NOT JUST DEFENDING; ADVOCATING FOR LAW IN MYANMAR*

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I. INTRODUCTION

From afar, the work of a lawyer struggling against entrenched authoritarianism may look like an exercise in futility. Lawyers fighting for causes under repressive regimes oftentimes appear cast in heroic but ultimately pointless roles. Austin Sarat and Stuart Scheingold in their introductory chapter to a landmark volume on cause lawyering have described the work of cause lawyers in authoritarian settings essentially as a struggle "to afford a modicum of protection against arbitrary arrest and imprisonment, torture, and other acts of political repression."[1] Lawyers who can do no more than provide a modicum of protection in difficult times would appear to have precious little to offer clients, other than some modest shields against the worst excesses of the powerful.

Our thesis, by contrast, is that lawyering against authoritarianism constitutes more than the defense of vestigial rights. The thesis does not

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1 Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 5 (Austin Sarat & Stuart Scheingold eds., 1998).

imply that cause lawyers in authoritarian settings have more means at their disposal to protect the rights of citizens than those that Sarat and Scheingold discern. Rather, it is informed by Frank Munger's observation that in places where law is weak, its seemingly limited prospects to oppose the state may not tell us the whole story of how legal advocacy is produced.[2] Where formal legal defenses of rights prove increasingly ineffectual, the collateral purposes of cause lawyering over time may outweigh the ostensible immediate purpose of representing clients in hard cases. In fact, precisely because the prospects for winning hard cases may be more limited than in other settings, lawyers mobilizing law in times of authoritarianism—by which we are referring to conditions in which authoritarian practices are habitual and institutionalized—may be more inclined to take a long-term, systemically oriented view of their work.[3]

Through research on Myanmar, we argue that in authoritarian settings where legality has drastically declined, the starting point for cause lawyering lies in advocacy for law itself, in advocating for the regular application of law's rules. Because this characterization is liable to be misunderstood as formalistic, particularly by persons familiar with less authoritarian, more legally coherent settings than the one with which we are here concerned, it deserves some brief comments before we continue.

In a recent book on legal professionalism, Scott Cummings describes lawyers as generally having relationships to three types of justice claims.[4] The first is a guardianship role of law and of access to justice; the second is concerned with professional ethics, and the third associates itself with a transformative project for political and economic change. Cummings brackets the work of cause lawyers with the last of these claims. We agree that the work of cause lawyers is essentially, and necessarily, concentrated on transformative justice. However, we also contend that for cause lawyers in Myanmar the first of the three relationships that Cummings highlights is of peculiar importance, because their profession has for over half a century been stripped of its ability to serve as a guardian of law. Furthermore, whereas the

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[2] Frank Munger, *Globalization, Investing in Law, and the Careers of Lawyers for Social Causes—Taking on Rights in Thailand*, 53 N.Y.L. SCH. L. REV. 745, 756 (2008–09).

[3] Frank Munger, et al., *Mobilizing Law for Justice in Asia: A Comparative Approach*, 31 WIS. INT'L L.J. 353 (2013).

[4] Scott L. Cummings, *What Good Are Lawyers?*, *in* THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE 21 (Scott L. Cummings ed., 2011).

transformative agendas of lawyers in Myanmar vary, insistence on the urgency of formal legality is among them a common cause. In other words, the defining characteristic of cause lawyers in Myanmar is the emphasis that they place on their relationship to the first of Cummings's three justice claims.

To appreciate how and why advocacy for law is a common cause for lawyers in Myanmar, we need to distinguish the type of authoritarianism practiced there over the last half century from authoritarianism as practiced, for instance, in apartheid South Africa, which Stephen Ellmann has described as operating a strikingly legalistic system of injustice.[5] Studying the work of Israeli courts in the occupied territories, George Bisharat has argued similarly that the occupying regime "while repressive, is an extension of a state in which democratic principles and the notion of the rule of law are taken seriously."[6] And within Asia, the government of Singapore is notable for its strategic use of law for authoritarian purposes.[7]

Unlike in these cases, successive military or military-backed regimes in Myanmar over the last half-century have had little regard for formal legality.[8] Here we are not implying that they have not concerned themselves with institutional arrangements to pass and enforce laws, and to see them put into effect through the state apparatus. But these practices are not themselves indicators of respect for formal legality. Rather, they are legalistic formalities of the sort associated with any modern state. Legalistic formality creates a semblance of legality; however, it does not constitute legality. It is, rather, what Lon Fuller memorably described as the "tinsel of legal form."[9] Formal legality rests in fidelity to law's rules: on recognition that those responsible for the administration of rules observe them in practice, so that law's substantive aims are met.[10]

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[5] Stephen Ellmann, *Law and Legitimacy in South Africa*, 20 LAW & SOC. INQUIRY 407, 409 (1995).

[6] George E. Bisharat, *Courting Justice? Legitimation in Lawyering Under Israeli Occupation*, 20 LAW & SOC. INQUIRY 349, 402 (1995).

[7] JOTHIE RAJAH, AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE 3–8 (Cambridge University Press. 2012).

[8] *See generally* Nick Cheesman, The Politics of Law and Order in Myanmar (2012) (PhD dissertation, Australian National University, Canberra) (on file with Australian National University Library).

[9] Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 660 (1958).

[10] LON L. FULLER, THE MORALITY OF LAW 157 (Yale University Press rev. ed. 1969).

A lawyer working in a system absent of formal legality has two basic choices. He can adapt and work according to rules however they are implemented, giving up on his guardianship role, or he can persist with it, and insist upon fidelity to legal rules.[11] The boundary that separates the cause lawyer from his conventional counterpart is that whereas most lawyers opt to serve their clients through whatever means are efficacious, the cause lawyer insists on formal legality even at cost to the individual client.[12] In so doing, the cause lawyer distinguishes himself at once from his peers and also from other persons concerned with the third type of justice claim that Cummings identifies. The political party activist, religious worker, or human rights defender all can and do promote transformative visions for social change. But only the cause lawyer through his professional practice situates that vision in justice claims laid directly and expressly on the legal system. By standing up for formal legality against the tendencies of authoritarianism to diminish it, the cause lawyer promotes the substantive value of law, and the merits of legality, in order to strengthen his own political position in the long run, so as to enable justice claims of the third type.

Our emphasis upon lawyers' core values in the struggle for formal legality against authoritarianism speaks to Lucien Karpik's conceptualization of "political lawyers" as a distinctive class to their cause-pursuing counterparts.[13] According to Karpik, political lawyers are concerned with the defense of basic civil liberties, upon which cause lawyers build more diverse and complex claims. Therefore, in a highly authoritarian setting political lawyering should be the norm, as the distribution of issues are concentrated and limited.

Study of Myanmar suggests that the distinction between political and cause lawyering is not clear-cut. The lawyers described in this chapter have limited symbolic, technical and financial resources; implement persuasion strategies to convince others that formal legality matters; and until very recently have occupied marginal places professionally: all features of cause lawyering that Karpik highlights to

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[11] We use the masculine third person for consistency when writing about cause lawyers in this article because the lawyers whose work we describe happen to be men. However, we want to acknowledge that women also work as cause lawyers in Myanmar, and we interviewed a number of them also for this paper.

[12] *See* Sarat & Scheingold, *supra* note 1, at 4, 7.

[13] Lucien Karpik, *Postscript—Political Lawyers, in* FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX 490-92 (Terence C. Halliday, Lucien Karpik, & Malcolm M. Feeley, eds., 2007). Special thanks to Terry Halliday for referring us to Karpik's chapter, and for his critical comments on the use of the "cause lawyering" label in this article.

distinguish it from political lawyering.[14] Notwithstanding, their specific political goals relate to "the central and old conflict between the state and civil society."[15] In short, they occupy the spaces and adopt the practices of cause lawyers, but in mobilizing law for justice their cause is classically political. Their mobilization of law for causes leads them back to the politics of the state itself.

We have chosen to concentrate here upon a single case study rather than attempt to describe exhaustively the causes that lawyers in Myanmar pursue or the full range of practices in which they engage. We narrate an attempt by an army-owned company to occupy and use cultivated agricultural land. Examining the role that lawyers played in helping to foil the attempt, we pause at appropriate points to discuss some of lawyering's history in Myanmar, the personal histories of the lawyers involved in the case, and the social and political milieu.[16]

A detailed study of this case helps us to reveal the layers of power with which cause lawyers and their clients come into contact, without some understanding of which a typology of lawyering or causes in Myanmar would have little meaning. We are interested, with John Gillespie,[17] to situate cause advocacy in a broader context of complaint and dissent, and to recognize that the sites, strategies and objectives of those lawyers who mobilize law for causes are highly contingent.[18] Indeed, the case addresses a topical problem relevant not only to larger justice claims in Myanmar, but also to such claims in other parts of Asia. Land grabbing by powerful enterprises connected to military and state interests is a growing problem in Myanmar, as it is in other regional countries with rapidly growing economies, authoritarian legacies, and antiquated, underfunded judicial systems.[19]

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[14] *Id.* at 491-92.

[15] *Id.* at 491.

