

Strategic Litigation Handbook for Myanmar

First Edition, September 2019

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® Strategic Litigation Handbook for Myanmar

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Introduction and Methodology

This handbook seeks to offer an accessible, concise and substantial overview of the conceptual basis and purpose of strategic litigation. It addresses the unique prospects and challenges posed to those contemplating adopting strategic litigation in Myanmar. The Handbook is intended to be potentially useful to all legal practitioners and community activists in Myanmar. It is based in large part on interviews, trainings and seminars that took place with lawyers and civil society activists from 2014-2019, facilitated by ICJ legal advisers and consultants. The Handbook shows the potential impact of strategic litigation in Myanmar, by drawing on experiences from Myanmar and other countries, while recognizing the related challenges and opportunities, as expressed by legal professionals and civil society actors.

Part one of the Handbook explores core aspects of strategic litigation, including its origins, key concepts, potential impacts, challenges and forums. In part two, areas of law are identified which offer potential options for strategic litigation actions, including procedures, legislation and constitutional writs. Practical steps for the planning and application of strategic litigation, such as media strategy and case selection, are outlined in part three. Finally, part four of the Handbook discusses related challenges in the Myanmar context, including a discussion of requisite reforms required in the justice sector more broadly.

PART 1: What is Strategic Litigation?

This part examines the emergence of strategic litigation as a tool for advancing social justice, including human rights, using comparative examples. It demonstrates how strategic litigation supports social change and access to justice in practice, by: 1) Defining and analysing the emergence of strategic litigation; 2) Providing key comparative examples; 3) Examining the impact and advantages of strategic litigation; and 4) Exploring the potential venues for strategic litigation

Definitions & Key Concepts

There is no universal definition or conception of 'strategic litigation'. In a sense, all litigation is "strategic", engaging the instrument of the law and justice procedures and mechanisms to advance as a strategy for advancing the interests of the litigants. However, in recent times the term as typically been used to connote something more specific, involving interests that may go beyond those of the primary litigants. The various adjudication processes it entails are sometimes referred to as 'public interest litigation', 'impact litigation', 'test case litigation', or 'community lawyering'. What they all have in common is the idea that courts and the law can be used as part of a campaign to achieve broader change in relation to matters seen to be in the broader public interest..

"Public interest litigation is a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected." *Black's Law Dictionary (7th edition) 1229, 1990*

Importantly, such litigation is not only used to defend the interest of a specific victim, (the client) or group of victims, but as part of an advocacy strategy to push for broader change and justice for society as a whole. This advocacy strategy may include civil society and media engagement and is often supported by Non-Governmental Organizations (NGOs).

"Litigation means taking cases to court. Strategic litigation is a method that can bring about significant changes in the law, practice or public awareness via taking carefully-selected cases to court. The clients involved in strategic litigation have been victims of [wrongs] that are suffered by many other people. In this way, strategic litigation focuses on an individual case in order to bring about social change".¹

But strategic litigation is not always a win or lose proposition. Although in the human rights context strategic litigation may pursue redress and remedy for the victims (the clients), it strategically targets broader social, legal and rights or policy issues; the litigation itself is used also as an advocacy tool. Even if the litigation fails, other goals can be achieved.

Strategic litigation is often based on 'test cases' used to achieve a positive broader impact on law and policy reform or development. 'Test cases' are selected strategically, chosen carefully, where the circumstances seem appropriate to prompt wider desired impact [reflecting larger societal issues.] It does not mean that the interests of the concerned victims are neglected, but rather that they are encapsulated into a larger campaign for legal or policy change. Thus, the careful determination of objectives and selection of cases is what makes the litigation "strategic". Cases may be strategically chosen to address power imbalances, raise rights awareness and to empower people. Lawyers and civil society use these 'test cases' to support social change and thus become themselves instigators of social justice. As noted by Colin Gonsalves, a lawyer in India:

"What is the role of a lawyer? The role of the lawyer is to be a great instigator of peoples' movements. In a situation where the blood is just below the boiling point... the role of the lawyer... is to bring that blood to a boil."²

¹ Mental Disability Advocacy Centre: http://mdac.info/en/what-wedo/strategic_litigation

² "Strategic Litigation Impacts: Global Narratives about Social Change," October 26, 2015, Open Society Foundations, New York, <https://www.opensocietyfoundations.org/events/strategic-litigation-impacts-global-narratives-about-social-change>.

The litigation can be emblematic or symbolic, whereby a case represents a problem at community, regional or national level. A positive outcome in an emblematic case would set a precedent or clearly define the law applicable to the larger community. Strategic litigation can also be a series of cases addressing the same problem in an attempt to draw attention to and change the misapplication of the law or procedure in the judicial system that impacts negatively on society as a whole.

Origins and Development of Strategic Litigation

Although forms of strategic litigation have existed as long as there have been legal systems. Strategic litigation began to be used most systematically when challenging discrimination and segregation during the civil rights movement in the United States especially during the 1950s and 1960s. It resulted in key legal decisions that had a very wide impact that demonstrated the power of strategic litigation. It has since been used widely, notably including in South Africa and India, during the 1990s-2000s.

Key historical examples

Important early strategic litigation cases included campaigns to fight racial discrimination in the United States. As part of the strategy, lawyers and civil society targeted discriminatory law and policy against black Americans through litigation at the US Supreme Court on segregation in education. The case of *Brown v. Board of Education* was carefully prepared by the lawyers so that the eventual Supreme Court ruling guaranteed equal protection and invalidated official racial discrimination practiced in many education throughout the country. Many other cases during the era were in successful, in seeking greater protection for persons from other disadvantaged groups. The impact was felt beyond access to education; it shed light upon and also moved toward addressing the broader issue of equal rights under the law for black Americans.

Another emblematic campaign of strategic litigation comes from South Africa. In the post-apartheid case of *Grootboom and Others* case in 2000, the Constitutional Court reviewed government policy, and recognized constitutional right to housing for all, as well as laying the foundation for subsequent successful economic, social and cultural rights claims in courts in South Africa and elsewhere.³ It also demonstrated that the judiciary can positively interpret policy in light of the constitution to address endemic issues in a society, and push governments to be more accountable.

In the *People's Union for Civil Liberties v. Union of India*, in 2001 the Indian Supreme Court's ruling resulted in new polices after the Court affirmed that the government had an obligation to fulfil the right to food.⁴ This ground-breaking case gave a positive interpretation to the right to life, forcing the government to proactively act against starvation and famine. It further supported a national right-to-food campaign with millions of people directly benefiting from the outcome.

These cases changed the lives of millions and their legal access to housing, food and health. Strategic litigation cases have been taken in many countries, including those in transition from conflict or under repressive regimes, such as Argentina, Colombia, Cambodia, Chile, Israel/Palestine and Tunisia, where lawyers and courts have supported the establishment of the rule of law. Strategic litigation can support the rule of law by developing the independence of the judiciary, including by providing forums for both lawyers and judges to test and to assert their independence.

³ Constitutional Court, South Africa, *Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (CC) (establishing the Reasonableness Standard).

⁴ *People's Union for Civil Liberties v. Union of India & Ors*, In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001. For analysis see: <https://www.escri-net.org/caselaw/2006/peoples-union-civil-liberties-v-union-india-ors-supreme-court-india-civil-original>.

Commonly used to protect human rights, strategic litigation can be used to tackle any issue important to society. It is also often used for environmental protection, access to land and natural resources for marginalized communities, or addressing corruption. Strategic litigation can also be used as part of a campaign targeted at businesses or investors when their actions are linked to serious human rights violations.

Examples of human rights cases:

In Malaysia, strategic litigation has been used to defend members of an indigenous community who were charged for trespassing for undertaking agricultural work on their own customary lands. From a case of trespass, litigating was used to transform it into a positive case to recognize indigenous peoples' customary land rights.⁵

In Colombia strategic litigation was used against the President of Colombia, the Ministry of Environment, the Ministry of Agriculture and several municipalities claiming that deforestation in the country's Amazon region and the resulting greenhouse gas emissions which threaten their rights to a healthy environment, life, health, food, and water.⁶

Cases can also target foreign companies or investors in their own country. In 1996 a group of Myanmar residents filed a lawsuit against Unocal in US federal court in 1996. The plaintiffs alleged they had suffered human rights abuses such as forced labour, murder, rape and torture at the hands of the Myanmar military during construction of a gas pipeline, and that Unocal was complicit in these abuses. Unocal and Myanmar's military government were in a consortium for the pipeline's construction. The parties reached an out-of-court settlement in which Unocal agreed to compensate the plaintiffs and provide funds for programmes in Myanmar to improve living conditions and protect the rights of people from the pipeline region (the exact terms of the settlement are confidential). This settlement was accepted by the court, and the case was closed on 13 April 2005.⁷

In September 2015, a group of 1826 Zambian villagers filed a lawsuit against Vedanta Resources company in a UK court over water pollution caused by its subsidiary's copper mining operations. They claim that the water pollution from the Nchanga Copper Mine damaged their lands and livelihoods. On 27 May 2016, an English High Court judge ruled that the lawsuit against Vedanta Resources could proceed. In July, the companies appealed and challenged the English courts' jurisdiction. On 13 October 2017, the Court of Appeal dismissed the companies' appeal and allowed the villagers to pursue their claim in the UK. In March 2018, the companies were granted permission to appeal and the Supreme Court's hearing that will determine jurisdiction took place on 15 and 16 January 2019. On 10 April 2019, the Supreme Court ruled that the Zambian villagers' case against Vedanta Resources can be heard in English courts. The Courts agreed to hear the case because, among other reasons, the villagers were denied access to justice in Zambian courts.⁸

⁵ See *Andawan bin Ansapi and Ors v PP* (Kota Kinabalu High Court Criminal Appeal K41-128-2010, 4 March 2010).

