe, in the country's west, where a group allegedly broke up officials' attempts to stop a rally from proceeding:

Some protestors, including around six monks, who were carrying sticks and knives forced themselves onto and assaulted responsible persons who were peacefully resolving matters... While endeavoring to obtain control, responsible persons were able to take into custody one of the violent persons... [But] as the situation was such that the protestors posed a violent danger, in order to control them, the crowd was dispersed at half past 3pm by the firing of tear gas canisters and shooting skywards to frighten. However, at 4pm around 50 monks again marched in protest along Minbagyi Road with around 100 people behind them on the left and right sides. That protest group reached the [Rakhine] State Peace and Development Council Office on Meyu Road where shouting demands for the release of the arrested person, they forced open the gate of the office compound; and some protestors climbing atop the brick wall fired slingshots and threw rocks. Although the responsible persons shouted for them not to commit violence, the protestors paid no heed and as the situation had reached the point that they had come en masse into the compound and would [continue to] be violent, the crowd was again dispersed by firing tear gas canisters and shooting skywards... In the course of the protest, nine police force personnel suffered injuries from slingshots, rocks and sticks. However, due to the great resolve of the responsible persons to handle the situation gently, it is learned that not a single protesting Sangha was injured, that not a single Sangha was taken into custody, and not a single protesting individual was injured.⁷

While the narrative of emergent violence and the need for calm action to restore public order was in 2007 broadly consistent with earlier occasions, the moment of criminalization of the unauthorized assembly was imprecise when compared to 1974 and 1988.

The criminalizing and containment of the protests in 1974 paralleled a demarcated sequence of formal acts. The sequence was as follows. First, an attempt was made at

⁷ သံဃာအတူအယောင်များ၏ စည်းရုံး လှုံ့ဆော်မှုကြောင့် ပခုက္ကူ၌ဆန္ဒပြအကြမ်းဖက်မှုဖြစ်၊ သွေးထိုးလှုံ့ဆော်မှုများကြောင့် စစ်တွေမြို့တွင်လည်း သံဃာတော်များ လမ်းလျှောက်ဆန္ဒပြ၊ ရန်ကုန်မြို့တွင်လည်း သံဃာအယောင်ဆောင်များကြောင့် သံဃာအချို့ စီတန်းလမ်းလျှောက်ခဲ့၊ မြန်မာ့အလင်း၊ ၂၀၀၇ ခုနှစ်၊ စက်တင်ဘာလ ၁၉ ရက်၊ စာ ၉။ ("The Violent Protest at Pakokku Occurred Due to the Machinations of Impostor Sangha; Due to Incitements, Sangha Also Walk in Protest in Sittwe; Due to Impostor Sangha, in Yangon Too Some Sangha Marched," *Myanma Alin* 19 September 2007: 9.)

reestablishing order under section 144 of the Criminal Procedure Code. Second, the civilian authorities called the army to assist. Third, a constitutional provision triggered military administration in the affected area, which in turn established military tribunals for the trial of protestors. Announcements of actions appeared in full and in the most prominent parts of the print and broadcast media.

A brief explanation of section 144 is required before proceeding, since it is particularly relevant to events in 2007. Section 144 grants formal authority to declare an assembly explicitly unlawful and take steps to prevent its continuance or reoccurrence. The moment of explicit criminalization of an assembly is the moment that a section-144 order takes effect. Before the section is invoked, individual acts by members of an assembly may be criminal offences, and the assembly can be dispersed where its members are allegedly assembled so as to offend. After it is invoked, the assembly is itself unlawful. It no longer matters how the members of the assembly conduct themselves. The act of assembling alone has been criminalized.

A section-144 order is supposed to be issued by a judge, and to set out reasons for its issuance. Any person affected by the order is entitled to its full text and is further entitled to go to court to submit that it be revised or rescinded. Also, it is supposed to be issued in the manner of a summons. This means that a person subject to the order must be notified in writing of its terms. If adequate steps are not taken to notify the person, the order does not stand. In the case of an order regarding the general public, copies of the order are supposed to be posted in places where the affected persons can read them easily.

In fact, judges ceased issuing orders under section 144 from 1974, when the power to do so was taken by executive councils. Consequently, in all three periods compared here, administrative officers issued the orders. However, in 1974 the authorities did observe the requirements for publicity, and widely reproduced the text of the section-144 order in full. Whether or not the order could have been challenged judicially is a moot point, since within hours military administration came into effect, and the courts were by this time anyway under executive control.⁸

What about in 1988? Events that year were much more protracted and widespread than in 1974. The official measures followed a similar sequence, but were less clear-

⁸ On the executive takeover of the judiciary, see Nick Cheesman, "How an Authoritarian Regime Used Special Courts to Defeat Judicial Independence in Burma," *Law and Society Review* 45.4 (2011).

cut. In June and July, state media announced the imposing and withdrawal of section-144 orders in various cities and towns around the country. In September a new military regime declared martial law, imposed a nationwide curfew, and banned assemblies. It did so without reference to the constitution, although it did not formally abrogate it. A series of orders that followed again established military tribunals for the trial of protestors. As in 1974, the state media carried key official announcements in full with maximum publicity.

