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## **STRATEGY AND PERFORMANCE OF PRIVATE BANKS IN MYANMAR**

Thin Thin Aye\*

### **Abstract**

This study is an attempt to analyze the strategies and performances of private banks in Myanmar. The main objective of this study is to identify the strategies practiced by the private banks in Myanmar to evaluate their performances and to explore the linkages between the strategies and performances. Data are analyzed using both exploratory and descriptive methods in quantitative and qualitative analysis. The study shows that most organizations appreciate the importance of the strategy to achieve business success. The study applied the Miles and Snow's types of strategy: prospector, analyser, defender and reactor. Findings from this study point out that one fourth of the respondent banks practiced prospector strategy, another one fourth practiced defender strategy and the remaining banks used analyzer strategy, but none of the remaining respondents applied reactor strategy. On the whole, the prospector banks appeared to be able to communicate the strategy from the top to bottom more effectively than the analyser and defender banks. From the analysis of financial and non-financial performances, it discovered that the prospector banks (KBZ bank and AYA bank) achieved higher level performance in non-financial performance but could be deduced in terms of financial performance that the defender bank (SMIDB bank) and analyser bank (FPB bank) realized a higher performance level. The study suggested that by using performance for a different period or covering a longer time period will be able to confirm any changes in strategy choices and their results will affect on the performance of the banks.

**Key Words:** Strategy, Financial Performance, Non-financial Performance.

### **Introduction**

The stability of the financial sector and its development are crucial requirements for the economic development of a country. Although the financial sector covers a wide range of businesses such as banks, insurance companies, credit societies and finance companies, it is the banks that are the major players, posing as the main pillar that supports the stability as well as

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the development of the sector. An efficient and dynamic banking system not only promotes the financial sector but also plays a critical role in the allocation and mobilization of the country's resources. A stable and solid banking system is generally considered as an engine for the economic growth. Hence, the health of an economy is closely related to the soundness of the banking sector.

The banking industry likewise is facing the challenges of the complex and dynamic nature of its environment. With the modern technology, global financial liberalizations and innovations, the banking sector has advanced enormously. However, the inevitable environmental changes pose various risks and threats in the operations of individual banks. Hence, the banks need strong and effective strategies to cope with the risks and threats as well as to guide their operations in their pursuit of superior performance within the bounds of the contemporary financial sector.

The bank is able to assess its performance and determine whether it is on track in relation to achieving its strategic goals. Organizational strategy and ensuing objectives are seen as the most important factors determining the choice of performance measures. In particular, organizational strategy can be an important determinant of a company's performance measurement system. Hence this study as an attempt to explore the strategies that are currently being pursued by private banks and their relatedness to performance.

More importantly, there had been no study conducted on the linkage between strategies and performance in Myanmar banking industry. To answer for this limitation in the number of studies, this study endeavors to explore the strategies used in the Myanmar private banks, measure the performance based on both financial and non-financial measures and finally analyze the linkage between strategies and performance of private banks in Myanmar.

### **Method of the Study**

Business strategy defines the manner in which companies compete in a specific industry or market (Walker, Ruekert 1987). The strategy of an organization is the outline of the way it aims to pursue its goal within the constraints of its environment. A strategy is considered to be effective if it

results in sustainable competitive advantage for the organization, resulting in superior performance (Ousthuizen 1997). The essence of formulating strategies is choosing whether the firm will perform different activities than its competitor or will execute similar activities more efficiently than its competitors do.

There are two models for formulating strategies: Porter's Model of competitive strategies and Miles and Snow strategy typology. Each provides a framework for competitive action. Porter's Model introduces a framework describing three competitive strategies: low cost leadership, differentiation and focus. To use this model, decision makers evaluate the competitive advantage and the competitive scope. With respect to advantage, managers determine whether to compete through low cost or whether to offer unique or superior products or services and then command a premium price. The other factor considered scope is whether to compete in a narrow or broad customer segments.

Thus Porter's Model is concerned with a given environment and management's role is to make a choice among alternative strategies. For the banking sector which is being challenged by environmental changes, Porter Model is obviously not a suitable model for strategy formulation.

The other business strategy model developed by Miles and Snow is a typology based on the idea that managers seek to formulate strategies that will be congruent with the external environment. In this model, the organization seeks to find a fit among internal organizational characteristics, strategy and the external environment. The four strategies developed by Miles and Snow are the prospector, the defender, the analyser, and the reactor.

A careful analysis of the two models reveals that Miles and Snow's Model which considers the strategic fit with the firm operating environment is more compatible with the realities of the banking sector. Thus, this study has adopted the Miles and Snow Model in the analysis of firm strategies and the related performance.

Differences in strategy can be expected to result in differences in focus on key performance indicators according to the type of strategy adopted. This leads to the following research questions to be explored in this study.

- (1) What are the type of strategies that are being adopted by individual private banks in Myanmar?
- (2) Are there any significant differences among the performance of private banks?
- (3) Are there any linkages between strategies and performances of private banks in Myanmar?

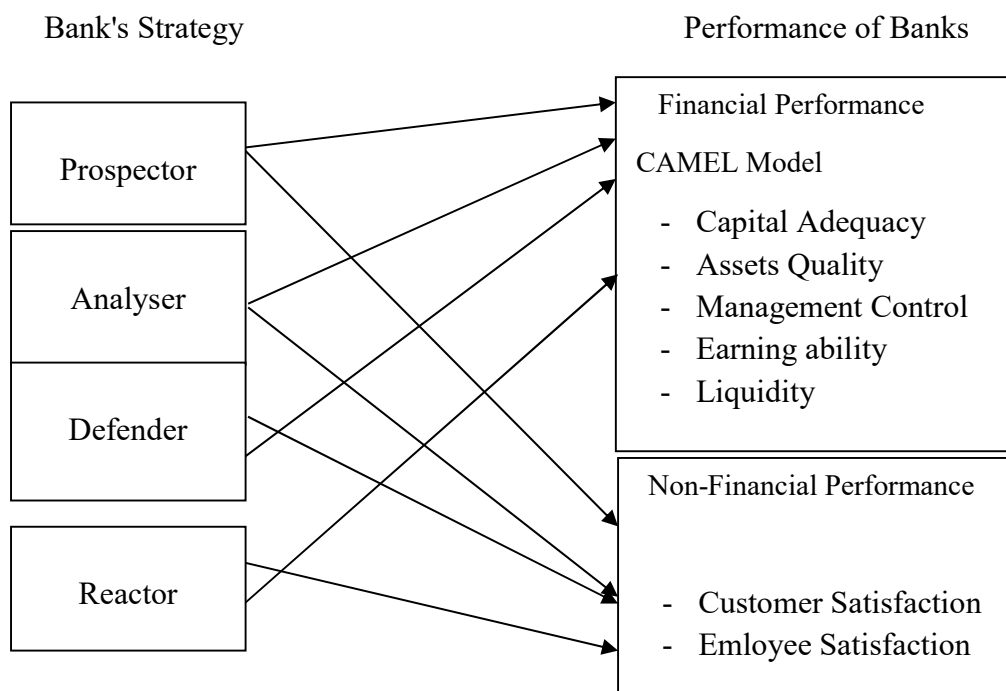
Therefore, The objectives of this study are as follows:

- (1) To identify the strategies adopted by private banks in Myanmar.
- (2) To analyse the performance of private banks in Myanmar.
- (3) To establish the linkages between strategies and performance of private banks in Myanmar.

Traditionally, performance measures were focused solely on financial accounting measures basing on past performance and favoring a short-term view and failing to provide long-term strategic perspective. The current trend however, is the endeavoring by companies to achieve financial goals through innovations and satisfaction of employees and customers. Hence, to appraise the achievement of a bank, a good measure of its performance in terms of customer satisfaction and employee satisfaction is required. Therefore, this study intends to analyze strategies and then influences on performance of private banks in Myanmar.

### **The conceptual framework**

From the above discussions, the study has developed the conceptual framework as shown in Figure 1.



**Figure 1.** Conceptual Framework of the Study

As presented in this figure, this study uses defenders, prospectors, analyzers and reactor strategies to measure business performance strategies according to Miles and Snow's typology. The criteria for performance measures are financial and non-financial performance measures. To measure financial performance, five variables are used; capital adequacy ratio, asset quality, management control, earning ability and liquidity. To measure non-financial performance measure, two variables are used; customer satisfaction and employee satisfaction. Employee satisfaction is generally considered as the driver of the employee retention and employee productivity. Satisfied employees are a prerequisite for increasing productivity, responsiveness, and quality and customer service (Kaplan 1996). Employee satisfaction means how satisfied employees are with their jobs. In general, employees want to be treated fairly and be respectable to them. If they are treated better they are satisfied and put their effort into organizational functioning. This is one of the reasons why organizations are concerned with employee job satisfaction. The result achieved from organization performance tends to focus organization's human resource policy.

There are seven elements of criteria that determines employee satisfaction; job content, relationship with supervisor, relationship with co-workers, training and development, salaries and incentives, promotion and career development.

The customer's satisfaction in the selected private banks is measured according to these eight criteria. They are customer expectation, bank appearance, and bank service, concern for mistake, trust, staff appearance and staff responsiveness.

### **Sample and data collection**

Primary as well as secondary data were applied in this study. Primary data was collected by using questionnaires with five-point Lickert scales, ranging from 1= 'strongly disagree' to 5= 'strongly agree'. Secondary data were collected from published reports, documents, newspapers, journals, magazines, the web sites of banks, other internet sources.

There are 23 domestic private banks which are currently operating in Myanmar. From these, eight private banks were selected by using simple random sampling method. Eight selected private banks are Myanmar Oriental Bank Ltd, First Private Bank Ltd, Kanbawza Bank Ltd, Small and Medium Industrial Development Bank, Ayeyarwady Bank Ltd, Myanmar Apex Bank Ltd, Asia Green Development Bank Ltd and United Amara Bank Ltd.

In all, (240) bank's officials and specialists were selected in equal number (30 each) from the selected private banks based on simple random sampling method. Specifically, in order to ascertain whether the strategy orientation adopted by CEOs had been successfully communicated throughout the management ranks of each bank, senior and middle managers were asked to identify their banks' strategy type. This was further investigated through interviews with fifteen middle managers and fifteen senior managers in each of the selected private banks. The selected bank's official and specialists were then interviewed with the help of pre-tested questionnaire at their head offices.

This analysis determined financial soundness indicators of all private banks in fiscal year 2012-13 and 2013-14 were used. (50) customers were randomly selected from each selected private bank and, structured

questionnaires were given to measure their satisfaction. And then, (50) bank staffs of each bank were randomly selected to analyse their satisfaction level.

### **Measures and Methodology**

Exploratory and descriptive methods were used in this study. Both quantitative and qualitative analysis were applied in this study.

Data collected were analyzed using descriptive statistics such as mode, mean and frequencies. Tabular analysis using average was used to identify the dominant strategy types.

The study analysed, both financial and non-financial performance (had been analyzed). Financial performance of the selected private banks were analyzed for the year 2012-2013 to 2013-2014 using CAMEL rating system. The Financial Soundness Indicators used to measure financial performance were calculated in terms of capital adequacy, assets quality, management control, earning ability and Liquidity ratios.

Financial ratios were measured by scores ranging from 1 to 5. If financial ratio is shown as percentage bad (or ) worse as norms in critical value it will be regarded as score 5. If financial ratios shows percentage good (or ) percentage best as per norms in critical value it will be regarded as score 1. If financial ratios show between percentage bad and good, the formula given below is used as inputs for calculating.

$$\text{Estimated score} = 5 - [(FSIs\% - \text{Bad}\%) / ((\text{Good}\% - \text{Bad}\%) / 4)]$$

The non-financial performance was analyzed based on customer satisfaction and employee satisfaction. In order to get the comprehensive understanding of the performance of private bank, in examining the quantitative data, the Statistical Package for Social Sciences (SPSS) software (version 16 for window) is applied to analyze the data in this phase.

