

# Governing Refugees

Justice, Order  
and Legal Pluralism

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## Chapter 6

# The struggle for ownership of justice

We lawyers just cannot help being Darwinian. We simply cannot shake off our assumption that some legal cultures are more developed than others. We prefer written law to oral law; we are happier with professional judges than with people's rough justice; and — need I say? — we just love cultures that have their own lawyers.

(Huxley 2001)

Dealing with crime and disputes is a key challenge of protracted encampment that has been almost entirely ignored in international policies for camp management. This lack of attention to justice and security has been identified as a contributing factor in the high levels of violence and insecurity encountered in some refugee settings; including, most recently, for refugees from Syria living in camps in Jordan (Refugees International 2012; Verdiramé and Harrell-Bond 2005; Crisp 2000: 610—2; Griek 2006a). In Thailand, as the previous chapter explained, trusted community-led systems have taken the primary role in maintaining stability and security. In these camps serious violent crime is relatively rare but many other crimes and social problems occur, from theft, assault and domestic violence, to gambling, drug and alcohol abuse, to the more culturally specific concerns of adultery and pre-marital sex. As with camp management generally, the Royal Thai Government has historically done little to police internal camp affairs and the vast majority of justice issues that occur in the refugee camps are resolved by refugees (as is typically the case in refugee camp situations; see Costa 2006). Refugee leaders who have sought to engage the Thai justice system describe being rebuffed:

They say, 'This is your community, this is your case.'<sup>1</sup>

They told me, 'Please educate your people. You, yourself must take care of your people, not to be creating so many problems in our soil. Otherwise we also can get headache. And then our parliament will complain because the refugees behave like this.'<sup>2</sup>

Sometimes we ask, and they say, 'Do it yourself. This is your people, not our people.'<sup>3</sup>

The devolution of justice functions to refugees was done partly on ideological grounds — 'these are not our people' — but also with some practical justification. Most of the refugee camps are remote and not easily accessible for investigations or policing activity, few refugees speak Thai language, local Thai police are themselves over-stretched and under-resourced, and refugees themselves largely prefer to resolve cases internally. The state absenting itself in this fashion is not unique to refugee situations. One report has estimated that informal justice systems deal with eighty—ninety per cent of all disputes in Malawi and sixty—seventy per cent in Bangladesh, are applicable to ninety per cent of land transactions in Mozambique and Ghana and are relied upon by eighty-five per cent of the population in Sierra Leone (Wojkowska 2006: 12). Contrary to the Weberian notion of a national executive with sole authority, in many parts of the world legal systems beyond the state *are* the legal system.

The infinite variety in the type of systems used means there is limited value in thinking only in terms of 'state' and 'non-state' justice. There are many possible ways in which justice systems beyond the state could be differentiated, including by the nature of process (restorative, adversarial), the nature of settlement (ritual, compensatory, violent), or by the underpinning belief systems (religion, Marxism, supernaturalism). In terms of the primary focus of this book — the relationship between community, state and supra-state orders — models of informal justice range from completely autonomous community-based structures to state-controlled processes with minimal community autonomy. Discussion of justice systems beyond the state rarely attempts to disaggregate these different models, instead relying on the simple binaries of state/non-state, formal/informal. As Norrie (1999) recognizes, this 'antinomialism' radically simplifies the universe of justice systems and reinforces hierarchical thinking, whereby national programmes are considered implicitly superior and non-state programmes are evaluated in terms of what they lack rather than what they contribute.

On the contrary, non-state justice systems are not merely an inferior version of state courts but can be an indispensable mechanism for resolving disputes that otherwise might not be addressed. Furthermore, the value of local dispute resolution is not restricted to an immediate case but includes the benefits gained from community participation in establishing shared values through rule definition and enforcement. As was discussed in Chapter 4, a capacity to establish and reinforce moral values, taking into account all relevant factors, is something that is deeply embedded with Karen village dispute resolution practices. *This value is lost —or 'stolen' (Christie 1977) —when legal processes become professionalized and the knowledge that is prized is not the socio-cultural-historical knowledge of community elders and leaders but a technical understanding of law.*

The systems used by refugees in Thailand are described in some detail below. These camps are climates of legal pluralism, where refugee-led dispute resolution systems are also affected by other sources of law, including Thai law and international human rights law. However, the term 'legal pluralism' suggests equity between normative systems that does not exist in practice. Law is embedded with assumptions, power and class relations, and where asymmetric power relations exist a struggle for ideological dominance often ensues (Starr and Collier 1989: 7; Burman and Harrell-Bond 1979). Historically this has tended to play out with a nation-state incorporating alternative justice structures into the national regime or reshaping the local justice practice into a more 'state-like' form. This is generally conceived at policy level as an act of generosity, of law as 'the gift we gave them', but it has real and practical consequences (Fitzpatrick 1989). A formal relationship with the state transforms local justice practice, making it indistinguishable from official dispute resolution structures by removing political power from local actors or diverting disputes into the state system (Cain 1985; Matthews 1988). Though total cooption is rare, once a community justice process is rationalized in this way it is profoundly altered. As McEvoy and Eriksson (2008: 188) recognize:

[T]he state's hegemonic power and 'will to dominate' can 'swallow up' community-based programmes, professionalize them and reconfigure them into the image of the state to such an extent that they ultimately lose their specific community focus and indeed legitimacy.

Attempts to incorporate informal legal processes into a rational bureaucratic ideal type were a familiar theme during the colonial era. Today, rather than a colonial power or national government coopting local justice systems, legal change is more likely to be instigated by international organizations in accordance with international human rights law and neo-liberal principles of development (Comaroff and Comaroff 2006: 25).

For some years, international rule of law reform was characterized by a 'rule of law orthodoxy' that was implemented by foreign experts, focused on state-level relationships and was concerned with the creation or reconstruction of state-level legal institutions (Golub 2003). More recently, there has been a shift towards 'legal empowerment' and engagement with non-state and customary justice systems (Pimentel 2010a, 2010b; Harper 2011; Ubink and McInerney 2011). Recognition of the role and value of non-state justice is important and long overdue, but engaging with customary justice systems presents practical and operational challenges that should not be underestimated (Faundez 2010). The lack of formal institutions and codification can make it difficult to untangle their operational logic without deep local knowledge and understanding, while their *sui generis* nature prevents the easy transfer of project approaches from one environment to another. If misjudged,

programmes intended to strengthen non-state justice systems risk instead undermining them (ibid). When the option of community-based dispute resolution is removed, it is not at all clear that its constituency take their problems to the formal legal system. Regarding personal injury cases in Thailand, Engel and Engel (2010) found that the declining use of traditional dispute mechanisms (in this case, a form of 'spirit-law' that was very similar to Karen animism) did not lead to more use of national courts and the pursuit of formal justice but rather to more avoidance: more frequently than in the past, people who experienced litigable personal injuries did nothing at all.

This chapter explores such dynamics for the refugee camps in Thailand. It opens with an overview of the structures used to resolve cases by refugees, before going on to examine how these systems are viewed by camp residents and by international organizations. Programmes operated by UNHCR and IRC have sought to enhance refugees' access to Thai justice by supporting referral of criminal cases to Thai courts, codifying camp rules and procedures and creating Legal Assistance Centres to advise refugees of their legal options. This work aimed to strengthen refugees' access to Thai courts and to build capacity at camp level but in practice the latter goal has proven difficult to achieve. The final sections examine the consequences of this for the functioning of refugee-led dispute resolution.

## Camp justice

For many years no coordinated attempt was made to establish rules or justice procedures for the refugee camps in Thailand. In the late 1990s, a set of camp rules and regulations was drafted by members of the Karen Elders Advisory Board and KRC, to apply to all seven Karen refugee camps. These rules were revised in 2011 and remain the only codification of 'law' in the refugee camps.<sup>4</sup> Their importance should not be overstated: few camp residents I talked with were aware of the existence of these rules and even fewer had any familiarity with their content. Nevertheless, their content gives a fairly good indication of the type of problems which refugee leaders anticipate dealing with in the camps, including prohibitions on criminal activities such as murder, physical violence, theft and sexual assault, rules pertaining to administration (e.g. any overnight guests must be reported; every house must display a household number); hygiene (e.g. every person must obey rules of water supply and sanitation); public participation (e.g. camp residents must attend meetings if they are informed of them); and morality (pornography is prohibited, as is engaging in sex work, 'illegal sexual engagement' and adultery). Gambling, drugs and the production or sale of alcohol are prohibited, and there is a curfew on all non-essential movement around the camp between 9pm and 5am. Punishments include education, warning, cash fine, public service, detention and 'turn over to Thai authority'.