The size of protest in 2007 was much smaller than in 1988, and the military regime much more powerful than its predecessor. The state had the means to put down the protests through straightforward policing actions via section-144 orders. It did not need to declare full military administration of the affected areas. Yet, the official response to the protests was manifestly more ambiguous than previously. The print media does not appear to have referred to the imposing of section 144 until 10 days after it took effect in Yangon and Mandalay. Even then, it did not consist of any announcement, let alone text in full. The first formal government statement on the protests, on October 4, also made no reference to section 144 orders or other legal measures against the many thousands of people by then being held in custody.

Contemporaneous eyewitness reports from 2007 do describe vehicles driving through affected areas declaring curfew with loudspeakers, and officials and other personnel invoking section 144 when going from door to door, instructing people to stay inside. Others indicated that military and police personnel in subsequent days warned people by loudspeaker to disperse in accordance with the section or be fired upon. But, the announcements seem only to have been issued orally and inexactly, as if the authorities concerned either did not think that the criminalizing moment mattered very much, or that they did not want it to be known any more widely than necessary.

Whereas in 1974 and 1988 the executive openly and precisely asserted its authority through the issuance of orders against public assembly, in 2007 it did so stealthily and ambiguously. It did not use the state media to make the text of any orders known widely, or completely. The secrecy around the section-144 orders and impreciseness of the moment of criminalization in response to events in 2007 was, I think, neither accidental nor incidental. The ambiguity of the criminalizing moment is also found throughout the methods used for the containment of the protests and detaining of participants, to which I now turn.

Blurring the lines of arrest and detention

In the days and weeks before the 2007 protests reached their crescendo, residents of Yangon observed Dyna trucks—which in Myanmar are converted for public transport—parked near junctions and at other key strategic points around the city, with groups of men lounging in or around them. Because the trucks are ubiquitous, they probably did not immediately attract attention from many passersby. One person told me that he had tried to board one, thinking it was running on his homeward route. When he saw a pile of wooden sticks in the back and one of the men on it told him to go away, he realized his mistake and complied with the instruction quickly.

What purpose did these Dynas and their passengers have? From where did they come? The government had acknowledged in 2006 the existence of a new indistinct civilian security force. The first direct reference to the group by a senior official seems to have been in a press conference by the then-police chief, Brigadier General Khin Yi, who mentioned that members of a volunteer group called “Swararshin”—which translates loosely as “masters of force”—had been patrolling with police and helping to make arrests. A journalist asked him to explain the meaning of “Swararshin”. He replied that,

The meaning of Swararshin is that our country’s people are the country’s “masters of force”. They are our country’s strength. For this reason, when sorting out all of our country’s affairs, we are drawing upon and using this mighty force, this people’s strength. Now, in the various tasks that we are carrying out for the rule of law, regional peace and tranquility and so on, fire fighters, Red Cross members, [council] members and the rest are lending assistance of their own volition without a penny in payment, and as these individuals are a mighty force, the state chose and designated the word Swararshin with which to honour and refer to them.⁹

Khin Yi’s disingenuous conflating of the gang with the fire brigade and Red Cross, which in Myanmar are agencies also trained and called upon to contribute to routine security tasks, conceals the distinctive purpose of the Swararshin. Those other bodies are permanent, official groups with large memberships whom the state aims to tap into at times of emergency, bodies with formal constitutions and complex supervisory structures. By contrast, the gang is inherently unofficial, situation-specific and poorly defined. One day it does not exist, the next it does. Recognition of the gang follows from its presence at the site of an arrest. It is not inaugurated or proclaimed in advance of its factual existence. In short, the gang operates in the open but without

⁹ နိုင်ငံတော်အနေဖြင့် ပြည်ပရင်းနှီးမြှုပ်နှံမှုတွေ ကျယ်ကျယ်ပြန့်ပြန့် အခွင့်အရေးပေးပြီးခေါ်ဆောင်၊ ပြည်ပကနေဝင်ရောက်လာမှုမပြုအောင် နည်းအမျိုးမျိုးနဲ့နှောင့်ယှက်ယာယီတားဆီးမှုကိုသုံးပြီး ပိတ်ပင်နေ၊ **မြန်မာ့အလင်း**၊ ၂၀၀၆ ခုနှစ်၊ နိုဝင်ဘာလ ၃ ရက်၊ စာ ၁၃။ (“The State Has Given Ample Opportunity to Bring in External Investments; Various Methods and Obstacles Are Being Used to Block Them from Coming In,” *Myanma Alin* 3 November 2006: 13.)

any precise frame of reference for people who see it do its work or who become its targets.