## Results/ Finding

### Strategic Orientation in Selected Private Banks

The terms "defender", "prospector", "analyser", and "reactor" were not mentioned in the questionnaire. These terms were substituted by generic categories of "type 1", "type 2", "type 3" and "type 4", corresponding to the appropriate strategic type. Table 1 presents the responses to questions given to the personnel of the eight selected private banks.

**Table 1:** Strategic Orientation of Selected Private Banks

Bank	CEO Response	Senior Managers Response (%)	Middle managers Response (%)	Chi-Square tests
BHJJ KBZ	Prospector	Prospector (80%)	Prospector (73.33%)	.666
AYA	Prospector	Prospector (80%)	Prospector ( 53.33%)	.121
AGD	Analyser	Analyser (66.67%)	Analyser (86.67%)	.195
MAB	Analyser	Analyser (73.33%)	Analyser (60%)	.439
UAB	Analyser	Analyser (60%)	Analyser (60.67%)	.705
FPB	Analyser	Analyser (73.33%)	Analyser (60%)	.439
MOB	Defender	Defender (60%)	Defender (73.33%)	.439
SMIDB	Defender	Defender (73.33%)	Defender (66.67%)	.690

**Source:** Survey data (2014)

Table 1 reveals that out of the eight CEOs from the chosen private banks, two from KBZ and AYA banks responded that their banks adopt the prospector strategy, while four CEOs from AGD, MAB, UAB and FPB banks answered that their banks use the analyser strategy and the CEO's for the two remaining bank MOB and SMIDB gave the defender strategy as their strategy used in their banks. The researcher considered the averages of the responses to the questions under each strategy. The category with the highest mean value is taken to represent the dominant strategy type within the bank. The results are given in Table 2.

**Table 2:** Strategy Types

<b>Banks</b>	<b>Types of Strategy</b>				<b>Dominant Strategy</b>
	<b>Prospector</b>	<b>Defender</b>	<b>Analysar</b>	<b>Reactor</b>	
KBZ	3.98	3.41	3.46	2.11	Prospector
AYA	3.89	3.43	3.89	1.93	Prospector
AGD	3.65	3.46	4.03	2.38	Analyzer
UAB	3.80	4.04	4.13	2.11	Analyzer
MAB	3.58	3.49	3.79	3.33	Analyzer
FPB	3.65	4.09	4.15	2.17	Analyzer
MOB	3.28	3.59	3.39	3.05	Defender
SMIDB	2.81	4.29	2.90	3.60	Defender

**Source :** Survey Data (2014)

Table 2 clearly indicates the dominant strategies adopted by the eight selected banks. There are four banks that have adopted the analyzer strategy and two each of the prospector strategy and defender strategy. However, incase of AYA, there is the question of the averages for the prospector and analyser strategies happen to be the same on the choice of dominant strategy would be doubtful. To overcome this point, the study has made use of the mode value rather than the average to decide the dominant strategy. Hence the prospector strategy a higher mode value is chosen as the dominant strategy for AYA bank.



### Analysis on Financial Performance of Selected Private Banks

**Table 3:** Overall Performance Ranking of Selected Private Banks

Bank	C		A		M		E		L		Group Rank		Composite Score
	Ave	Score	Ave	Score	Ave	Score	Ave	Score	Ave	Score	Ave	Rank	
KBZ	8.00	4.6	2.67	1.0	4.67	2.7	2.00	1.5	6.00	3.5	4.67	5	2.7
AYA	4.33	2.3	7.66	2.7	5.58	3.0	5.67	3.7	4.67	3.4	5.58	6	3.0
AGD	5.67	2.5	7.33	2.6	6.17	3.2	6.67	4.0	5.67	3.6	6.17	8	3.2
MAB	7.00	3.4	6.00	2.0	5.99	3.2	5.33	3.6	6.33	3.6	5.99	7	3.2
UAB	3.00	1.8	2.00	1.0	3.83	2.5	8.00	4.2	2.33	2.8	3.83	3	2.5
FPB	1.67	1.0	1.67	1.0	2.33	1.7	2.00	1.3	4.00	3.3	2.33	1	1.7
SMIDB	1.33	1.0	4.67	1.3	2.50	1.6	2.33	1.9	1.67	2.0	2.50	2	1.6
MOB	5.00	2.3	4.00	1.1	4.58	2.5	4.00	3.0	5.33	3.5	4.58	4	2.5

**Source:** Survey Data(2014)

Table 3 shows overall performance ranking for the period 2012/13-2013/14 of the selected private banks' as analyzed by CAMELS Rating System, FPB bank scored 1.7 and ranked first. SMIDB Bank score 1.6 and was ranked second respectively.

According to the CAMEL framework composite scores of one or less means the bank is in strong condition. None of the selected private banks managed to achieve this condition. However FPB bank, SMIDB bank and MOB bank have scores greater than one but less than two so that they achieve satisfactory overall performance, and the remaining bank with scores greater than two merely obtain average but satisfactory performance overall. All the banks are within the range of satisfactory performance so that they could cope with any changes in the banking sector and withhold any crisis and remain liquid and earn satisfactory returns.

### Analysis on Non-Financial Performance of Selected Private Banks

Non-financial measures also are important indicators of the performance of the banks. However, the bank pays limited attention to non-financial measures despite the fact these measure mean are to retain their strong customer base and large market share. Non-financial performance includes measure of employee satisfaction and customer satisfaction.

**Table 4:** Employee Satisfaction of Selected Private Banks

Items	Mean Value							
	KBZ	MAB	AYA	AGD	UAB	SMIDB	MOB	FPB
Job Content	4.12	3.95	4.03	3.78	3.89	3.51	3.70	3.82
Relationship with Supervisor	3.88	3.76	3.92	3.56	3.69	3.27	3.48	3.42
Relationship with Co- Workers	3.88	3.96	3.95	3.63	3.79	3.49	3.86	3.83
Training & Development	3.93	3.60	3.70	3.28	3.51	2.47	3.24	3.23
Salaries and Incentives	4.13	3.56	3.85	3.51	3.48	2.97	2.94	3.02
Promotion	3.80	3.18	3.48	3.20	3.20	2.76	3.10	3.58
Career Development	4.21	3.76	4.00	3.50	3.80	3.00	3.32	3.49
Overall Employee's Satisfaction	4.01	3.67	3.85	3.5	3.67	3.05	3.32	3.42

**Source :** Survey data (2014)

Analysis of Table 4 reveals that KBZ bank received the top position overall employee satisfaction as well as all other measures except for relationship with supervisors where it is behind MAB bank and AYA bank. In contrast the SMIDB occupies the lowest position on all counts except in the case of salaries and incentives where it is slightly higher than MOB.

**Table 5:** Customer Satisfaction of Selected Private Banks

Items	Mean Value							
	KBZ	MAB	AYA	AGD	UAB	SMIDB	MOB	FPB
Customer Expectation	3.76	3.68	3.78	3.65	3.70	3.23	3.59	3.41
Bank Appearance	4.44	3.89	4.48	3.97	3.89	3.18	3.38	3.64
Reliability of Bank Service	3.98	3.74	4.07	3.66	3.59	3.11	3.49	3.87
Concern for Mistake	3.56	3.46	3.44	3.32	3.42	3.30	3.60	3.92
Willingness to help Customer	4.14	3.58	4.22	3.68	3.46	3.28	3.46	3.84
Trust	3.78	3.86	4.04	4.00	3.90	3.66	3.68	4.02
Staff Appearance	4.21	3.82	4.18	3.82	3.72	3.41	3.44	3.89
Staff Responsiveness	3.54	3.60	3.92	3.57	3.45	3.29	3.44	3.67
Overall Customer 's Satisfaction	3.93	3.71	4.02	3.70	3.64	3.29	3.51	3.85

**Source :** survey data (2014)

Table 5 indicates the measure of the banks' services. Hence also there is consistency in the results as AYA bank earned the highest customer satisfaction and the SMIDB bank got the lowest in almost all counts. The only exception is in the measure of the concern for mistakes where FPB bank performed better than AYA bank. Again, the variance between the scores for the banks in every count is quite small. Hence it could be deduced that all the selected banks enjoy comparable measures of customer satisfaction.

### **Analysis on relationship between strategy and performance of private banks**

The differing strategic orientations suggest that measurement of performance in the banks may also differ. This study examines whether the adoption of specific strategic orientation influences the type and number of performance measure in selected private banks. Moreover, this study examines the relative influence of financial and non-financial performance measures on short-term and long- term decision-making.

### **Relationship between Strategy and Financial Performance**

This study applies the CAMEL framework to analyze the selected private banks to identify the strengths and weaknesses of the performance. Table (Appendix 1) shows analysis of capital adequacy component ratios of selected private banks for the period 2012/2013 and 2013/2014 given by strategy types.

The reason why the prospector banks (KBZ bank and AYA bank), achieved a lower core capital to total deposit ratio is because they have not only extended a large number of branches but also have raised large amounts of total deposit. However, for the defender banks have only limited number of branches and thus lesser deposits are able to maintain a high ratio of core capital to total deposit.

The results indicate that the prospector banks have made extensive use of their core capital in investments in risk weighted assets. Thus they could improve their performance by investing their core capital to make loans interest earning. The other two types viz, analyser and defender banks more continuously use their core capital in making loans. Due to the limited number of branches they can also make less NPLs.

This study shows that the defender banks achieved score of 1.7 with ranking first. The analyser banks obtained score of 2.2 with ranking second and the prospector banks achieved score of 3.4 with ranking third. The composite of capital adequacy components reveals that the prospector banks with many branches, are high in both capital and deposits. However, to make profits, loans need to be implemented, acquisitions of fixed assets and other assets need to be done, which are risk weighted assets.

Table (Appendix 2) shows the analysis of selected private bank's assets quality component ratios from 2012/13 to 2013/14.

The composite of assets quality components for the financial year 2012-13 and 2013-14 reveals that the defender banks with average 1.67 %, score 1.8 and ranked first. The analyser banks with average 2 % score 1.7 and the prospector banks with average 2.33 % score 2.8 were ranked second and third respectively.

For asset quality component as a whole the defender banks have low non-performing loans. This is an indication that the defender banks are in good condition and are able to pressure their capital against NPLs.

Table (Appendix 3) shows the analysis of selected private bank's management control component ratios from 2012/13 - 2013/14.

The rating and ranking of the composite management control component shows that the defender banks scored 2.2 and ranked first followed by the analyser banks with the score of 2.6 and the prospector banks with score of 3.1.

Table (Appendix 4) shows analysis of selected private bank's earning ability component ratios for financial years 2012/13-2013/14.

The rating and ranking of the earning ability component ratios shows that the defender banks with the average ratio of 1.33 % and score 2.5, was ranked first followed by the prospector banks achieved the average ratio of 1.67 % and score 2.6 and the analyser banks with average ratio of 3 % score 3.1 were ranked second and third respectively.

The highest ranking achieved by defender banks was the result of adequate and proper control practised by these banks. The banks could manage to take full opportunity to earn full interest on their loans, as well as to reduce the number of NPLs. The low ranking of the analyser banks can be explained by the fact that they are recent comers into the banking industry and thus have not been able to attract enough clientele for earning income.

Table (Appendix 5) shows the analysis of the selected private bank's liquidity component ratios for the financial years 2012/13 - 2013/14.