⁶ STC 4360-2018, Colombian Supreme Court Rules to Protect Future Generations and Amazon Rainforest in Climate Change Case, see: <https://www.escri-net.org/caselaw/2019/stc-4360-2018>.

⁷ For more information on the UNOCAL case see: Business and Human Rights Resource Centre, *Unocal Lawsuit*, Available at: <https://www.business-humanrights.org/en/unocal-lawsuit-re-myanmar>.

⁸ For more information on the Vedanta trial and its potential impact in Myanmar see: Aguirre, *The Vedanta Appeal, Corporate Liability and Access to Justice: Relevance for Myanmar?* (Business and Human Rights in Burma) Available at: <https://businesshumanrightsburma.wordpress.com/2019/01/19/vedanta-corporate-liability-and-questions-for-myanmar/>.

Potential Impact

Strategic litigation involves more than simply winning legal arguments in court: it creates public awareness, encourages public debate, sets important precedents, achieves change for people in similar situations, and sparks policy changes. This is done by cooperating with civil society and attracting media attention to shed light on a particular problem, sector, or group. Strategic Litigation, directly or indirectly, can generate at least three kinds of impact:

1. Material changes for individual clients and communities through compensation and other reparation, affirmation and rights, or prosecution of perpetrators;
2. Policy, law, jurisprudential and institutional change through court reasoning, the adoption of administrative regulations or legislation, or institutional change; and
3. Changes in the attitude and behaviour of government; changes in public discourse through increased rights awareness, a sense of empowerment, and understanding of the rule of law.⁹

The objectives of strategic litigation can be:

- To obtain judicial clarity on the application of the law by getting the courts to interpret the meaning of a particular legal provision or principle in a particular
- To establish legal precedent so as enable others to enforce their rights more confidently and effectively
- To highlight bad policy or practice as part of a wider campaign for legal and social change (this objective can be achieved even if the case itself is lost in court)
- To change legislation and government policy (this can be achieved even if the case is lost in court)

Successful strategic litigation goes beyond the work of lawyers, prosecutors and judges. The best results are sometimes found when litigation is part of a broader campaign combined with public protests, advocacy, and lobbying in which lawyers become part of a network or a coalition to support social change. Building networks between the clients, the community, NGOs, investigative reporters, human rights advocates, and capable local litigators is an essential first step in identifying cases that have the potential to produce significant outcomes. The role of the media – including social media – is important as it can play an essential role in informing the public on the importance of the case and its relevance to the broader public or individuals, but also raise political visibility through publicity.

Strategic litigation can carry various impacts. It is not only about winning or losing argument in court, as the results of the strategy go beyond what happens in the courtroom. Losing a case is not always negative if it nonetheless ultimately leads to the desired change. That is why it is important to approach strategic litigation beyond the simplistic view of cases being 'won' or 'lost'. As noted by a lawyer from South Africa: "judicial victories are embedded in political struggles; they are neither self-realizing nor self-effectuating; [court] decisions are the beginning of the fight, not the end."¹⁰

Strategic litigation is often a process, not a single legal intervention, as the litigation itself may be only one among a range of advocacy efforts. To be successful, litigation and other strategies by social movements and others should be mutually reinforcing. The process of litigation itself is often a force of change and empowerment of voiceless and marginalized communities. As noted by the Open Society Justice Initiative "When it comes to strategic

⁹ Open Society Justice Initiative, *Strategic Litigation Impacts: Insights From Global Experience* (Open Society Foundation, 2018). Available at: <https://www.opensocietyfoundations.org/sites/default/files/strategic-litigation-impacts-insights-20181023.pdf>.

¹⁰ R. Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980 – 1994* (1995), at 64.

human rights litigation, a broad, holistic, multi-stakeholder strategy is ultimately more determinative of positive impact than the legal strategy alone.”¹¹

Strategic litigation can connect rights and remedies as well as facilitate discharge of the obligation of the legal system to provide access to justice, fair trials and uphold the rule of law. This requires lawyers to seek effective remedy to human rights violations, to challenge unfair trials and procedure and engage in the law reform process. Courts have the responsibility and the authority to ensure such remedies. Unless lawyers, working with civil society, can ensure that courts carry out their responsibilities by adopting strategic litigation campaigns to challenge bad procedure, policy and law, the courts may continue to lack independence, perform poorly, and fail to provide access to justice and accountability.

Is litigation the best route?

Civil society, and lawyers and their clients, must consider whether strategic litigation is the best approach, given the formidable obstacles to successful strategic litigation campaigns in Myanmar (see part 4). They must ask what role litigation will play in a wider campaign and whether it will help achieve their long-term goals. With a judiciary that is not independent, negative outcomes are foreseeable. Will the goals of the campaign be negated if the courts rule against the petitioners? It may be that advocacy aimed at political rather than judicial actors is more effective in many cases. Strategic litigation campaigners must also consider the impact on clients and community. Before engaging in a long legal battle, a few key questions should be examined.¹² The following are some key questions to consider before starting litigation:

- Is there a legal issue involved that exemplifies or relates to broader public interests?
- Would a court decision be able to address the problem, at least in significant measure? Or is there a better way to tackle the issue than through litigation?
- Are the potential impacts, objectives and the key issues in the case easy to understand for the general public? How can the case be publicized in order to influence public opinion to further the strategic objective sought?
- Is the social-political-economic environment supportive or are there particular sensitivities and risks? Who are the opponents and what is the estimated level of commitment to that opposition? Who are their supporters?
- Who else has an interest in the issue and what are those interests? Can you build a larger coalition or network to support the issue at stake?
- What are the strengths and weaknesses of the client’s case? What are the strengths and weaknesses of the opposition’s position? What are the legal claims and how strong are those claims on the merits, within the system and in public opinion?
- Is the court independent, impartial and competent to hear the case? If not, can the case contribute to demands that the specific court, or courts in the jurisdiction more broadly, satisfy these criteria?
- What could the impact be if litigation is successful? What could the impact be on the different groups if litigation is unsuccessful?
- How likely is it that the court will look favourably on the action? What political repercussions could follow either a win or loss in court? Could progress towards the strategic objective sought be set back/harmed if the case is lost or the intervention is not successful?
- Is the legal theory/argument clear and simple, and is the remedy easy to implement?

Choice of Forum: National and International

The choice of the forum is an essential element of the strategy. Strategic litigation can take place at any level; it does not have to be only at the Supreme Court but could also take place

¹¹ Open Society Justice Initiative, *Strategic Litigation Impacts: Insights from Global Experience* (October 2018), p. 19, available at: <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-insights-global-experience>

¹² These questions are based on several sources including Wilson, and Rasmussen, *Promoting justice: A Practical Guide to Strategic Human Rights Lawyering*, 2001, at 61-62; Geary, *Children’s Rights: A Guide to Strategic Litigation*, 2009, at 8.

in lower courts and/or as part of administrative adjudication processes. Submissions to a National Human Rights Commission or administrative or quasi-judicial mechanism can play a role in strategic litigation, by addition to an officially documented record of complaints, which can be cited in courts or in communications to other mechanisms. Strategic litigation can also involve international mechanisms. Regional and global legal avenues are a way to push for legal remedies for violations taking place in Myanmar. For example, it can include the use of non-judicial mechanisms, whether an executive oversight agency, a committee of a national parliament or an inter-governmental body, such as the human rights treaty bodies administered by the United Nations acting in a quasi-judicial capacity. These quasi-judicial international bodies can constitute subsidiary and last resort mechanism to act when a State has been unable or unwilling to effectively administer justice.

Part 2: Potential Areas of Law for Strategic Litigation in Myanmar

There are a number of areas of law in Myanmar that have potential to address wider social issues and human rights violations. While the challenges must be acknowledged, lawyers and civil society have begun to develop strategies to address pressing local, regional and national concerns. The following section outlines examples of potential areas of law and strategy being used to create change.

Administrative Bodies: Land, Environment, Investment

A number of Myanmar's laws and regulations related to land and the environment provide for limited appeals processes or dispute resolution where the government and the administration are authorized to make decisions. While the processes are limited and have been criticized for????,¹³ they can be useful and provide additional venues as part of a strategic litigation campaign, as land grabbing is a core concern facing many communities and one upon which civil society campaigns are focussed.

There are procedures in the various land laws related to land acquisition for dispute resolution. For example, the Environmental Impact Assessment Procedure allows for limited appeals and the Myanmar Investment Law provides for potential input from civil society. While not always clear or consistent, these avenues may be explored as part of a potential strategic litigation campaign.

1894 Land Acquisition Act (LAA)

As Myanmar's primary law used for land acquisition, the LAA empowers the State to carry out public purpose land acquisitions. The Act prescribes two stages of the acquisition procedure when objections can be made: first to the General Administration Department (GAD), then in the courts.¹⁴ These should both be explored as preventative measures in strategic litigation campaigns focussing on land rights.

The LAA requires notification that an area is likely to be required for a public purpose land acquisition. Under the Act an interested person¹⁵ may challenge the public purpose grounds of the acquisition.¹⁶ A declaration of intended acquisition must be published in affected areas and claims for compensation for the dispossession of land, crops, trees, buildings and other livelihoods invited. The LAA provides a procedure for an interested person to submit an

¹³ For details see: Human Rights Watch, Nothing for Our Land (July 2018) Available at: <https://www.hrw.org/report/2018/07/17/nothing-our-land/impact-land-confiscation-farmers-myanmar>.