The Swonarshin's function in 2007 was to play the role of the police or military in their stead, and to do so in a manner that was detached from the procedures that apply to those agencies, to do so in a manner that was inherently ambiguous. Its purpose was to dis-integrate and in-formalize state authority at a time that state security forces were otherwise fully integrated and formalized, a time in which those forces also had huge resources and formidable numbers. No problem of capacity existed for which the gang could be justified as an auxiliary of the sort that operated in earlier decades, when the state needed manpower and also needed to pull armed groups under their auspices, as discussed by Callahan in the article cited above. Nor did it serve any conventional security purpose that could supplement the work in which official agencies are already engaged. In short, the Swonarshin was in 2007 not an auxiliary, but a proxy: not a supplement, but a substitute.

At the time of the protests in 2007, recruitment to the Swonarshin seems to have been a responsibility mainly of local administrators. Lacking precise instructions, given the deliberately ambiguous character of the gang, administrators performed this task inconsistently. But the men whom they recruited seem to have belonged to two broad categories: one, a cadre of members who routinely worked with the administrators and other officials; and the other, hired muscle recruited for a short time with the promise of some money, food and alcohol.

Throughout the 2007 protests, these men assaulted people and abducted them from the streets. The UN Special Rapporteur on human rights in Myanmar estimated that, "Between 3,000 and 4,000 people were arrested in September and October... Most of the arrests took place during the crackdown on the demonstrations and the night raids carried out by the security forces and non-law enforcement officials..."¹⁰ Contemporaneous state news reports gave voice to the ambiguity of these arrests, often describing persons not as having been "arrested" at all but as having been "brought, held, questioned and investigated". Those responsible for the abductions were "people not desirous of disturbances". When cases against abducted persons came to court, some of their abductors appeared as witnesses. One who identified

¹⁰ Paulo Sérgio Pinheiro, Human Rights Situations That Require the Council's Attention: Report of the Special Rapporteur on the Situation of Human Rights in Myanmar (United Nations Human Rights Council, 2007), 13.

himself explicitly as Swonarshin when asked by the defendant whether he came to make an arrest of his own accord, or in conjunction with police replied:

[Prosecution witness:] We did not arrest. We just rendered assistance.

To whom did you render assistance? – With a mind to avert a disturbance, we rendered assistance. I acted as a member of the public, to avert a disturbance, to avoid disruption of the thoroughfare.¹¹

Swonarshin and plain-clothed police and other state personnel took arrested persons to undisclosed and unknown locations. These included both conventional detention facilities and non-conventional ones. Officials locked up hundreds of people in prisons without following protocols for record keeping. Other detainees they variously held in the grounds of the former racetrack; at a technical institute; and, at a police battalion camp, which is not a police station under the terms of criminal procedure law and therefore also not a conventional place of detention. Some detainees were moved repeatedly from place to place, evoking the physical as well as juridical ambiguity of the space in which they were suspended.

Many detainees left custody in a manner that was as ambiguous as the way that they went in: through the signing of vague assurances that they would obey the law in the future. According to one in a series of state media reports on releases,

Up to October 4, 2003 persons had been arrested, brought and questioned in accordance with law for assembling in defiance of section 144. It was found on investigation that among them are persons who were involved in the disturbances, persons who followed and lent support, and persons who unknowingly went along with the assemblies. News is received that as the unknowing persons are also violators of the law, up to today 692 have been released by way of a pledge.¹²

A copy of a pledge that I obtained contains no reference to any section of law. It is not consistent with any of the standard forms for release of detainees. The wording of the document is at once ambiguous and menacing, the detainee signing to the effect that she acknowledges having committed an unspecified crime and that if detained for committing the same type of offence in the future she will be prosecuted. It concludes, “I was arrested because of an offence. I am being released because the state has leniency. I pledge that if summoned, I will come at all times.”

¹¹ **ရဲအုပ်စိုးနိုင် နှင့် ဦးအုန်းသန်း**၊ ၂၀၀၈၊ ဖြစ်မှုကြီး မှုအမှတ် ၁၂။ ရန်ကုန်အနောက်ပိုင်းခရိုင်တရားရုံး၊ ဦးခင်မောင်မြင့်၏ ထွက်ဆိုချက်၊ တရားလိုသက်သေအမှတ် ၄၊ ၂၀၀၈ ခုနှစ်၊ ဇေဇော်ဝါနီလ ၇ ရက်။ (*Inspector Soe Naing v. U Ohn Than*, 2008 Criminal Case No. 12, Yangon Western District Court, Testimony of U Khin Maung Myint, Prosecution Witness No. 4, 7 February 2008.)

¹² ဗုဒ္ဓ ၁၄၄ ကို ဖိဆန်ကာ လူစုလူဝေး ပြုလုပ်သဖြင့် ဖမ်းဆီးခေါ်ဆောင်မေးမြန်းခြင်း ခံရသူများအနက် ၆၉၂ ဦးအား ကတိခံဝန်ချက်ဖြင့် ပြန်လည်လွှတ်၊ **မြန်မာ့အလင်း**၊ ၂၀၀၇ ခုနှစ်၊ အောက်တိုဘာလ ၅ ရက်၊ စာ ၁၇။ (“692 Persons among Those Arrested, Brought and Questioned for Assembling in Defiance of Section 144 Released by Way of Pledge,” *Myanmar Alin* 5 October 2007: 17.)