The rating and ranking analysed by the liquidity component shows that the defender banks average ratio of 1.33 % and score 2.8 was ranked first. The analyser banks with average ratio of 2.33 % and score 3.7 and the prospector banks average ratio of 2.33% score 3.4 were ranked second and third respectively. The defender banks' small ratio indicated that they were subjected to lesser risks. They also maintained the most liquid assets. Therefore, they obtained the best position in liquidity component. The prospector banks on the other hand managed the highest deposits and highest

loans so that they were open to high risk. The prospector banks, with the lowest liquidity ratios, received the last position among all banks in liquidity component.

To assess the overall financial performance of the selected private banks, the study calculated the composite ranking and the results are conferred in Table 6.

**Table 6:** Relationship between Strategy and Overall Financial Performance Ranking

Bank's Strategy	Capital Adequacy	Asset Quality	Management Control	Earning Quality	Liquidity Quality	Component Score (Average)	Rank
Prospector	3.4	2.8	3.1	2.6	3.4	3.1	3
Analysar	2.2	1.7	2.6	3.1	3.7	2.6	2
Defender	1.7	1.8	2.2	2.5	2.8	2.2	1

**Source:** Survey Data (2014)

Table 6 shows the overall financial performance ranking for the financial years 2012/13 and 2013/14 from all selected private banks. The table reveals that by the CAMELS rating system, defender banks scored 2.2 and ranked first. The analyser bank scored 2.6 and ranked second while the prospector bank scored 3.1 and ranked third respectively.

The defender banks with overall top rank of one earned the top position in all components of the CAMELS framework except in the case of earning quality and liquidity quality. As these banks' composite ranking score is close to 2, they can be considered as satisfactory.

The analyser banks are basically strong. However as their rating score is 3, these are susceptible to extend shocks and easily fall under are thus as "Fair". These banks have suffered from some moderate weakness in management control and need to improve supervisory capacity of Board of Director and management team. These banks have manageable size and the capacity to cope with difficult situations, able to follow the rules and regulations, and acceptable risk profiles but analysed as lacking in supervisory concern.

The prospector banks with score of 3.1, and lowest rating but the composite rating is above 3 so that banks are analysed as in "average condition". These banks need to monitor and check in one (or) more than one component area. There are weakness in management supervision and cannot withstand fluctuations in the economy. Banks with composite score of (3) need to face external effects more than the other two type banks which have composite scores of (1) and (2). In addition as these institutions do not follow rules and regulations, have mixed manageable sizes and having capacity with risky profile and inadequate management control are termed as unacceptable. This kind of financial institutions needed to be monitored and checked with formal and informal enforcement actions.

### **The Relationship between Strategy and Non-Financial Performance**

Generally, the banks do not pay much attention to non-financial measures as a means to retain their critical performance management system. Non-financial performance measures undertaken by banks are explained in two sections: employee satisfaction and customer satisfaction.

### **Relationship between Strategy and Employee Satisfaction**

**Table 7:** Analysis on Employees Satisfaction by Type of Strategy

Items	Mean Score (M)			P-value
	Prospector Banks	Analysers Banks	Defender Banks	
Job Content	4.10	3.68	3.32	.000
Relationship with supervisor	3.90	3.68	3.37	.000
Relationship with Co- Workers	3.91	3.86	3.68	.028
Training & Development	3.82	3.40	2.86	.000
Salaries and Incentives	3.83	3.33	2.96	.000
Promotion	3.64	3.29	2.93	.000
Career Development	4.10	3.64	3.16	.000
<b>Overall Employee Satisfaction</b>	<b>3.90</b>	<b>3.55</b>	<b>3.18</b>	<b>.000</b>

Source : Survey data (2014)

Table 7 reports the summarized results of one-way ANOVA for difference among mean scores of employees satisfaction by each strategy typology. This study indicates that there are significant differences between the three typologies and seven criteria of the employee satisfaction. The study discovered that banks with different strategies have different effects on employee satisfaction. The result indicates that prospector banks relied on more overall employee satisfaction than analyser banks and defender banks. This is confirmed by one - way ANOVA test, which shows that there are significant differences between prospector, analyser and defender in term of the total number of measures used ( $p < .05$ ). It can be found that bank customers at prospector banks and analyser banks also agree with overall satisfaction at their banks. Bank's employee at defender banks disagree with overall satisfaction at their banks. The Table's overall results show that the employees from the prospector banks are the most satisfied with their jobs.

### Relationship between Strategy and Customer Satisfaction

**Table 8:** Analysis on Customer Satisfaction by Type of Strategy

Items	Mean Score (M)			P-value
	Prospector Banks	Analyser Banks	Defender Banks	
Customer Expectation	3.77	3.74	3.41	.000
Bank Appearance	4.46	3.85	3.28	.000
Reliability of Bank Service	4.02	3.60	3.23	.000
Concern for Mistake	3.50	3.53	3.45	.732
Willingness to help Customer	4.18	3.64	3.37	.000
Trust on Bank	3.91	3.95	3.67	.004
Staff Appearance	4.19	3.81	3.42	.000
Staff Responsiveness	3.73	3.58	3.37	.001
<b>Overall Customer Satisfaction</b>	<b>3.97</b>	<b>3.71</b>	<b>3.40</b>	<b>.000</b>

Source : Survey data (2014)



Table 8 indicates that there are significant differences between the three typologies and seven criteria of the customer satisfaction. The study discovered that banks with different strategies have different effects on customer satisfaction. The result indicates that prospector banks relied on more overall customer's satisfaction than analyser banks and defender banks. This is confirmed by one - way ANOVA test, which shows that there are significant differences between prospector, analyser and defender in term of the total number of measures used ( $p < .05$ ). It can be found that bank customers at prospector banks and analyser banks also agree with overall satisfaction at their banks. Bank customers at defender banks disagree with overall satisfaction at their banks.

### **Discussion**

From the analyses of employee satisfaction and customer satisfaction, the study found that prospector banks had higher mean value than the other banks on both counts. In addition, as these two banks belonged to the group using the prospector strategy, it would be deduced that prospector banks achievement is of higher level in term of non financial performance, but in terms of financial performance, the defender banks achieved the higher level.

However, the other two banks that were not performing well now right with the experience and exposure they were getting from the business environment improved and raised their performance by changing from defender strategy to either prospector or analyser strategy.

In order to improve the bank's operations and to achieve sustainable growth the following plans should be implemented for the near future:

- (1) Defender banks and analyser banks must open more bank branches in towns and townships where there are potential for business.
- (2) Defender banks and analyser banks providing services to the customer based on modern technology, customize offerings and treating customers based on their interest with some variation in utilizing effectively.
- (3) Prospector banks must reduce to the optimal level of operations and diversify it to increase profitability.

- (4) The private banks promote banking business, in line with advanced technology, for prompt dependable and modernized operations.
- (5) The private banks upgrade the banks human resources systematically in order to develop internal and external banking businesses.
- (6) The private banks should select bright and efficient personnel for the bank and upgrade their capability.
- (7) The private banks should train the staff for the capacity development such as local and international training to be skillful, to be qualified.

### **Summary**

To determine a strategy, it is very important for the company to have a comprehensive assessment of its own capabilities and performances relative to the competitors as well as the company's positioning in the industry. The external analysis assesses the macroeconomics environment of economics growth which includes interest rates, currency exchange, regulations, and general expectations of the organization role in society.

The study highlighted the importance of the banks selection a suitable strategy that simultaneously builds on its strengths and reduces its weaknesses. At the same time, the bank must select performance measure that helps it translate that strategy into action, which will improve its performance. The banks that select the wrong strategy or the wrong performance measurement to drive their strategy to meet the expectations, may not survive, especially in an unstable environment. Therefore, the challenge for banks is to align their internal perception with the external perception, as this in itself may be a signal for managers in their choice of performances.

To be successful in the industry, banks need to be supported by qualified and professional human resources. For the newly established banks to recruit experienced professional in the banking industry will be costly. Thus the human resource departments from the banks should be not only fully qualified but also have adequate understanding and commitment to their jobs. Competition in banking industry is getting stiffer every day. All the players in the banking industry are competing to provide innovative products and services to the customers. To deal with this situation, it is very essential for

banks to keep innovating and maintaining high level of service to give value to their customer. The private banks providing services to the customer based on modern technology, customize offerings and treating customers based on their interest. With competitive products and excellent service quality, can expect to give high customer satisfaction and loyalty, and eventually increase market share.

### **Limitations and further research**

This section attempts to explain the requirements for further study and the limitations of current study. Firstly, this study only focused on strategy and performance of selected private banks in Myanmar. Thus, all private banks should be explored as a further study in order to compare financial performance and non-financial performance. A research using performance for a different period or cover a longer time period be encouraged to confirm any changes in strategy choices and their resulting effect on the performance of the banks. A further study could be done on strategy and the performance of private banks in Myanmar using Porters' competitive strategy and Kaplan and Norton's Balanced Scorecard to evaluate the firms performance. A further research work could also be undertaken in other industries such as manufacturing, retailing, hospitality and health industries and profit and non-profit institutions to help drive the implementation and measurement of their strategies.

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## References

- Ackoff, R. (1981), *Creating the Corporate Future*. New York: John Wiley and Sons.
- John, C., Jacqueline, D, & Robert, H. (2002), *Corporate Strategy*. New York, NY: Mc Graw-Hill.
- Johnson, H. & Kaplan, R., (1987), *Relevance Lost the Rise and Fall of Management Accounting*. Boston: Harvard Business School Press.
- Kaplan, R., & Norton, D. (1992, January), The Balanced Scorecard Measure that Drive Performance. *Harvard Business Review*, 70, 71-79.
- Kaplan, R., & Norton, D. (1996), Using the Balanced Scorecard as a Strategies Management System. *Harvard Business Review*, 74 (1), 75-85.
- Miles, R., and Snow, C., (1978), *Organizational Strategy, Structure and Process*. New York, NY: McGraw-Hill, A. D. Meyer and H. J. Coleman Jr. 1978. *Organizational Strategy, Structure, and Process*. *Academy of Management Review*. 12: 607-621.
- Mintzberg, H. (1994), *The Rise and Fall of Strategic Planning*, Free Press.
- Ousthuizen, H. (1997), An Evaluation of the Relevance of the Miles and Snow Strategic Typology under Present-day Conditions of Major Environmental Uncertainty-the Emperor's New Clothes or a Paradigm Shift? *South African Journal of Business Management*, 28(2), 63-73.
- Porter, M., (1980), *Competitive Strategy: Techniques for Analyzing Industries and Competitors*. New York: The Free Press.
- Porter M., (1985), *Competitive Advantage*. New York: The Free Press.
- Tayanya, S. (2004), Examining the Factors which Influence Performance Measurement Management in the Thai Banking Industry: An Application of the Balanced Scorecard Framework, Ph.D Thesis, Murdoch University.
- Thompson, A., Strickland, A. (1996), *Strategic Management* (9<sup>th</sup> ed). Chicago: Irwin.
- Walker, O., Ruekert, R. (1987), Marketing's Role in the Implementation of Business Strategies: A Critical Review and Conceptual Framework. *Journal of Marketing*, 51(3), 15-33.