Beyond the KRC Rules, no consistent model of dispute resolution applies in all seven Karen refugee camps, nor do the camps have identical governance climates. I conducted fieldwork interviews with refugee leaders and community organizations from five camps but the majority of my camp-based research and all of my case observations were conducted in Mae La Oon. Mae La Oon and its neighbor Mae Ra Ma Luang are generally considered to be among the most stable camps on the border, with the fewest serious crimes and the most effective justice systems. They have also experienced less external intervention on justice issues than some of the other 'Karen' camps, as will be discussed below.

In Mae La, a single judge resolves cases and disputes, in conjunction with other camp leaders as he chooses. In Mae Ra Ma Luang, the camp leader appoints a panel of camp committee members to decide each case as it arises, usually including five to seven members of the camp committee, elders or other influential camp residents. Mae La Oon has a more institutionalized system, with a dedicated justice team comprised of three judges. The judges are chosen by the camp leader and camp committee, and are supported by Security members who patrol the camp, arrest and detain offenders and conduct investigations (though the term 'investigations' is used loosely here, as transcripts of interviews by Security members suggest that only a stock set of very simple questions is asked: (1) Did you do it? (2) How many times? (3) Do you agree to accept punishment?)

All camps *do* share a structural similarity of hierarchical governance. Veroff (2010) has described dispute resolution in Meheba refugee settlement in Zambia as a diffuse environment where refugees select from a range of possible authorities to decide their case. In the Karen refugee camps in Thailand, the maintenance of order is secured in a much more coherent and cohesive fashion. Most disputes and problems that occur in the camp are addressed at section level. If this is not possible, the case will be referred upwards to the camp committee or the Camp Justice team. The referral process is hierarchical, but it is also networked as a variety of organizations and individuals may become involved in a case, including social welfare, KWO, KYO or refugee staff of internationally-funded initiatives such as the Child Protection Committee or the Sexual and Gender-Based Violence Committee. Thus, 'judges' do not take decisions unilaterally but in consultation with several other individuals and organizations.

The types of cases that arise can include theft, assault, disorder, fighting and other aspects of personal security and criminal law. Relationship disputes are a frequent occurrence, including cases of domestic violence but also situations of abandonment (such as where a man applies for resettlement claiming that he is single but in reality has a wife and children or a pregnant girlfriend) and a myriad of other potential problems between couples and families. Problems can also arise from the challenges of living in confined spaces without basic civic regulation. The houses in the refugee camps are

packed very tightly together and a fractious baby or noisy teenagers can disturb literally hundreds of people. Furthermore, disputes are not confined within the camp boundaries, but may involve Thai civilians (e.g. labour disputes, alleged assault or rape, or other problems relating to a relationship between a refugee and a Thai citizen), or non-refugees from Burma who are visiting the camp (perhaps a theft, or a broken promise of marriage, or the use of counterfeit money), or a former refugee who has been resettled to another country (who promised to repay a debt, or to sell goods on behalf of a refugee). Such cases — where one of the parties is not a refugee — are particularly difficult for refugee leaders to resolve.

*Process: the pursuit of order*

The camp justice system shares many characteristics with mediation in 'non-industrial' societies: there is very limited legal codification, the process is led by community leaders of general authority rather than highly educated specialists, and decision-making is guided by values of consensus and harmony-seeking (Merry 1982; Abel 1982). It also shares many characteristics with the dispute resolution practices used in Southeast Burma, as outlined in Chapter 4, including a focus on the maintenance of order (understood as an absence of conflict and acceptance of authority); reliance on a narrow set of shared values (reinforced by moral messages circulated publicly and privately); and a premium placed on the community good rather than individual demands.

In some societies, acts that transgress the social order are tolerated or even respected as defiance (Benda-Beckmann and Pirie 2007: 6). In the Kakuma and Dadaab camps in Kenya, Crisp suggests that the 'social organization and culture' of the refugee communities enhances a sense of impunity whereby 'camp residents have a tendency to feel that they are above the law' (2000: 619). This is not the case among refugees in Mae La Oon (or the other border camps) where deviation from the camp rules was generally met with intense disapproval and the importance of obeying rules was universally recognized.

Moral guidance is central to dispute resolution processes within the camps (as was discussed in Chapter 4). In cases I attended, judges offered moral instruction in a variety of terms, telling an adulterous couple that they should respect their marriage vows made before God, a thief that the traditional way set down by the Karen ancestors is to be honest in all things, and a young person who had been fighting that he should obey his parents and teachers and live quietly in the camp. These 'soft' forms of social control provide clear narratives of morality and appropriate behaviour that are at least as important as the institutionalized aspects of dispute resolution. While the form of authority appealed to varied (from God to Karen ancestors to parents and teachers) it was clear that the camp rules were not the relevant reference. Rather, it was a shared 'common sense' of morality and appropriate

behaviour, reflecting the standards of honesty, truth, duty and responsibility which were perceived as authentically 'Karen' (Cheesman 2002: 214).

A desire for peace and harmony was presented as a quintessentially Karen trait, encapsulated in a phrase that I was repeatedly told explained the 'Karen' philosophy of dispute resolution: 'if it is a big problem we make it small, and if it is a small problem we make it disappear'. This is a classic 'harmony ideology' and as such can mean that ignoring or minimizing conflict ('lumping it') is integral to the process of dispute resolution, as the primacy placed on social order subordinates individual preferences to the perceived communal good (Nader 1990). Ultimately, however, it is a different philosophy of justice and dispute resolution, one to which the adversarial formalism of the common law tradition is equally alien and undesirable and is likely to be seen as escalating rather than resolving disputes. Riles (2006: 61) has suggested that, 'To be a professional lawyer [. . .] is to be agnostic about the ends and to be far more interested in the means'. This approach is antithetical to the Karen philosophy of dispute resolution, which is entirely concerned with the end goal of making a problem 'disappear' and rather less concerned with the means of achieving that.

### ***Sanctions***

The process of dispute resolution and decision-making is participatory and consensus-based. However, its primary goal is not the healing or restoration of relationships between individuals (as in Native American dispute resolution practice [Zion 1999; Pimentel 2010b]) but the maintenance of social order (as has been described in Zincanteco courts [Speed and Collier 2000: 895] and in village governance in Ladakh [Pirie 2006]). In a further distinction from restorative justice systems, the outcome is not a reparation settlement or reconciliation ritual but a punitive disposal such as detention or a fine. Serious punishments are difficult to impose in the camps as few people have money to pay a fine and there are no secure detention facilities. In most camps, the 'jail' is a simple bamboo hut and wooden Leg-stocks are used to shackle and restrain (and, as these stocks are painful and uncomfortable, they also add an additional punitive measure). The offender is not shackled publicly but detained in a bamboo hut.<sup>5</sup> Family members are allowed to visit but otherwise an offender is kept with other detainees and guards. Some offenders are permitted to move around during the day provided they remain close to the security office. After the detention period is complete the offender signs a note pledging to obey the rules in the future and is released. Proceedings throughout are low-key with little evidence of the theatre or drama so often considered an integral component of legal sanction, such as the 'circus' of community dispute resolution described by Christie (1977) in Tanzania, the drama of trial by ordeal described by Tonkin (2000) as occurring throughout Africa, or the wigs, gowns and other archaisms of British court room practice.



## NO Governing refugees

Violence is not central to the justice process, in the sense that it is never officially imposed as a punishment, but I was told that offenders were often beaten by Security members in arrest and detention. The most serious punishment is exclusion or banishment from the camp, which may occur if agreement cannot be reached between disputing parties or if a person refuses to accept and abide by the authority of the camp leaders. As noted in Chapter 4, the threat of banishment or expulsion is a powerful sanction in small-scale cooperative societies and can operate as either a punishment or a means of conflict avoidance. In the past, short-term banishment was used to punish young men who repeatedly broke the camp rules, perhaps by fighting, stealing or other such petty disturbances. If he (as it invariably was) refused to abide by the camp rules, he might be sent to join the KNU/KNLA for a period of some months and could return to the refugee camp once he proved willingness to obey the camp leaders. This sanction would be carried out in camps or supporting roles away from active combat. Nevertheless, such referrals have become rare — and perhaps stopped altogether — after vehement criticism by international agencies and actors that this practice constitutes forced recruitment of child soldiers.<sup>6</sup>

Despite the evidently punitive dimension of such processes as detention, banishment and referral to the KNU, these disposals were described by justice workers as rehabilitation and viewed as part of a process intended to transform offenders into good citizens who can contribute to their community. Even sending an offender back to Burma, some people said, was an opportunity for the person to learn a 'good way' of discipline, hard work and subordination. Describing such a case, one young person said:

[L]ater the camp leader and leaders here sent him to the KNU so that he will stop the fighting here, he will be a good person. But when he [goes] back to the KNU, the leaders are not allowed to punish him, only to teach him so that he will know, 'Oh I did a bad thing in the past, so right now I know I have to do the good thing'. But they give him enough food. They teach him.<sup>7</sup>

Though it seems improbable that sending young men to a conflict zone can be seen as an acceptable punishment, this rationale is not dissimilar to perceptions of military service in Western societies, which represent the army as a place for wild young men to learn discipline and self-control and to become patriotic citizens (Bouffard and Laub 2004). There is no evidence that the process works, as a teacher in Mae La Oon acknowledged:

[I]f young people go back to Karen State, in that area, they will know the situation in Karen State, how difficult it is to survive, and they will compare their life in the refugee camp and in Karen State and think about how to make their life better. Some people when they come back

to the refugee camp, their life is getting better, but not all. It is difficult to treat, I think.<sup>8</sup>

In the emphasis on reintegration and rehabilitation as opposed to punishment, there is a suggestion of 'reintegrative shaming', sanctions imposed in a way that reintegrates offenders into the community rather than stigmatising them (Braithwaite 1989; Braithwaite and Mugford 1994). For example, an offender's family members are always included in the process of dispute resolution and the rhetoric is of reform and improvement rather than humiliation. However, there is a point at which efforts to rehabilitate are sharply cut off and the offender may be sent out of the family by his parents or sent out of the camp by leaders. Reintegration could perhaps best be described as 'all or nothing'. After a term of detention an offender apparently re-enters the community with no lasting stigma, providing s/he agrees to accept the authority of the camp leaders. However, if a person continues to re-offend or if there is a continuing problem, s/he may be utterly rejected. This limit to tolerance again indicates that the primary objective of the justice system is not to heal relationships between offender and victim but to heal the breach in the social order and ensure that the authority of the camp leadership is respected.

## Legitimacy

Wilson (2000: 87) has suggested that the extent of plurality within a legal system depends on one's position. To the South African Justice Minister the national criminal justice landscape may seem to be populated by hundreds of co-existing justice processes, but to a petty criminal the justice system will look 'relatively unified and integrated'. Similarly, while I saw the camp as a jurisdictionally complex site, refugees in Mae La Oon saw a single hierarchy: cases should be reported 'step by step', first to the section leader, then to camp-level leaders and only if the case could not be solved in the camp (e.g. if the crime was a very serious one or if the disputants could not agree) should it be referred outside to the UNHCR or the Thai authorities. This structure was understood by everyone within the camp and recognized as an appropriate pathway, ensuring that those best able to respond to a problem would be alerted immediately.<sup>9</sup>

Support for the camp governance structures was not uncritical. Practical limitations of the system were fully understood, including the difficulty in responding appropriately to very serious crimes and the inability to assert jurisdiction over non-refugees (and thus to protect refugees against exploitation or violence that occurs outside of camps). Women's organizations have campaigned for years to try to ensure that cases of domestic violence and sexual violence are recognized and responded to appropriately (see further Chapter 7). There was also criticism of individual decisions and of

decision-makers, for example, that refugees with money could bribe their way out of punishment and that leaders or prominent people within the camp were given preferential treatment (so 'ordinary' refugees were punished for making and selling alcohol while section and camp committee members were not). Refugees also complained that those in leadership positions were sometimes uneducated and unqualified. This was perceived as a growing problem due to resettlement departures. It was most frequently levelled at Security members, who were seen as 'low status', uneducated and prone to use violence during and after arrest. This may not be unrelated to the fact that Security often appears to be the poorest sector of the camp administration, which perhaps attracts less educated staff than other sectors of leadership and has certainly in the past received less external support.<sup>10</sup>

Nevertheless, with such caveats noted and within the (admittedly narrow) parameters within which they operate, the camp governance structures are fairly effective and even well-adapted for their purpose. The hierarchical, flexible, order-focused systems allow for minor disputes to be dealt with at an early stage and in doing so they play an essential role in maintaining peaceful co-existence among camp residents. They also command high levels of legitimacy within the camp population and are vastly preferred to engagement with either the Thai authorities or international organizations.

It is valuable here to distinguish between the legitimacy of institutions versus the legitimacy of process and personalities. The justice structures were criticized with regard to specific practices and decisions but this did not negate a preference for community decision-making and a perception that this was a legitimate and appropriate form of governance for the camp. This perception is important. In determining 'why people obey the law' Tyler (1990) found that the primary reason for obedience was not fear of punishment but a perception of fairness and a belief that the system is legitimate. Yet whether something is 'fair' or 'legitimate' depends on the measure used; it is in essence a subjective position that reflects personal or communal values. Beetham (1991) identifies three perspectives on legitimacy: philosophical, legal and social scientific. The first is concerned primarily with the moral justifiability of power, the second is concerned predominantly with the nature of rules, and the third is concerned with the *belief* of legitimacy within the society. Though there is no reason for these perspectives to be polarized — each, after all, can illuminate elements of the relationship between law and society — they are often pitted in opposition.

In Thailand, divisions between legal and social scientific perspectives in particular have shaped evaluations of the camp governance systems on the Thai—Burma border. Camp committees, community-based organizations and refugees demonstrate a high level of support for and trust in the structures in general despite dissatisfaction with individual cases. International organizations, in contrast, place less weight on popular feeling than on adherence to internationally recognized procedural standards.

**'We must go step by step': sociological legitimacy**

The most obvious barometer of support for dispute resolution structures is people's willingness to use them. A survey by the IRC asked more than 2,000 refugees in Mae La camp and in the two Karenni refugee camps in Mae Hong Son province, 'If you were a victim of crime, where would you go first?' Sixty-seven per cent of respondents said they would go to their section leader or to camp justice; a further 13 per cent said either camp committee or camp security; 0.5 per cent said they would go to UNHCR, while only 1 per cent in total would go to the Thai camp commander, *Or Sor*, Thai police or Thai courts (IRC 2007: 53). A follow up survey three years later, with 2,138 refugees in five camps, asked those who had experienced crime where they had sought advice. Camp structures were still greatly preferred to Thai structures, with 61 per cent of respondents using camp structures, 5 per cent going to UNHCR or NGOs and 4 per cent going to Thai authorities (IRC 2010: 46).

These statistics could be interpreted in a number of ways: as support of the camp structures, fear of other structures, or as coercion by camp leaders to keep cases inside the camp. I found the first two reasons to be much more prominent. In particular, refugees considered involvement with the Thai authorities to be dangerous, with the potential for a perpetrator to take repercussions against the individual victim or collectively against the camp. I was told of several occasions where threats had been made against victims of crime, their advocates and even an entire camp. This included a case in Mae La Oon where a woman reported to an international agency that she had been raped by a man from a village close to the camp. The case was referred to the Thai justice system, after which threats of physical violence were made against the victim, her family and the international agency staff member who had referred the case.<sup>11</sup> This experience and others like it have instilled deep fear of the consequences of referring cases to Thai court:

If we go to the Thai police, maybe the Thai authorities will create a problem for the camp.<sup>12</sup>

We should go step by step. If someone went directly to the Thai police maybe they will be hurt or even killed.<sup>13</sup>

Thai laws can't help refugees because they are only used to punish refugees.<sup>14</sup>

In my interviews, refugees also expressed genuine support for the camp structures as the appropriate site for dispute resolution:

We are Karen, we have our own leaders. They should solve our problems.<sup>15</sup>

If we bring problems to them [Thai authorities] we can't speak Thai, we don't understand the legal system, we don't have the same background. People should have their own law.<sup>16</sup>

In contrast to the belief in legitimacy expressed by camp residents (that these systems are appropriate, culturally relevant and safe) international agencies are concerned with its *legal* legitimacy: the practice of dispute resolution and its adherence to human rights standards. Reports by UNHCR describe the camp systems as failing to adhere to international standards on gender equality and due process and as lacking 'a clear legal basis, transparency, fair procedures, and trained personnel' (e.g. UNHCR 2006b: A8; UNHCR Thailand 2006b: 5). Popular support from within the refugee population — its social scientific legitimacy — is recognized to exist but is considered misguided, the result of oppression or of not knowing better, and therefore invalid:

Refugees often prefer for the crime to be 'solved' under traditional justice systems that do not meet basic standards of due process and do not apply sanctions in line with international human rights standards or Thai law. Refugees' preference for using traditional systems of justice stem from its familiarity, pressure from refugee leaders, and a desire to keep refugee problems hidden from host country authorities (for fear of eroding Thailand's receptiveness to hosting the refugee problem).