Although police could use a breached pledge to justify subsequent prosecution, compliance with a pledge did not guarantee non-prosecution. Khin Sanda Win was released on a pledge on October 25, after being detained illegally from September 29. However, on November 1 two police officers came to her house and informed her that their station had opened a case against her. The next day the police lodged a charge under the Arms Act, which the prosecutor changed to attempt to endanger life. On November 26, the local police station chief testified as a prosecution witness. In cross-examination, the defence lawyer asked questions and got replies as follows:

Do you know that... among 22 detained students [held together], Ma Khin Sanda Win was among 2 released on 25-10-07, and that there is a record that she was released into the guardianship of her parents? – I know that she was released.

Is it that the Kyauktada Police Station has brought a case against Ma Khin Sanda Win who was released, the security forces having found her not at fault? – Our police station brought the charge simply because of a crime [having been committed].¹³

The use of the possessive in the policeman’s reply is striking, because it introduces a degree of agency that is absent from the prior stages of Khin Sanda Win’s detention. It is a lexical break from what has come before. The policeman is simultaneously indicating that he knows, and is prepared to speak on, what he and his men have done; but, that whatever happened before is irrelevant. ‘His’ police station works in the normal criminal juridical realm, where crimes are investigated, suspects arrested and charges laid in accordance with law. In other words, the moment that ‘his’ station entered into the process was the moment of actual criminalization of this specific accused. It signalled her restoration to the juridical process, the restoration of her juridical personhood. And it is with this process, and the role of the courts in it, that the next part of this paper is concerned.

Interpreting the lines of prosecution

In a system whose claims to legitimacy are staked on the maintenance of public order, which is to say, the maintenance of the state’s specific order, unauthorized public assembly constitutes the most serious challenge. No room exists for questions of adjudication. The court hearing has as its purpose not the trying of the accused but the pulling of her back over the threshold from where she has been suspended extrajudicially. It reactivates the juridical not as a means to make sense of the extrajudicial, but so as to neutralize it.

¹³ **ရဲအုပ်စိုးနိုင် နှင့် မခင်စန္ဒာဝင်း။** ၂၀၀၇၊ ဖြစ်မှုကြီး မှုအမှတ် ၅၂၅၊ ကျောက်တံတားမြို့နယ်တရားရုံး၊ ရဲအုပ်စိုးနိုင်၏ ထွက်ဆိုချက်၊ တရားလိုသက်သေ အမှတ် ၁၊ ၂၀၀၇ ခုနှစ်၊ နိုဝင်ဘာလ ၂၆ ရက်၊ စာ ၄။ (*Inspector Soe Naing v. Ma Khin Sanda Win*, 2007 Criminal Case No. 525, Kyauktada Township Court, Testimony of Inspector Soe Naing, Prosecution Witness No. 1, 26 November 2007: 4.)

Because the outcome of the process is not altered by a lack of clarity in the police charges, absence of evidence, or denials of guilt from the accused, the court process can also afford to admit the ambiguity that precedes it. In 2007, far from denying the extrajudicial quality of what went before, courts admitted and absorbed the manifold ambiguities and illegalities of the criminalization and containment of protestors. Hearing most cases in secrecy, they could permit any number of departures from the official narrative because they did not deliberate on facts; merely imposed sentences.

In the case of three men convicted for having harboured a fugitive monk, for example, the court heard testimony based on a record from “an interrogator in the joint group” investigating the case. The identity of the interrogator or composition of the joint group is not made clear in the court records of the police complaint. The defence attorney took up this and other ambiguous aspects of the case in cross-examination:

You have been a policeman for about 30 years and know that a [confession] record taken before police is inadmissible [as evidence in court]... – I am coming to testify as per the duty assigned to me from above.

Where “above”? – Our Special Branch officer, whose name I am not authorized to reveal...

U Obasa [the fleeing monk] has committed what offence? – He participated and demonstrated in the September 2007 events.

In what way did he participate in the said demonstration? – He marched with tens of thousands of people.

Aside from U Obasa being among the many monks who participated, were there other offences? – No.