Table

**Capital Adequacy Component Ratios of Banks by Strategy Type**

<b>Bank's Strategy</b>	<b>Capital Adequacy Component Ratios</b>											
	<b>C2</b>			<b>C3</b>			<b>C1</b>			<b>Group Rank</b>		<b>Component Score</b>
	Average	Rank	Score	Average	Rank	Score	Average	Rank	Score	Average	Rank	Score
Prospector	6.94	3	4.7	16.67	3	2.6	18.16	3	3.0	3	3	3.4
Analysar	14.42	2	3.5	34.65	2	1.3	35.20	2	1.7	2	2	2.2
Defender	16.32	1	2.8	44.01	1	1.2	46.04	1	1.1	1	1	1.7

**Source:** Survey data (2014)**Notes:** C1 = Capital Adequacy Ratio

C2 = Core Capital to Total Deposits

C3 = Core Capital to Risk Weight Assets

## Appendix 2

**Table**  
**Assets Quality Component Ratios of Banks by Strategy Type**

Bank's Strategy	Assets Quality Component Ratios											
	A1			A2			A3			Group Rank		Component Score
	Average	Rank	Score	Average	Rank	Score	Average	Rank	Score	Average	Rank	Score
Prospector	0.71	3	1.6	611.98	1	3.0	0.39	3	1	2.33	3	2.8
Analyser	0.58	2	1.5	442.77	2	2.5	0.32	2	1	2.00	2	1.7
Defender	0.24	1	1.2	427.80	3	1.3	0.18	1	1	1.67	1	1.8

**Source:** Survey data (2014)

**Notes:** A1 = Non- performing Loans (NPLs) / Total Loans

A2 = Provision / NPLs

A3 = Non- performing Loans (NPLs) / Total Assets

## Appendix 3

**Table**  
**Management Control Component Ratios of Banks by Strategy Type**

<b>Bank's Strategy</b>	<b>Management Control Component Ratios</b>								
	<b>M2</b>		<b>M1</b>		<b>M3</b>		<b>Group Rank</b>		<b>Component Score</b> (Ave; other 4 Component)
	<b>Average</b>	<b>Rank</b>	<b>Average</b>	<b>Rank</b>	<b>Average</b>	<b>Rank</b>	<b>Average</b>	<b>Rank</b>	
Prospector	78.12	1	83.82	1	65.26	2	1.33	3	3.1
Analysar	51.94	2	35.32	2	73.82	1	1.67	2	2.6
Defender	15.91	3	11.93	3	30.59	3	3.00	1	2.2

**Source:** Survey data (2014)

**Notes:** M1 = Total assets growth rate  
M2 = Loans growth rate  
M3 = Total income growth rate



## Appendix 4

**Table**  
**Earning Ability Component Ratios of Banks by Strategy Type**

Bank's Strategy	Earning Ability Component Ratios											
	E1			E2			E3			Group Rank		Component Score
	Average	Rank	Score	Average	Rank	Score	Average	Rank	Score	Average	Rank	
Prospector	2.61	2	2.9	25.29	1	2.9	21.89	2	1.9	1.67	2	2.6
Analysar	1.41	3	4.1	18.99	3	3.6	24.56	3	1.7	3.00	3	3.1
Defender	2.85	1	2.6	22.63	2	3.3	13.49	1	1.5	1.33	1	2.5

Source: Survey data (2014)

**Notes:** E1 = Return on Assets (ROA)

E2 = Return on Equity (ROE)

E3 = Operating Expenses/ Total Income

## Appendix 5

**Table**  
**Liquidity Quality Component Ratios of Banks by Strategy Type**

Name of Bank	Liquidity Quality Component Ratios											
	L1			L2			L3			Group Rank		Component Score
	Average	Rank	Score	Average	Rank	Score	Average	Rank	Score	Average	Rank	Score
Prospector	24.27	3	4.3	65.66	1	1.0	88.10	3	5.0	2.33	2	3.4
Analysar	27.36	2	3.9	67.94	3	1.7	80.88	2	4.4	2.33	2	3.7
Defender	34.46	1	2.8	66.93	2	1.0	78.45	1	4.5	1.33	1	2.8

**Source:** Survey data (2014)

**Notes:** L1 = Liquidity Ratio

L2 = Total Loans / Total Deposit

L3 = Total Deposits/ Total Assets

## **HRM PRACTICES AND EMPLOYEE RETENTION: THE CASE OF HOTELS IN YANGON**

Phu Pwint Nyo Win Aung\*

### **Abstract**

Retaining competent employees is the most important agenda for all organizations. Thus, human resource management practices are broadly applied to retain skillful employees as valuable assets of the organization. This study aims to examine human resource management practices that determine the retention of employees of hotels in Yangon. From among 24 hotels having at least 100 rooms capacity and located in Yangon, 8 hotels were randomly chosen as a sample covering 277 employees representing 11% of the population. Through SPSS version 20.0, multiple linear regression analysis is applied to analyze the data. The study found that among the human resource management practices; training and development and employee participation were vital factors that indeed influenced employee retention in the hotels. Based on the findings of the analysis, the study suggested the provision of training and development opportunities for career advanced; and employee participation practices are best practices to retain highly qualified and competent workers in hotels in Yangon.

**Keywords:** HRM practices, compensation and benefits, training and development, work-life balance, employee participation and employee retention.

### **Introduction**

In today's intensely competitive global marketplace, to become a low cost leader or a differentiator, management needs to rely heavily on the highly committed or competent workforce while maintaining competitive advantage. In a growing number of organizations, human resources are now viewed as a source of competitive advantages. Most organizations and their management invest on human resources because it is known to be one of the most important assets of the organizations. Employees are the greatest human resources of an organization and their contribution can make the difference between the success and failure of organization. Therefore, it is advisable for

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every organization to maintain its best performers especially in today's competitive economic arena where competitors are observed to poach employees from each other.

Competent human resources can assist organizations to achieve the optimum use of other resources, and consistently contribute to effectiveness and continuous improvement of the organizations. Worldwide competitive organizations rely on their employees to provide innovative solutions to the problems they might have. Indeed, in the world where competition is high, and technologies, processes and products can easily be duplicated by competitors, employees are the key and most reliable resource that can keep an organization a step ahead of its competitors. Pfeiffer (2005) affirms that acquisition, development and retention of talent form the basis for developing competitive advantage in many industries and countries. Accordingly, for any organization to thrive and remain competitive, it is important to attract and retain skilled human resources. This implies that employee retention plays a vital role in the growth of organizations.

Employee retention is the vital challenge in all organizations. An examination of employee retention literature reveals that efforts to retain employees are more focused on employees with core competencies or in core business units. In order to achieve competitive advantage, maximum utilization of resources and to get organizational efficiency employees must be retained in a true spirit in order to cope with all these conditions (Hassan, Khan, and Akram Naseem, M., 2011). More specifically, employee retention is a critical aspect for every company regarding competitive advantage because human resource is the most critical asset of today's modern world (Anis, Rehman, Nasir, and Safwan, 2011). The success of the most competitive companies throughout the world lies in their highly skilled employees on which these institutions spend millions to retain.

Long-term health and success of any organization depends on the retention of key employees. To a great extent, customer satisfaction and organizational performance in terms of increased sales, satisfied staff, effective succession planning and others are dependent upon the ability to retain the best employees in any organization. It is essential to explore the significant factors to retain the employees. By exploring those factors, the

business organizations including hotel industry can practice them to keep their employees stay.

The hotel sector is growing at a very fast rate in Myanmar. This sector can be classified into hotel industry, travel and tourism, restaurants, pubs, clubs and bars, contract catering, and aviation. The tourism industry is linked to the hotel industry which is a labor intensive one. With the rapid growth in tourism, hotel industry is now facing a shortage of skilled and satisfied local personnel. Thus, of all the available resources to hotel managers, human resources is of greater value. Employee turnover has been one of the biggest challenges in the hotel industry. The hotel industry constantly suffers from staff turnover because the hotel market is very competitive and attracts the talented employees. Resulting in high direct expenditure as well as intangible costs, the retention of staff is needed to get improvement and constant attention to the hotel sector. By maintaining and retaining qualified employees who will provide quality services, hotel organizations have the potential of tremendously influencing the efficient development of tourism.

Many researchers have pointed out that human resources management practices impact on the outcomes such as employee satisfaction, employee commitment, employee retention, employee presence, social climate between workers and management, employee involvement, employee trust, employee loyalty, organizational fairness (Edger & Geare, 2005; Paauwe & Richardson, 1997 and Storey, 1989). This study focuses on compensation, training and development, work-life balance and employee engagement as these factors are common across the three theories 2.2. In addition, these factors are important in the context of Myanmar hotel industry. Compensation offered employees at some level of security, autonomy, recognition, and improved self-worth, leading to be satisfied with the current job and hence retention. Proactively creating opportunities will motivate employees to achieve their career objectives and reinforce positive behavior. Work-life balance is universally appealing and promotes the awareness that the organization will support the employees' personal needs. Employee participation also serves as a route to business success and is achieved when organizations and employees value each other.

The study has chosen the hotels as study units because hotels have become very effective partners in the process of economic development and they are facing with competition and retention problems. The study analyzes the factors determining the retention of hotel industry in Yangon and to ascertain whether human resource management practices of the hotels influence employee retention.

### **Literature Review**

Employee Retention involves taking measures to encourage employees to remain in the organization for the maximum period of time (Griffeth and Hom, 2001). Organizations are facing a lot of problems in employee retention these days. Hiring knowledgeable people for the job is essential for an employer. But retention is even more important than hiring. Retention is ‘a voluntary move by an organization to create an environment which engages employees for the long term’ (Chaminade, 2006). A more detailed and recent definition of the concept of retention is ‘to prevent the loss of competent employees from leaving productivity and profitability’ (Chiboiwa, Samuel, and Chipunza, 2010). Some people view employee retention as the result of the implementation of policies and processes that assist employees to remain with the company because of the provision of a work environment that meets their needs (Baer, Fagin, and Gordon, 1996). Employee retention has been defined as “the effort by an employer to keep desirable workers in order to meet business objectives” (Frank, Finnegan, and Taylor, 2004).

Employees who are satisfied have higher intentions of persisting with their organization, which results in a decreased turnover rate (Mobley, Griffeth, Hand, and Meglino, 1979). Intent to stay is a strong predictor of turnover; therefore, factors affecting intent to stay are likely to affect turnover as well as retention. Intention to stay mirrors the employee’s level of commitment to his organization and the willingness to remain employed (Hewitt, 2004). Intention to stay is defined as employees’ intention to stay in current organization. Undesirable, unwanted, and voluntary attrition that companies experience when highly valued employees quit to take another job elsewhere is a much bigger problem than the frequency of corporate layoffs reported (Mobley, 1982). Price and Mullar (1981) stated that intention to stay

was an estimated probability that an employee will continue to work in an organization.

### **Relationship between Compensation and Benefits Practices and Employee Retention**

The compensation system that an organization offers to its employees plays an important role in determining the commitment levels of employees and their retention. Employee compensation includes all forms of pay and rewards received by employees for the performance of their jobs (Snell and Bohlander, 2007). Direct compensation includes employee wages and salaries, incentive-payments, bonuses and commissions. While indirect compensation comprises the many fringe benefits provided by employers and non-financial compensation including health care, life insurance, subsidized lunch, leave policy, overtime, pension plan, and transportation policies. Compensation is a powerful communicator of organizational goals and priorities and companies that expect to be successful must make employees become partners in their success (Shuster and Zingheim, 1993). Pam (2007) observes that employee compensation can be a sensitive subject, and people get very passionate when trying to determine the most appropriate compensation plan for any business. According to the survey report conducted by the Society for Human Resource Management (2012), they found that compensation and benefits would affect employees' retention.