[16] For this article we conducted 37 interviews with a total of 20 lawyers and five human rights defenders in Myanmar, in October 2011, June and July 2012, March 2013, and December and January 2014, 18 of them men and seven of them women. The three lawyers directly involved in the case study we interviewed on more than one occasion each, and a number of the other lawyers also we interviewed more than once. Additionally, we met one of the farmers directly involved in the case, and others from the area where events occurred. Interviews were conducted in Burmese. We also relied upon court records, media reports and written accounts of the case, and supplementary official documentation. These documentary sources also were in Burmese.

[17] John Gillespie, *The Juridification of Cause Advocacy in Socialist Asia: Vietnam as a Case Study*, 31 WIS. INT'L L.J. 671 (2013).

[18] Munger, et. al., *supra* note 3

[19] At the end of 2013, a government investigative commission in Myanmar had received and examined over 1000 complaints of forcibly seized land, representing only a small fraction of the

The case study also speaks to many similar struggles undertaken by cause lawyers and their allies in Myanmar over the last decade or more in which people have used the *idea* of law to mobilize for change. To practitioners and researchers who have taken an interest in the country since its nascent democratization began, the upsurge in the use of legal idiom to advance causes—what Munger refers to, drawing on Pierre Bourdieu, as symbolic entrepreneurship of law's legitimating power—may seem remarkable.[20] In fact, demands for formal legality have long been a part of struggles for political and economic rights in Myanmar.[21] People today advocating for formal legality are not starting anew. They are building on what they have done and learned already.

Our story begins with the events that prompted the cause lawyers' involvement in the land struggle. We track the entry of the case into the courts and concentrate upon how the lawyers through the legal process advocated both for the rights of their clients and for formal legality. We situate the case in a larger field of political power, and end with some comments on the challenge that formal legality represents to the enjoyment of impunity in countries like Myanmar where legal rules and political practices are highly incongruent.

The story concludes prior to the establishment of a partly elected, nominally civilian government in 2011, bringing to a close more than two decades of unmediated military rule.[22] But the story of law's

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total number of such cases around the country. NYEIN ZAW LIN, *Part 4 of Report on Land Confiscation to be Submitted to Coming Session of Pyithu Hluttaw*, DAILY ELEVEN, Dec. 24, 2013, at 2 (in Burmese). A committee on rule of law headed by Daw Aung San Suu Kyi had by mid-2013 received over 3400 complaints regarding land grabbing. PYITHU HLUTTAW RULE OF LAW AND TRANQUILITY COMMITTEE REP. (July 31, 2013) (in Burmese.) On other countries in the region, *See, e.g.*, Cambodian League for the Promotion and Defense of Human Rights (LICADHO), *Land Grabbing & Poverty in Cambodia: The Myth of Development*, 20–27 (May 2009); Mary Ann Manahan, *Is Asia for Sale? Trends, Issues, and Strategies against Land Grabbing*, 26 KASARINLAN: PHIL. J. THIRD WORLD STUD. 466, 466–67 (2011); Miles Kenney-Lazar, *Plantation Rubber, Land Grabbing and Social-Property Transformation in Southern Laos*, 39 J. PEASANT STUD. 1017 (2012).

[20] Frank Munger, *Constructing Law From Development: Cause Lawyers, Generational Narratives, and the Rule of Law in Thailand*, *in* LAW AND DEVELOPMENT AND THE GLOBAL DISCOURSES OF LEGAL TRANSFERS 240–243 (John Gillespie & Pip Nicholson eds., 2012); *see also* Pierre Bourdieu, *Rethinking the State: Genesis and Structure of the Bureaucratic Field*, *in* STATE/CULTURE: STATE-FORMATION AFTER THE CULTURAL TURN 62-64 (George Steinmetz ed., 1999).

[21] *See generally,* Cheesman, *supra* note 8.

[22] For an overview of recent events, *see* MYANMAR'S TRANSITION: OPENINGS, OBSTACLES AND OPPORTUNITIES (Nick Cheesman, et al eds., 2012); DEBATING DEMOCRATIZATION IN MYANMAR (Nick Cheesman, et al., eds., 2014, forthcoming). On the legal system specifically, *see* LAW,

mobilization for causes in Myanmar has only just begun. Since 2011, people in Myanmar have deployed the idiom of law in increasingly innovative and assertive ways. Our case study suggests that the mobilization of law for causes from 2011 has been made possible by the efforts of professionals and their allies in Myanmar over preceding years to defend the notion of formal legality against the corrosive effects of protracted authoritarianism.

II. FROM THE FIELDS, A CAUSE FOR LAWYERS

In December 2009 bulldozers arrived in an area of Kanma Township, Magway Region, in central Myanmar, and cut a road through fields cultivated by seven farmers to a site of a planned factory, under a joint project of private interests and the flagship army-owned corporation, Union of Myanmar Economic Holding Limited.[23] The construction workers also occupied the land of one of the farmers and began using it to store equipment. The following May, in the process of leveling out land for a site office, a bulldozer destroyed part of a farmer's bean crop. When she went to the head of the local administration to complain, he told her that, "It's a state project and I daren't say anything [against it]."[24] Then, in September, staff of one of the biggest and most powerful businesses in Myanmar, Htoo Construction Company, part of the group of companies owned by the army-connected businessman U Teza, came to the area, moved further earth for roads, and planted flags and markers to indicate planned construction sites.

The pattern of incursions into the farmers' land continued for around a year.[25] The farmers became increasingly anxious, and some got into stand-offs with company employees. They decided to seek out assistance.[26] They heard about a former tuition teacher in a not-too-distant town, known to be good at helping people make complaints to higher authorities. Four of the farmers went to see him. He took down the details of the companies' activities and, after seeking advice from

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SOCIETY AND TRANSITION IN MYANMAR (Melissa Crouch & Tim Lindsey, eds., 2014, forthcoming).

[23] For details of the company's establishment after the 1988 coup and its subsequent operations, *see* MAUNG AUNG MYOE, BUILDING THE TATMADAW: MYANMAR ARMED FORCES SINCE 1948 176-180 (Institute of Southeast Asian Studies. 2009).

[24] Farmers' Rights Defenders Network, Expropriations of Farmlands and Partial Victories 7 (2011) (in Burmese).

[25] *Id.*, at 7-8, 13.

[26] Interview 18, 2012.

some experts on land usage and tenure, in January 2011 drafted the first letter of appeal against the companies' trespasses.[27] Sixty-one farmers signed the January 13 letter, which they sent to authorities at various levels, as well as to the office of the International Labor Organization ("ILO") in Yangon and to the Asian Human Rights Commission ("AHRC"), Hong Kong.[28]

The farmers soon observed some changes. The private company, Htoo, ceased advertising its presence at the site, removing logos and name signage.[29] Its personnel began driving unmarked vehicles. Then, during the third week of January, local administrators began summoning signatories of the letter to their office.[30] When farmers went to the office, officials transported them to the project site office, where company staff pressured them to sign agreements to give land over to the project.[31] The farmers refused to sign the agreement on the grounds that the compensation was inadequate, also believing that the compensation would not be paid and the factory would pollute the local environment.[32]

On January 27, local administrators summoned farmers from affected villages to a meeting. Two retired army majors from the holding company and the head of the township administration—the next level up in the administrative hierarchy from the village-level—attended. They explained that the project was to construct caustic soda and PVC factories in the locality.[33] They added that it was a state project, and important for regional development. Therefore, the farmers had to sign the agreements to surrender land. The farmers later testified in court that one of the former army officers told them that whether or not they wanted compensation they had no choice but to sign, and that if children—which is to say, the farmers—"do not listen to the admonitions of their parents then the stick is necessary."[34]

Instead of intimidating the farmers into surrendering their land, the officials generated more resentment. Some of the farmers met a number of times with the former teacher who had helped to draft the

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[27] Interview 18, 2012; Interview 27, 2013.

[28] Farmer's Rights Defenders Network, *supra* note 24, at 13.

[29] Interview 18, 2012.

[30] Farmer's Rights Defenders Network, *supra* note 24, at 13-14.

[31] *Id.* at 14.

[32] *Id.* at 14-15.

[33] *Id*, at 15-16.

[34] Testimony of U Tin Nyunt, Appendix, *U Than Oo* v. *Union of Myanmar*, Criminal Revision Case No. 5 (Thayet District Court 2011) (Myan.).

original complaint.[35] They talked about legal action. The teacher knew a prominent cause lawyer in the city, who had previously represented him in a politically motivated case. Six of the farmers went with him to the former capital, Yangon, and met the lawyer, U Aung Thane.