So far as you know, is there a police or court action or warrant pending against U Obasa from which he is absconding? – There is no proclamation that he is an absconder.¹⁴

Practically every aspect of this testimony evokes ambiguity in the identifying, detaining and charging of the accused. The persons responsible for ordering that the policeman bring the case and those involved in the investigation cannot be identified. The fugitive monk’s alleged offence is itself elusive, since a notice for his arrest has not been issued and the policeman can say no more than that he marched with thousands of his peers. This admission effectively defeats the prosecution case, since without a declaration that the monk was wanted by the police the accused could not

¹⁴ ခုန့်ပျားချိုသန့် နှင့် ကျော်ဝင်းကျော် ဝါ ဥ၊ ၂၀၀၈၊ ဖြစ်မှုကြီး မှုအမှတ် ၃၅၆၊ ဒဂုံမြို့သစ် (တောင်ပိုင်း) မြို့နယ်တရားရုံး၊ ရဲအုပ်ဆန်းလွင်၏ ထွက်ဆိုချက်၊ တရားလိုသက်သေ အမှတ် ၂၊ ၂၀၀၈ ခုနှစ်၊ မတ်လ ၂၆ ရက်၊ စာ ၅-၆။ [*Police Captain Myo Thant v. Kyaw Win Chay and 2*, 2008 Criminal Case No. 356, New Dagon (Southern) Township Court, Testimony of Inspector Hsan Lwin, Prosecution Witness No. 2, 26 March 2008: 5–6.]

have known that they were committing an offence, even if they had harboured him. But, as the purpose of the hearing was to record testimonies and assign sentences, not to deliberate upon the facts, it made no difference to the finding of guilt.

The lack of evidence against persons accused over events in 2007 is indicative of the courts' essentially administrative function in these cases. Special Branch police, who investigate political crimes, brought charges against Ma Honey Oo on allegations that she had led protestors, had set up a new student union with a group of friends the month before, and had contacted overseas news media. All of the alleged charges it based upon "reliable information". But as cross-examination of a police investigator revealed, the nature of that reliable information and the persons who gave it could not be disclosed in court:

Are the persons who gave the reliable information on the list of witnesses [submitted to the court for examination]? – They have not been submitted as witnesses.

Can you submit documentary proof regarding your testimony of communications [by the accused] with abroad? – I have no documentary proof to submit.

Can you submit documentary proof of the student union of which you testified, together with the membership of the group? – I cannot.

You cannot submit proof of the student union and furthermore you have stated but have no proof that Ma Honey Oo was involved in the student union in the course of which she committed acts to disrupt law and order of which you have accused her. – It is as per the information received.¹⁵

Because the function of the court in this case and others like it was to process and impose punishment on the accused, any statement uttered by the police officer automatically obtained the authenticity it needed for the purpose of conviction. No requirement for evidence existed. The tyranny of the "information received" was that it could neither be proven nor refuted. It belonged to a different plane, independent from the authority of the court and everyone in it, including even the police officer bringing the case.

Whereas Ma Honey Oo fought the charges against her on the basis that she was not a participant in the protests and student group as the police alleged, some defendants used the hearings against them to celebrate the events for which they were allegedly criminally responsible. These "defence" statements raise ontological problems that go to the ambiguity of the criminalization of the protests themselves. In the case of Kyaw

¹⁵ ဒုက္ခရောက်သူများနှင့် မဟာနန်းဦး (ခ) ဟန်နီ၊ ၂၀၀၈၊ ပြစ်မှုကြီးမှုအမှတ် ၃၀၊ ရန်ကုန်အရှေ့ပိုင်းခရိုင်တရားရုံး၊ ဒုက္ခရောက်သူများအောင်စီ ထွက်ဆိုချက်၊ တရားလိုသက်သေ အမှတ် ၁၊ ၂၀၀၈ ခုနှစ်၊ မတ်လ ၁၉ ရက်၊ စာ ၃။ [*Inspector Hla Thein v. Ma Honey Oo (a) Honey*, 2008 Criminal Case No. 30, Yangon Eastern District Court, Testimony of Sub Inspector Soe Moe Aung, Prosecution Witness No. 1, 19 March 2008: 3.]

Ko Ko, an admitted member of the All Burma Students Union, the judge recorded that,

Defendant-1 Kyaw Ko Ko... said in testifying that on 25-9-07 having marched along Shwedagon Pagoda Road towards the city, on reaching Sule Pagoda Road and the side of the town hall while the crowd was flying the fighting peacock flag he climbed atop a dais and gave a speech... that he said in the speech he was an All Burma Students Union leader and that the students had seen the people’s difficulties and that they stood for the people; that the students had not given up and had resisted government that had persecuted the people from one era to the next; that he urged the majority of students to fall in behind the Sangha in the current events in order to peacefully send *metta*, to join the battle to confront oppression without fear, and to raise the fighting peacock flag to the heights ...¹⁶

This testimony challenges the official position that the assemblies in which the defendant participated were criminal at all. The accused does not deny involvement in the protests; he rejoices in it. What he denies is that this involvement constitutes a crime. Other defendants likewise challenged police assertions that in marching on the road chanting verses of *metta*—loving-kindness—the Sangha committed an offence. U Gambhira, a monk accused of being a ringleader of the protests, like Kyaw Ko Ko made no attempt to deny that he had done the things of which he stood accused, but insisted throughout that what he had done broke neither secular nor religious law:

As we acted in accordance with the Vinaya rules, our Sangha have done no wrong. In going in procession reciting verses to send metta, [we were thinking that] in order to resolve all the crises that have arisen in the country, only by solving the political difficulties will everything else be resolved. We Sangha acted only on matters within the rules set for Sangha in order that the hatred, rancour and doubt between the current power-holders, the SPDC dictators, and democratic forces might be settled... The sending of metta is not unrest. In keeping with the meaning of the Metta Sutta, with the peace of *metta-dhamma*, we simply endeavoured for peace, for ourselves and for our environs.¹⁷

Lay defendants also contested charges brought against them for engaging in routine religious practices, which according to police in the context of the protests were criminal acts. The police complaint against Thet Zaw, a sports journal editor who had previously been given clemency in a case of high treason, was that he had on two consecutive days purchased 20 rice packets and brought them to the eastern stairway of the Shwedagon Pagoda for distribution to monks. According to the Special Branch, this act of bringing alms to the most revered Buddhist site in the country was an attempt to insult religion. When asked by the defence attorney if it was not habitual

¹⁶ ခုရဲအုပ် သိန်းနိုင် နှင့် ကျော်ကိုကို (ခ) ရဟု (ခ) ကလော်ဒီ၊ ၂၀၁၀၊ ပြစ်မှုကြီး မှုအမှတ် ၉၃၊ ကျောက်တံတားမြို့နယ်တရားရုံး၊ ၂၀၁၀ ခုနှစ်၊ မေလ ၁၁ ရက်၊ မြို့နယ်တရားသူကြီး (အထူးအာဏာ) ဦးစောဝင်း၊ စာ ၅-၆။ [Sub Inspector Thein Naing v. Kyaw Ko Ko (a) Rahu (a) Klordi, 2010 Criminal Case No. 93, Kyauktada Township Court, 11 May 2010, Township Judge (Special Power) U Saw Win: 5–6.]

¹⁷ ရဲမှူးရဲညွန့် နှင့် ဂွဏီရ (ခ) စနေဘာသာ (ခ) ညီညီလွင် (ခ) လှိုင်ဘွား ဝါ ၁၁၊ ၂၀၀၈၊ ပြစ်မှုကြီး မှုအမှတ် ၁၆၅၊ အလုံမြို့နယ်တရားရုံး၊ သီးသန့်တရားရုံး၊ ခုံရုံးအမှတ် ၁၆၅/၂၀၀၈၊ တရားခံများအတွက် အပြီးသတ်လျှောက်လဲချက်၊ ၂၀၀၈ ခုနှစ်၊ နိုဝင်ဘာလ ၁၉ ရက်၊ စာ ၅။ [Police Major Ye Nyunt v. Gambhira (a) Candobhasa (a) Nyi Nyi Lwin (a) Hlaing Bwa and 10, 2008 Criminal Case No. 165, Ahlone Township Court, Special Court, Tribunal No. 165/2008, Closing Submission for the defence, 19 November 2008: 5.] Metta-dhamma is the natural law of metta. The Vinaya is the branch of the Buddhist canon that sets down the code of conduct for adherents.

for Buddhists to feed monks, the policeman replied that according to tradition, providing food to monks should be done straightforwardly, implying that in this case the circumstances under which the accused fed the monks constituted an offence. The lawyer argued further that the act of the monks walking on the street chanting verses did not constitute a protest at all. When the police officer rejected his assertion, the lawyer went to the meaning of the word for “protest” in Burmese, which is literally to display one’s opinion or desire. A protest, he argued, would necessarily entail some demand, whereas the monks simply walking on the street to spread metta did not constitute such an act. Again the police officer rejected the argument, but refused the attempt to draw him into what for him would have been a needless debate about the semantics of protest.¹⁸

Similarly, the hearings of cases against people who marched the month before turned on the alleged illegality of walking on the road because petrol prices had drastically increased. The court recorded the cross-examination of a police officer who deposed in one of these hearings as follows:

[Prosecution witness:] On 25-8-07 Ko Min Thu led 30 people to demonstrate around wards of Mogoke about the increased price of fuel, and while demonstrating presented a letter written by himself to U Kyi Maung, manager of the MPPE government petrol station in Aungnan Ward, for the price of fuel to be reduced to its original level.

The price of fuel did in fact increase. – The price of fuel increased as per the government’s stipulation.

So then this was just a presentation for the authorities to know of [the effects of] the increased price of fuel. – Incorrect. It was just a protest march to damage the national government by assembling to demonstrate about the increased price of fuel.¹⁹

That the issues represented in a demonstration could be factually correct but the assembly nonetheless criminal corresponds with the inherently unauthorized character of public assembly in an authoritarian setting. Indeed, a police officer testifying in a case of protest from earlier in the year in which the accused was charged with sedition summed up the mentality when he also admitted that the demonstration was morally legitimate and factually reasonable but nonetheless seditious. Asked how it could constitute an act of sedition, and he replied in effect that he did not know what sedition was in law, but that he knew it when he saw it.