De Vos and Meganck's (2009) research showed that there were two reasons why turnover is so common in hotels. Financial rewards and lack of career opportunities were cited as being the top reasons for employee turnover. On the other hand, the reasons why employees decided to stay were social atmosphere and relationship with coworkers, job content, career opportunities, and financial rewards. Coincidentally, the reasons why people are leaving are the same reasons for people staying, depending on where their current job is. With all of these studies, however, it is proven that rewards given to employees will entice them to stay, and the lack of rewards will be reason for them to leave. Mathis and Jackson (2004) also argued that a balanced, fair and competitive compensation and reward system affect the retention of employees. This makes compensation and reward planning a vital dimension of effective human resource management policies. Besides the

regular direct financial compensation, organizations can also use other financial and non-financial incentives to motivate and hence retain employees (Nzuve, 1997). The primary effect offering benefit type of compensation is to retain the employees in the organization on a long term basis (Flipppo, 1984).

### **Relationship between Training and Development Practices and Employee Retention**

Jones et al. (2009) concluded in a study and stated that training is positively associated with employee retention. Schmidt (2007) research studies concerned on the importance of job training to different categories of employees and it can conclude that training and development positively influenced the job satisfaction leading to retention.

Various benefits can be obtained through training which includes the improvement of organizational productivity, increasing employee retention and satisfaction, and greater organization commitment among others. Chiang et al., (2005) found that training quality had a positive relationship effecting job satisfaction and thus increased an employee's intention to stay in the hotel industry. Hence, the organization should emphasize employee training as it has a significant effect on the retention of employees. Hence, organizations can train their employees so that their willingness to stay will increase (Chang and Chang, 2008).

Evans and Lindsay (1999) stated that training and development can increase the quality of the employees and this will bring the advantages for the organization in the long term. Through the training and development, the relationship with employees, organization will be able to maintain and increase employee's retention decision (Samuel and Chipunza, 2009). In addition, it also could attract existing employees to continue work at current job position (Haines, Jalette, and Larose, 2010). By providing opportunities for training and career development which forms part of career management, organizations are supporting their employees to more knowledgeable as well as to achieve their personal career goals. Lee and Bruvold (2003) established that comprehensive training and development activities are positively related to productivity, reduce staff intention to leave, and ensures organizational effectiveness. A study by Thomsen et al., (2006) has also shown a positive



relationship between diverse career opportunities and applicant attraction to and retention in an organization.

### **Relationship between Work-life Balance Practices and Employee Retention**

According to Deery (2008), it appears that the conflict between these important dimensions of human activity can cause both job dissatisfaction and family conflicts and hence intention to leave an organization. Thus individuals who have to work and at the same time play major roles in their homes are likely to experience conflict or face challenges with both roles. A study by Maxwell (2005) also indicated that work-life balance policies such as the introduction of flexible working hours and arrangements, provision of better training, breaks from work and better work support do not only address work-life balance issues but also enhance employee retention.

Work-life balance and reduced work-family conflict increase one's chances of retention (Anderson, Coffey, and Byerly, 2002). Research has suggested that organizational work-life benefits and a supportive work climate are linked positively to employee well-being and retention (Allen, 2001). Work-life quality was found to be a significant predictor of job satisfaction, commitment and longer stays (Rhoades and Eisenberger, 2002). Aryee, Luk, and Stone, (1998) found a positive correlation between satisfaction with work flexibility and intentions to stay. They hypothesized that a flexible work schedule and supervisor support for work-life policies would show a positive correlation with organizational commitment and a negative relationship with turnover intentions.

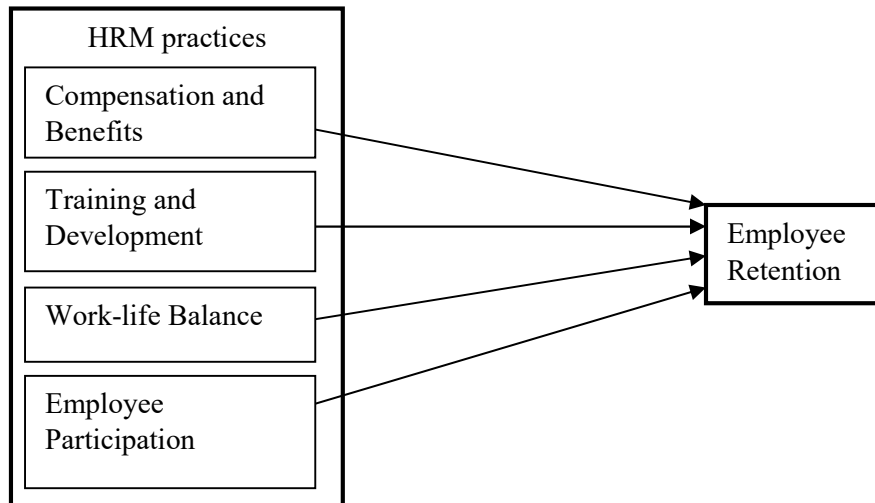
### **Relationship between Employee Participation Practices and Employee Retention**

In line with the research on employee participation has been emphasized in relation to job satisfaction (Cotton et al., 1988). In Past studies showed that employee participation is positively related to performance, satisfaction, and productivity of an employee (Pfeffer 1994; Wagner 1994; and Verma 1995). Bhatti and Qureshi (2007) research study supported that the employees participation has the positive impact on job satisfaction, employee

productivity and employee commitment. Employees' participation in decision making has a positive and significant impact on the job satisfaction of the employees indicating that an employee's participation in decision making can help to enhance the better employees' performance.

Employee participation creates a sense of loyalty in a competitive environment and also increases employees' trust and subsequent retention. Employee participation has been shown to have a significant relationship with productivity, profitability, and employee retention (Bhatnagar, 2007). As noted by Schaufeli and Bakker (2004), participated employees are likely to have a greater attachment to their organization and a lower propensity to quit. The findings from Truss et al. (2006) also confirm this when they found that, overall, engaged employees are less likely to leave their employer. According to Baumruk (2006), organizations with higher participation levels have lower employee turnover, higher productivity and better results. Research indicates that organizations with engaged employees have higher employee retention as a result of reduced intention to leave and turnover leading to increased productivity, profitability and growth (Markos and Sridevi, 2010).

The conceptual framework of this study is shown in Figure (1).



**Figure 1:** The Conceptual Framework of This Study

## **Method**

### **Sample and Research Design**

The population for the study was made up of all the staff of the selected hotels in Yangon. There was a population of (2472) employees. Data were collected from (277) employees from eight hotels in Yangon. The respondents include the employees from Central hotel, Sule-Shangrila, Park Royal, Chatrium, City Golf Resort, Micasa, Hotel Yangon and Tawwin Garden. The target populations for this study include both managerial and non-managerial employees in various departments in the hotel. Primary data is collected for the purpose of study and addressing the problem. Therefore, the main source of getting data for this study is mainly from primary source. Questionnaires were used for the collection of primary data from the selected employees in the chosen hotels. The questionnaire consists of two sections which are section A and section B. Section A contains questions on demographic profile. The objective of demographic question was to acquire some basic information of the respondents. The questions include respondent's gender, age, marital status, highest education completed, current job experience, and job title. For Section B, the questions based on dependent variable and independent variables are formed. The independent variables are compensation, training and development, work-life balance, and employee participation and dependent variables is employee retention.

**Table 1:** Measurement of Variable

<b>Variables</b>	<b>Category</b>	<b>Measurement</b>	<b>Measure</b>	<b>Expected Effect</b>
Compensation and Benefits	Independent Variable	-Total reward received by an employee in exchange for their performance to hotels. (Direct pay and indirect pay or benefit).	-10 items -Five point Likert Scale	Positive effect on Employee Retention
Training and Development	Independent Variable	-Introduction of training and development programs for employees	- 10 items -Five point Likert Scale	Positive effect on Employee Retention
Work-life Balance	Independent Variable	-Balance their careers and family lives. -Flexible working schedules, pleasant working condition, leave and recreation	- 10 items - Five point Likert Scale	Positive effect on Employee Retention
Employee Participation	Independent Variable	-Effort to display their idea, creativity and decision for success of organization. -Degree of participation and empowerment	- 10 items - Five point Likert Scale	Positive effect on Employee Retention
Employee Retention	Dependent Variable	-Willing intention to stay in current job	-10 items - Five point Likert Scale	Job Satisfaction

### **Analysis and Results**

In demographic characteristics of respondents in selected hotels, the gender, age, educational level, marital status, and number of dependents are studied and are shown as follows.

**Table 2:** Socio-demographic Characteristic of Respondents

Socio-demographic Characteristic		Number of Respondents	Percent
Age	Under 20	2	.7
	21 to 30	100	36.1
	31 to 40	100	36.1
	41 to 50	59	21.3
	Over 50	16	5.8
	<b>Total</b>	<b>277</b>	<b>100</b>
Gender	Female	153	55.2
	Male	124	44.8
	<b>Total</b>	<b>277</b>	<b>100</b>
Education	Primary	0	0
	Middle	6	2.2
	High	91	32.9
	Graduate	175	63.2
	post Graduate	5	1.8
	<b>Total</b>	<b>277</b>	<b>100</b>
No. of Dependents	Nil	40	14.4
	1 to 2	116	41.9
	3 to 4	94	33.9
	5 to 6	9	3.2
	Over 6	18	6.5
	<b>Total</b>	<b>277</b>	<b>100</b>
Marital Status	Single	152	54.9
	Married	125	45.1
	<b>Total</b>	<b>277</b>	<b>100</b>

Ages of respondents are classified into five categories as under 20, 21-30, 31-40, 41-50 and over 50 years. Majority of the respondents are between the ages of 21-30 years and the ages of 31-40 years which is made up of 36.1%(100) of total respondents followed by age between 41and 50 years at

21.3%(59). Over 50 years is approximately at 5.8% (16) and age under 21 years is only at 0.7% (2). Out of 277 total respondents, 153 are female and 124 are male. The total sample is made up of 55.2% of female respondents and 44.8% of male respondents. Most of respondents are female although the hospitality industry has been traditionally male dominated partly because of the culture and nature of the industry. Majority of respondents are graduates at 63.2% or (175), followed by High school level with 32.9% (91) of total respondents. Respondents with middle level are 2.2% (6) and post-graduates are 1.8% (6) of total respondents. Most of the respondents are graduated. As nature of hotel business, they require the graduates staffs because the staff are serving for local guest as well as foreigners. The staff need in fluently language skills. Number of dependents is being classified into five categories as 0, 1-2, 3-4, 5-6 and above 6. Majority of the respondents have the dependents of between 1 and 2 dependents with 41.9% (116) of total amount of respondents, followed by the category is 3 and 4 with 33.9% (94), category of no dependents is with 40% (14.4), category of above 6 persons is with 6.5% (18) and a very few percentage of respondents have the largest number of dependents such as 5 to 6 with 3.2% (9). Out of 277 respondents, 152 (54.9%) are single and the rests 125 (45.1%) are married employees.

**Table 3:** Reliability Test from Employee Responses on Scale Items

<b>Factor</b>	<b>No. of Items</b>	<b>Cronbach's Alpha</b>
Compensation and benefits	10	0.912
Training and Development	10	0.944
Work-life balance	10	0.892
Employee participation	10	0.894
Employee retention	10	0.918

It could be observed that the four human resource management practices and employee retention of the alpha values are more than 0.8. Therefore, internal consistency of items to the concepts is excellent.

Multiple regression analysis was applied to investigate the factors that relate to job satisfaction. In multiple regression models, the employee retention is used as dependent variable and compensation and benefits, training and development, work-life balance, and employee participation are used as independent variables. The results of SPSS output analyzing effect of human resource management practices on job satisfaction are shown in Table (4).