(UNHCR 2006b: A8)

### ***The 'due process critique human rights as trumps***

As discussed, the systems of dispute resolution and order maintenance used in the refugee camps are diffuse, flexible and largely un-codified. Assessing their practice through a lens of procedural legitimacy inevitably skews the analysis towards the areas where they are most different from formal court structures and away from recognition of their overall contribution to camp stability and refugee welfare. This is explicit in the introduction to a Burma Lawyers' Council report on 'The Situation of the Refugee Camps from the Rule of Law Aspect':

Many administrative bodies do a good job contributing to stability of the camps and promoting the welfare of the refugee people. However, as the objective of this research is to study the flaws or failings of rule of law institutions within the camps, only those areas of concern will be highlighted.

(2007: 4)

Meyerstein (2007) has described a similar dynamic in the reaction of international organizations to the creation of gacaca courts in Rwanda to process crimes committed in the genocide of 1994. Gacaca incorporated a traditional community dispute resolution process into the Rwandan criminal justice system and as such presented a unique response to an unprecedented situation. This approach attracted extensive criticism from international human rights organizations, most frequently on procedural grounds. Meyerstein notes that this 'due process' critique established a juridical ideal of technical and procedural standards that the gacaca courts could never attain; and, indeed, which only a Western court *could* attain (see also Clark 2010: 132-67).

A bias towards 'formal' and state courts can be obscured by the apparently reasonable formula of a 'human rights-based approach'. According to this approach — often advocated by those who are generally sympathetic to informal justice systems, such as Golub (2003) and Pimentel (2010a, 2010b) — informal justice practices are acceptable, provided they do not contravene human rights standards. A pertinent example of this is the UNHCR Code of Conduct, which is also the agency's guidance for engagement with refugee-led justice systems:

Respect the cultures, customs and traditions of all people. Strive to avoid behaving in ways not acceptable in a particular cultural context. However, if considered as directly contrary to an international human rights instrument or standard, the later applicable instruments should guide us.

(UNHCR 2004b: i, 2006b: 30):

This seems like an entirely reasonable compromise between recognition of local justice systems and protection of human rights but it has consequences that are not immediately apparent. Normatively, the human rights-based approach establishes international human rights standards as a 'trump' card overruling all other values (McEvoy 2007; Meyerstein 2007: 480). The extent to which this is problematic depends on which right is at issue. Ignatieff (2001: 173) has argued that human rights activism should recognize 'the elemental priority [. . .] to stop torture, beatings, killings, rape, and assault and to improve, as best we can, the security of ordinary people'. Brown (2004) develops this point further in arguing that to see the prevention of cruelty as 'the most we can hope for' is not defeatism but rather the fundamental goal of human rights advocacy. Translated to non-state justice systems, this approach would dictate that the primary concern should be with the core 'prevention of cruelty' rights (such as the right to life and prohibition against torture) rather than with narrowly defined due process norms such as the right to legal counsel. Similarly, gender and ethnic representation are important long-term goals but failure to meet these goals should not delegitimize a non-state justice system, not least because equal representation is rarely seen

in any formal justice system (including the UK, where of the eleven serving Supreme Court judges at the time of writing, ten are men, one is a woman and all are Caucasian).<sup>17</sup>

Jurisdictionally, the human rights-based approach grants external actors (such as UNHCR staff) the authority to decide when a community justice system is exceeding its functions, thus removing any certainty or self-determination from those local systems. In this, there is an echo of the 'repugnancy clause' which was a staple of colonial-era legal reform, whereby the practice of customary courts was acceptable provided it was not 'repugnant to' any provisions of written law or 'contrary to morality, humanity and natural justice' (Otlhogile 1993: 526).<sup>18</sup> Describing a similar provision ordering the relationship between indigenous justice systems and the Mexican state, Speed and Collier (2000: 901) call it 'a cruel hoax' which gives the appearance of protecting indigenous authority while actually removing its autonomy. This not only reduces the capacity of local actors to conduct dispute resolution but by establishing human rights in opposition to community values also risks setting up resistance to human rights values as a foreign imposition. Neither of these outcomes helps to advance the ultimate goal of human rights protection. The conclusion to be reached from this is *not* that serious human rights violations by local justice systems should be tolerated but rather that the potential for human rights discourse to be used to reduce the power of local authorities must be recognized (Speed and Collier 2000).

This is also not to say that human rights are inappropriate, inapplicable or unimportant to non-Western 'cultures' (see further Chapter 7 for a discussion of cultural relativist critiques). It is precisely because human rights values *are* important that they should be communicated in a way that local actors understand and as part of a conversation to which they can contribute. Drawing on many years of practical experience in working with community-based and indigenous justice systems, Braithwaite (2002) has outlined a process for achieving this in establishing community restorative justice programmes. The first stage is to assemble key stakeholders to reflect on a core set of principles, standards or rights. These might be grounded in the values of international or regional human rights instruments but should be expressed in terms which all participants can understand. Through a process of deliberation and agreement, local stakeholders should commit to these shared standards. Contested standards may be resolved by 'reflexive practice', a process of negotiation that refers back to values and principles that have already been agreed. Throughout, didactic training on law or human rights should be avoided in favour of training sessions which are a reflexive process of discussion between all participants. Over time, discussions should gradually expand outwards to include increasing numbers of the local population, before culminating in community-wide adoption of the standards. Through participation and

consensus-building, human rights values and principles can be embedded into ways of seeing and resolving problems. With its recognition and understanding of the unique and lasting value to a community in participating in norm definition and enforcement, this approach could be of particular value in a refugee camp context.

## NGOs and the rule of law orthodoxy

Until recently, international humanitarian agencies paid little attention to justice and security in refugee camps. As rule of law activities gained prominence within the UN system as a whole, they began to also be incorporated into refugee operations (Costa 2006; UNHCR 2006b). In 2004, the UNHCR in Thailand launched an ‘administration of justice’ programme. By 2013, access to legal assistance was central to its protection programming, and to the work of IRC.

This work began in an environment where there was an evident need for external support. It was extremely difficult for refugees to access the Thai criminal justice system, or to receive any redress if the perpetrator was a Thai citizen. Women’s organizations had been working for years to determine the safest way for migrant and refugee women to seek justice for sexual and domestic violence, whether in camps or through Thai courts. Resettlement had placed the camp-led dispute resolution systems under increasing strain as experienced staff and leaders left, and as new types of crime became more common (including debt and loan cases, and youth delinquency; on the latter, see Chapter 7). Overall, however, the systems were ‘reformable’: there was no institutionalized violence or corruption, there was considerable respect for the existing structures, and many (though by no means all) refugee leaders were amenable to change. The ideal role for international organizations was therefore to retain the strengths of the existing system (popular legitimacy, simplicity, efficiency) while addressing such problems as lack of resources, staff turnover and refugees’ power inequalities and vulnerabilities *vis-a-vis* non-refugees and the Thai criminal justice system. Of course, achieving this is rather more difficult than it sounds, to which a tranche of past and present law reform processes are testimony (Ubink and McInerney 2011; Harper 2011; Faundez 2010; Pimentel 2010a; Carothers 2003).

The first programmes on the administration of justice in the camps were led by UNHCR and broadly followed the ‘rule of law orthodoxy’ of state-focused, state-centric initiatives, focusing on consultation with Thai police and other officials, and on encouraging reporting of serious cases to Thai courts. A more ‘legal empowerment’ approach was represented by a project to create ‘Legal Assistance Centres’ (LACs) which serve as a conduit between refugees, camp justice structures and Thai authorities.



*Legal Assistance Centres*

Implemented by IRC with partial UNHCR funding, three Legal Assistance Centres have been operational since 2007 (in the two Karenni camps of Ban Mai Nai Soi and Ban Mae Surin and in the Karen camp of Mae La) and two more opened in 2012 (*in* Umpiem Mai and Nu Po). In the camps where it is present, LAC responds to refugees' requests for legal advice and provides support in referring cases to the Thai legal system. Activities include training for camp residents on Thai law, basic legal concepts and human rights awareness; training for camp staff (including mediation and restorative justice techniques); material and technical support to camp staff; and a law reform' process of consultations to harmonize camp justice practice with Thai law and international human rights law (Hutchinson 2013; Harding *et al.* 2008). LAC has no investigative capacity or authority to resolve cases but provides education and assistance. In this role it also serves as a bridge or buffer between the camps and local Thai authorities. This function has been developed by, for example, bringing Thai court staff and police to visit Mae La camp in order that they can better understand the situation of refugees (Harding and Varadan 2010). LAC has also been able to secure refugees' access to entitlements of the Thai legal system; such as victim compensation for the family of a refugee killed by a passing car.