¹⁴ ICJ, "Special Economic Zones in Myanmar and the State Duty To Protect" (Geneva 2016) p.31. Available at: <https://www.icj.org/wp-content/uploads/2017/02/Myanmar-SEZ-assessment-Publications-Reports-Thematic-reports-2017-ENG.pdf>

¹⁵ An interested person is someone with an easement on the land or who would be otherwise affected financially, and has an interest in claiming compensation in the event of acquisition. For example, a farmer or labourer working on the land is considered an interested person. The Act contains no requirements for an interested person to be in possession of formal land tenure.

¹⁶ 1894 Land Acquisition Act, Art. 5(1)(2)(3). 1932 Land Acquisition Rules, Art. 3.

objection to the Court. The Act details advice and instruction for the Judge to take into consideration.¹⁷ If these opportunities have not been afforded, the land acquisition and its impact could be challenged in court, including through the use of the constitutional writs outlined below.

Farmland Law

The 2012 Farmland Law and 2012 Farmland Rules also contemplate public purpose land acquisitions.¹⁸ In the case of disputes, the upper farmland bodies may review the decisions of lower bodies. The state or region body is the highest arbiter and can make a 'final' decision on the matter.¹⁹ Despite this so-called 'finality clause' and the lack of an independent mechanism for reviewing administrative decisions or arbitrating disputes in the Farmland Law, a case may nonetheless be led with the courts (see below). Due to the significant area of dispute concerned for many individuals across the country, it is vital that any strategic litigation campaign dealing with farmland confiscation supports farmers in disputes with the Farmland bodies and challenges their decisions at the highest available forum. If these opportunities have not been afforded the land acquisition and its impact may be challenged in court through the use of the constitutional writs outlined below.

Vacant, Fallow and Virgin Land Law

The 2012 Vacant, Fallow and Virgin Lands Management Law (VVF Law) is designed to allocate State land to individuals, investors and others.²⁰ In practice it has been used to privatize land and remove it from communal or traditional use.²¹ These practices have been made worse through recent amendments heavily criticized by national and international human rights organizations.²² Criminal penalties are stipulated for encroachment and for failure to comply with an eviction order, normally carried out against farmers working the land.

But allocated land that is not used within four years of the issuance of a permit may be reclaimed by the State without compensation. The Central Committee is empowered to arbitrate and rule on disputes arising, which has resulted in some unexpected successes for farmers.

Court Acquits Farmers Charged Under VVF Law

A court in Irrawaddy Region's Nyaungdon Township acquitted eight farmers involved in a land dispute case. In 2006, the Irrawaddy Region Peace and Development Council granted

¹⁷ 1894 Land Acquisition Act, Art. 18(1). Part 3 of the Act outlines the process for judicial review; 1894 Land Acquisition Act, Part 3: Reference to the Court and Procedure Thereon.

¹⁸ For a full explanation of the procedure see: International Commission of Jurists, Special Economic Zones in Myanmar and the State Duty To Protect (Geneva 2016) p.31. Available at: <https://www.icj.org/wp-content/uploads/2017/02/Myanmar-SEZ-assessment-Publications-Reports-Thematic-reports-2017-ENG.pdf>

¹⁹ 2012 Farmland Law, Ch. 8.

²⁰ For a full explanation of the procedure see: International Commission of Jurists, Special Economic Zones in Myanmar and the State Duty To Protect (Geneva 2016) p.32. Available at: <https://www.icj.org/wp-content/uploads/2017/02/Myanmar-SEZ-assessment-Publications-Reports-Thematic-reports-2017-ENG.pdf>

²¹ For more details see: Myanmar Centre for Responsible Business, Briefing Paper: Land (2015) Available at: <http://www.myanmar-responsiblebusiness.org/pdf/2018-Briefing-Paper-Land-draft.pdf>; An updated consultation draft is available at: <https://www.myanmar-responsiblebusiness.org/pdf/2018-Briefing-Paper-Land-draft.pdf>.

²² Land in Our Hands Network: <https://lioh.org>; TNI. There is no Vacant Land <https://www.tni.org/en/publication/there-is-no-vacant-land>; UN Special Rapporteur on the situation of human rights in Myanmar: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24296&LangID=E>.

999 acres of land in Byaw Tha Lan village tract in Nyaungdon Township to a business investor. The concerned investor failed to develop the land for industrial purposes, however, and the original owners began farming it again in 2014. In 2016 the businessman brought charges against the farmers under the Vacant, Fallow and Virgin Land Management Law.

After a trial lasting more than two years, the court acquitted the farmers as the land automatically should revert to state ownership. According to the Myanmar Legal Aid Network, the case marks the first acquittal of farmers sued by a businessman in a land dispute in Nyaungdon Township. In most such cases, farmers are either sentenced to prison or fined, it said.²³

This case could be utilised strategically in future litigations in Myanmar, given that it shows a rare documented example of a court eventually ruling in favour of the farmers in this type of dispute.

Environmental Impact Assessment (EIA) Procedures

The 2015 Environmental Impact Assessment (EIA) Procedures contain an appeal process²⁴ that has been rarely if ever used. Persons from communities that disagree with an EIA can consider an appeal as part of a wider strategic litigation campaign, either as a group or as an individual. Procedural aspects of public consultation and transparency are open to challenge. Moreover, the finality of the decision to approve the EIA itself can be challenged through the use of the constitutional writ of mandamus. As the EIAs and the decision-making process around them are not often made public, appealing them requires the collaboration of lawyers and civil society to assist affected communities. If these opportunities have not been afforded the land acquisition and its impact should be challenged.

Investment Law

Myanmar's 2016 Investment Law and the implementing Investment Rules issued in April 2017 create space for lawyers and civil society to interact with the Myanmar Investment Committee (MIC). The Investment Rules instruct the Myanmar Investment Commission (MIC) to consider whether investors have demonstrated a commitment to responsible investment. In considering the good character and reputation of the investor, the MIC may study whether the investor or any associate with an interest in the investment broke the law in Myanmar or any other jurisdiction. The rules explicitly mention environmental, labour, tax, anti-bribery and corruption or human rights law.

If an investor is known to have violated environmental protection standards or was involved with human rights abuses, the MIC should not grant it a permit. If such a company applies for an investment permit, individuals from civil society may, as part of a strategic litigation campaign, bring its record to the attention of the MIC and advocate for the rejection of a permit. If the MIC grants permits for companies that do not meet the requirements outlined in the Investment Rules, their decisions must be subject to review by the judiciary including through the use of the constitutional writs outlined below.

Myanmar's 2014 Special Economic Zones Law reaffirms the full applicability of environmental laws, land laws and labour laws within the zones. Failure of authorities to ensure compliance with these laws, by State or non-State actors, may also be challenged including through Myanmar's courts.²⁵

²³ Irrawaddy Magazine, Court Acquits 8 Farmers Sued by Owner of Unused Land in Irrawaddy Region (7 January 2019) Available at: <https://www.irrawaddy.com/news/court-acquits-8-farmers-sued-owner-unused-land-irrawaddy-region.html>.

²⁴ Chapter VI, Articles 71-75.

²⁵ See, generally: ICJ, "SEZs in Myanmar," full citation above.

Constitutional Rights

Constitutional rights form the basis of many strategic litigation campaigns around the world. Myanmar's Constitution of 2008 has a chapter on Citizen's Rights and Duties. Protected rights include equality before the law, non-discrimination and equal opportunity the right to life, freedom of expression, assembly, association, culture, language and religion, freedom of movement, protection of privacy, freedom from slavery, the right to an education and to healthcare, democratic participation, property, the right to counsel, to redress and to due process under the law. While many of these "fundamental rights" protections are restricted to citizens of Myanmar, section 347 of the Constitution guarantees to "all persons" equal protection before the law.²⁶ The clarification of constitutional rights and duties requires interpretive rulings from the Constitutional Court. Otherwise many of them may remain vague provisions which may not be given direct effect to the lives of the people. So far, the Constitutional Court has recorded very few judgements as not many cases have been referred by the legislative and executive bodies and none are known to have been referred from the courts.

Despite the importance of these constitutional rights they remain largely absent from public debate and civil society advocacy. Lawyers do not often raise Constitutional arguments. The courts seem unwilling to hear Constitutional arguments and unable or unwilling to refer them to the Constitutional Tribunal. Yet Article 323 of the Constitution states that if there is a dispute in court over the constitutionality of a law the 'court shall stay the trial and submit its opinion to the Constitutional Tribunal' in accordance with the procedures and shall obtain a resolution. What these procedures are requires further clarification. The ICJ is unaware of any reported instances in which courts have referred disputes to the Constitutional Court.

A strategic litigation campaign could include the submission of constitutional arguments to the court for referral to the Constitutional Tribunal. The Tribunal could then rule on how the constitutional rights apply in practice and whether laws are themselves constitutional. If the Courts refuse to follow the prescribed procedures and submit the dispute to the Tribunal, then records of this failure must be kept. These records can be used as evidence in a wider campaign to show that constitutional principles are not being applied and that elaboration on the constitution is not being undertaken by the Judiciary. At the same time, it is important to consider that it could be more strategic to not seek an authoritative ruling from the Constitutional Tribunal, if it is possible or even likely that this produces a bad outcome for the complainants.