**Table 4:** Effect of Human Resource Management Practices on Employee Retention

Dependent variable (Job Satisfaction)	Unstandardized Coefficients		t test	Sig	VIF
	B	Standard error			
Constant	1.445	.250	5.779	.000	
Compensation and Benefits	.055	.058	.948	.344	2.014
Training and Development	.326***	.062	5.255	.000	2.014
Work-life Balance	.029	.059	.492	.623	1.614
Employee Participation	.259**	.079	3.260	.001	1.976
R <sup>2</sup>	0.356				
Adj R <sup>2</sup>	0.347				
F-value	37.607***				
Durbin-Watson	1.671				

**Source:** SPSS Outputs (Appendix B)

Statistical significance Indicate\*\*\* at the 1% level, \*\* 5% level and \* 10% level

The adjusted R<sup>2</sup> 0.347 explains that 34.7% of total variance in employee retention is accounted by four human resource management practices. Results suggest that four dimensions of human resource management practices variables have significantly explained the 34.7% of the variance in job. The value of calculated (Durbin-Watson) was 1.671 and each Variance Inflation Factor (VIF) was less than 5. These results show that serial correlation and multi-collinearity problems were not detected in this analysis. The regression coefficient of training and development is 0.326 at 1%

significance level. This shows that there is direct relationship between training and development practices and employee retention. The regression coefficient of employee participation practices is 0.259 at 5% significance level. This shows that there is direct relationship between employee participation practices and employee retention.

### **Discussion and Recommendation**

The significant relationship between training and development and employee retention was expected because generally, providing training and development opportunities for employees is a valuable human resource activity expected to enhance their self-esteem, morale, and intention to stay. The indication is that employees may stay as the organization increases the provision of training and development. The result shows that the training and development practices foster the employees' willingness to stay longer in their job. If the training program and career development system is good, employees will stay in their current job. Training and development practices can provide the opportunity for employee to gain experience and training employee skills. The training and development can increase in employee chances for advancement and increased job satisfaction in current workplace and can lead to a more loyalty to the current hotel. When employees are given opportunities for learning and career development they feel valued and appreciated. Training and development is the foundation of human resource management and the importance of knowledgeable and highly skilled employees are the essential resources for the hotel as the service nature. In the knowledge age, it is possible that the employees always expect to gain the new knowledge, skills and ability to upgrade their present condition, position and their future career development. From this study, it is evidenced that hotels are investing in the training of their employees. However, they are also losing the employees they have trained to their competitors. For the hotel, it is a need for nurturing and strengthening of employee competencies. Thus, hotel managers are suggested to improve the training and development program as motivator to contribute to employee retention

In Myanmar hotel industry, the management should try to retain the talent employees by allowing the participation in work autonomy, decision



making and problem solving rather than by only adjusting compensation and benefit. The new, more effective and reasonable ideas can be explored from employees' ideas and suggestion. Additionally, that kind of participation can upgrade employee behavior and perception to satisfy and stay at their current job. The result shows that the employee participation practices lead the employees to be satisfied with their job. If employees receive empowerment and participation in decision making in respect of their job, employees will stay with their current job. The direct relationship between employee participation practices and employee retention is found in this study. Employee participation practices can be a motivator of employee retention. This is because high proportion of the respondents in this study is the young and middle age employees who are assumed to be have said generation X and Y with strong need for taking challenges and high level of imagination and responsibility in order to expand their skills and experience. Involvement and participation of them to decision and problem solving initiatives enhance intention to stay with current hotel organizations. The hotel management should treat their employees as inspirational ones to involve in problem solving and decision making. However, employee participation practices alone are not enough to retain a highly skilled, motivated and experienced workforce; there might be other interaction variables outside the realm of human resource management such as leadership style, organizational culture. Moreover, the other factors can provide their expectation level to stay in the hotel.

Surprisingly however, compensation and benefits did not have a significant effect on employee retention. Compensation and benefits alone are not enough to retain a highly skilled, motivated and experienced workforce that the organization needs to excel in the culture of hotels in Yangon. Therefore HRM managers should strive to look for newer and innovative employee retention practices because it appears employees are keen on them. Also, though there was evidence that work-life balance practice does not lead to employee retention it is necessary for the effective functioning of an organization. It is therefore important that organizations identify and try out other contemporary HRM functions such as training and development and employee participation that can attract and retain employees rather than stick to only the traditional ones compensation and benefits. By establishing that

training and development practices and employee participation practice have significant impact on retention, this study has added to knowledge on HRM practices that are essential for employee retention.

Ministry of Hotels and Tourism and its sector associations should encourage more professional education for hotel industry. From a tourism and hospitality education and training perspective, work is needed to increase access to learning opportunities and ensure provision meets quality standards. The MOHT should work to ensure tourism education and training aligns with the common ASEAN tourism and hospitality curriculum, and that industry employment practices develop in tandem with the ASEAN Mutual Recognition Agreement for Hotel and Tourism Professionals. The Ministry and associations should discuss with designated HR managers from hotels to determine current training practices and approaches, and the level of investment in training. The Ministry should convene focus group meetings for employee turnover problem with each of the associations under the MHA and MTF to secure inputs and insights from employers, and also professional and industry groups. Meetings with different chapters of the associations should be undertaken in selected destinations. The ministry and its sector associations should also support for scholarships and sponsorship programs to promote hotel and tourism-related tertiary education for hotel employees. The development of management, internship and mentorship training programs is Should be encouraged.

At individual level, employees need to take active roles in organizational plans and decisions and objectively decide on career goals. They should take proactive action in work role and play an active part in organizational decision making. Employees need to take proactive roles to ensure the progress of their career development. Employees should have some responsibility for choosing appropriate training programs to attend to improve their skills and ability at work. Clearly, organizations in the hotel sector provide numerous forms of training. Also the employees were suggested to have the type of training that match with their employment needs and practice. Instead of attending inappropriate training programs and viewing training as a waste of time, employees should be able to take a preemptive role in deciding which programs suit their needs. Further, employees should take a greater

initiative to move forward and establish the associations they need to advance their interests. The employees should participate in decision making and problem solving in workplace. Job openings should be posted and that there are no barriers on transferring to new positions. They should fully utilize their skills, abilities and experience in their positions.

### **Limitations of the Study**

The study is about factors determining the employee retention that are to be undertaken in different hotels in Yangon. The study was carried out in the hotels in Yangon which have at least 100 rooms and three operation years. The sample of hotel was scoped to those in the Yangon which is the capital city of Myanmar and has the largest concentration of different hotels operating in Myanmar.

Additionally, the focus of the study was on larger hotels, whose adoption of HRM practices is considerably greater than for smaller hotels. Within the hotel sector, Worsfold (1999) contends that a soft version of HRM is more appropriate to luxury hotels. By contrast, budget hotels are more likely to advocate a hard version of HRM and give more consideration to control. Therefore, the study focuses on the hotels which are registered under Ministry of Hotels and Tourism, having more than 100 rooms and receiving at least three operating years in Yangon. There are 24 hotels in Yangon that meet these specifications. Among them, the study selected 8 hotels in Yangon to reach the desired respondents.

Although there are also numerous human resource management activities, the study could not cover the exhaustive list of human resource management functions due to constraints of time and budget. The study focuses only on compensation, training and development, work-life balance, and employee participation practices. The chosen human resource management practices are vital to today's hotel industry. Therefore, the study fails to take account of all factors influencing on employee retention such as leadership, strategy and so on.

The results therefore, are clearly not representative of the hotel industry as a whole because the limitation of the study is that, it was carried out in the hotel industry in Yangon. Hence, this may limit the ability of the

researcher to generalize the findings for the industries in the country as a whole. The study needs to gather more required information, supporting document and conduct comprehensive survey for this study. In addition, the is small survey being carried out for hotel industry, finding the relevant facts and information to use as secondary data are limited for various reasons. The limitation of this study is the limitations in scope of the survey. It was carried out in the hotel industry of Yangon in Myanmar. Hence, this may limit the ability to generalize the findings to include other hotels of the country as a whole. The study used random sampling to conduct research and only 277 respondents were chosen. Therefore, it was difficult to make sure that the result of the study can accurately be estimated. The sample respondents may be biased and cannot represent the whole population. Besides that, this is the first research in hotel industry, therefore, the questionnaire design may have weaknesses and could not precisely pinpoint the view of whole industry.

### **Needs for Further Study**

In the study, the data are collected from hotels in Yangon only. Hence, the first recommendation is that the future research should be done by opening the survey to other locations in order to improve the generalizability of the findings of the study. By doing so will also ascertain larger sample size where questionnaire can be distributed to more hotels in other important regions in Myanmar such as Bagan, Mandalay, and Shan state. So that, the data obtained from the whole nation will generate the result more accurate and comprehensive picture to capture the nature of human resource management practices in hotel industry from the respondents.

The study on human resource management practices and its effect on retaining employees is a very attractive area due to the importance of human resources and potential income earning opportunity of hotel industry for Myanmar. As most of the studies are carried out in the Western world which necessitated this study, it is important that more researchers especially those in Asia continue to explore the area empirically.

Another recommendation is that the further study can be done by focusing on other human resource management practices such as performance appraisal, equal employment opportunities, and other related factors such as

leadership style, job security and so on, since the main factors in this research are training and development, compensation, work-life balance, and employee participation that affect the employee satisfaction in hotel industry. Thus, this is a limitation in this study because the other factors that affect the employee retention in the hotel industry have not been covered. Further researchers can continue to explore the changes trends of employee retention in Myanmar hotel industry with different periods.

## References

- Allen, T., (2001). Family-supportive work environments: The role of organizational perceptions. *Journal of Vocational Behavior*, 58(3), 414-435.
- Anderson, S. E., Coffey, B. S., and Byerly, R. T. (2002). Formal organizational initiatives and informal workplace practices: Links to work-family conflict and job-related outcomes. *Journal Of Management*, 28(6), 787-810.
- Anis, A., Rehman, I., Nasir, A., Safwan, N. (2011), Employee retention relationship to training and development: A compensation perspective. *African Journal of Business Management*, 5(7), 2679-2685.
- Aryee, A., Luk, V., and Stone, R., (1998). Family responsive variables and retention-relevant Outcomes Among Employed Parents. *Human Relation Journal*, 51, 73.87
- Baer, E., Fagin, C., and Gordon, S., (1996). *Abandonment of the patient: The impact of profit-driven health care on the public*. New York: Springer Publication Company.
- Baumruk, R., (2006). Why managers are crucial to increasing engagement. *Strategic Human Resource Review*, 5(2), 24-27
- Bhatnagar, J., (2007). Talent management strategy of employee engagement in Indian ITES employees: key to retention. *Employee Relations*, 29(6), 640-663.
- Bhatti, K. K., and Qureshi, T. M. (2007). Impact of employee participation on job satisfaction, employee commitment and employee productivity. *International Review of Business Research Papers*, 3(2), 54-68.
- Chaminade, B. (2006). *A retention checklist: how do you rate?* Retrieved 11 25, 2011, from [www.humanresourcesmagazine.co.au](http://www.humanresourcesmagazine.co.au)
- Chang, C. P. and Chang, W. C. (2008). Internal marketing practices and employees' turnover intentions in tourism and leisure hotels. *The Journal of Human Resource and Adult Learning*, 4(2), 161-172.