Aung Thane is among Myanmar's most experienced and outspoken cause lawyers.[36] Similar to other older professionals who obtained qualifications in the 1970s and 80s, during a time of one-party government, he originally studied law on the side, while working as a clerk in the road transport board. He took to law because of a hatred of injustice and inequity, which he saw daily in the hypocrisies of the nominally socialist regime that then controlled access to political power.[37] Despite working as a civil servant, he refused to join the ruling party, and consequently did not get promoted. The army officer in charge of his department treated him with disdain and ordered him to undertake menial tasks. In his spare time he read books on leftist ideology and felt that the party line in those days had little to do with leftist values expressed by the authors whose works he read. When he began practicing in the 1980s, he represented people in cases where party members and non-party members clearly had been treated differently, even though no legal grounds existed for their differentiation.[38]

By the 1980s the legal profession in Myanmar, then known as Burma, had fallen a long way since its heyday about half a century earlier. Lawyers were no longer either politically powerful or economically prosperous. From the 1920s lawyers in Burma had been, like their peers in India, central to the burgeoning nationalist movement. In the absence of representative government, the lawyer emerged in India as the quintessential public representative.[39] The legal profession's distinctive position, according to Jonathan Ocko and David Gilmartin, obligated lawyers to become political actors—mediators between colonizers and colonized, "standing between the universal pretensions of the law and the cultural particularism that, under the British Raj, had

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[35] Interview 18, 2012; Interview 27, 2013.

[36] In Burmese, "U" and "Daw" are honorifics for men and women respectively. Therefore, after the first designation of a person's name in this article, we omit these prefixes from subsequent references.

[37] Interview 7, 2012.

[38] *Id.*

[39] MITHI MUKHERJEE, INDIA IN THE SHADOWS OF EMPIRE: A LEGAL AND POLITICAL HISTORY 1774-1950 xviii-xix (Oxford University Press. 2010).

come to influence profoundly the meaning of 'society.'"[40] In Egypt and Algeria, India and Burma, lawyers used the law to reach otherwise inaccessible state power, and also sometimes to challenge the legitimacy of that power.[41]

In Burma, the legal profession's fortunes plummeted after General Ne Win took power definitively in March 1962. Unlike his coup-making counterparts in other parts of South and Southeast Asia, Ne Win did not seek any legal endorsement for his actions.[42] To the contrary, among the first persons Ne Win had arrested was Chief Justice Myint Thein. The judge remained in custody for six years.[43] Meanwhile, a more complaisant senior judiciary reconceptualised the role of lawyers, consistent with expressed socialist ideology, as one of cooperation rather than contestation with other participants in the courtroom process.[44] Since both the state and the legal profession were now ostensibly working in the public interest, theoretically no cause existed whereby they could come into conflict. The only question that remained was how to synthesize and coordinate shared concerns for the betterment of society.

After 1962, successive postcolonial authoritarian regimes in Burma systematically displaced the procedures that at one time were not only the substance, but also what Nasser Hussain has described as the spirit of this legal system.[45] Colonial-era procedure continued to operate, since the new regime found it easier to leave it as it was than make any

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[40] Jonathan K. Ocko & David Gilmartin, *State, Sovereignty, and the People: A Comparison of the 'Rule of Law' in China and India*, 68 J. OF ASIAN STUDIES, 69 (2009).

[41] Nathan Brown, *Law and Imperialism: Egypt in Comparative Perspective*, 29 L. & SOC'Y REV., 103, 113 (1995).

[42] In 1958, Ne Win conducted a constitutional coup, heading government temporarily with nominal legislative approval. He remained in power until 1960, when he handed power back to the re-elected former prime minister, U Nu, from whom he seized power in 1962. On the political exigencies in this period, *see* Richard Butwell & Fred von der Mehden, *The 1960 Election in Burma*, 33 PAC. AFF. 144 (1960). Richard Butwell, *The Four Failures of U Nu's Second Premiership*, 2 ASIAN SURV. 3 (1962). On the military takeover, *see* Mary Callahan, The Origins of Military Rule in Burma 468-80 (1996) (PhD dissertation, Cornell University). U NU, U NU: SATURDAY'S SON 325-327 (U Kyaw Win, ed., U Law Yone, trans., Yale University Press. 1975). *See also* Nick Cheesman, *How an Authoritarian Regime in Burma Used Special Courts to Defeat Judicial Independence*, 45 L. & SOC'Y REV. 801, 805-807 (2011).

[43] Myint Zan, *Obituary: U Myint Thein MA, LLB, LLD*, 69 AUSTRL. L. J. 225, 226 (1995), http://www.academia.edu/647844/Obituary_U_Myint_Thein_MA_LLB_LLD. STAFF REPORTER, *127 Detainees Released*, WORKING PEOPLE'S DAILY, Feb. 28, 1968, at 1.

[44] *See, e.g.*, *U Saw Lwin* v. *Kada*, 551 Burma Law Reports (Chief Court 1965); *In the Matter of U Aung Thein, Advocate*, 208 Burma Law Reports (Chief Court 1968).

[45] NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW, 65 (Martha Minow, et al. eds., University of Michigan Press. 2003).

radical changes, but it was now absent deeper justification: consisting of neither the law's spirit nor its substance. This change in character of the system, and with it the reformulation of the lawyers' role, is relevant to our reasoning as to why present-day Myanmar lawyers are, when advancing transformative justice claims, concerned with doing things by the book. The insistence on formal legality constitutes an attempt to restore to the legal system the procedural function of the lawyer, lost after 1962, and in so doing, restore something of the substance and spirit of law itself.

Although lawyering in Burma from the mid-1960s meant lawyering in accordance with state ideology, the government at no time prohibited private lawyering. Unlike in China and some other socialist states with revolutionary mass movements, it never classed lawyers as workers of the state. Lawyers did poorly under Ne Win, but they fared better than professional judges, who the government in 1972 began replacing with panels of lay judges, as part of a new judicial system that was hierarchically integrated with the one-party parliamentary system inaugurated in 1974.[46] Bar associations continued to operate, but no longer had any clout. The party after 1974 closed off the spaces that had existed in the system during earlier periods for social and political action.[47] No opportunities existed for the sort of political maneuvering that lawyers practiced in Indonesia under the New Order regime, where the Indonesian Legal Aid Institute began work by promoting the rule of law consistent with official policy, but could increasingly shift its focus towards cases with a "structural dimension" that would advance social movement politics.[48] Nor were the universities positioned to play any meaningful role in advancing socially conscious lawyering—in contrast to some universities in China during recent years.[49]

U Myat Hla, a senior lawyer who began practice in 1968, told us that after 1974 the system deteriorated badly and lawyers were dissatisfied with their work.[50] Opportunities to contest political power

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[46] Cheesman, *supra* note 42, at 818-819.

[47] On the absence of judicial independence in this period, *see* Myint Zan, *Judicial Independence in Burma: Constitutional History, Actual Practice and Future Prospects*, 4 S. CROSS U. L. REV. 17, 38-42 (2000).

[48] EDWARD ASPINALL, OPPOSING SUHARTO: COMPROMISE, RESISTANCE, AND REGIME CHANGE IN INDONESIA 100-112 (Muthiah Alagappa ed., Stanford University Press. 2005).

[49] Benjamin J. Liebman, *Lawyers, Legal Aid, and Legitimacy in China*, *in* RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA 318-319, 328-335 (William P. Alford ed., 2007).

[50] Interview 14, 2012; Interview 29, 2013.

from within the courts did not exist, because the lay 'people's judges' were all political appointees who made decisions in the party's interests, rather than according to law. Few lawyers became party members, both because they had no inclination to become members and also because the party did not want them. Those people who stayed lawyers, like U Myat Hla, did so because they needed an income, not as a way to "invest in state politics."[51] Persons wanting to make political investments at this time turned elsewhere. However, lawyers began to reinvest politically in 1988 when, over the course of six months, protests against the one-party regime swelled; forcing Ne Win to step down from office. When Myat Hla saw marchers on the streets, he knew that the time had come for lawyers to reclaim their lost role in politics.[52] He called a meeting of his town bar association, which he chaired, and urged the members to join the people. They agreed, and in August 1988 together they marched in unison and in courtroom attire, as a professional group, to call for change.

With no end to the unrest in sight, and more and more professional groups pronouncing their dissatisfaction with the ruling regime, the army reasserted control and ultimately suppressed the protests in September.[53] Myat Hla witnessed student protestors shot dead in front of him and was shocked into action.[54] Even as the street demonstrations ended, he began a new life as a politically conscious professional. More and more lawyers did the same. During the 1990 general election, many lawyers again took an active interest in politics, some running for office and others campaigning on behalf of candidates. Myat Hla joined the rising political force, the National League for Democracy ("NLD"). He won a seat with almost 75 per cent of the votes in his electorate,[55] but was never allowed to occupy it, since the military declined to recognize the results as a mandate to govern.

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[51] YVES DEZALAY & BRYANT G. GARTH, ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE, 4 (John M. Conley & Lynn Mather eds., Chicago University Press. 2010).

[52] Interview 29, 2013.

[53] To date the most comprehensive English-language account of the events in 1988 is contained in BERTIL LINTNER, OUTRAGE: BURMA'S STRUGGLE FOR DEMOCRACY (White Lotus. 1990). More succinct informative accounts can be found in MICHAEL W. CHARNEY, A HISTORY OF MODERN BURMA 148-62 (Cambridge University Press. 2009). CHRISTINA FINK, LIVING SILENCE: BURMA UNDER MILITARY RULE 50-63 (Zed Books. 2001); DONALD M. SEEKINS, STATE AND SOCIETY IN MODERN RANGOON 133-55 (Routledge. 2011).