Judicial Review of Executive Decisions: Constitutional Writs

Courts must have some power of review, at least to ensure that administrative authorities are acting reasonably and in accordance with the law, whilst respecting and protecting constitutional rights, and human rights protected under international law. Many common law post-colonial States have adopted constitutional provisions and acts to ensure judicial review of administrative decisions.²⁷ Concern for administrative accountability has also resulted in the creation of a wide range of regulatory reforms from statutory forms of judicial review to freedom of information schemes, the creation of a wide range of independent regulatory bodies such as anti-corruption commissions, judicial commissions or ombudsman, the establishment of constitutional courts and the inclusion of extensive human rights provisions in constitutions.²⁸

As there is no general statutory right to seek review of administrative action in Myanmar, one of the only means at present to seek judicial review of administrative decisions in Myanmar is

²⁶ ICJ, "Citizenship and Human Rights in Myanmar: Why Law Reform is Urgent and Possible," June 2019.

²⁷ For example see the Constitutions of South Africa, Namibia, Malawi, Kenya, and Fiji.

²⁸ For a detailed history and analysis of administrative law reform, as well as a comparative analysis of Constitutional Writs applicable to Myanmar see: Crouch, Mellissa *The Prerogative Writs as Constitutional Transfer* (Oxford J Legal Studies, 2018) 38 (4): 653

through the application of the Constitutional Writs.²⁹ Writs are included in many Constitutions of post-colonial states around the world in order to protect against the abuse of executive power suffered during colonialism.³⁰ The Writs have become associated with assertive judicial action and strategic litigation to protect constitutional rights.

Writs as a basis for Strategic Litigation in India and Pakistan:

The 1950 Constitution of India departed from the British tradition and included a bill of rights and the five writs as a remedy for the protection of "fundamental rights" and conferred on the Supreme Court and High Courts the power to issue the five writs or any other writ for the protection of rights (article 32). This gave the writs more prestige, certainty and a higher public profile, leading to a rapid increase in inexpensive and efficient strategic litigation in India.³¹ The Judiciary also took deliberate steps to widen access, giving rise to new areas of litigation including the environment.³²

The constitutional writs are also important in Pakistan. Under the Constitution, the High Courts have original jurisdiction to hear writs cases (article 199). Some limitations have been maintained: the person bringing the case must be affected in some way, which precludes some public interest litigation. Yet, the remedies allow greater room for protection than the common law as it allows for greater room for interpretation to facilitate the protection of rights and the constraint of power.³³

Myanmar was the first State to include all five writs in its constitution of 1948 and included them again in 2008.³⁴ From the case of *Myuang Pyu*³⁵ in 1940 until the 1970s, the courts of Myanmar asserted themselves as a venue to seek review of the executive branch of government. While few administrative disputes are now referred to the courts in Myanmar, the judiciary nonetheless has authority to review administrative decisions.

Constitutional writs are a mechanism for the judicial review of decisions by administrative bodies and lower courts in their exercise of executive power. Chapter 1 of the 2008 Constitution, Article 18(c), confers the power to issue writs on the Union Supreme Court. The

²⁹ Articles 377-378 of the 2008 Constitution provide for the writs of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari to be granted by the Supreme Court and there is an accompanying Law on the Application of Writs 2014.

³⁰ See: Crouch, Melissa *The Prerogative Writs as Constitutional Transfer* (Oxford J Legal Studies, 2018) 38 (4): 653

³¹ This idea of incorporating the writs into the written constitution and connecting them to the protection of constitutional rights was adopted and included in other constitutions as countries across South Asia gained independence, including Burma, Pakistan, Sri Lanka and Bangladesh. Constitutional writs also emerged across Africa, including in Nigeria, Sierra Leone, Kenya, Gambia and Zimbabwe, and across the Commonwealth Caribbean, in states such as Mauritius, the Bahamas and Barbados

³² There is a wide body of literature on public interest litigation. See eg Shylashri Shankar, 'The Embedded Negotiators: India's Higher Judiciary and Socioeconomic Rights' in Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa and Columbia* (CUP 2013) 95-128; Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Books 1980); Manoj Mate, 'Public Interest Litigation and the Transformation of the Supreme Court of India' in Diana Kapiszewski, Gordon Silverstein and Robert A Kagan (ed), *Consequential Courts: Judicial Roles in Global Perspective* (CUP 2013); SP Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*(OUP 2002).

³³ Sadaf Aziz, *The Constitution of Pakistan: A Contextual Analysis* (Hart Publishing 2018) 125. See also Osama Siddiqi, 'Public Interest Litigation: Predictable Continuity and Radical Departures' in MH Cheema and IS Gilani (eds), *The Politics and Jurisprudence of the Chaudhry Court 2005-2013* (OUP 2015). Ahmed Sanaa, 'Supremely Fallible? A Debate on Judicial Restraint and Activism in Pakistan' (2015) 9(2) *Vienna Journal on International Constitutional Law* 213.

³⁴ For more on this progressive jurisprudence see: ICJ, *Handbook on Habeas Corpus* (Geneva, 2016). Available in English and Burmese at: <https://www.icj.org/myanmar-writ-of-habeas-corpus-can-help-protect-human-rights/>

³⁵ *In the matter of Maung Pyu and others* (1940) All Indian Law Report (Rangoon).

jurisdiction of the Supreme Court to issue writs is outlined in the 2008 Constitution, Chapter VI, Article 296. Five separate prerogative writs may be issued by a Court:

- Certiorari: (Ahmukaw Sachundaw Amein) to cancel an unlawful decision by an executive power.
- Prohibition: (Tamyinse Sachundaw Amein) to prohibit and prevent an illegal act by an executive power.
- Mandamus: (Anape Sachundaw Amein) to direct an official to perform their duties or correct an illegal action.
- Habeas corpus: (Shedawthwin Sachundaw Amein) to review the lawfulness of an individual's detention and order his/her release.
- Quo warranto: (Anapaingme Sachundaw Amein) to prevent a person from carrying out unauthorized acts.

The procedure for the application of the writs is outlined clearly in The Application of Writs Act 2014, Pyisdaunsu Hluttaw (Act no. 24/2014) and the Procedural Rules and Regulations for Applications of Writs (Union Supreme Court Notification no. 117/2013). Other laws may not interfere with these writs. So, despite finality provisions in the 1894 Land Acquisition Act and 2012 Farmland Law,³⁶ for example, the Writs can be used by individuals to review, block or correct the decisions of authorities. This principle applies to the acts of all executive powers including investment bodies.³⁷

Using Writs to Review Executive Decisions: *Professor Daw Kyin Hte v Minister for Education* (2013) Union Supreme Court of Myanmar (unreported case number 290), dated 5 June 2014.³⁸

Writ applications to the Supreme Court provide potential for strategic litigation, particularly in the areas of investment decisions and land confiscation, if lawyers are willing and have the means to repeatedly submit them. In *Professor Daw Kyin Hte v Minister for Education* (2013), an economics professor who had been 'forced to retire' from her position by the Minister of Education lodged a writ application with the Supreme Court to seek certiorari or mandamus³⁹ against the decision of the Minister. The case was brought on the basis of two constitutional rights claims: equal rights before the law and equal opportunity in public employment. Referring to past Myanmar case law and international standards, The Supreme Court held that the decision of the Minister to force her to retire was beyond his power and awarded the writ. This was the first time the Supreme Court had declared the decision of a government minister to be unlawful.

This case demonstrates that determined lawyers can successfully use the constitutional writs to defend constitutional rights. Eventually the Court may be independent enough to review executive administrative decisions of a more sensitive nature. Otherwise, a record of disagreement with administrative decisions will be compiled through denied applications.

The constitutional writs are symbolic as protectors of rights against the power of the executive authorities. They are not often applied in Myanmar as a means to review government policy or constitutional rights. But they are used successfully by powerful actors such as land owners and employers in disputes.⁴⁰ If lawyers, with the support of NGOs and civil society, are willing and able to continually test the Judiciary, it could potentially open up

³⁶ 1894 Land Acquisition Act, Art. 5(a2). 2012 Farmland Law, Art. 25(c).

³⁷ 2015 SEZ Rules, Art. 49. 2016 Investment Law, Art. 98.

³⁸ For more information see: Myanmar Times, University teacher Wins Supreme Court Battle (16 June 2015) available at: <https://www.mmtimes.com/national-news/10694-university-teacher-wins-supreme-court-battle-over-dismissal.html>.

³⁹ The details of this case are difficult to obtain. The Myanmar Times reported that the writ of mandamus was used while others explain that it was certiorari, see: Crouch, Mellissa The Prerogative Writs as Constitutional Transfer (Oxford J Legal Studies, 2018) 38 (4): 653.

⁴⁰ Crouch, Mellissa The Prerogative Writs as Constitutional Transfer (Oxford J Legal Studies, 2018) 38 (4): 672.

a fruitful area of strategic litigation. This could represent a significant avenue to allow more scrutiny by citizens to access, challenge and open for reviews decisions concerning their human rights.

The Writ of Habeas Corpus

Where rights relating to deprivation of liberty are engaged, the law in Myanmar provides remedy through the writ of *habeas corpus*. Notwithstanding its shortcomings,⁴¹ the 2008 Constitution's recognition of writs under Chapter VIII on the Fundamental Rights and Duties of the Citizen is a positive step for the rule of law in the country. Article 378 confirms that *habeas corpus* is a fundamental right protected by the constitution. Apart from the writ of *habeas corpus* guaranteed under the Constitution, section 491(1) (a) and (b) of the Criminal Procedure Code provides a remedy akin to habeas corpus. It confers the High Courts with appellate criminal jurisdiction power to set free individuals who are illegally detained.