¹⁸ ရဲမှူးရဲညွန့် နှင့် သူရ (ခ) အဝနာ ဝါ ၂၊ ၂၀၀၈၊ ပြစ်မှုကြီး မှုအမှတ် ၇၇၊ ရန်ကုန်အနောက်ပိုင်းခရိုင်တရားရုံး၊ ရဲမှူးရဲညွန့်၏ ထွက်ဆိုချက်၊ တရားလိုသက်သေ အမှတ် ၁၊ ၂၀၀၈ ခုနှစ်၊ ဩဂုတ်လ ၁၄ ရက်။ [*Police Major Ye Nyunt v. Thura (a) Zarganar and Another*, 2008 Criminal Case No.77, Testimony of Police Major Ye Nyunt, Prosecution Witness No. 1, 14 August 2008.]

¹⁹ ဒုရဲမှူး ဝင်းမြင့် နှင့် မင်းသူ (ခ) ကိုဦး၊ ၂၀၀၈၊ ပြစ်မှုကြီး မှုအမှတ် ၆၀၆၊ အောင်မြေသာစံမြို့နယ်တရားရုံး၊ ဒုရဲမှူး ဝင်းမြင့်၏ ထွက်ဆိုချက်၊ တရားလိုသက်သေ အမှတ် ၁၊ ၂၀၀၈ ခုနှစ်၊ ဩဂုတ်လ ၂၂ ရက်၊ စာ ၄-၅။ [*Police Captain Win Myint v. Min Thu (a) Ko Oo*, 2008 Criminal Case No. 606, Aungmyay-thazan Township Court, Testimony of Police Captain Win Myint, Prosecution Witness No. 1, 22 August 2008: 4–5.]

Sentencing of persons accused over the 2007 protests occurred in two broad phases. In the first phase, in the lead up to and during the protests, police brought accused persons to courts that handed down sentences with extraordinary efficiency. For example, Min Aung, a defendant who allegedly led a march in Rakhine State on September 19 returned from Yangon to his home in Thandwe on October 13, and police arrested him there on the same day. For three days, they kept him at the district station, where Special Branch and military intelligence interrogated him. They then brought him to court, where a judge sentenced him on October 17.²⁰ A lawyer lodged an appeal on his behalf. The state court upheld the verdict but reduced the sentence on October 24.²¹ The entire process from date of arrest to the revision of sentence took less than a fortnight. Similarly, police in the north arrested Ko Thiha on September 7 and charged him with sedition for having come to collect some documents at a photocopy shop for distribution at demonstrations. On September 14 they brought him to court. A judge heard the case in a single day. On September 17, even before the protests for which he was allegedly collecting materials had reached their apex, the judge sentenced Thiha to 22 years in prison.²²

In the second phase of sentencing, delayed cases suddenly proceeded in unison, about one year after the protests. Courts handed down many verdicts in October and November 2008. A lot of cases in this phase were against groups of protestors, bundled together and tried a dozen or more at a time for omnibus offences. For example, police charged 14 people in a single case for causing hurt to public servants, endangering life, obscenity and abetment. Out of the 14, only two were visible in the photographs of demonstrators that police submitted as evidence; notwithstanding, the judge sentenced all of them to over three years in jail. Fourteen activists of the 88 Generation Students group also appeared in court to hear verdicts in November 2008. The police spread charges against them over facsimile cases, and duplicated charges under the same laws, so the court could impose penalties that cumulatively would vastly exceed the maximum sentences that they could otherwise have been

²⁰ ခုရဲအုပ် စံရွှေသိန်း နှင့် မင်းအောင်၊ ၂၀၀၇၊ ဖြစ်မှုကြီး မှုအမှတ် ၂၈-၂၉၊ သံတွဲခရိုင်တရားရုံး၊ ၂၀၀၇ ခုနှစ်၊ အောက်တိုဘာလ ၁၇ ရက်၊ ခရိုင်တရားသူကြီး သောင်းတင်။ [*Sub Inspector San Shwe Thein v. Min Aung*, 2007 Criminal Case Nos. 28-29, Thandwe District Court, 17 October 2007, District Judge Thuang Tin.]

²¹ မင်းအောင် နှင့် ပြည်ထောင်စုပြန်မာနိုင်ငံတော်၊ ၂၀၀၇၊ ဖြစ်မှုဆိုင်ရာအယူခံ မှုအမှတ် ၃၂-၃၃၊ ရခိုင်ပြည်နယ်တရားရုံး၊ ၂၀၀၇ ခုနှစ်၊ အောက်တိုဘာလ ၂၄ ရက်၊ ပြည်နယ်တရားသူကြီး စန်းလွင်။ [*Min Aung v. Union of Myanmar*, 2007 Criminal Appellate Case Nos. 32-33, Rakhine State Court, 24 October 2007, State Judge San Lwin.]