[54] Interview 29, 2013.

[55] "MYANMA ALIN" AUNG THAN, RECORD OF THE 1990 MULTIPARTY GENERAL ELECTION 60 (Aung Sitthi Press. 1992) (in Burmese.)

Meanwhile, the new State Law and Order Restoration Council, a cabal of military officers and hangers-on, abandoned the experiment in socialist legality. It shut down the lay people's courts and re-established the professional judiciary, appointing members of the judicial bureaucracy as judges.[56] The system now operated to ensure military control over the judiciary through hierarchical appointments and removals.[57] In regular meetings at all levels, administrator-soldiers issued orders, warnings and advice to judges and prosecutors. The regime also amended the Bar Council Act so as to control the appointment and dismissal of members, and deny the legal profession an autonomous peak body.[58]

These restrictions notwithstanding, the end of the suffocating one-party system combined with the new political consciousness and enthusiasm for political struggle of 1988 contributed to the slow re-emergence of cause lawyering. As in earlier times, the courts again offered some avenues, albeit extremely small and narrow ones, for resistance to authoritarianism through ostensibly non-political institutional means. As lawyers became increasingly dissatisfied with the manifold injustices heaped upon people in Myanmar by the military government, they took up whatever institutional opportunities they had available to them to work against the dictatorship. Despite the absence of the opportunity structures, the autonomous professional bodies and international connections which enabled cause lawyers in places like Hong Kong,[59] legal professionals in this period did begin to mobilize law for particular purposes.

Aung Thane was one of those lawyers who, from early on, occupied a frontline position in the hard-fought political battles between the new regime and its opponents. Yet, while in 1988 Myat Hla and other advocates were taking to the streets to demand an end to dictatorship, Aung Thane was in jail, falsely implicated in an import-export scam.[60] Released, ironically, during a mass opening of jails aimed at hastening

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[56] SLORC Order 2/88 (Sep. 18, 1988).

[57] The Judiciary Law, No. 2/1988, section 3 provided for the military junta to appoint the Supreme Court, which under sections 5, 10 and 11 had responsibility to form and supervise subordinate courts, and to appoint personnel. The Judiciary Law 1988 § 3, 5, 10, 11 (No. 2/1988) (Myan.).

[58] Law Amending the Bar Council Act, No. 22/1989, § 3. Under the amendment, the council comprises of a Supreme Court judge, the attorney general and a deputy, two bureaucrats and six lawyers whom the Supreme Court has selected.

[59] WAIKEUNG TAM, LEGAL MOBILIZATION UNDER AUTHORITARIANISM: THE CASE OF POST-COLONIAL HONG KONG (Chris Arup, et al. eds., Cambridge University Press. 2013).

[60] Interview 7, 2012.

the rise to power of the new military junta by provoking criminality, Aung Thane also joined the NLD, and was involved with the legal aid team created by the party in 1992. By the late 1990s, the team played a major part in opposition politics, representing party members and other people accused of political offences, on one occasion audaciously lodging criminal cases against members of the ruling junta over the unlawful arrest of a number of senior party figures.[61]

Other lawyers in the 1990s and 2000s found new ways to work on less confrontational causes that also contributed to the emergence of a new corpus of socially and politically engaged lawyers. The government signed two human rights conventions, concerning the rights of women and children, and passed or amended some domestic laws with contents framed in response to the growing global movement for human rights.[62] These measures enabled lawyers to work openly on cases of violence against women and children, human trafficking and other related problems. Under the guise of this work and sometimes with tacit agreement of authorities, some of these lawyers conducted human rights programs, and encouraged young professionals to get involved in social justice issues. Some lawyers initiated legal aid networks under the auspices of local charities and religious groups. Others took to advocacy on economic and social rights.

When the International Labor Organization succeeded in setting up an office in Myanmar to receive and investigate complaints of forced labor, lawyers began submitting complaints on illegal confiscation of land, unfair dismissal of workers, and basic freedoms to assemble, associate and speak on livelihood rights—just as the farmers in Kanma did, with the advice of the tuition teacher.[63] Even if the ILO was unable to act on many complaints, complainants could publicize their submissions as a way to underscore their lack of confidence in the police,

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[61] Interview 7, 2012.

[62] In 1991 Myanmar acceded to the Convention on the Rights of the Child and in 1997 to the Convention on the Elimination of All Forms of Discrimination against Women. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, Status of Ratification of the Principal International Human Rights Treaties, as of 14 July 2006, at http://www2.ohchr.org/english/bodies/docs/status.pdf. In 1993, the government passed the Child Law, and in 2005, the Anti-Trafficking in Persons Law. Child Law 1993 (No. 9/1993) (Myan.); Anti-Trafficking in Persons Law 2005 (No. 5/2005) (Myan.).

[63] For specific examples as well as a detailed account of the ILO's global mandate and its work in Myanmar, *see* RICHARD HORSEY, ENDING FORCED LABOUR IN MYANMAR: ENGAGING A PARIAH REGIME 116, 123–25 (Routledge. 2011).

local administrators, and courts.[64] By writing to the ILO, complainants gave a vote of confidence to an impartial procedure; one in which rules mattered and decisions would not be arbitrary, in contrast to those offered by the state itself.

But the efforts of lawyers to carry forward their causes came with risks, not least among them, the risk of being disbarred from practice, and the risk of jail. Some lawyers lost their licenses for cooperating with the ILO. In 2005 U Aye Myint received seven years in prison for allegedly spreading false news about army confiscation of pastureland.[65] After the ILO intervened to help secure his release, he received a perfunctory notice stating he was disbarred.[66] Nevertheless, he set up a legal aid group, Guiding Star, concentrated on cases involving the illegal confiscation or compulsory acquisition of farmland, forced labor, and some cases of child soldiers.

Aung Thane was among a small team of lawyers in 2008 that handled about 150 cases concerning defendants charged as a result of antigovernment protests in 2007. The lawyers took the cases with the knowledge that they risked retribution, given the political characteristics of the cases, and the political activism of the accused.[67] Closed courts within or adjacent to the central prison heard these cases. Aung Thane and a counterpart represented a group of defendants among whom one verbally informed the court that the defendants "no longer had faith in the judiciary" and wished to withdraw power of attorney.[68] The judge became angry and told the defendant to address the court through his advocate. Aung Thane replied that he would not speak on the defendants' behalf any more, since they had said that they did not want his services any longer, and left the court.[69] At the next hearing, he and the other lawyer submitted documents withdrawing their powers for the clients'

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[64] Nick Cheesman, *Ending Forced Labour in Myanmar: Engaging a Pariah Regime*, 21 S. E. ASIA RES. 343, 345 (2013) (book review).

[65] *Sub Inspector Win Thwin Oo* v. *Aye Myint*, 2005 Criminal Case No. 960 (Daik-U Township Court 2005) (Myan.). This case was the second officials brought against Aye Myint for having contact with the ILO. In 2003 a court sentenced he and another lawyer to death for treason. HORSEY *supra* note 63, at 110-116. Also, *see* Ken Maclean, *Lawfare and Impunity in Burma Since the 2000 Ban on Forced Labour*, 36 ASIAN STUDIES REV. 189, 198 – 99 (2012).

[66] SUPREME COURT, Order No. 40/2006 (2006) (Myan.).

[67] Interview 7, 2012.

[68] *Daw Naw Than Than Aye* v. *U Aung Thane and Another*, 2008, Criminal Miscellaneous Revision Application No. 99 (Supreme Court, Yangon 2008) (Myan.). Supreme Court, Yangon, 2 respondents' rebuttal submission, 6 November 2008: 1.

[69] Interview 7, 2012.

stated reason. The judge then cited them for contempt. The two went to jail for four months each. After their release, they each received a notice informing them that their licenses to practice were revoked.[70]

Lawyers in Myanmar have in recent decades had few formal avenues for complaint if unfairly judged. By law—and here again we see the special importance for cause lawyers of correct adherence to the basic system of written rules—cases of misconduct go to the Bar Council, which can inquire by itself or refer the matter to the judiciary. Relevant laws set out rules for the holding of inquiries and for accused lawyers to defend themselves.[71] But after 1989, no cases against lawyers appeared in the law reports, and the Supreme Court suspended or dismissed advocates without making information public. Sometimes even the accused lawyers themselves did not learn of the action taken against them until after the fact. One told us that she learned of her disbarment via an order pinned to her courtroom noticeboard.[72] According to the current Chief Justice of Myanmar, as of 2011 around 229 lawyers had had their licenses revoked since 1972; however, if the number he cites is correct, most lost theirs within the last two decades.[73]

Happily, recent political changes have opened the door to many lawyers who were hitherto barred from practice to be readmitted. In October 2011, the attorney general indicated some willingness from the new government to reexamine specific cases.[74] Accordingly, Aung Thane and fifteen other lawyers who lost their licenses after being imprisoned for political reasons submitted a letter to the country's new president, former army general Thein Sein, requesting that they get their licenses back.[75] A year later, Aung Thane received notification that he could again

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[70] SUPREME COURT, Order No. 46/2009 (2009) (Myan.).