Neither of these remedies has been effective in reviewing the lawfulness of the arrest and detention of detainees since 2008.⁴² Nevertheless, the writ's application is a constitutional right and a duty of the Supreme Court of the Union. When police or the courts do not have a lawful basis to detain a person or do not follow arrest and detention procedure or fair trial standards exactly, lawyers should submit applications for habeas corpus immediately. Large numbers of applications may encourage the Supreme or High Courts to fulfil their duty. Otherwise, their failure becomes a record of fair trial rights violations.

Injunctions

Other remedies often found in Common Law jurisdictions are injunctions. In addition to their primary powers, particularly those of *certiorari* and prohibition, courts may make an order restraining the executive branch body from continuing to act unlawfully or may grant an urgent interim injunction to prevent irreparable damage.

An injunction is a legal and equitable remedy in the form of a court order that compels a party to do or refrain from specific acts. In Myanmar, it is possible to obtain a temporary injunction under the Criminal Procedure Code and Civil Code of Procedure, and a permanent injunction under the Specific Relief Act 1877. It is often used in reference to contract law. Injunctions can be used to prevent future violations of the law or rights and can repair past violations. A party that fails to comply faces criminal or civil penalties and can be charged with contempt of court.

Civil Claims

Despite the government's obligations under the land, environment and investment laws, these laws do not give an express the right to sue for compensation or other reparation. However, lawyers can use domestic civil law and claim, for example, common law negligence for damages suffered. Negligence gives people a right to sue for harm caused by the defendant's failure to exercise the care that a reasonable person would have exercised under the same circumstances.

In general, civil cases are commenced by submitting a complaint to the competent Court of first instance⁴³ along with the necessary documents that the plaintiff attaches or relies on, ad

⁴¹ Global Justice Centre. 'The 2008 Constitution Breaches Myanmar/Burma's Binding Obligations under International Law Including the United Nation's Charter' (November 2012).

⁴² For analysis on the Writ of Habeas Corpus in Myanmar see: International Commission of Jurists, Handbook on Habeas Corpus (Geneva 2016). Available in Burmese and English at: <https://www.icj.org/myanmar-writ-of-habeas-corporus-can-help-protect-human-rights/>.

⁴³ The Courts of First Instance are the Township Courts for civil cases in which the suit is not more than 100 Lakhs (or 10 million Kyats), or will be the Courts of Self-administered Division, Courts of Self-administered Zone and the District Courts for which the suit-values are more than 100 Lakhs

valorem Court-fees stamps and summons fees to the Court registry etc. The facts that should be contained in the complaint are provided in the Order VII of the Civil Procedure Code. These include particulars of the plaintiff and defendants, a statement of claim and the relief sought, suit value and the time or period when the cause of action has arisen. The complaint can be submitted by the plaintiff or by his lawyer.

After receiving the complaint and any accompanying documents, the judicial officer should check and send them with comments to the head of judges of the respective Court, and register the case as a civil suit. The head of judges distributes the case to the subordinate judges to deal with the trial. The trial judge summons the defendant who may admit or make the written statement or file a counter claim to the claims made by the plaintiff.

At any stage of the proceedings, the plaintiff or the defendant may apply to the judge for provisional remedies such as injunctions. Either can make any application for discovery and inspection of the related documents, and ask the other party for written questions regarding the facts of the case. The Court can instruct either party to disclose documents and submit affidavits related to the facts of the case.

The judge then frames the issues of law at the first hearing of the suit. The processes of the examination-in-chief, cross-examination and re-examination are done by having the parties and their witnesses present statements before the Court. The burden of proof is always on the plaintiff to prove the case on a balance of probabilities (which is a lower evidentiary threshold than the beyond a reasonable doubt standard in criminal law). After the hearings and closing arguments at the end of the trial, the Court will pronounce final judgment and decree. If the Court rejects the plaintiff's suit, the plaintiff can appeal all the way up to the Union Supreme Court, starting at the nearest superior Court.

Limitation periods and Causes of Action

Lawyers conducting strategic litigation around negligence cases should be aware of the 1909 Limitations Act, which is not well understood in Myanmar,⁴⁴ and that it has been interpreted to impose short time limits on when a case can be filed after the occurrence of an alleged harm. These could potentially preclude cases from being heard in court. As such, lawyers must be familiar with the cause of action, the type of injury, and the relevant limitation period under the Act: for personal injury it allows one year to file suit; for negligence, two years. Both are too short by international standards and should be revised to give plaintiffs adequate time to prepare their case and bring it to Court.

Lawyers pursuing civil claims should consider pleading multiple available causes of action, identifying all damages and remedies. In addition to negligence, claimants can sue for personal injury, public and/or private nuisance and potentially trespass to land and strict liability, and for an injunction to stop activities, all of which are standard principles of civil law applicable in Myanmar Courts.

and not more than 10000 Lakhs (or one billion Kyats). For suits in excess of 10000 Lakhs (or one billion Kyats) the Courts of First Instance are the High Courts of the Regions or States.

⁴⁴ For example, in the *Myaung Yo Villagers v Myanmar Pongpipat Company Limited and No. 2 Mining Enterprise* case in Dawei, The courts decided on the basis of paragraph 22, First Schedule of the Act, which provides that 'injury to person' cases must be led within one year. The plaintiffs' case was that the damage is not 'injury to person' which applies to claims for bodily harm- but one regarding property damage arising from negligent conduct, so that paragraph 22 is the incorrect time period. It appears that the correct limitations period is two years, according to paragraph 36 of the First Schedule, which allows for a two-year limitation period for negligent 'malfeasance, misfeasance and nonfeasance.' Further, the Court does not appear to have properly dealt with the issue of 'continuing wrongs' under section 23 of the Limitations Act, which can determine when to start counting time for a limitation period.

Suing a State-owned entity

The procedural law is unclear and has raised concerns for lawyers seeking to represent clients in civil claims against State-owned entities. It is unclear how section 80 of the Civil Procedure Code (which requires prior notice to the government two months before filing a suit) applies to State-owned economic enterprises.⁴⁵

Civil cases also demonstrate the limitations of litigation as a means of securing redress for communities: Many people may not be willing to bring a case to court. Those who suffer damage may be too fearful of the defendant entity or the government more generally to have their names listed on the lawsuit. In this regard, it indicates the importance of non-litigation advocacy which would pressure the government and company to respond more justly to the community as a whole.

Criminal Law

Fair trial standards are not consistently observed in Myanmar; they are regularly flouted. The Courts generally do not apply procedure and law applicable to fair trial standards and instead conduct the court according to routine practice. For example, authorities block lawyers' access to their detained clients, or otherwise undermine and contravene the rights to legal representation or a defence. Authorities have not allowed or ensured that lawyer-client meetings take place in conditions that protect and respect the confidentiality of lawyer-client communications. Lawyers and their clients have been faced with purposeful delays in court processes when their clients, or the causes with which the clients are associated, are sensitive to powerful interests. All of these violations may be challenged by lawyers before the courts.

Pre-Trial Motions

Pre-trial motions are a practical measure through which lawyers can demand a legal remedy from the court for rights violations, thereby actualizing and protecting the rights of their client.⁴⁶ The lawyer can bring the rights violation to the attention of the court with a view to securing a timely remedy for the client. Pre-trial motions hold the judicial system accountable and ensure the fulfillment of each actor's responsibility in the administration of justice.

Lawyers can play a crucial role by presenting the appropriate applications to the court, not only to the prosecution, thereby effectively protecting the legal rights of their clients. They appeal to the authority of the court: Litigating issues pre-trial gives the judge an opportunity to affirm authority. In oral argument, lawyers remind the judge that it is their interpretation of the law, not the prosecutors', that determines the validity and outcome of a pre-trial motion.

Pre-trial motions can be engaged to demand a specific remedy for an individual client, but also, used consistently, pre-trial motion practice can be used strategically to address systematic and widespread violations, like unlawful arrests or invasive and inappropriate search and seizure of evidence.

⁴⁵ In addition, in the Dawei Case, a small procedural defect regarding the notice letter's addressees could entirely preclude the claim.

⁴⁶ For more information see: The International Legal Foundation, *Measuring Justice: Defining and Evaluating Quality for Legal Aid Providers* (November 2016) Available at: <http://theilf.org/wp-content/uploads/2011/08/ILF-Measuring-Justice-Report-FINAL.pdf>.

Pretrial Motions to the Court

In an example of a pretrial motion in Myanmar, lawyers drafted a written motion based on the right to counsel at the remand hearing, supported by the right to legal defence in the 2008 Constitution, the right to counsel at remand explicit in the Legal Aid Law, provisions in the Criminal Procedure Code that refer to right to defence, and the court manual that says the suspect has a right to be heard opposing remand.

The lawyers were present at remand hearings and had varying degrees of success in filing for Power of Attorney and submitting written motions to represent, to be heard on remand arguments and to make other applications such as a general bail request and access to a copy of the police file. Lawyers have asked for their filing of Power of Attorney to be stapled to the police file, which would be included in the Court File in order to document their strategic intervention. The same approach can be applied to issues such as disclosure and access to evidence as well as bail conditions, for example.⁴⁷

Criminal Trespass

Many civil society organizations claim that illegal land grabbing by the government on behalf of the military or private companies results in community members being charged with criminally trespassing on their own land.⁴⁸ While governments may seek to acquire land for public purposes, this must be conducted through a consultative, transparent legal process that provides for adequate compensation and relocation packages before the acquisition takes place. If not, the process is a forced eviction which constitutes a violation of human rights (the right to housing), in violation of international law and generally also of national law.⁴⁹

While written reports of cases that may serve as evidence of precedent (case law) is difficult to obtain in Myanmar, there are reports of lawyers defending clients against criminal trespass charges by challenging the legality of the government's original land acquisition. Lawyers have argued that if the land has not been acquired legally, with notification and compensation according to the 1894 Land Acquisition Act, then their client remains the rightful owner and cannot be charged with trespassing. This line of argument has resulted in farmers being acquitted of trespass in Bago, for example,⁵⁰ but has not resulted in their land being returned.