An evaluation of more than 2,000 camp residents in the sites where LAC operates found considerable success across a range of indicators, including increased awareness of Thai law, improved confidence in camp justice and perceptions of overall safety and security (IRC 2010: 3–5). Yet of the 2,138 respondents, only six had sought advice from LAC and ten had reported a dispute to LAC. Other refugees were indisputably the preferred option for seeking advice and for reporting disputes. In this the hierarchy of 'step by step' remained central, with section leaders as the clear first preference for both seeking advice (29 per cent) and reporting a problem (32 per cent) (ibid: 20, 43).<sup>19</sup>

LAC was created with the dual goal of enhancing refugees' access to Thai law and strengthening the operation of camp justice structures. An early evaluation of the programme stressed the importance of the second aspect, advising against 'a legalistic approach' and advocating simple systems that were based '*on culturally acceptable practices, rather than trying to undermine or replace these*' (Aiken 2009: 42). Efforts were made to strengthen the capacity of camp administrations through training and resource provision, recruitment of refugees as paralegals and consultation with refugee leaders about the progress of cases. As the programme has developed, this work has continued but the legal empowerment component of LAC's work has become less prominent than its work in strengthening access to Thai law. An institutional bias towards Thai law is also clear in staffing, with Thai lawyers and law students taking a leading role in project implementation. While their commitment and professionalism is not in dispute, people with formal legal

training are not necessarily the most appropriate people to work with community justice systems; indeed, they might even be the *least* appropriate people, as their measure of a successful system will typically be the legal system in which they have been trained.

Power dynamics between 'local' and 'international' staff are a perennial challenge in international development (Pouligny 2006: 87—5). These dynamics take on an additional dimension in a refugee situation, where the relationships to be navigated are not only between international/national staff but international/national/refugee staff. The relationship between refugees and citizens *of* the host society is particularly sensitive. When this is combined with the charged dynamics of justice reform (which inevitably challenges deep-seated norms and cultural values), there is a risk that justice reform will be viewed as a Trojan horse to reshape refugees' identities and encourage them to (in this case) 'become Thai'. As one of my interviewees commented, when asked how he felt about LAC, 'In five years, the camps will be under the control of the Thai authorities. There will be no need for camp committees.'<sup>20</sup>

For its first five years of operation LAC was present in only three of the nine border camps, and only one of these (Mae La) was a 'Karen' camp. This has had obvious implications for equitable service delivery, capacity-building and participation. It has also had implications for consistent policy advice to refugees. In the camps where LAC is present, IRC is the primary avenue of external contact and advice on justice matters. Where LAC is not present, UNHCR is the lead agency on these issues. This is important because staff of the two organizations at times had different approaches to camp justice, including regarding the most important questions of all: which problems and crimes can be solved in camp and how they should be dealt with. This difference — and the tension between the 'rule of law orthodoxy' and the goal of legal empowerment — was particularly evident in efforts to define camp rules and procedures.

### ***Harmonizing camp rules and Thai law***

One of LAC's primary objectives for strengthening camp justice was a law reform' process to clarify camp rules and harmonize camp practice with Thai law. Two concurrent law reform processes were instigated, one with members of the Karenni Refugee Committee, camp committees and community representatives of the camps of Ban Mai Nai Soi and Ban Mae Surin, and one with the KRC and members of the camp committee and community organizations from the camp of Mae La. The drafting process for the 'Karenni camps' included representatives of both camps. In Mae La, members of the camp committee, representatives of camp-based community organizations and members of the KRC were formed into an 'Approval Committee'. The Mae La process has been described by a former LAC staff member as 'an instructive example of norm transference in the context of development and

humanitarian interventions' (Hutchinson 2013) but its restriction to only one of the seven Karen refugee camps meant that it was not representative of the wider refugee population.<sup>21</sup> The capacity-building impact of the law reform process was further weakened — perhaps fatally so — by its failure to produce a concrete outcome; a failure that was not due to resistance *from* refugees but to a lack of clarity and consensus among international agency staff about what the process was intended to achieve.

There is relatively little normative clash between the crimes punished in the camps and under Thai law, with the most direct inconsistency being the *camp* practice of punishing adultery and pre-marital sex (which are not crimes under Thai law). Nevertheless, after four years, the IRC-LAC law reform process had not publicly circulated even a draft document. In February 2011, the KRC issued a revised set of camp rules and regulations that showed little evidence of an enhanced knowledge base from the years of law reform discussion. The revisions meet some very broad objectives (e.g. clarifying that camp rules do not conflict with Thai law, avoiding defining adultery as a crime and removing any role for the KNU in cases involving refugees) but they are very unclear. There are four categories of offence: 'rules', 'civil law suits', 'crimes' and 'civil law suit — crime'. Non-discrimination is categorized as a rule punishable by education, warning or referral to Thai authority. Showing or selling 'x-rated movies or pictures' is also a rule, punishable by a cash fine and one month confinement. Offences identified as civil law suits include the violation of 'social and cultural norms' of adultery and prostitution, which should be dealt with by 'warning, compromising or action taken similar to that of action taken by related society'. Crimes include forestry offences, gambling, drugs, stealing, fraud, murder, human trafficking, violent and sexual offences and some vague prohibitions such as 'the illegal exploitation of children for self-gain which creates mischief in the child', 'any action that negatively affects the stability and peacefulness of the camp' and 'abusing the personal rights of others'. Each of these vague offences has only one permitted response: to refer to the Thai authority.

Participants in the law reform process attributed the delay to a combination of staff turnover within IRC-LAC and to UNHCR opposition. Some UNHCR representatives in Thailand had been opposed to the idea of establishing a legal code for the camps from the outset. As one staff member said to me: 'Law reform. It's not law. [ . . . ] Why do they need law for the camps when there is a Thai law covering the whole of Thailand?'<sup>22</sup> This representative also considered that the camp systems were a 'parallel' system in violation of Thai sovereignty and that any arrest, detention and punishment carried out by camp leaders was illegitimate. In response to such complaints, the Law Reform process was re-envisaged and re-named as Developing Mediation and Legal Standards. In October 2011, the process was changed again, dropping all reference to 'law' and becoming Mediation and Dispute Resolution Guidelines. Refugee leaders and participants from

all sectors (including IRC-LAC staff) were deeply disillusioned with the repeated delays and lack of progress:

It's been delayed again and again. The person responsible for the Law Reform from LAC has changed again and again. At the beginning we put so much effort to make a traditional law that is not against the Thai law. For example, before, adultery was a crime in our community, it can be sentenced to up to seven years in prison. We adapted quickly, we challenged the old community leaders and eventually we made agreement on that, that it's not a crime. So many issues. And then it changed again. So eventually I decided not to join them. I quit from the Approval Committee.<sup>23</sup>

According to UNHCR, refugees cannot arrest refugees [ . . . ] Refugees cannot use law. Refugees cannot write their own law. They cannot create an article. They cannot punish a person. So what can we do? It is a big problem.<sup>24</sup>

In 2013, the Mediation and Dispute Resolution Guidelines were piloted in the camps where LAC operates (it is not clear if or when they will be extended to 'noa-LAC' camps). The Guidelines — approximately eighty pages long in English — consist of twelve guidance notes, each addressing a broad area rather than a single offence. The issues covered fall into three types: core principles of dispute resolution (including guidance notes on general principles, absolute jurisdiction offences and conflict of interest); methods of dispute resolution (including notes on alternative dispute resolution, mediation and group conferencing and arbitration) and specific case types (involving youth, rape, domestic violence, adultery, marriage and divorce, and debt and loan cases).

The crux of the Guidelines is that serious offences must be sent to Thai courts but that other offences may be solved in camps where that is the preference of the parties. Cases that must be referred to Thai law include murder, rape, assault causing grievous bodily harm, narcotics offences, human trafficking, offences against children, possession of firearms and forestry offences. Camp-based dispute resolution is underwritten with the principle that 'all disputes that arise in the camps can be referred to the Thai justice system at any time'.<sup>25</sup>

The Guidelines do not resolve the central problems of defining camp rules and jurisdictions, but instead focus on establishing a process of dispute resolution. Camp justice is to be 'alternative dispute resolution' wherein detention is only to be used in exceptional cases or where there is an immediate risk of violence or flight from the camp. Other disposals include a warning, promissory note, fine, damages and community service order (CSO). Three forms of alternative dispute resolution are identified: mediation,

arbitration or group conferencing. The option closest to that already used by refugee leaders is group conferencing, whereby all interested and affected parties can participate (mediation will involve the disputants and a mediator, and arbitration will involve the parties to a dispute and any witnesses).