[71] Bar Council Act. India Act No. 38/1926, §§ 10–13; Legal Practitioners Act. India Act No. 18/1879, §§ 13 – 15 (Burma).

[72] Interview 2, 2011.

[73] On 26 August 2011 Chief Justice U Tun Tun Oo told the parliament that since 1972, 69 higher grade pleaders and 88 advocates had had licenses suspended, while 125 of the former grade and 104 of the latter grade had had licenses revoked. *Second Regular Session of First Pyithu Hluttaw Continues for Fifth Day*, NEW LIGHT OF MYANMAR, Aug. 27, 2011, at 6. Our conclusion that most have been from 1988 is based upon examination of available records, discussions with practicing lawyers, and because the numbers of lawyers increased after 1988 when compared to before.

[74] *Second Regular Session of First Amyotha Hluttaw Continues for 29th day*, NEW LIGHT OF MYANMAR, Oct. 4, 2011, at 1, 10, *available at* http://www.burmalibrary.org/docs12/NLM2011-10-04.pdf.

[75] Letter (Nov. 4, 2011) (in Burmese).

represent clients in court.[76] Aye Myint also got permission to return to practice.[77] And the lawyer who saw her disbarment notice pinned on an announcement board regained her credentials too. As for Myat Hla, who lost his license following a trumped-up case aimed at discrediting him for his political activities from 1988,[78] the current political changes have come too late in life for him to again practice and he has not bothered to apply.

Lawyers all around the country have begun establishing new professional bodies to advocate for their own causes. In June 2012, Aung Thane was among senior lawyers who convened the first meeting of the Lawyers' Network (Myanmar). The meeting called for reductions of the excessive increases in stamp duty tax on court documents; the reestablishment of the Bar Council as an independent body; and the return of lawyers' licenses which were revoked for political reasons.[79] Around 150 professionals attended the meeting. The Special Rapporteur on Myanmar of the High Commissioner for Human Rights took up a number of their concerns in a report to the United Nations General Assembly.[80]

In October 2012, through the network, Aung Thane helped organize the first public demonstration of lawyers in Myanmar for over two decades. The demonstrators expressed opposition to the selling of the old Supreme Court building and the Yangon divisional court complex to private firms for hotel projects.[81] Almost a thousand people participated.[82] In addition to waving placards concerning the court premises, participants also carried signs opposing the stamp duty hikes and calling for the independent Bar Council to be restored. The network

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[76] Letter No. 4052/2-70(Su-17)/2012 from the Supreme Court (Nov. 14, 2012) (Myan.).

[77] PANIDA, *Some Dismissed Lawyers Reobtain Right to Practice*, MIZZIMA (2012), at http://www.mizzimaburmese.com/news/inside-burma/9904-2012-08-17-15-06-29.html (in Burmese).

[78] Interview 1, 2011.

[79] Meeting Agenda, June 1, 2012 (in Burmese).

[80] U.N General Assembly, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Transmitted by Note of the Secretary-General, ¶¶ 75–76, U.N. DOC. A/67/383 (Sept. 25, 2012) (by Tomás Ojea Quintana), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/67/383.

[81] DENNIS AUNG AUNG, *Rangoon Lawyers Take to the Streets—Again,* THE IRRAWADDY, Oct. 17, 2012, *available at* http://www.irrawaddy.org/burma/rangoon-lawyers-take-to-the-streets-again.html.

[82] *Burmese Broadcast* (British Broadcasting Corporation Oct. 18, 2012).

has since indicated that it intends to take legal action over the conversion of the court buildings to hotels.[83]

The Lawyers Network is by no means the only newly emergent professional body to advocate for law and to speak out on social causes. For instance, the Myanmar Legal Aid Network ("MLAW"), also began operating in 2012 as an umbrella group for seven local law firms and non-governmental agencies whose work involves legal training and raising legal awareness, as well as monitoring and reporting on legal issues.[84] The group is linked to the South East Asia Legal Aid Network, and in its international connections exemplifies the new mood of engagement in Myanmar, after so many years of stifling isolation. It has held workshops with regional bar councils on the establishment of legal aid projects; lobbied the attorney general on the Bar Council; and, arranged for study trips and conferences abroad. MLAW also assists its members in drafting and submitting policy proposals for legal reforms. Like the Lawyers Network, MLAW is an heir to the years of hard-fought struggle by courageous individual lawyers and small firms that kept up their advocacy work under military dictatorship. It also represents a new and savvier model of advocacy for formal legality: one more cognizant of global trends and opportunities; more adept at communicating and lobbying through formal and informal channels.

Professional organizations like MLAW and the Lawyers Network (Myanmar) call upon an increasingly diverse range of resources to—as Yves Dezalay and Bryant Garth put it—"build positions in the field of state power."[85] However, in building positions, lawyers in Myanmar cannot yet be compared to their counterparts elsewhere in Asia whom Dezalay and Garth describe as political champions against authoritarianism.[86] Politically and economically, lawyers in Myanmar remain far more peripheral than lawyers in any of the cases studied by Dezalay and Garth. Yet, through creative use of symbolic resources they can succeed in calling up power both from inside the state and outside of it, while insisting on the primacy of formal legality. In the next section

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[83] NOE NOE AUNG, *Lawyers Group to Sue Over Hotel Project*, MYANMAR TIMES, Aug. 5-11, 2013, http://www.mmtimes.com/index.php/national-news/yangon/7717-lawyers-group-to-sue-over-hotel-project.html.

[84] The member groups are Justice For All, Youth Legal Clinic, U Kyaw Nyunt Law Firm, Lawka Alin, Paung Ku, Pyoe Pin and the Key Population Network.

[85] DEZALAY & GARTH, *supra* note 51, at 4.; *See also* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 814, 823 (1987); Bourdieu, *supra* note 20, at 56–58.

[86] DEZALAY & GARTH, *supra* note 51, at ch. 11–12.

we return to our narrative of the land struggle in Kanma to amplify and support this assertion.

III. IN A LARGER FIELD, OF POWER

In the four years without his license, Aung Thane neither despaired nor gave up. Once released from prison, he continued his practice by receiving cases and distributing them to over a dozen juniors, advising them on how to proceed, and helping them to prepare submissions for court. He assigned one of these lawyers, U Kyaw Htay, the case from Kanma Township.

Kyaw Htay is a young lawyer who began practice in 2006. He says that he came from a rural area and took up law because of a sense of natural justice and a notion that law somehow mattered to the organization of his society.[87] He started out with a mentor in his local bar council, but in 2009 he asked Aung Thane if he could join his firm. Kyaw Htay wanted experience working on political cases, and he respected Aung Thane as a well-known and experienced lawyer of high integrity. Kyaw Htay explains that coming from a farming family of seven siblings, out of which he was the only one to finish high school, he had a natural affinity for the case from Kanma. Despite this affinity, he never let emotion get the better of him in court. His standpoint is strictly for adherence to law: for things to be done "in accordance with law"—a phrase that he repeats often. His soft-spoken manner and cool demeanor seem somehow inconsistent with the types of cases that he handles. In fact, these qualities are advantageous to a lawyer confronting police, former military officers, and other powerful people in the courtrooms of Myanmar. And in the case in Kanma Township, Kyaw Htay had to speak softly and stay calm when faced with a number of specific and serious challenges created by personnel from the companies and local power elite keen to prevent the case from slipping out of their control and into a larger field of power.

On February 4, 2011, Kyaw Htay lodged complaints from four farmers in the Kanma Township Court—the lowest level of the court hierarchy in Myanmar—against the two retired army officers who had menaced farmers at the January meeting, and the site manager of the project.[88] The complaint accused the three respondents of illegal trespass,

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[87] Interview 9, 2012.

[88] Farmers' Rights Defenders Network, *supra* note 24, at 16.

destruction of property, and criminal intimidation. The township magistrate registered four cases, one for each farmer, and instructed the police to investigate. Two weeks later, having received a police report, she found that the complaints were groundless and closed the cases.[89]

Kyaw Htay was undeterred. Indeed, he expected this outcome since, he says, "in our country the administrative arm of government still controls the judicial arm, and this is the main obstacle to the rule of law."[90] He moved applications for revision before the next court in the judicial hierarchy.[91]

He had four basic grounds for revision of the cases; each one constituting an insistence that the judiciary should do its job and apply the law, although each also referred implicitly to substantive claims for justice. First, the police report recorded that the project was not situated on agricultural land and therefore the farmers had no cause for grievance. This finding ignored the obvious damage caused to the farmers' land by construction of roads, movement of earth and parking of vehicles and equipment on fields. The applicants submitted many photographs in evidence showing the extent of this damage, but the court turned a blind eye to them. Second, the township court judge incorrectly recorded that the project was a state project, when in fact it was a project under contract from a state holding company to a private company, and could not be classed as a state project. Third, the companies only offered the farmers compensation for damages informally. No legal assurances existed regarding compensation because the companies provided no evidence that they had legal authorization to use the farmers' cultivated lands to access the site office. Fourth, the project staff had at no time shown that they obtained the necessary title deeds to utilize any of the land for the purposes of a factory project. In other words, they only said that they were granted approval to construct the project on the site. They had not shown any documentary proof to the court.