In Thilawa, lawyers for 33 Farmers charged with criminal trespass argued similarly that the land remained in the possession of their clients.⁵¹ The court, however, inexplicably found the farmers guilty of trespass despite the government's acknowledgement that the land acquisition procedure had not been followed.⁵² Following this acknowledgement, the lawyers

⁴⁷ For more ideas on the application of the law see: <https://frontiermyanmar.net/en/fixing-justice-with-the-tools-at-hand>.

⁴⁸ For example see: Human Rights Watch, *The Farmer Becomes the Criminal: Land Confiscation in Burma's Karen State* (2016) Available at: https://www.hrw.org/sites/default/files/report_pdf/burma1116_web_0.pdf

⁴⁹ For full details on Myanmar's land acquisition law and procedures see: International Commission of Jurists, *Special Economic Zones in Myanmar and the State Duty to Protect Human Rights* (Geneva 2017) Available at: <https://www.icj.org/myanmar-amend-special-economic-zones-law-to-protect-human-rights-new-icj-report/>

⁵⁰ U Aung Kyaw Myint (Deputy Township General administrative authority) Vs Yan Paing Soe Criminal case No. 4479, Bago Township court, 2013 (Case notes on file with the ICJ).

⁵¹ For example, Earth Rights International (ERI), with other civil society actors, supported a strategic litigation campaign to raise awareness that the Myanmar Government confiscated residential and farm land for the Thilawa Special Economic Zone and ignored the procedures and requirements of Myanmar law. Their campaign involved local and international lawyers, a network of international and local NGOs and CSOs and capacity building for the local affected community.

⁵² For more information on this case see: Earth Rights International, *Press Release: Myanmar Farmers Convicted in Major Land Rights Case*. Available at: <https://earthrights.org/media/myanmar-farmers-convicted-major-land-rights-case/>

for the farmers had applied to the Supreme Court to have the charges quashed but the application was summarily dismissed, apparently without evidence of articulated legal reasoning.

Despite the unclear and contradictory jurisprudence, challenging the validity of the land acquisition process could provide the basis of a strategic litigation campaign, from a case-specific action to a nation-wide series of actions. Lawyers could work with local CSOs to raise awareness of the law and empower local communities to demand that the government respect the law. A media strategy could ensure that extra pressure to conform with the law is applied to the government when it undertakes land acquisition, and for businesses to ensure their activities do not encourage, enable or otherwise participate in unlawful land acquisitions. For lawyers to adopt this type of strategy and legal tactics, lawyers and NGOs need to share information and case files widely to overcome the lack of consistent court reporting.

PART 3: Planning Strategic Litigation in Myanmar

Strategic litigation associated with advocacy in the public interest is in its nascent stages in Myanmar. For decades the courts have not been used to challenge unjust laws, policy or procedure. The legal profession has been systematically undermined and under resourced, severely hampering the role of lawyers as advocates for social justice and change. Without minimizing the challenges ahead, this handbook offers potential avenues to address some of these fundamental issues by highlighting areas where litigation could support change.

Practical Steps & Good Practice

There is no simple formula for ensuring successful strategic litigation as every situation is different and involves specific campaign strategies. However, based on international best practice and experience, there are guiding principles and practical considerations. There are essential elements that need to be integrated to ensure the best outcomes and sustainability of strategic litigation. Strategic litigation requires long-term planning. The timing, organization and rigour of the strategic campaign are important.

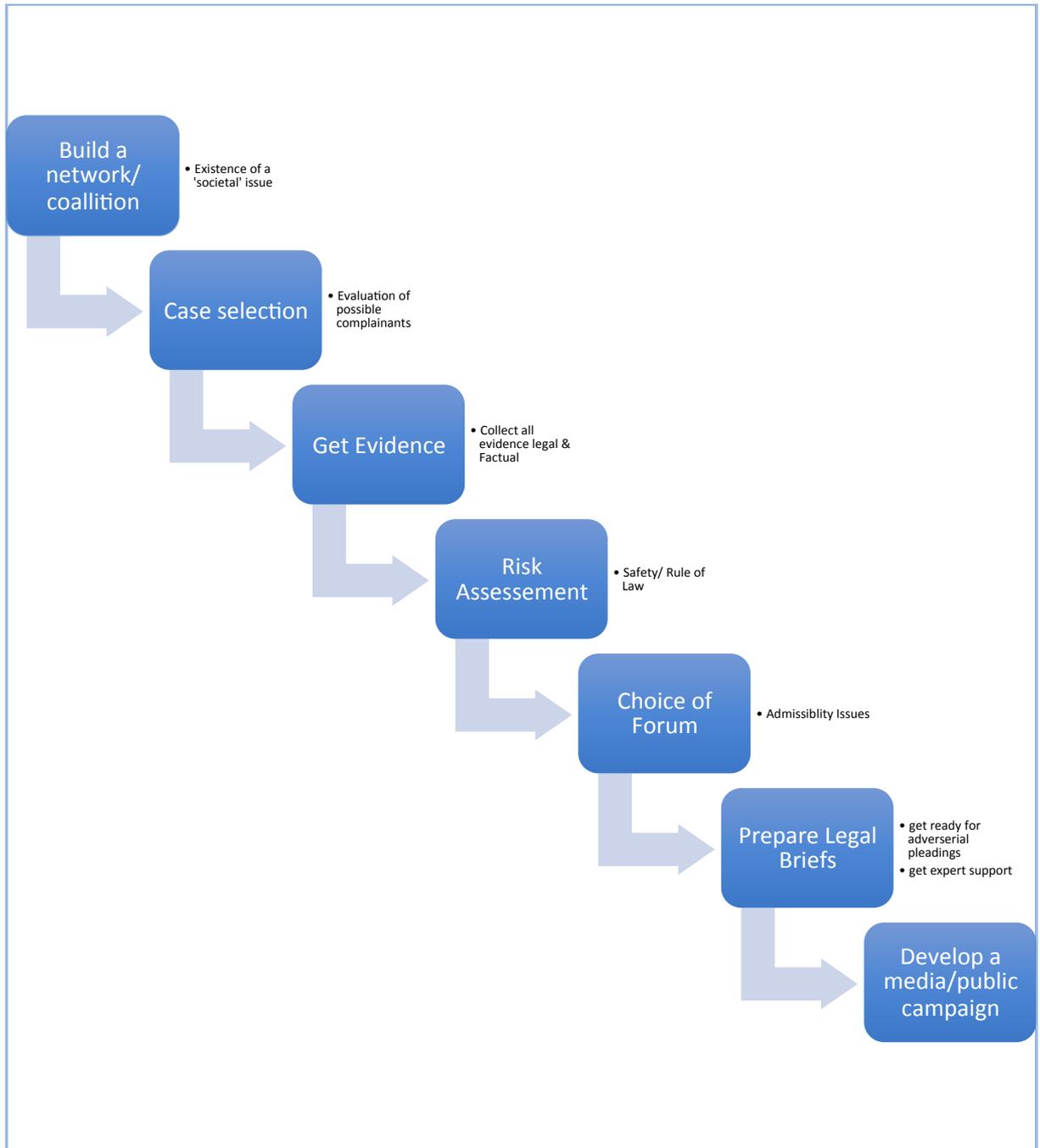
International best practice indicates the following key factors are essential to strategic litigation campaigns. This can serve as a checklist of essential steps towards undertaking strategic litigation:

1. Creating a Strategic Litigation Network of lawyers and csos
2. Evaluation of possible victims/choice of victims that will best fit the claim or precedent to be established
3. Get all admissible evidence/collect all evidence.
4. Undertake Safety/risk assessment
5. Choice of Forum/Admissibility issues
6. Prepare legal briefs/legal strategy
7. Get ready for adversarial pleadings/get expert support
8. Engage with media/national/international/start media/public campaign

Creating Strategic Litigation Networks

An established and sustained network between lawyers, civil society and the affected community is key to successful litigation. Experience shows that building a network of lawyers and a supportive advocacy network is essential to engage in complex and long-term strategy. There is support in Myanmar for state, regional or national networks of senior and junior lawyers as well as CSO representatives to share the burden of *pro bono* work, pool resources and cooperate on strategies to organize strategic litigation. The networks need to include rough gender balance, as well as local, regional, and national lawyers. Key is that these actors have a connection to the local communities through language, trust and local knowledge. The focus of these networks is to encourage cooperation rather than competition amongst lawyers, in the public interest. These networks can support initiatives, workshops and the sharing of best practice.⁵³

⁵³ For example, NGO Justice Base Lawyers have held numerous "Communities of Practice" workshops where lawyers discuss strategy to push the boundaries of what was previously acceptable, including: By correcting in-court terminology, refusing to accept judges and/or law officers referring to their client as a "criminal" and instead requesting that the court record state their client as an "accused"; By asserting that the presumption of innocence extends throughout the trial until the judgment, rather than ending if and when the judge confirms the charge; By attempting to reach their clients in police custody and representing them at remand hearings; By negotiating with law officers to remove irrelevant witnesses from the witness list and challenging undue delays; By obtaining copies of police investigation documents, witness statements and other relevant documents; By applying for bail at the earliest opportunity, representing clients at remand hearings; By filing motions to have the Constitutional Tribunal review the constitutionality of a law, if it is in dispute, pursuant to Section 323 of the 2008 Constitution.