It is helpful that the Guidelines clarify a role for camp leaders in resolving disputes in camp and that they offer a flexible rather than legalistic guide to decision-making (in contrast to a 2010 draft of the 'law reform', which was a thirty-one-page document of dense legal definitions extracted from the Thai Penal Code). Formalizing the camp dispute resolution system as a restorative justice approach may be helpful, provided sufficient investment and attention is given to supporting the implementation. Restorative justice has *many* advocates in Anglo-European jurisdictions, where it is seen as a valuable alternative to the inefficiency and inhumanity of the prison 'punishment society'. A variety of studies have found that restorative justice approaches can increase victim satisfaction with the justice system, reduce re-offending and improve community safety. While it is naturally difficult to provide a definitive answer on whether restorative justice 'works', the evidence base has been assessed as 'far more extensive, and positive, than for many other policies [in the UK criminal justice system]' (Sherman and Strang 2007: 4).

However, dispute resolution does not become 'restorative justice' simply by removing the possibility of punitive sanctions. The approach used by refugee leaders at present has many elements that are close to a restorative justice model (such as an emphasis on consent, participation and a negotiated solution) but it also relies on the sanction of detention. In my interviews in 2012, camp leaders found it difficult to understand how a justice process would be effective without this as 'mediation is not good for cases where there is a clear right and wrong'.<sup>26</sup> One LAC staff member acknowledged that encouraging restorative justice approaches had been 'one of the areas of greatest resistance in what we're trying to do'.<sup>27</sup> Community-based organizations were not receptive to a restorative justice approach and perceived CSOs as giving them responsibility for the rehabilitation of youth gangsters', a task that they were not trained or resourced to carry out.<sup>28</sup> This was linked to more deep-seated — and wholly reasonable — concerns about the capacity to effectively implement an unfamiliar justice model:

The mediation process is part of camp justice, so if we are going to do mediation in camp, the people doing it really need to understand it, they need to have the necessary skills to do it. Right now, they don't. If we don't have camp justice any more, we really have to make clear which cases will *go* to Thai court. For absolute jurisdiction cases, it's clear — what's not clear is what happens with everything else. With camp justice, if there is to be a mediation system in camp, they need to choose the best and most skilled people to do it. Section leaders at the moment are not educated.<sup>29</sup>

### ***Referral to Thai courts***

The Mediation and Dispute Resolution Guidelines are the culmination of several years' effort to clarify the role of camp justice and encourage referral of serious crimes to the Thai criminal justice system. Between 2003 and 2006, UNHCR supported the referral and processing of only seven serious crimes involving refugees to the Thai criminal justice system (IRC 2009: 2). Later, IRC reached an informal agreement with the Thai Ministry of Interior regarding offences which should be dealt with in Thai court (the same 'absolute jurisdiction' offences that are identified in the Mediation Guidelines).<sup>30</sup> Since LAC was created, many more cases have been referred from the refugee camps to the Thai criminal justice system, with 120 cases referred in 2011 alone (UNHCR Thailand 2011).

However, not all of these cases are serious crimes. In fact, it seems that the majority of case referrals relate to immigration ('illegal presence') and forestry offences. Statistics provided to me by LAC show that sixty cases were referred from Mae La to Thai justice in 2009- Of these cases, 18 per cent were forestry offences and 11 per cent were illegal presence. Sexual violence cases (rape and attempted rape) and cases of physical harm (actual and attempted murder, manslaughter, assault and domestic violence) were a total of 37 per cent of referrals, i.e. twenty-two cases. During the same period, in Ban Mae Surin and Ban Nai Mai Soi, sixty-seven cases were referred to Thai court, of which cases of physical harm and sexual violence constituted only 12 per cent; cases of 'illegal presence' accounted for 75 per cent of all referrals. Similarly, in 2010, of seventy-seven cases referred to Thai justice from Mae La, 44 per cent were cases of illegal presence and forestry offences. Cases of physical violence and sexual violence accounted for only 27 per cent of the total.<sup>31</sup> Of referrals from the Karenni camps, 66 per cent were cases of illegal presence.

When serious crimes occur it is critical that refugees should have access to Thai courts. However, while the principle of refugees' access to Thai courts has been affirmed, the reality is rather different. In the past referrals were resisted by both Thai police and refugees and to some extent this resistance continues. Refugees may not wish their case to be processed in Thai court for fear of discrimination as well as practical challenges such as language, transport and lack of legal knowledge. For many years, camp leaders have been encouraged to resolve cases internally and there is a continuing fear that referring cases to Thai courts will lead to repercussions by perpetrators of crime, or that the Thai authorities will tire of the increasing demands that are being placed on them. International support is considered essential to overcoming the power imbalance that refugees face in engaging with Thai citizens or authorities:

LAC help us access Thai justice and this is very good for us. By ourselves we can't do this. If a Thai citizen harms a refugee, they discriminate against us. But if LAC speaks for us, they can't do this.<sup>32</sup>

In addition, while access to Thai law is vitally important for responding to serious cases occurring in the refugee camps, it is less appropriate for the (much more common) low-level disputes that arise. International agencies may be driving the reform agenda but national officials have to implement it and the Thai criminal justice system is simply not equipped to provide the constant, continual low-level dispute resolution that section leaders currently conduct. Furthermore, camp staff and community organizations have found that the Thai police continue to prefer that they manage problems internally and at times refuse to accept cases, instead returning offenders to the camp without punishment.<sup>33</sup> Conflicting advice from international agencies and from Thai authorities places camp leaders in a difficult position:

Ten days ago, I caught five people *using drugs*. I sent them to the Thai authorities and the Thai authorities sent them back yesterday. When I asked, 'What did the Thai authorities do?', they said, 'They just took a picture and released us.' This is a big problem. We send these young men who are drug addicts to the Thai authorities and then the Thai authorities send them back. This is very bad.<sup>34</sup>

When the [Thai] camp commander comes to the camp committee, he says one thing to the camp committee and another to the NGOs. For example, when the camp commander comes to the camp, they say to the camp committee that you can arrest this person. Then UNHCR come and say, 'Why did you arrest this person?'<sup>35</sup>

#### 'One *nation, one law*'

While efforts to encourage and support referrals to Thai court have been valuable for particularly serious criminal cases, they have also led to confusion among camp security and justice staff about how to respond when referrals are rejected or are not possible. My interviewees suggested that the messages conveyed in NGO-led training programmes were at times misunderstood and misinterpreted:

In the past, if the neighbours see the husband beat his wife several times, they would report to the leaders and they would take action. Now, they understand that if the victim doesn't tell the leaders then nobody can do anything. [. . .] They are told that if they do this it's wrong, and if they do that it s wrong. They have less confidence. They don't want to take any responsibility or any action because different organizations have different ideas about what they should do.<sup>36</sup>

Sometimes, there is domestic violence in my section, but this is not against Thai law so I don't dare to go and detain.<sup>37</sup>

Effective communication is always a challenge in international development programming, but misunderstanding has potentially serious consequences here. The comments above suggest a move away from an 'order-focused' approach (whereby section leaders would intervene where they perceived a problem to exist) to a 'victim-focused' approach (whereby section leaders believe they should wait for a victim to report a problem before taking action). It is significant that these speakers describe confusion in responding to domestic violence cases, as this is the single case type that has had by far the most external attention to encourage effective responses.

The comments above also suggest that anxiety about the appropriate response may discourage camp staff from taking any response at all; an outcome that is likely to increase impunity and decrease stability rather than to strengthen 'access to justice'. Much of the blame for this confusion, and for the lengthy wrangling around the law reform, was placed with the hardline stance of UNHCR staff in advocating 'one nation, one law':

Basically, I think that the UN are very strong about this — the only law is Thai law. And I think that that has sort of been undermining the traditional justice system. Not that there weren't major problems with the traditional system, but instead of trying to improve and work on the traditional system their mantra is "Thai law is the only law". [. . .] And it's not like the Thai justice system and the Thai police are readily jumping up to fill the justice roles, their justice roles in the camp. So it's kind of like, they're directing everyone to go through this justice system that isn't really there.<sup>38</sup>

In some cases, we feel we could solve in the camp but UNHCR say no.<sup>39</sup>

UNHCR ask KRC to be careful with Thai law, it is 'one nation, one law'.<sup>40</sup>

This highlights an important point, which is that the non-governmental sector is no more monolithic than the state. Between and within agencies there can be considerable policy differences which may be enshrined in agendas defined at headquarters or may be related to decentralisation at the field level. In the refugee camps in Thailand, opposition to refugee-led 'parallel justice systems' was led by UNHCR representatives rather than the Royal Thai Government, which while presumably in principle opposed to a justice system that opposes its state sovereignty has taken no action to suggest that it considers the refugee-led structures to be such a system.<sup>41</sup> I was repeatedly told that IRC-LAC staff were more sympathetic to community



governance than counterparts in UNHCR. However, not all UNHCR representatives adhered to the stance of ‘one nation, one law’, while LAC staff did not promote legal empowerment with sufficient conviction *to* overcome UNHCR opposition.