²² ခုရဲမှူး ဝင်းမြင့် နှင့် ကိုသိဟ၊ ၂၀၀၇၊ ဖြစ်မှုကြီး မှုအမှတ် ၁၃၄၊ မန္တလေးခရိုင်တရားရုံး၊ ၂၀၀၇ ခုနှစ်၊ စက်တင်ဘာလ ၁၇ ရက်၊ ခရိုင်တရားသူကြီး ဝင်းဌေး။ [*Police Captain Win Myint v. Ko Thiha*, 2007 Criminal Case No. 134, Mandalay District Court, 17 September 2007, District Judge Win Htay.]

given. They also charged them in connection with a range of purported crimes going back over a number of years.

In each of these cases, the points of reference for sentencing did not emerge from the evidentiary contents of the hearing, but from the prior criminalization of the accused: as protestors, instigators, destructionists and public enemies. The purpose of sentencing was not to affirm guilt, which was already taken for granted, but to signify definitively the beginning of punishment. Returned to jail, juridically the accused were not the same persons as before. The sentence completed an administrative process of bringing them back across the threshold from an anomalous zone into which they had been thrust, restoring to them the entitlements of juridical personhood that they had hitherto lost by virtue of the manner in which they had been arrested and detained.

Conclusion

I have in this paper briefly surveyed the containment and criminalizing of protest in Myanmar, through a case study of 2007 with reference to earlier events in 1974 and 1988. My empirical finding is that the juridical frame for the containment and criminalization of protest was much more ambiguous in 2007 compared to the two earlier cases. The response to protestors in 2007 not only lacked formal legal clarity but was also, I have argued, accompanied by purposeful ambiguity. This ambiguity ran from the moment of criminalization, through to the methods of dispersal, confinement and prosecution of protestors.

The manner in which protestors and persons accused of instigating protests were taken and held incommunicado during 2007 is evocative of the sort of anomalous zone that Giorgio Agamben has described in his work on the state of exception, a zone of anomie where the normal order of things—“normal” in the sense of empirical regularity, not normative legal order—was suspended.²³ Having been abducted from the streets by a gang and pulled over a juridical threshold into detention centres and elsewhere, detainees and their relatives in 2007 had literally no choice but to wait to learn what would happen next. Most subsequently walked free after signing assurances that had no basis in law. The assurances they signed had an effect of extending the zone of anomie from sites of detention back into their ordinary lives,

²³ Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago & London: University of Chicago Press, 2005) 23.

since they attached conditions to physical liberty that had not applied prior to their incarceration.

The remainder of people in detention, officials passed through the courts. Hearings were functionally administrative, generally held in secret, and could admit contradictions of—and deviations from—the official narrative, since their contents would not be known publicly and since they had no bearing on the sentences imposed. As such, judges persistently and systematically endorsed—and in some cases heard in detail—stories of illegal arrest and detention, torture and brutality that preceded the arrival of detainees in court.

The zone of anomie from which people were brought in Myanmar was in certain respects as Agamben has described it, neither fully inside nor outside the juridical order, but rather, a zone in which the juridical and extrajudicial are blurred. The ambiguity that inhered to events in 2007 was by no means incidental. It was indicative of the extent to which under protracted military rule in Myanmar, the juridical and extrajudicial have become increasingly proximate to one another. The zone is systemic. Since the juridical constellation by which it is guided is the state of siege, as Agamben has written, it ambiguity appears distinctly—so to speak—in moments of crisis.²⁴ At all other times it is less distinct, perhaps latent, but present nonetheless.

From my study of Myanmar, however, I cannot agree with Agamben that what happens in the detention site within the zone depends only “on the civility and ethical sense of the police who temporarily act as sovereign”.²⁵ The zone might be outside the ordinary juridical order, but the decisions that the temporary police-sovereigns make are informed by their perceptions of what can and cannot be done in the rest of the system. In Myanmar, they make informed decisions concerning the lives and liberties of their charges with expectations that they can move people across the extrajudicial threshold and back into the system proper according to a timeframe and circumstances of their choice. Consequently, they make very different decisions from the police-sovereigns in places where no such expectations exist, like those who patrolled the anomalous zone into which tens of thousands of Sri Lankans were permanently disappeared in the late 1980s and early 1990s. Only by being at the

²⁴ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen, Meridian: Crossing Aesthetics, eds. Werner Hamacher and David E. Wellbery (Stanford, Ca.: Stanford University Press, 1998) 20, 166.

²⁵ Agamben, *Homo Sacer: Sovereign Power and Bare Life* 174.

threshold of the juridical and extrajudicial could detainees in Myanmar be brought back into the normal criminal juridical system, when officials policing the anomalous zone were ready to return them. This systemic arrangement accounts in part, I think, for why in Myanmar while the incidence of custodial abuses is high, the incidence of extrajudicial killing and enforced disappearance is—outside of the civil war zones—low when compared to some other countries in Asia.²⁶

²⁶ On this point see, Nick Cheesman, "Thin Rule of Law or Un-Rule of Law in Myanmar?," Pacific Affairs 82.4 (2009): 611-12.