Until recently, lawyers in Myanmar have not been able to develop cooperative strategies or build networks of support with other lawyers and civil society. Many lawyers were unfamiliar with the potential advantages of working with civil society to harness their voices, gain legitimacy and pursue the public interest. Likewise, civil society organizations (CSOs) have not fully trust or engage with the potential valuable role of lawyers and legal advocacy.

Responsible CSOs are often well informed about international standards and their potential to support advocacy. CSOs can be extremely well connected via essential community networks that have been established and built on trust over the years. They have active campaigns and have taken the lead on law reform initiatives, particularly in the area of land law. In responses to changes in government arrangements in Myanmar, some civil society actors have embraced the role of monitoring government performance and democratic advocacy.

Lawyers can play an important role in building the legal capacity of CSOs, while CSOs can continue political and social advocacy and develop a legal strategy with lawyers.

A crucial opportunity for strategic litigation lies with the myriad CSOs willing to support. Some CSOs can offer assistance in the form of capacity building, education and training for lawyers, local CSOs and the affected communities.⁵⁴ They conduct regular activities to the underlying legal, political, social and economic issues with the law at both the national and international levels. These activities also help lawyers and CSOs to understand that they are not alone; their case is emblematic of a community, national and international problem.

Media and Communications Strategy

An important step in the strategy is to develop a carefully planned media and communication strategy. The media strategy should aim to enhance public knowledge and potentially contribute to public support. Supportive media can help develop a public campaign and raise awareness about how the litigation supports social change. The communication strategy needs to be developed early to ensure maximum impact and a positive follow up from the journalists. Media relations must be carefully managed. Community activists can get unfavourable press attention from some media, and bad press can undermine public's support for the case and make it more difficult for decisions makers. Lawyers should help media to understand legal processes, including rules on reporting at the Court, to ensure that media also know their rights and obligations in regard to reporting on cases.

The Public Law Project has developed tips for developing a media strategy, including to:

1. Identify the key issues in your case and why they are important for the public. Try to encapsulate this in three or four short sentences. You can then use these sentences to describe the case in press releases, leaflets, on your website or social media pages and when speaking to journalists.
2. Focus your press strategy around the different stages in the litigation and give regular updates about what stage the case is at and when the next stage will take place.
3. Journalists will often be interested in a personal story so think about whether there is a back story that will make the case more human and accessible for the public. If there is, pitch the story as an exclusive to a journalist in the lead up to the litigation. This will lay the groundwork for press interest in the case when it goes to court.
4. Research whether the issues in your case are being litigated or campaigned about elsewhere. If they are, incorporate this into your press materials to demonstrate the wider significance of your case.
5. Draft a press release for journalists at each stage of the litigation. A press release should be short and informative. You should include a simple summary of the issues in the case, a narrative of what has happened so far and some powerful quotes that show why the case is important. You should also include the contact details of someone who could provide a journalist with more detailed information should they need it. If you are publishing the press release to announce the judgment in your case, consider attaching a copy.⁵⁵

Social media, particularly Facebook, are powerful tools that can be adapted and utilised in campaigns, using traditional and emerging media strategies.

⁵⁴ The ICJ has conducted numerous activities bringing together Myanmar civil society actors, including lawyers, to discuss the concepts and strategies of strategic litigation, including through engagement with resource persons who have been involved in these actions in other parts of the Asia Pacific region. In another example, ERI has supported the local communities indirectly through capacity building training, legal research and advice and directly by facilitating national and international advocacy trips to raise awareness about their concerns. They also supported media advocacy and short video documentary making. ERI staff have met and worked with the local community regularly over years of engagement, which is crucial to building trust and encouraging the campaign's development.

⁵⁵ Public Law Project, Guide to Strategic Litigation, (2014), p. 34. Available at: https://publiclawproject.org.uk/wp-content/uploads/data/resources/153/40108-Guide-to-Strategic-Litigation-linked-final_1_8_2016.pdf.

Victim Protection & Risk Assessment

Strategic litigation in Myanmar presents risks to clients and the community. The selection of clients must be a long-term process in which lawyers, NGOs and civil society engage with the community to prepare them to take a case and support them throughout litigation. Crucially, the support must continue after litigation to assist the community with the consequences.

By putting their name forward to become part of strategic litigation, the clients/victims can put their own lives and liberties at risk. They become the main figure of the larger campaign. As such it is important to ensure that their life is not unduly put at risk and that minimum ethical considerations are examined with them before pushing for the choice of litigation. This is specifically the case of marginalised communities and ethnic groups who are already facing acute and often violent discrimination. It is extremely important to consider the safety of the complainants involved in the case at all times, and they must be sufficiently informed to make their own decisions on involvement in the case, and that they retain ownership of the case.

Risks are commonplace in strategic litigation. Although they will always be present, it is important to be clear and transparent about such potential dangers that victims might face and to listen to their concerns. Equally it is essential to ensure that the complainants are informed and aware of the overall strategy and accept the dangers and complexities they might be facing as a result of their engagement. For it is the victims who may face the security forces, who may have their lives put into the public eye, and who must live in the community after the campaign is completed.

A danger of strategic litigation is that it becomes a forum used by national and international advocates and lawyers to push solely for their own agenda, even where it might be at odds with the wishes and/or interests of the people on whose behalf they are purportedly acting. Litigation, even when strategic, must remain about representing the clients/victims, while doing so in manner that ensures to the extent possible their safety or well being. It is important to ensure that the interest of the victims/clients align with the overall strategic goals, and that both will benefit. There are a few key questions which could help trying to alleviate or at least anticipate such dangers.

- What is the client’s goal and is it linked to a larger community impact? How can the lawyer help them clarify the goal(s)?
- What level of commitment does the client have to achieving the goal?
- Beyond litigation, are there are other methods of achieving the client’s goal? Are these more or less likely to be effective?

Here is summary of potential benefits/risks⁵⁶:

Potential Benefits of Strategic Litigation	Potential Risks of Strategic Litigation
<ul style="list-style-type: none"> • Win a desired outcome for the client or group of clients • Set important precedent • Achieve change for similarly situated people • Spark large scale policy changes • Empower clients/victims 	<ul style="list-style-type: none"> • Unduly burden client • Community backlash • Political backlash • Risk safety of client, especially marginalized groups • Privilege political or strategic goals over individual goals

⁵⁶ UN Women: <http://www.endvawnow.org/en/articles/948-engage-in-strategic-litigation.html>.

<ul style="list-style-type: none"> • Raise awareness • Encourage public debate • Highlight the lack of judicial independence or fairness on a given issue • Provide an officially-sanctioned platform to speak out on issues when government may be trying to silence voices on that issue 	<ul style="list-style-type: none"> • Set bad precedent • Undermine judiciary by highlighting lack of independence or power on a given issue • Expend valuable resources on a case that may be very difficult to win
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Case Selection & Timing

Once decided that litigation is an appropriate strategy to support change or achieve redress, there are several key strategic considerations to be taken into account before selecting relevant cases, these include both theoretical questions regarding the scope of the case, and practical considerations:

(1) Principles of Case Selection

- The case presents an opportunity to clarify, develop or strengthen the law
- The case presents an opportunity to bring domestic law into compliance with international law and standards and advance national implementation of international law
- The case presents an opportunity to increase compliance with the law
- The case presents an opportunity to shed light on a particular problem
- The case concerns a serious infringement of the law with regard to its nature or scale
- The case tests whether national legislation or practice complies with applicable international law obligations
- The case is supported by civil society and can be backed by a strategic litigation campaign

(2) Practical considerations:

- Are the facts of the case clearly established or ascertainable?
- Is there sufficient evidence, and is of kind that is admissible in a court of law?
- The required resources are available and proportionate to expected results. How costly will it be? Are the possible costs justified by the potential legal-policy gains?
- Is collective procedure, such as “class action” better or would individual claims be better suited? If a collective action is decided what are the practical and legal hurdles?

PART 4: Challenges to Overcome

Although the last few years have witnessed significant changes in the legal landscape of the country, there are still serious impediments to the entrenchment of the rule of law, the protection of human rights and the respect of the separation of powers in Myanmar. Nonetheless, if carefully developed, strategic use of litigation could support these aims and support the development of a stronger role for the judiciary.

Supporting the Independence of the Judiciary

The greatest challenge to strategic litigation in Myanmar is the independence of the judiciary. Despite Constitutional Provisions to the contrary,⁵⁷ the judiciary of Myanmar is not yet fully

⁵⁷ Article 19 of the 2008 Constitution of Myanmar prescribes “as judicial principles”: “to administer justice independently according to law; to dispense justice in open court unless otherwise prohibited by law; and to guarantee in all cases the right of defence and the right of appeal under law”. These principles are also reflected in the Union Judiciary Law (The State Peace and

independent. Decades of authoritarian rule have systematically weakened and compromised the legal system. The executive branch, and in particular the country's military and security apparatus, maintain undue influence.⁵⁸ The judiciary as a whole is drastically under resourced and requires capacity building support. Effective strategic litigation requires a judiciary capable of determining whether the actions of government are legal or not.