These institutional variations and power dynamics have had important consequences for justice programming in the refugee camps, as evidenced in the fundamental lack of clarity about the purpose and objectives of the law reform process. This lack of clarity not only affected the direction of international programming but placed refugee leaders in the challenging position of navigating the politics of international organizations as well as those of internal camp affairs:

In the first time, when we started law reform process, a lawyer from England she worked with LAC and she was very enthusiastic to create a law for the refugee camps. After more than one year, she left and another one came. Not too strong. [...] He or she? Maybe a man. He listened to us, but not too much technical support from him. [...] And then another came, weaker, another came, weaker. The last one, ‘I am not sure that we can get approval from MOI’. At the same time, UNHCR — UNHCR also have turnover and the last one very strong, very strong guy. A very strong UNHCR and a very weak LAC. So LAC can do nothing.<sup>42</sup>

LAC has to obey UN. UN is more important than LAC so whatever UN say, LAC have to follow.<sup>43</sup>

### **A tentative counter-critique**

Non-state justice systems operate all over the world, with varying degrees of efficacy and legitimacy. In refugee situations, the extent to which refugee-led dispute resolutions systems are an asset to camp management will obviously depend on the specific circumstances of each context. Nevertheless, it is highly likely that most disputes and social problems that arise in refugee camps will be solved at community level and thus that some form of local dispute resolution will be an essential component of camp management.

As has happened with other rule of law projects, international agencies in Thailand have been critical of the legitimacy of camp justice while apparently overlooking the procedural failings of the formal system (Carothers 2003: 11). An assumption that Thai law is the appropriate destination for cases from the refugee camps overlooks the considerable flaws in the Thai national justice system, which is chronically overstretched with delays in case processing, prison overcrowding and serious problems of corruption and abuse of human rights throughout the system. Ethnic minorities, refugees

and migrants are at particular risk of mistreatment (Amnesty International 2002; Human Rights Watch 2012).

In my own interviews with refugees who had been imprisoned in Thai jails, one man who had been imprisoned for theft described the conditions as so unbearable that he wanted to commit suicide,<sup>44</sup> while another man, jailed purely for immigration offences, had been beaten so badly in prison that he still experienced pain from his injuries many years later.<sup>45</sup> Yet when I raised the matter of prison conditions with a staff member of UNHCR he said, 'it depends where you compare it to. Compared with my country, Thai prisons are pretty good'.<sup>46</sup> In its very flippancy this comment indicates a relative lack of concern with human rights violations when they occur in a national criminal justice system.

This blindness to bureaucratized violence resonates with Cover's (1986) work on the 'violence of law'. Cover argued that when the state is recognized as the sole legitimate holder of authority we become inured to the 'violence of legal acts' by familiarity with its roles and institutions. This does not imply that non-state legal processes are *not* violent — on the contrary, he recognizes all law as backed with violence — but in state legal processes, the sanitized theatre of court process prevents appreciation of its real meaning. He wrote, 'I think it is unquestionably the case in the United States that most prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk' (ibid; 1607). Applied to the position for refugees in Thailand, this blindness to the violence of law permits the cruelty of Thai prison to be routinized (and as such deemed acceptable), while violence beyond the state (such as the referral of offenders to the KNU in Burma for punishment) is recognized for what it is and deemed unacceptable.

In Rwanda, Meyerstein (2007; 492) describes an energetic 'countercritique' from members of the Rwandan Government and judiciary to criticisms of the gacaca courts, in a dialogue that he links to postcolonialism and the desire to assert an independent, authentically 'local' legality. In contrast, Karen refugees are for the most part deferential to Western knowledge, which tends to be associated with positive conceptions of political power and social development. In my interviewees with camp judges, section leaders and security staff, they often expressed embarrassment at what they viewed as a lack of sophistication in their practice. There was a perception that the camp processes of dispute resolution were vastly inferior to Western law and an assumption that I, as a Western-trained lawyer, would 'look down' on the processes used in camp. This attitude was less prevalent among those who were more educated and who had more experience in dealing with foreigners. These people were better positioned to compare the different legal traditions and recognized that legal formalism also had disadvantages, and that a notion of law as malleable and instrumental may not be appropriate for their community after all. One Karen leader who had participated with LAC in

the law reform process described long lawyerly debates about words and definitions of crimes, saying:

This is why I hate the law. In law there are two channels [holding hands out from his side, weighing them like a set of scales] but if you are clever in talking, if you are clever with words, then you will win the case.<sup>47</sup>

There was also some irritation with the human rights idealism of NGOs, which ignored the difficulties faced by refugee camp justice and security staff:

Sometimes the community get annoyed. Sometimes they appreciate it if they get more knowledge. And they think, 'Ok, so before we didn't know but now we know so it's better.' But sometimes they feel like, 'Hey, we're not in our own country, we're in the refugee camp, this is the best we can do.' And normally they think that their decision is better than what the NGOs think, because it's the community making the decision, judging other people who commit a crime in the community. So they feel that it's more fair, and they look at it every way.<sup>48</sup>

There was also some recognition that this environment of institutional pluralism would have lasting consequences for community management practices, both for the refugee camps and potentially inside Burma:

Another concern I have is the long-term effect of this process, you know because it's so much out of the hands of the community but it is given a certain status, part of that, uh, 'mysterious knowledge' of lawyers. These documents will have power in the future and they will have authority and so, you know, when refugees go back to Karen State, are these laws going to go with them? So how far reaching will it be, the effect on this culture or this community?<sup>49</sup>

There is something both familiar and ironic about this process — familiar, in that it repeats a process of rationalization of customary justice practices within the state which was more common in colonial times, yet ironic in that community-level governance practices among the Karen survived colonialism but are threatened by 'state capture' at a time of statelessness, as refugees. There is a further irony in the fact that elsewhere there has been a turn *away* from the state as the exclusive justice authority. In Europe and in America, criminologists and sociologists have increasingly noted a loss of faith in the penal system and punishment society (Braithwaite and Mugford 1994; Garland 2002, 1993) and emphasized the value of flexible and decentralized governance practices, and of more constructive relationships between community and state, such as community policing partnerships or community restorative justice initiatives (Crawford 1997, 2006; Johnston

and Shearing 2003; Loader and Walker 2007). These proposals all suggest fruitful new directions in security knowledge which recognize the possibilities in governance beyond the state and are rooted in recognition of the limitations of national policing and prosecution structures, and of the value of community dispute resolution in its own right.

Of course, an analysis focused on state capture risks over-simplifying the relationship between 'community' justice and other legal orders. This is particularly problematic in relation to human rights — which, after all, seek to emancipate and not oppress. Human rights standards may be used by international actors to challenge the autonomy of local actors but they can also be a tool for local actors to confront oppression and inequality. This chapter has identified a struggle to own and to define justice at the institutional level. The following chapter shifts the focus from institutions to ideas to examine the effect of human rights values on camp justice practice.

## Notes

- 1 Interview #60, KWO member, 6 June 2009.
- 2 Interview #95, former camp leader, 12 March 2010.
- 3 Interview #59, KRC member, 4 June 2009-
- 4 The most recent version of the camp rules was revised and amended in February 2011. UNHCR and IRC prepared a set of Mediation and Dispute Resolution Guidelines that was circulated to community organizations in August 2013. These Guidelines are discussed further below.
- 5 In three camps, IRC-LAC has funded the construction of secure detention units, and trained security staff in appropriate detention standards. As a result, the use of stocks has been abandoned in these camps.
- 6 An earlier version of the camp rules was explicit about the role of the KNU in camp justice, stipulating 'forward to mother organisation' as the punishment for murder, death [sic], possession of firearms and suspected informers (Burma Lawyers Council 2007, Annex 37). There is no mention of a role for the KNU in the updated version of the KRC camp rules (KRC 2011). The subject of sanctions for youth delinquency is returned to in Chapter 7.
- 7 Interview #25, Mae La Oon, 4 March 2009.
- 8 Interview #48, Mae La Oon, 15 May 2009-
- 9 This cohesion may well be significant for the success of these systems as while there are in theory multiple possible legal orders, most refugees only recognize one, thus reducing the use of 'forum-shopping' (see further Chapter 7).
- 10 This is another area where there is wide variation between camps. Where IRC-LAC operates, security receives considerable technical and material support. Where IRC-LAC is not present (such as Mae La Oon and Mae Ra Ma Luang) Security members have received little or no dedicated training and assistance.
- 11 Another example occurred in 2003 in a Karenni camp, where a young girl and a woman were raped by two Thai *Or Sor*. The camp committee reported this case and it was prosecuted in Thai military court with the perpetrators sentenced to nine years in military jail. Throughout the process, the victims, their families and