It is at this point that we see the lawyers bringing to the land struggle the specific attributes and skills that set them apart from other actors working for transformative justice, making their role of special

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[89] *U Than Oo* v. *U Maung Maung Aye and Two*, 2011 Criminal Case No. 12 (Kanma Township Court 2011) (Myan.). The other three cases plaintiffs U Htay, U Aye Cho and Daw Toke Toke brought against the same respondents, respectively.

[90] Interview 9, 2011.

[91] *U Than Oo* v. *Union of Myanmar*, 2011 Criminal Revision Case No. 5, Thayet District Court (Myan.). Again, the three other appellants all brought identical appeals against the same respondents.

importance, not only within the courts but also within the larger field of power. With the application for revision, the companies could no longer contain the dispute at the local level through an admixture of incentives and threats. The case would go up the judicial ladder, and the lawyers handling the case would deploy the resources available to them through the courts, and use them to demonstrate both the legal and moral rightness of their clients' position. By putting on the official record the farmers' grievances and pursuing their complaints up through the courts, the lawyers pushed the case outside the parameters of local institutions and practices and into a bigger domain.

This move to take the case higher up and further out across a range of different institutions, some inside the state apparatus, some outside of it—to make the conflict in Kanma visible and relevant to different people with competing ideas and interests—is an example of how cause lawyers in Myanmar work pragmatically to advance a case, and with it a cause. But attempts to push cases into a larger field of power require that those persons with a justice claim also be prepared to take risks. Not everyone has this sort of commitment. In many cases, as in Kanma, it accumulates slowly, and the determination to make formal complaints and to fight in court only comes after people fail to obtain satisfaction via other techniques, and alternatives become limited.[92] Aung Thane tells people who are going up against powerful interests, like farmers struggling to hold onto land, that he and his team will stand *behind* them: meaning that such people must be prepared to stand at the front and accept the consequences and, if something bad happens, the lawyers will back them up.[93] In this conception, the law is not a shield that protects people from getting hit. Rather, it is a bulwark against which litigants can put their backs and keep upright when facing an aggressive and more powerful opponent. People will get hurt, but sturdy support might just see them through. The analogy seems particularly apt for the case in Kanma, in light of what happened next.

By pushing the Kanma case further into the field of state power, Kyaw Htay and Aung Thane forced the hand of the farmers' adversaries, who now resorted to violence. On the night of March 21, 2011, company personnel assaulted two of the farmers who brought the case against the

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[92] On farmers' practice of inching from informal to formal complaint, see ARDETH MAUNG THAWNGHMUNG, BEHIND THE TEAK CURTAIN: AUTHORITARIANISM, AGRICULTURAL POLICIES AND POLITICAL LEGITIMACY IN RURAL BURMA/MYANMAR 193-195 (Kegan Paul. 2004).

[93] Interview 8, 2012.

companies to court, and three others travelling with them by motorcycle.[94] They beat up their two targets and locked them in a room at the site office. When word reached the relatives of the detained men, a group converged on the site office and demanded that they be released.[95] The site manager turned on floodlights and through a loudspeaker allegedly threatened to drive vehicles into the villagers and kill them.[96]

At this point, the township police chief arrived and, not long after him, the district chief.[97] The presence of the latter man indicated that the matter had moved some way up the hierarchy and had become a matter of concern in a larger field of power, beyond the politics of the township, the level at which a case of this sort would ordinarily be addressed. Family members of the detained men demanded that the police meet with them, but the officers refused them entry. The villagers could see the men through a doorway with blood pouring from wounds. When Daw Myint Sein, the wife of one of the men, persisted in asking the township chief that she be allowed to meet her husband, he told her to stop bugging him and threatened that he had firing orders.[98] After some time the police left with the two men, whom they took to lock up. In the morning, the police took them to the township hospital where they told medical staff to record that the men had suffered their injuries after falling from a motorcycle. The police then took them to court, where they met their three friends—whom police had arrested during the day—and from court they were transferred to the district jail.[99]

The attack obtained coverage on the major broadcasters from abroad.[100] Not only did the radio stations describe the assault in detail, but they also summarized the land dispute and the reasons for the farmers' grievances leading to the incident. Aung Thane told one station that he thought the attack was motivated by the appeal for revision of the

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[94] Farmers' Rights Defenders Network, *supra* note 24, at 16-17, 20.

[95] Farmers' Rights Defenders Network, *supra* note 24, at 21–22.

[96] *Id.* at 22.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Had this incident occurred in 2013, domestic print media would also have covered it. But in 2011 the print media were still wary of taking up cases of this nature, involving powerful military and business interests, and consequently most of the news reports came through the radio stations and Internet sites based abroad. For an insider's view of the growth of private news media in Myanmar, *see* Pe Myint, *The Emergence of Myanmar Weekly News Journals and Their Development in Recent Years*, *in* MYANMAR'S TRANSITION: OPENINGS, OBSTACLES AND OPPORTUNITIES 204 (Nick Cheesman, et al. eds., 2012).

cases against the former army officers and company manager.[101] He added that the lawyers would make further complaints to higher levels about the collusion of local officials with the company personnel to frame the accused farmers. Thus, rather than frightening their opponents into impotence, the attackers succeeded in putting the events in Kanma on the current affairs agenda. They also pushed them up the list of priorities for the lawyers working on the dispute, since the lawyers were now also publicly and fully committed to defending the complainant farmers.

Four days after the attack, villagers from the area who were involved in the land conflict packed the courtroom to hear the charges against the farmers. The company officials and ex-army men claimed that the accused drove onto land used for the factory project and threw rocks, which broke two windows. The prosecutor—who in Myanmar is referred to as a "law officer"—submitted charges of trespass and endangering public safety against the five men, as well as obscenity, mischief, and use and ownership of unregistered motorbikes.[102] Officials also charged a sixth villager over the motorbikes. Meantime, Myint Sein with Kyaw Htay's assistance herself lodged a criminal case against two of the assailants, for causing harm and obscenity.

Special police and security officials came to the courthouse to take photographs and details of the people entering and leaving the courtroom.[103] Their activities did not deter farmers from attending the trial and, over the week of hearings in which the prosecution presented its case, the court was full of people coming to see and hear the testimonies of company officials, former soldiers, police and local counselors. With the case continuing to receive widespread attention and Kyaw Htay vigorously cross-examining the farmers' accusers, the law officer lodged an application in the district court to have the trial moved to another township, ostensibly for security reasons.[104] The defense lawyers opposed the order to transfer the hearings because it would inconvenience the families of the accused men, but the court dismissed

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[101] *Burmese Broadcast* (Radio Free Asia Mar. 22, 2011).

[102] The Central Government Act, No. 45 of 1860, PEN. CODE (1860), §§294,336,427,452, *in Major Win Myint (retd.)* v. *Than Oo and Four* 2011 Criminal Case No. 89; Minhla Township Court; Control of Imports and Exports (Temporary) Act, No. 56/1947, section 5(1), in *Inspector Ohn Shwe* v. *Than Oo and Another; Inspector Ohn Shwe* v. *Htun Min Lwin and Another; Inspector Ohn Shwe* v. *Kyaw Nyunt and Another,* 2011 Criminal Case Nos. 90-92. Minhla Township Court (all Myan.).

[103] Interview 9, 2012.

[104] Farmers Rights Defenders Network, *supra* note 24, at 30.

their application and on the morning of the next scheduled trial date, instead of taking their positions in the local courtroom to begin making their defense testimonies, the police took the accused men to a lockup in a different district.[105]

Following the latest turn of events, Aung Thane prepared a further letter of appeal, this time to the country's president, setting out the facts of the case, the causes for the farmers' grievances, and the details of the attack on the group of five farmers and their subsequent prosecution.[106] The letter ended with the blatant violations of the principle of open court. Aung Thane noted that those attending as observers had their identities recorded and photographs taken by special police and security officers. He also noted that the same officers were seen taking the case file from the court at the end of proceedings each day and make copies, despite the fact that they had no authority to obtain the file. Regarding the transfer of the trial to another township Aung Thane concluded that,

> Eleven prosecution witnesses deposed before the Kanma Township Court. The local residents and villagers who came to listen caused no problems for proceedings. Now all of the prosecution witnesses have been examined, the intentional creating of difficulties to prevent people from exercising their rights to see and hear the defendants take the stand undermines the authority of the court to adjudicate independently. Accordingly, we are making this complaint of these true events in order that high authorities conduct a special investigation and take action against the responsible persons.[107]

One hundred and thirty-three people signed the letter.[108] They received no reply, and on April 27 the defense testimonies began at the court in Minhla. Over a hundred villagers travelled by boat and train to attend the trial, along the way talking with other farmers about the case and handing out materials that the former tuition teacher and fellow human rights defenders prepared and brought along for the journey. At Minhla, as at Kanma, special police and other personnel photographed and recorded the identities of people coming to listen. At least one plain-clothed officer entered the courtroom to take photographs, but when confronted by some of those in attendance, he slipped out a side door

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[105] *Id.* at 31.