Although the judiciary has taken the first steps towards asserting its independence, it generally remains unwilling and unable to directly challenge the decisions and actions of the executive. Political and military influence remain major obstacles to respect for the rule of law, and consequently, for strategic litigation. In cases involving government officials or their vested interests, judges and prosecutors do not consistently assert their independence and are perceived to act unethically.

Developing Administrative Law

One of the major challenges ahead concerns the lack of a strong and clear legal framework to support administrative law and judicial review of executive decisions in Myanmar. The country has no system of public administrative law which means that lawyers do not have standing to challenge most government decisions on rule-making, adjudication, or the enforcement of a regulatory agendas.⁵⁹ The foremost possibility to appeal against an administrative decision is to take the case to the next level in the administrative hierarchy, hoping that a higher-ranking officer would quash or amend the decision of the subordinate. However, in practice such decisions are rare, arbitrary and inconsistent, lacking reasoned, written judgement. A number of laws, such as the land laws outlined above, give recourse within the administrative structure, but seek to limit a person's right to take a land-related case to court.

Administrative law is an important part of access to justice because it can operate as a check and balance on government decision-making and provide an avenue for individuals to seek review of government decisions through the courts. It helps ensure that decision-making is just and fair and according to law, with clear rules and procedures in place to guide the processes. Many administrative bodies make their internal review process final and binding through finality clauses that rule out judicial review. This impedes access to justice for victims if these decisions violate human rights. However, as shown above, many administrative bodies and areas of the law offer avenues for strategic litigation campaigns to consider, engage with and possibly litigate.

Developing Legal Capacity and Combating Corruption

The capacity and willingness of some judges to hear complex cases involving the public interest can be a barrier to strategic litigation. To increase the chances of successful strategic litigation in courts, litigants can engage with institutions including NGOs who are working with the judiciary, in order to lay a groundwork for more likely acceptance by judges of

Development Council Law, No. 20/2010) Section 3; The principle of independence is reinforced through the requirement that judges of the Constitutional Court, the Supreme Court and High Courts be free from party politics. Constitution of Myanmar 2008, Art. 300(a) and Art. 301(f) and Union Judiciary Law, S. 30(f) for the Chief Justice of the Union and the judges of the Supreme Court; Art. 309(a) and Art. 310(f) and Union Judiciary Law S. 48(f) for the Chief Justices and Judges of the High Courts; 2008 Constitution, Art. 330(c) and Art. 333(f) for the Justices of the Constitutional Court.

⁵⁸ International Commission of Jurists, Handbook on Habeas Corpus (Geneva 2016) p. 20. Available in Burmese and English at: <https://www.icj.org/myanmar-writ-of-habeas-corpus-can-help-protect-human-rights/>

⁵⁹ For a full explanation of administrative law and issues of access to justice in Myanmar see: Mellissa Crouch, Access to Justice and Administrative Law in Myanmar (MyJustice, October 2014) Available at: <https://www.myjusticemyanmar.org/sites/default/files/Access%20to%20Justice%20and%20Administrative%20Law%20in%20Myanmar.pdf>.

certain processes (such as use of environmental law) or legal mechanisms (such as writs), by incorporating those elements of law into legal capacity building and education.

Legal capacity building and ongoing legal education is required and needs to be supported by the Office of the Attorney General and the Supreme Court. The Ministry of Education should, in consultation with the legal profession, commit to improving legal education. Lawyers associations and CSOs can also contribute to this process.

Lawyer networks are developing to challenge impunity and promote access to justice. These networks can support each other to challenge 'this is the way it is done' when routine practice contravenes codified law, procedure and fair trial rights. Lawyers can increasingly challenge these practices with the law. And where there is unjust law, the next step is to use strategic litigation to create precedent ensuring that the rule of law is publicly accessible. Where this proves impossible, lawyers and civil society must organize and campaign to ensure that the issues become part of the public debate. This in itself contributes to the development of the rule of law by ensuring a more public debate and access to law and legal institutions.

The prevalence of corruption throughout the legal system restricts fair trial rights and recourse to strategic litigation.⁶⁰ The public process that strategic litigation could open is a potential ingredient to tackle the issue of corruption by offering a platform for more open and public scrutiny.

Building the Resilience of Lawyers

Lawyers and CSOs face potential legal and professional repercussions for taking strategic litigation cases. While structural challenges remain, many lawyers still fear reprisals, including harassment for example via social media, or through being subjected to unjust contempt of court proceedings or disbarment as a result of strategic litigation campaigns.

Lawyers working on politically sensitive cases still face problems such as on-going illegal actions by the police, politically motivated disciplinary action by the non-independent Bar Council, and discrimination on the basis of religion and ethnicity.⁶¹ Such lawyers continue to experience harassment, threats and monitoring by State security officials.

Engaging in strategic litigation in Myanmar can result in a lawyer facing increased and undue opposition from the prosecution and judges. Lawyers also feel that a strategic litigation campaign would draw attention to the 'sensitive' issue at stake, rendering a routine case a 'sensitive' one, and therefore jeopardize their client's interests. Moreover, strategic litigation raises sensitive matters such as constitutional rights or fair trial standards that the courts have shown themselves unwilling or unable to address. The clients themselves may be reluctant litigate in human rights matters or oppose the government in the courts.

CSOs often steer clear of legal advocacy and the judiciary in general for a variety of reasons. They overwhelmingly view the judiciary as lacking independence and the legal system as corrupt and inefficient. The legal system and the judiciary are perceived as part of the government, not as impartial arbitrators or institutions that uphold the people's rights. CSOs find it hard to get lawyers with the resources, capacity and will to engage with their campaigns. They often believe the best lawyers are linked with business already and are not

⁶⁰ Myanmar ratified the UNCAC in 2012, and the Myanmar Anti-Corruption Law (2013) was subsequently enacted to comply with the convention. *Anti-Corruption Law 2013, Pyidaungsu Hluttaw Law No. 23/2013.*

Under this law, all public servants, including judges and law officers, are subject to penalties including imprisonment and a fine if they engage in bribery. Id. at Chapter 10. An Anti-Corruption Commission (ACC) was established to investigate bribery complaints in compliance with the new law. The Penal Code Sections 161-171 also criminalise corruption.

⁶¹ For more information see: International Commission of Jurists, *The Right To Counsel: the Independence of Lawyers in Myanmar* (Geneva, 2013) available at: <https://www.icj.org/wp-content/uploads/2013/12/MYANMAR-Right-to-Counsel-electronic.pdf>.

going to challenge powerful vested interests in the courts. Instead of strategic litigation, CSOs are more likely to target political actors with advocacy.

Pro bono work in Myanmar is not fully developed. While many lawyers will provide free services to the poor or deserving, the idea of pro bono work in the public interest is not yet common. There are not yet many public interest lawyers groups or networks for developing strategic litigation campaigns. Lawyer salaries are relatively low, and many cannot take time to work in the public interest or to make the necessary trips to Nay Pyi Taw to engage the Supreme Court. Moreover, gathering evidence in land cases or those involving health and pollution, for example, is expensive and requires specific technical expertise. Many lawyers note that engaging in strategic litigation is beyond their available resources. The development of strategic alliances with CSOs and NGOs can sustain the emergence of opportunities to support the work of the layers and their pro-bono involvement.

Recognizing these challenges, strategic litigation can be a response to these, used as part of the process of performing positive change in the way lawyers and other civil society actors collaborate on human rights and environmental issues, and to pressure and invite justice actors to treat human rights cases in a way they are unlikely to have done in the past.

ANNEX

Further available resources:

- Margarita Ilieva, Strategic Litigation: The Role of NGOs, available at http://www.essex.ac.uk/armedcon/story_id/000697.pdf
- Public Law Interest Law Initiative, Columbia University Budapest Law Center, Public Policy Advocacy: Strategic Litigation and International Advocacy, available at http://www.essex.ac.uk/armedcon/story_id/000698.pdf
- Public Law Strategic Support Project, Guide to Strategic Litigation: https://publiclawproject.org.uk/wp-content/uploads/data/resources/153/40108-Guide-to-Strategic-Litigation-linked-final_1_8_2016.pdf
- The Equinet Handbook on Strategic Litigation http://www.equineteurope.org/IMG/pdf/equinet-handbook_strategic-litigation_def_web.pdf
- A strategic evaluation of public interest litigation in South Africa: <https://www.atlanticphilanthropies.org/wp-content/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf>
- Steven Budlender, Gilbert Marcus SC and Nick Ferreira, *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* (Atlantic Philanthropies September 2014)
- Open Society Justice Initiative, *Global human rights litigation Report* (Open Society, 2018, available at: <https://www.opensocietyfoundations.org/reports/global-human-rights-litigation-report>)
- Public Law Project, *Guide to Strategic Litigation*, <http://www.publiclawproject.org.uk/data/resources/153/Guide-to-Strategic-Litigation.pdf>, 2014
- ISHR, *Simple Guide to UN Treaty Bodies* (2015), available at: http://www.ishr.ch/sites/default/files/documents/ishr_simpleguide_eng_final_final_de_c15.pdf
- UN Women, What is advocacy and why is it important? (available at <http://www.endvawnow.org/en/articles/92-what-is-advocacy-and-why-is-it-important.html?next=94> and following pages)
- OSJI, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (2010), Executive Summary.
- Interights Bulletin, Increasing the Impact of Human Rights Litigation: Implementation of Judgments and Decisions (December 2010).
- Office of the High Commissioner for Human Rights (OHCHR), 'Protection of Victims, Witnesses and other Cooperating Persons', Manual on Human Rights Monitoring, Available at: <https://www.ohchr.org/Documents/Publications/Chapter14-56pp.pdf>

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