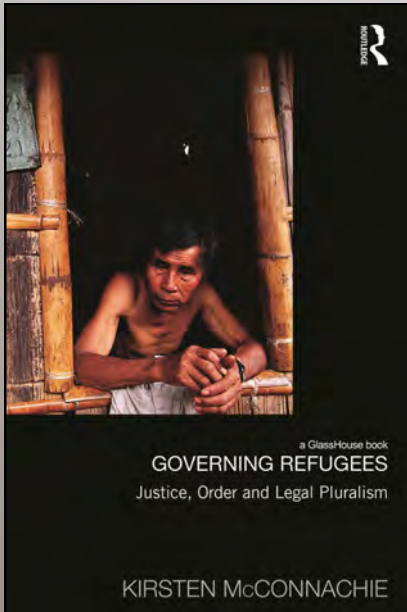
- the camp committee were repeatedly threatened and urged to drop the prosecution.
- 12 Interview #24, Mae La Oon, 4 March 2009-
  - 13 Interview with camp resident, Mae La Oon, recorded in field notes, 2 Feb 2010.
  - 14 Interview with former section leader, Mae La Oon, recorded in field notes, 14 Feb 2010.
  - 15 Interview #76, camp resident, Mae La Oon, 15 Feb 2010.
  - 16 Interview #59, KRC member, Mae Sot, 4 June 2009-
  - 17 See [www.judiciary.gov.uk](http://www.judiciary.gov.uk) (accessed 2 August 2013).
  - 18 This provision became the basis for challenging polygamy across much of sub-Saharan Africa, and it is an interesting twist that while the human rights-based approach also challenges local conception of sex and sexuality, it is no longer perceived promiscuity that is a problem but rather sexual conservatism, i.e. the policing of adultery and pre-marital sex.
  - 19 Where respondents seek advice: section leader (29%); family members (21%); camp security (12%); camp management (5%); CBO (4%); camp justice (3%); zone leader (2%); religious leader (2%); Thai authority (3%), NGO (2%), UNHCR (1%); LAC (1%); Thai citizen (1%); other (2%). Where respondents report a dispute: section leader (32%); other family members (15%); camp security (14%); other camp residents (7%); camp management (6%); camp justice (6%); CBO (4%); zone leader 3%; religious leaders (2%); Thai authorities (4%); LAC (2%); NGO (1%); Thai citizen (1%); other (1%)
  - 20 Interview #96, KYO member, Mae Sot, 14 March 2010.
  - 21 Earlier, I outlined Braithwaite's proposal for a participatory, consensus-based, values-focused approach to establishing bases for community-based restorative justice programmes. This approach would have been much more valuable for refugees in Thailand than the Approval Committee' process followed by IRQ LAC and UNHCR, where the process throughout was conducted in terms that participants were unfamiliar with: first, the dense legalism of the Thai penal code, then the complex vocabulary of 'Alternative Dispute Resolution' Furthermore, the Approval Committee allowed only a small number of refugees to participate in the drafting and consultation process, in a role that was (as the name implies) primarily one of agreeing to a process designed and devised by others. It was clear that the KRC and camp committees were willing to cooperate with a law reform process and to revise the camp justice procedures; this goodwill could have been harnessed to hold a conversation about human rights values and standards in terms which refugee participants could understand. Allowing the wider refugee population to participate in the process of debating and negotiating standards would have strengthened understanding of the values and rationale underpinning the reform of justice and dispute resolution, thus increasing programme sustainability as well as local ownership.
  - 22 Notes from interview #138, Mae Sot, 23 April 2012.
  - 23 Interview #139, Mae La, 24 April 2012.
  - 24 Interview #134, Mae Hong Son, 20 April 2012.
  - 25 Mediation and Dispute Resolution Guidelines, Guidance Note #1.
  - 26 Interview #139, Mae La, 24 April 2012.
  - 27 Interview #65, Bangkok, 6 January 2010.
  - 28 Interview #167, Mae Hong Son, 3 May 2012.

- 29 Interview #167, Mae Hong Son, 3 May 2012.
- 30 These offences are also identified in the Mediation and Dispute Resolution Guidelines as those that cannot be solved in camps and that must be referred to Thai courts.
- 31 Interview #170, Mae Sot, 5 May 2012.
- 32 Between January and December 2010, seventy-seven cases were referred to Thai justice from Mae La: illegal presence 33%; forestry offence 11%; drug use/possession 1%; drug trafficking 1%; child abuse 2%; attempted murder 1%; accidental death 4%; vehicle accident 5%; theft 4%; suicide 1%; rape of a minor 16%; rape 1%; physical assault 1%; physical harm 3%; other 14%; murder 2%. In Jan-Dee 2009, sixty cases were referred to Thai justice from Mae La: forestry offence 18%; illegal presence 11%; manslaughter 1%; murder 6%; other 9%; physical harm 7%; rape 2%; rape of a minor 12%; theft 2%; threat of murder 1%; human trafficking 1%; accidental death 4%; attempted murder 5%; attempted rape of a minor 1%; child abuse 1%; child support 1%; divorce 1%; domestic violence 2%; drug trafficking 4%; drug use 9%. Statistics as provided by LAC and on file with author. These statistics were provided as a pie-chart which gave the total number of cases reported to LAC and referred to Thai justice. For each individual case-type a percentage was given rather than a number of cases.
- 33 A DFID document cites LAC database data in claiming that in 2011, 93% of all appropriate serious crimes in the five camps where *LAC* operates were successfully referred to the Thai *justice system*. My interviews with leaders and community organizations from four of those five camps suggested that this is not the case. It is possible that camp staff do not tell NGOs if Thai police reject a case for fear of damaging their relationships with local authorities. See DFID Logical Framework [203400], Output indicator 4.1. Available online at <http://projects.dfid.gov.uk/iati/Document//4082541> (accessed 1 September 2013).
- 34 Interview #142, Mae La, 24 April 2012.
- 35- Interview #159, Umpiem Mai, 28 April 2012.
- 56 Interview #152, Umpiem Mai, 26 April 2012.
- 37 Interview #157, Umpiem Mai, 27 April 2012.
- 38 Interview #165, Mae Sot (phone interview), 3 May 2012.
- 39 Interview #139, Mae La, 24 April 2012.
- 10 Interview #170, Mae Sot, 5 May 2012.
- 11 A UNHCR representative acknowledged to me that 'Government officials can't admit openly that there is a parallel legal process in the refugee camps, even if in practice they might prefer it' and said that in conversations with several Ministry of Justice prosecutors, all had denied the existence of a parallel justice system in the refugee camps. (Notes from interview #138, Mae Sot, 23 April 2012.)
- 42 Interview #134, Mae Hong Son, 20 April 2012.
- 43 Interview #155, Mae Hong Son, 27 April 2012.
- 44 Interview #77, Mae La Oon, 16 Feb 2010.
- 45 Interview #54, Mae La Oon, 28 May 2010.
- 46 Field notes, 11 March 2010.
- 47 Interview #99, KRC member, Mae Sot, 16 March 2010.
- 48 Interview #4, KWO member, Mae Sariang, 11 January 2009.
- 49 Interview #91, Mae Sariang, 12 March 2010.

# Governing Refugees

## *Justice, Order and Legal Pluralism*

**Kirsten McConnachie**



Refugee camps are imbued in the public imagination with assumptions of anarchy, danger and refugee passivity. *Governing Refugees: Justice, Order and Legal Pluralism* marshals empirical data and ethnographic detail to challenge such assumptions, arguing that refugee camps should be recognised as spaces where social capital can not only survive, but thrive.

This book examines themes of community governance, order maintenance and legal pluralism in the context of refugee camps on the Thailand-Burma border. The nature of a refugee situation is such that multiple actors take a role in camp management, creating a complex governance environment which has a significant impact on the lives of refugees. This situation also speaks to deeply important questions of legal and political scholarship, including the production of order beyond the state, justice as a contested site, and the influence of transnational human rights discourses on local justice practice.

The book presents valuable new research into the subject of refugee camps as well as an original critical analysis. The interdisciplinary nature of McConnachie's assessment means *Governing Refugees* will appeal across the fields of law, anthropology and criminology, as well as to those whose work directly relates to Refugee Studies.

*"At last, recognition of the unique community-based refugee camp management model developed on the Thailand border. McConnachie's insightful research challenges common perceptions of refugees as powerless victims and of refugee camps as dangerous places lacking normal social structures. It also shows that on this border, trust well-placed has built strong community structures with potentially crucial roles to play in refugee return, reintegration and reconciliation in Burma. Academically rigorous, the analysis nevertheless displays deep understanding of the practical challenges of humanitarian responses in politically complex situations. This book makes an important contribution to refugee assistance and camp management policy debates."*

**Jack Dunford MBE**, Executive Director, The Border Consortium 1984 to 2013

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