[106] Letter from Aung Thane, to President of Myanmar (Apr. 5, 2011) (on file with authors) (in Burmese)

[107] *Id.*, at 3.

[108] Farmers' Rights Defenders Network, *supra* note 24, at 31.

with the assistance of police officers on duty.[109] Local officials also took at least one defense witness to their office, where they allegedly threatened him to retract his testimony.[110]

Asked for his legal analysis of the move to the new court and events there, Aung Thane told one radio station that, "what we can say in terms of law is that this case has been set up so that one side will win. The courts and police are avoiding their responsibilities because of the power of Holding Limited and Htoo." The interview continued,

> President Thein Sein spoke of the rule of law in his [inaugural] address, and yet within the same month this sort of thing has gone on, so is it that the president's message hasn't filtered down or what?
>
> A lot of the villagers have that attitude about this case. I think around 130, 140 signed a letter to President Thein Sein; however, we can see that the same old people are carrying on with this trial in the same old manner as before [the speech]. We'll have to take these as lessons for how to get about transforming the judiciary. We'll keep them as an example to illustrate one day the types of steps that we've had to go through.[111]

As Aung Thane predicted, on May 19, the judge at the Minhla court convicted the five farmers, despite the fact that none of the prosecution witnesses testified to seeing the accused throw rocks at the factory site office. After abruptly giving the defense attorney only fifteen minutes in which to prepare his closing statement, the judge sentenced the men to terms from eight years and six months to twelve years and six months in jail each, by ordering that maximum or close to maximum sentences for each offence be served consecutively.[112] He acquitted the sixth man charged over the motorbike offence, who had not been involved in the incident. Simultaneously, he acquitted the two assailants of the five charges Myint Sein brought against them.[113] About 150 relatives and supporters were present to hear the verdicts.

Speaking on radio after the ruling, Kyaw Htay characteristically spoke in a measured, professional way. He concentrated on the

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[109] Interview 9, 2012.

[110] Farmers' Rights Defenders Network, *supra* note 24, at 32.

[111] *Burmese Broadcast* (Democratic Voice of Burma May 20, 2011).

[112] The court convicted the accused under the Penal Code in *Major Win Myint (retd.)* v. *Than Oo and Four* 2011 Criminal Case No. 89. Minhla Township Court, 19 May 2011 (Myan.). Three other cases dealt with the alleged offences concerning the motorcycles.

[113] *Daw Myint Sein* v. *Zarni Aung* alias *Zarni and Another*, 2011 Criminal Case No. 93. Minhla Township Court, 19 May 2011 (Myan.).

misapplication of law, saying that the true facts were not as the court had represented them, and that the prosecution case was full of errors.[114] He lodged appeals the following month at the district court in Minbu. In his appeal submissions, Kyaw Htay went through the evidence presented by both sides in the prior court hearings, and reasserted the facts as originally argued by the defense. He pointed out that under section 71 of the Penal Code, even had the accused been found guilty of the offences, the adding up of penalties to arrive at the lengthy jail terms ran contrary to law.[115]

A lawyer residing in Minbu named U Tin Aung Htun took the appeal cases into court in June 2011. Tin Aung Htun is unusual, in that he is based in a small district town, but has been active as a defender of causes, taking justice claims of the sort more commonly handled by his city counterparts. People like the tuition teacher who originally brought the Kanma case to Aung Thane have in the past tended to pass over locally based lawyers because of perceptions that they are too embedded in local power relations, and may not have the gumption for a fight of this sort.[116] By contrast, Tin Aung Htun has, for about fifteen years, taken up cases that have challenged the local power complex—government administrators, businesspersons, police officers, prosecutors and judges—which he refers to as "one set."[117]

As a result of his work as a local cause lawyer taking on the "one set," Tin Aung Htun has long suffered harassment and petty inconveniences: including, in past years, police hanging around the teashop on the corner of his street to follow him when he went to meet clients, and being forced by judges to wait all day at court just to lodge a piece of paperwork or set a date for a hearing. He also repeatedly applied

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[114] *Burmese Broadcast*, *supra* note 111.

[115] The first paragraph of section 71 reads: "Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of his offences, unless it be so expressly provided." In fact, the adding up of penalties in this manner has been a feature of rulings in politically motivated cases heard in the lower courts during recent years, but defense attorneys appealing against them have sometimes succeeded in getting a reduced sentence on appeal. The Central Government Act, No. 71 of 1860, PEN. CODE (India).

[116] Interview 18 & 21, 2012. By the end of 2013, the situation was changing and in regional towns some lawyers were showing, or at least expressing, willingness to challenge local officials on certain matters. Interview 30, 2013. Interviews 36 & 37, 2014.

[117] "One set" is a colloquial term in Myanmar for a woman's outfit in which both the blouse and sarong are made from the same fabric. Tin Aung Htun uses it as a metaphor to mean that the police, prosecutors, judges and local administrators in his town are all cut from one cloth. Interview with Tin Aung Htun (Interview 21, 2012).

to have a license issued to practice in the Supreme Court—which after five years of practice in lower courts should be a formality—but he has not received a license or an explanation for why not.[118] Still, Tin Aung Htun says that some people in the local complex understand why he takes cases out of concern for justice rather than financial gain and, even if they are themselves unwilling to get involved, they respect him. On one occasion, he received a phone call warning him against proceeding on a case in a particular way because some officials laid a trap to prosecute and imprison him. He took the advice, stayed out of jail and kept practicing; however, his luck ran out in the Kanma case.

When the applications for appeal against the convictions of the Kanma farmers came up at Minbu in June, it was just another day in court for Tin Aung Htun.[119] Both he and Aung Thane responded to media inquiries about what happened and what was the likely outcome. He had no special expectations, since these types of cases, once in the larger field of power, invariably pass through intermediate courts with brusque dismissals by judges on their way to higher authorities. However, when he arrived at the courthouse he saw officers from various police and intelligence agencies present and agitated. They asked Tin Aung Htun questions about why he came to court, instead of the lawyer who was originally given power of attorney. Then the judge called him into his chamber and, while talking to an unidentified person on the telephone, confirmed that the parties had lodged all the necessary paperwork and that everything was in order.

We do not pretend to know the ins-and-outs of the decision-making process in this case, but clearly an arrangement was made relatively high up in the state hierarchy to enable the farmers' release. Senior officials once alerted to the dispute may have felt that to antagonize the farmers further through continued pursuit of the case and imprisonment of the men was unproductive, and could provoke further needless conflict. Consequently, the law officer responding to the appeal in Minbu, while insisting on the correctness of the prosecution's original case, concurred with the appellants' submissions that the sentences seemed to be excessive and that they ought to be reduced. One of the retired army officers who appeared as a co-respondent in the district court reiterated that the project was for regional development and for the benefit of the local populace. However, he added, as the villagers at the

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[118] *Id.*

[119] Interview 23, 2012.

planned location opposed the factory, the project was being moved to an adjacent area. He continued that his company just wanted the case resolved amicably and "held no grudges" against the farmers.[120] Accordingly, the district judge on June 30 upheld the lower court's convictions but reduced the sentences to a few months per offence, which when ordered in accordance with section 71—and with the sentences for the motorcycle registration offences served consecutively—allowed the men to go home after the judge issued the revised verdicts.[121]

Farmers and lawyers celebrated a small victory. The farmers returned home and subsequently the companies packed up their stuff and moved to a new area a few miles away. At the new locality, they reportedly began trying more persuasive, less coercive methods, offering more compensation and working through local intermediaries—such as the village Buddhist abbot—to get farmers' compliance. However, the companies ultimately failed to make headway against strong local resistance at the new site, and finally gave up on the project.[122]

For Tin Aung Htun, the small victory was bittersweet. After years of skirting his way around and through the obstacles posed to lawyers in Myanmar, shortly after handling the case he received a letter, like that received by Aung Thane a few years before, revoking his license. He supposes that the revocation order was prompted by his comments on radio after the appeal, in which he declined to acknowledge the state's goodwill for stepping in to have the farmers released, and said that the rulings did not constitute a victory for the appellants, since the convictions were not overturned.[123] However, as he was not invited to defend himself against accusations of wrongdoing, like other lawyers in similar circumstances, he can only guess at the reasons for the loss of his license. Nor does the notification give any specific reason. It reads only that an investigation found Tin Aung Htun to be "notorious for writing

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[120] *U Than Oo and Four* v. *The State [Major Win Myint (retd.)]*, 2011 Criminal Appeal No. 19, Minbu District Court, 20 June 2011, 3 (Myan.).

[121] *U Than Oo and Four*. The court also revised the convictions over use of illegal motorcycles in three subsequent cases. This method of sentence reduction to cover time already served and allow for release on the day that an order is issued—either an original order against someone held in remand or an order on appeal—is commonly used in Myanmar's courts and is known as the "sentence-release" method.Nick Cheesman, *Myanmar's Courts and the Sounds Money Makes*, *in* MYANMAR'S TRANSITION: OPENINGS, OBSTACLES & OPPORTUNITIES 240-241 (Nick Cheesman, et al. eds., 2012).