- Chiang, C. F., Back, K., and Canter, D. (2005). The impact of employee training on job satisfaction and intention to stay in the hotel industry. *Journal of Human Resources in Hospitality and Tourism*, 4(2), 99-118.
- Chiboiwa, M. W., Samuel, M .O., and Chipunza, C. (2010). An examination of employee retention strategy in a private organisation in Zimbabwe. *African Journal of Business Management*, 4(10), 2103-2109.
- Cotton, J. L., Vollrath, D. A., Froggatt, K.L., Lengnick-Hall, M. L., and Jennings, K. R.(1988). Employee participation: Diverse forms and different outcomes. *Academy of Management Review*, 13 (1), 8 – 22.
- De Vos, A., and Meganck, A. (2009). What HR managers do versus what employees value: exploring both parties' views on retention management from a psychological contract perspective. *Personnel Review* , 38(1), 45-60.
- Deery, M. (2008). Talent management, work-life balance and retention strategies. *International Journal of Contemporary Hospitality Management*, 20(7), 792-806.
- Evans JR, Lindsay WM. (1999). *The management and control of quality*. West Publishing Company: St. Paul.
- Flippo, E. B., (1984). *Personnel Management* (4<sup>th</sup> ed.), New York: McGraw Hill.
- Frank, F. D., Finnegan, R. P., and Taylor, C. R. (2004). The race for talent: retaining and engaging workers in the 21<sup>st</sup> century. *Human Resource Planning*, 27 (3), 12-25.
- Griffeth, R.W., and Hom, P.W. (2001). *Retaining valued employees*. Thousand Oaks, CA: Sage.
- Haines, V. Y., Jalette, P., and Larose, K., (2010). The Influence of Human Resource Management Practices on Employee Voluntary Turnover Rates in the Canadian non-governmental sector. *Industrial and Labor Relations Review*, 63(2), 228-246.
- Hassan, M., Hassan, S., Khan, K. U. D. and Akram Naseem, M. (2011). Employee retention as a challenge in leather industry. *Global Journal of Human Social Science*, 11(2), 8-14.
- Jones, M.K, Jones, R.J., Latreille, P.L. and Sloane, P.J. (2009). “*Training, job satisfaction and workplace performance in Britain: evidence from WERS 2004*”, IZA discussion papers 3677, Institute for the Study of Labor (IZA), Bonn.
- Lee, C. H., and Bruvold, N. T. (2003). Creating value for employees: investment in employee development. *International Journal of Human Resource Management*, 14(6), 981-1000.
- Markos, S., and Sridevi, M. S., (2010). Employee engagement: the key to improving performance, *International Journal of Business and Management*, 5(12), 89-96.

- Mathis, R. L., and Jackson, J. H.,(2004). *Human Resource Management*, (11<sup>th</sup> ed.), Singapore: Thomson Asia Pte. Ltd.
- Mobley, W. H., (1982). *Employee turnover: causes, consequences, and control*, Addison-wesley, London.
- Mobley, W. H., Griffeth, R. W., Hand, H. H., and Meglino, B. M. (1979). Review and conceptual analysis of the employee turnover process. *Psychological Bulletin*, 86(3). 493-522.
- Pam Newman (2007). Determining Employee Compensation. Microsoft Small Business Centre. Retrieved March 16, 2015, from: [www.microsoft.com/smallbusiness/resources/management/pay-benefits/the-benefits-of-employee-benefits.aspx#DeterminingEmployeeCompensation](http://www.microsoft.com/smallbusiness/resources/management/pay-benefits/the-benefits-of-employee-benefits.aspx#DeterminingEmployeeCompensation)
- Pfeffer, J., (1994). *Competitive advantage through people: Unleashing the power of the workforce*, Boston, MA: Harvard Business School Press.
- Pfeffer, J., (2005). Changing mental models: HR's most important task. *Human Resource Management*, 44, 123-128.
- Price, J. L., and Mueller, C. W., (1981). A causal model of turnover for nurses. *Academy of Management Journal*, 24, 543-565.
- Samuel, O., and Chipunza, C. (2009). Employee Retention and Turnover: Using Motivational Variables as a Panacea. *African Journal of Business Management*, 3 (8), 410-415.
- Schaufeli, W. B., and Bakker, A. B. (2004). Job demands, job resources, and their relationship with burnout and engagement: a multi-sample study. *Journal of Organizational Behavior*, 25, 293-315.
- Snell, S., and . Bohlander, G., (2007). *Training and development: managing human resources*. (14<sup>th</sup> ed.), Manson, Ohio: South-Western.
- Thomsen, J. L., Jarbol, D., and Sondergaard, J. (2006). Excessive workload, uncertain career opportunities, and lack of funding are important barriers to recruiting and retaining primary care medical researchers: *A Qualitative Interview Study*. 23, 545-549
- Truss, K., Soane, E., Edwards, C. Y. L., Wisdom, K., Croll, A., and Burnett.J.,(2006). *Working life: employee attitudes and engagement*, London, CIPD.
- Verma, A. (1995). *Employee involvement in the workplace. In Research in personnel and human resource management*, New Haven, CT: JAI Press
- Wagner, J.A., (1994). Participation's effect on performance and satisfaction: a reconsideration of research evidence', *Academy of Management Review*, 19, 312-330

## **RELATIONSHIP BETWEEN DEMOGRAPHIC VARIABLES AND ORGANIZATIONAL COMMITMENT OF EMPLOYEES IN TEN PRIVATE BANKS IN YANGON**

Than Soe Oo<sup>\*</sup>

### **Abstract**

The main objective of the current study is to investigate the relationship between demographic variables (gender, position, educational level and working experience) and organizational commitment in banking sector in Yangon. The primary data was gathered through the use of self-administered questionnaire from 380 employees in ten private banks. The finding of the study showed that the employees from the private banks in Myanmar have moderate level of commitment. The results also showed that, there are significant relationships between demographic variables and organizational commitment. The study also showed that education level and working experience effect on affective commitment, gender and educational level effect on continuance commitment and working experience effect on normative commitment. Position did not have any effect on all components of commitment.

**Keywords:** Organizational Commitment; Demographic Variables, Normative Commitment

### **Introduction**

Organizational commitment has been regarded as one of the important constructs that aid employees' performance. The success of an organization depends to some extent on employee motivation and commitment. Commitment at workplace can take various forms and arguably has potential to influence organizational effectiveness and employees' well being (Meyer & Herscovitch, 2001). Organizational commitment is a linking of the individual to the organization (Mathieu & Zajac, 1990) and it makes an individual to be identified with a particular organization (Allen & Meyer, 1996). The psychological link between the employee and his or her organization makes it less likely that the employee will voluntarily leave the organization (Feldman, 1995). The role of organizational commitment plays in healthy organizational climate and high productivity. Therefore, the need for researchers is to

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investigate the role of commitment playing in maintaining good working environment for employees to ensure high performance. Research by Mowday, Porter & Steers (1982) suggested four categories of variables that affect organizational commitment which included personal characteristics, job characteristics, work characteristics and structural characteristics. In addition, some researchers have linked organizational commitment to several variables such as job satisfaction, emotional intelligence, occupational stress, achievement motivation, job performance, organizational citizenship behavior and turnover intentions (Salami, 2008; Siu, 2003; Savery & Syme, 1996). Indeed, some studies have also found a relationship between some demographic characteristics (Igbal, 2010; Elizur & Koslowsky, 2001) and organizational commitment. Thus, the current study will identify the level of organizational commitment of bank employees and also find out whether there is a significant evidence of relationship between organizational commitment and demographic variables including gender, position, educational level and working experience.

## **Literature Review**

### **Organizational Commitment**

Meyer & Allen (1991) separate organizational commitment in three sections and show that all of them are different and can be measurable. These three factors of organizational commitment are:

- Eagerness (affective commitment),
- Need (continuance commitment) and
- Obligation (normative commitment).

### **Affective Commitment**

Affective commitment is the kind of commitment that causes workers to become closer to organization emotionally and make happy feel them because of being part of organization (Wiener, 1982). According to Meyer & Allen, affective commitment reflects the worker's depictability of himself inside organization and participation to the organization. Affective commitment is workers' identification with organization's interior activities

and stickness to these activities. In other words, it means workers' acceptance of organization as a part of their family and loyalty to the organization (Bobbie, 2007).

Affective commitment is achieved when individual and organizational values concur resulting happiness of workers. Workers emotional commitment establishes when they observe personal and organizational values matching (Wiener, 1982). A worker having emotional commitment becomes very happy for being inside the organization and do not think to leave the organization as a result of feeling a part of organization (Meyer & Herscowitch, 2001).

### **Continuance Commitment**

Continuance Commitment is workers wish to continue with organization membership and commitment because of personal expectations and profits. As it is called rational continuance in literature, it is awareness of worker for the cost of leaving from organization (Chen & Francesco, 2003).

It is based on profit between worker and organization. It is the need of staying in organization after assessing/measuring of his/her investment to organization (Bergman, 2006). In other words, it is the possible material loss of that force worker to stay in organization. In that sense worker thinks that leaving the organization will cost much to him/her. Some of them prefer to stay in organization because of not to find new work or lack of qualification. And some think there's no alternative because of personal or family problems (Ölçüm, 2004).

Continuance commitment can be described as workers' belief about cost of leaving from organization will be high for them. As for the other reasons, workers stay on the organization because of some social, physiologic and economic reasons such as; fear not to be cable to find a better job, unwillingness to leave from friends, unwillingness to move in a new place, family issues, money loss etc. (Allen & Grisafe, 2001).

### **Normative Commitment**

Normative Commitment is preference to stay on the organizations because of past relations. Worker's feelings, because of the trainings or good relations are the cause of this commitment (Ünler, 2006). In other words, this commitment is different from other two since worker beliefs that to stay in the organization is some kind of responsibility. Normative commitment is affected by organizational culture, age, education, serving period (Dordevic, 2004).

As a conclusion, affective commitment comes out because of personal want, continuance commitment comes out because of profit requirement, and normative commitment comes out because of ethical and moral issues (Wasti, 2002).

### **Demographic Variables and Organizational Commitment**

Over the years, many researchers have associated demographic factors with organizational commitment. Previous studies have been reviewed regarding the relationship between organizational commitment and gender, position, educational level and working experience.

### **Gender and Organizational Commitment**

Some studies reported a weak relationship between gender and organizational commitment but gender may affect employees' attitude towards the organization. In a study of finding the level of commitment of family and non-family member of family businesses, Forkuoh, Affum-Osei, Osei & Addo Yaw (2014) found that female employees were highly committed compared to their male counterparts. In a related study, Kumasey, Dlle & Ofei (2014) also found that, males were found to be more committed to their respective organization compared to female and the relationship between authority and the related attitude of work commitment is positive for men but negative for women Loscocco (1989) but this low level of commitment among female employees may be attributed to high level of discrimination at work places (Channar, Zareen & Imran, 2011). In related study on demographic and psychological factors predicting organizational

commitment among industrial workers (Salami, 2008), showed that gender was not significant predictor of organizational commitment. A work by Pourghaz, Tamini & Karamad (2011) also found no difference in male and female overall commitment.

### **Position and Organizational Commitment**

Vo Van Viet (2015) found that there was a moderate correlation between position hold and affective commitment. Stevens, Beyer, & Trice (1978), and Loui (1995) revealed a significant positive relationship between organizational commitment and job involvement. Jena (2015) found that the job level has a significant impact on the affective commitment and continuance commitment.

Cohen & Gattiker (1994) found that type of position was significant predictors of organizational commitment where managers have higher levels of commitment than non-managers. Mowday, Poter & Steers (1982) however, did not find any significant differences in the commitment levels across type of position.

### **Educational Level and Organizational Commitment**

Educational level has also been found to be related to organizational commitment (Salami, 2008). According to Mathieu & Zajac (1990), there is a strong relationship between educational level and organizational commitment. It is likely that workers with high educational qualifications occupy higher ranks and therefore have more responsibilities which invariably require more commitment to the organization (Salami, 2008) and that educational level may lead to high level of commitment. On the contrary, Al-Kahtani (2012) and Igbal (2011) found that educational level is negatively related with organizational commitment and that more educated people may have high expectations which the organization may be unable to meet them. According to Igbal (2011) highly educated individuals may have less commitment since they may have other opportunities of employment. Again, Affum-Osei, Osei & Addo Yaw (2014) found that, employees who were having certificates from first degrees and below showed high committed compared to those with higher qualifications.