[122] Interview 33, 2013. Interviews 36 & 37, 2014.

[123] Interview 23, *supra* note 119.

complaint letters" and "not someone of good repute in pursuing cases."[124] Tin Aung Htun has since submitted letters for the license to be returned, and furthermore, that he be licensed to practice in the Supreme Court. As of early 2014 his letters had not been acknowledged, and unlike Aung Thane, he is yet to regain his license to practice.

But the story does not end here. The Kanma affair, once in the larger field of power, developed its own momentum. The Hong Kong-based AHRC publicized the case in April 2011, and subsequently it reached the General Assembly of the United Nations.[125] That September, the Special Rapporteur referred to the case in a periodic report, when underscoring his concern about new forms of rights abuse in the country, including land confiscation by the government, military personnel, and private businesses.[126]

Lawyers and farmers from Kanma also linked up to a larger domestic campaign on rights for cultivators in Myanmar. In November 2011, a lawyer and one of the local activists prepared a petition to the president opposing the draft of a new farmland law.[127] By mid-December, more than 3,300 farmers in the Magway region, including Kanma, had reportedly signed the petition opposing the draft.[128] Despite their efforts, the president signed the draft into law the following April.[129] Rural protest against new political and economic alliances aimed at grabbing and using land for "state projects" has since become increasingly vociferous.

In Letpadaung, Sagaing Region, thousands marched and camped out during 2012 against the forcible acquisition of land by Economic Holding Ltd and a Chinese partner for a copper mining operation.[130] The language of formal legality resonated throughout the Letpadaung

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[124] SUPREME COURT, Order No. 39/2011 (2011) (Myan.).

[125] ASIAN HUMAN RIGHTS COMMISSION, *BURMA: Farmers Ambushed, Attacked and Prosecuted for Case against Army-owned Company*, Asian Human Rights Commission (2011), http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-073-2011.

[126] U.N General Assembly, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Transmitted by Note of the Secretary-General, ¶ 69, U.N. DOC. A/66/365 (Sept. 16, 2011) (by Tomás Ojea Quintana), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/66/365.

[127] Petition Opposing the 2011 Farmland Law (Draft), 26 November 2011 (in Burmese.)

[128] *Burmese Broadcast* (Voice of America Dec. 13, 2011).

[129] *Farmland Law Promulgated*, MYANMAR ALIN, Apr. 3, 2012 (in Burmese).

[130] ASIAN HUMAN RIGHTS COMMISSION, *BURMA: Farmers Rise Up at Land-grab by Army-owned Company*, Asian Human Rights Commission (2012), at http://www.humanrights.asia/news/ahrc-news/AHRC-STM-184-2012.

protests.[131] Farmers marched with placards mimicking government-issued signboards; declaring no trespassing on threat of prosecution. Villagers protesting the arrest of a group of their peers and a lawyer helping them converged on the local police station carrying a banner reading, "Respect the law."[132] After paramilitary police launched a brutal nighttime attack on encamped protestors, firing incendiary weapons into their shelters, the Lawyers Network teamed up with a group of former political prisoners to issue a report calling for the conflict to be solved through adherence to the rule of law.[133]

In February 2013, hundreds of farmers and police officers fought at Ma-Ubin, in the delta region, resulting in the death of a police constable.[134] A lawyer from Aye Myint's Guiding Star firm went to represent the farmers facing multiple charges for murder, causing harm, and unlawful assembly.[135] Responding to the violence in Ma-Ubin, the Lawyers Network issued a statement calling for an investigation into the police handling of the events so that the rule of law might be respected.[136] One of the farmers involved put it more plainly: "when those people duty-bound to uphold the law don't take any responsibility for it, how can you dare blame us who are facing starvation and have no choice but to act to save our lives if we no longer respect so-called law?"[137]

The farmer's statement sounds dismissive of formal legality, but in fact it speaks exactly to the advocacy for law at the heart of lawyering against authoritarianism in Myanmar. Were law correctly and justly applied, farmers would not be forced to take matters into their own hands. Precisely because the type of authoritarianism practiced in Myanmar over the last half century has had little regard for formal legality, those persons charged with upholding law likewise have little incentive or inclination to be faithful to it. If officials expect farmers to

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[131] Nick Cheesman, *What Does the Rule of Law Have to Do with Democratisation (in Myanmar)?*, 22 S. E. ASIA RES. (forthcoming 2014).

[132] *Nine Villagers from Wetmway and Shwehlay Released*, RADIO FREE ASIA (2012), *available at* http://www.rfa.org/burmese/news/copper-mine-women-release-09112012100034.html.

[133] Lawyers Network (Upper Myanmar) & 88 Generation Students Group, Report of Investigation into Police Battalion Suppression of Peaceful Demonstrators against the Letpadaung Hill Copper Project (2013) (in Burmese).

[134] AUNG SOE & KYAW OO NAING, *Police Officer Dead in Clashes Between Police and Peasants in Maletto Tract, Ma-Ubin Township*, VOICE, 4-10 Mar. 2013, at 23 (in Burmese).

[135] *Burmese Broadcast* (Voice of America Mar. 6, 2013).

[136] Lawyers Network, Police Shoot and Use Force to Disperse through Intimidation Crowds of Farmers Seeking Return of Lawlessly Confiscated Farmland, 27 February 2013 (in Burmese).

[137] Personal communication, 28 February 2013.

act according to law, then they must demonstrate that they are beholden to it likewise. Thus, after decades in which the government daily blared out demands for everyone to "respect the law," the public domain has turned into an echo chamber, rebounding those same demands back onto their producers, who no longer have a monopoly on how the legal idiom is used, by whom, and to what ends.

IV. CONCLUSION

Where protracted authoritarianism has heavily degraded formal legality, lawyers advocating for law—insisting that legal norms ought to matter, despite empirical facts suggesting otherwise—do more than merely defend vestigial rights. Recognizing that their ability to advance causes through specialist knowledge and skills depends on the salience of formal legality, the extent to which legal rules matter and can be made politically relevant, these lawyers advocate for what Cummings describes as "the *public good* understood in terms of the basic system of rules" on paper and in practice.[138] Their common cause is to keep alive an institutional and public consciousness of fidelity to law, without which projects for transformative justice through the courts can amount to very little.

This consciousness matters a great deal for the transformative agendas that cause lawyers variously pursue, be they concerned with the justice claims of farmers or workers, with the political struggles of opposition parties, or with the rights of all persons to associate and speak freely. The success or failure of these projects, and the distinctive parts that lawyers play in them, is contingent upon the extent to which law can be made to matter in the future in ways that it does not in the present.

Consequently, advocacy for law itself, the shared commitment to the normative value of law, has pragmatic and potentially far-reaching outcomes. By insisting upon legal formality as a condition of transformative justice, cause lawyers in Myanmar advocate for the inherent value of rules in the courtroom, but also incrementally build a constituency in the wider society. In advocating for faithful application of declared rules, in insisting on formal legality in the public domain, lawyers encourage people to mobilize around law as an idea, essential for making law meaningful in practice. They promote a notion of the legal system as once more an arena in which citizens can set up interests that

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[138] Cummings, *supra* note 4.

are not congruent with those of the state; an arena in which cause lawyering is made viable and in which the cause lawyer has a distinctive role to play.

The publicity that cause lawyers bring to the public domain goes well beyond the defense of a client or promotion of a particular cause. It raises larger questions, and with them challenges, about how the government is formed and state power is arrayed and why. It insists upon the right of constituents to scrutinize and criticize holders of power. This insistence is no triviality. It challenges the conventions of the field of state power in Myanmar, within which law has at best served the instrumental purposes of those who rule rather than those subject to its rules. In other words, behind all the talk about how to do things "according to law" looms a much bigger problem: impunity. Once all the talk about how to make law work for—rather than against—people in Myanmar is said and done, what remains is the ease with which people with authority, money, and connections operate outside the law. It is the persistence of impunity to which the farmer in Ma-Ubin alerts us when she asks why she should respect so-called law that leaves her with no choice but to act against it, not because of its contents, but because of the manner in which those charged with upholding it choose to ignore those contents whenever they find them inconvenient.

Obviously, the restoration of formal legality alone will not end impunity, which can be obtained either through law or through its willful neglect. However, formal legality is a prerequisite in any struggle against impunity, just as it is a prerequisite for the rule of law. It is for this reason that insistence on formal legality is not in this setting a conservative doctrine—as it might appear to professionals in countries where a reasonable degree of congruence in the basic system of rules can be taken for granted and on which transformative justice projects can be built with sufficient degree of certainty—but a radical one. Situated in a long-term trajectory to address impunity, formal legality is a doctrine that goes to the radix of political power by placing back upon the powerful the onus to comply with the rules as given, and to prove their compliance by submitting themselves to the institutions of law. Ultimately, it is for this reason that cause lawyers in Myanmar do not just defend, but also, and above all, advocate for law itself.