### **Working Experience and Organizational Commitment**

Experience or long service in a particular sector may also lead to high level of commitment. For instance, job tenure is a significant predictor of organizational commitment; Igbal (2011) research highlights the importance of work experiences that commitment that the organization is supportive of its employees treats them fairly and enhances their sense of personal importance and competence by appearing to value their contributions to the organization (Meyer & Allen, 1997).

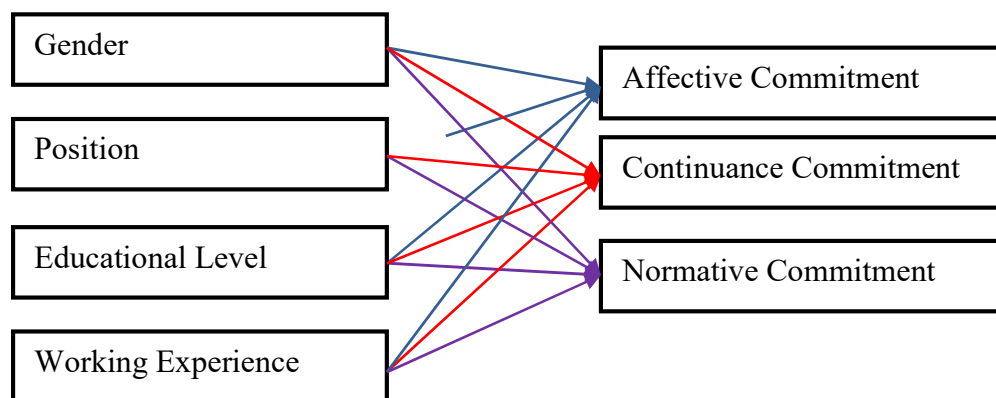
According to Amangala (2013), number of years of service (*i.e.* tenure) has an overwhelming influence on commitment. In a study to the extent, to which faculty members are committed to their University, Igbal (2011) showed that length of service is highly significant and positively associated with organizational commitment. He argues that, the longer an employee stays in the organization and the older they become the feelings of responsibilities for outcomes relevant to him also increases. In a related study, Pourghaz, Tamini & Karamad (2011) found that, employees who had 1 - 4 years job tenure obtained high mean scores on total scores of organizational commitment in comparison with those who had 9 years and upper job tenure.

### **Objectives of the Study**

Based on the previous studies, the following conceptual framework is developed for the current study

- (1) to measure employee perception on organizational commitment and
- (2) to determine the relationship between demographic variables and commitment level of employees in private banks.

The conceptual framework of the study is shown in Figure 1.



**Figure 1:** Conceptual Framework of the Study

### Research Methods

The study is quantitative research in nature. This study uses both descriptive and casual analysis to arrive at conclusion and recommendation. The main focus of the study is domestic private banks in Yangon. Thus, the study use two-stages sampling: first stage is selecting banks and second stage is selecting employees. According to Central Bank of Myanmar Report (2015), there are 24 domestic private banks in Myanmar and the head offices of these banks are located in Yangon Area. As the first stage of the sampling, out of 24 banks, ten domestic private banks with large number of employees are only selected as the sampling unit for the study. In the study, the sampling units are head offices of the banks and the data are collected from these head offices.

As the second stage of sampling, total 380 respondents are proportionately selected from each bank. Here, the sample size is determined by Krejice & Morgan (1970). Respondents include both executive and non-executive level employee. The study mainly uses the primary data regarding organizational commitment level. Then, the data is collected through the self-administrated questionnaire. The data is collected from 2016 July to August. After that, the data is analyzed using descriptive statistics and inferential statistics.

Questionnaires consist of two parts. In first part questions for demographic factors (gender, position, educational level and working experience) are included. In the second part Meyer & Allen organizational commitment questionnaire is used. In this part questions belong to organizational commitment questionnaires with three components i.e affective commitment, continuance commitment and normative commitment are included. The question designed about commitment are in five-point Likert scale where: “1: Strongly disagree”, “2: Disagree”, “3: Neither agree nor disagree”, “4: Agree”; “5: Strongly agree”. Statistical Packages for Social Science 22 (SPSS 22) is used for data analysis after collection of all the responses. Descriptive statistical methods are used to describe demographic characteristic of the respondents such as gender and education level. Independent Simple t Test and One-Way ANOVA test are used. Findings are analyzed in 95% confidence interval and 0.05 significance level.

### **Analysis and Discussion of Findings**

The demographic profile of the respondents is reported in the following tables. Table 1 displays the demographic variables of respondents.

**Table 1:** Demographic Variables of Respondents

<b>Attribute</b>	<b>Characteristics</b>	<b>Frequency</b>	<b>Percent</b>
<b>Gender</b>	Male	104	27
	Female	276	73
<b>Position</b>	Executive Level	126	33
	Non-Executive Level	254	67
<b>Education Level</b>	Middle School	1	1
	High School	2	1
	University Graduate	332	87
	Other (Master)	45	11
<b>Working Experience</b>	1-3 years	214	56
	4-6 years	108	28
	7-9 years	10	3
	10-12 years	8	2
	More than 12 years	40	11

**Source:** Survey Data (2017)

According to Table 1, total 380 respondents from the private banks participated in the study. In terms of gender composition, male respondents represented 27 percent and female respondents constituted the majority, i.e 73 percent. Because of the job nature in banking industry, female workers are more in demand than the male workers and thus the proportion of the former is higher than the latter in a typical branch. In terms of position, 67 percent of the respondents are non-executive level including Junior Bank Assistance, Senior Bank Assistance, Junior Clerk, Senior Clerk, Supervisor, Assistant Supervisor, Officer, System Engineer and Network Engineer, and 33 percent of the respondents are from the executive level such as Manager, Assistant Manager and Deputy Manager. This reflects the hierarchy of work structure in most organizations in which there are large number of staff in the lower level of hierarchy.

In terms of working experiences, more than half of respondents have been working at their banks for 3 years or less, just over a quarter of them has between 4 and 6 years, 11 percent more than 12 years, 3 percent between 7 and 9 years and 2 percent between 10 and 12 years. The study shows the majority group of respondents with less than three years experience since the sample group consists of non-executive level. Another reason is most of the banks make new recruitments because of the growth of the banks. In terms of education level, 87 percent of the respondents have got a bachelor degree, 11 percent of the respondents are master degree holders and only a tiny 2 percent are not university graduate. This is because that university graduate is threshold qualification of the banking industry. Thus majority of the respondents in the study hold their bachelor degree due to the requirement of the banking industry.

The study firstly identified the commitment level in three types and overall level by calculating the mean score and presented the result in Table 2. Commitment is measured by five-point Likert scale. Means value less than 2.00 was categorized as low level of commitment; means value between 2.00 and less than 3.50 was moderate level of commitment, and means values of 3.50 or higher was categorized as high level of commitment.



**Table 2:** Employee Perception on Organizational Commitment

<b>Variables</b>	<b>Mean</b>	<b>Standard Deviation</b>	<b>Level of Commitment</b>
Affective Commitment	3.43	0.62	Moderate
Normative Commitment	3.18	0.52	Moderate
Continuance Commitment	3.04	0.77	Moderate
Overall Commitment	3.22	0.64	Moderate

**Source:** Survey Data (2017)

According to Table 2, respondents from private banks in Myanmar have the highest on affective commitment, followed by normative commitment, and then continuance commitment. Overall, the employees from the private banks in Myanmar have moderate level of commitment.

In this section, the effect of demographic factors on organizational commitment is analyzed using independent sample t Test and One-Way ANNOVA. The analysis results regarding the gender effect are presented in Tables 3.

**Table 3:** Gender and Organizational Commitment

	<b>Gender</b>	<b>N</b>	<b>Mean</b>	<b>F</b>	<b>Sig.</b>
<b>Affective Commitment</b>	Male	104	3.2846	2.722	0.100
	Female	276	3.4833		
<b>Continuance Commitment</b>	Male	104	2.8077	4.137	0.043
	Female	276	3.1254		
<b>Normative Commitment</b>	Male	104	2.9551	0.251	0.617
	Female	276	3.2693		
<b>Overall Commitment</b>	Male	104	3.0158	5.981	0.015
	Female	276	3.2927		

**Source:** Survey Data (2017)

Table 3 reveals the effect of gender on three components of organizational commitment. The result shows that there is significant difference in overall commitment between male and female. Female employees have higher overall commitment than male employees. The study shows the higher commitment of female employees, this suggests that the job nature of banking industry is more appropriate for females than male employees. In addition, females attach importance more to the colleagues, communication with current people and demand more job stability and security than male employees. Then, female tried to do more for their job status thus they have more commitment (Mowday, Steers & Porter, 1979). However when analyzing by components, it was found that there is no significant difference between male and female employees for affective and normative commitment. As for the continuance commitment, a significant difference is found between male and female employees ( $p=0.043$ ). It is also found that the mean score of continuance commitment of female employees is higher than that of male employee.

Regarding the position effects on organizational commitment are presented in Table 4.

**Table 4:** Position and Organizational Commitment

	Position	N	Mean	F	Sig.
<b>Affective Commitment</b>	Executive Level	126	3.4619	1.319	0.251
	Non-Executive Level	254	3.4126		
<b>Continuance Commitment</b>	Executive Level	126	2.9587	2.441	0.119
	Non-Executive Level	254	3.0780		
<b>Normative Commitment</b>	Executive Level	126	3.1680	1.034	0.310
	Non-Executive Level	254	3.1909		
<b>Overall Commitment</b>	Executive Level	126	3.1962	7.521	0.006
	Non-Executive Level	254	3.2272		

**Source:** Survey Data (2017)

According to Table 4, the result shows that there is significant difference in overall commitment between executive and non-executive level. It was found that non-executive employees have higher commitment than executive level employees. However, when analyzing by each component, the results reveal that there is no significant difference between executive level and non-executive level of employees for all components of organizational commitment.

Then the study conducted to analyze the relationship between educational level and organizational commitment and the result is presented in Table 5.

**Table 5:** Educational Level and Organizational Commitment

	<b>Educational Level</b>	<b>N</b>	<b>Mean</b>	<b>F</b>	<b>Sig.</b>
<b>Affective Commitment</b>	Middle School	1	3.4000	2.638	0.049
	High School	2	2.6000		
	University Graduate	332	3.4578		
	Master	45	3.2533		
<b>Continuance Commitment</b>	Middle School	1	3.2000	3.162	0.025
	High School	2	2.3000		
	University Graduate	332	3.0819		
	Master	45	2.7467		
<b>Normative Commitment</b>	Middle School	1	3.1667	0.647	0.585
	High School	2	3.0000		
	University Graduate	332	3.1973		
	Master	45	3.0889		
<b>Overall Commitment</b>	Middle School	1	3.2556	2.972	0.032
	High School	2	2.6333		
	University Graduate	332	3.2457		
	Master	45	3.0296		

**Source:** Survey Data (2017)

According to Table 5, there is significant difference in overall commitment between employees with different education level. However, when analyzing by each component, the results show that there is a significant relationship between affective, continuance commitment and educational level but there is no significant relationship between normative commitment and educational level. A significant difference is found among employees with different educational backgrounds when looking at affective commitment of

employees ( $p=0.049$ ). It reveals that university graduated employees have the higher mean score than other employees with a different background, on the other hand, high school employees have lowest mean score. As for continuance commitment, the mean score of middle school employees have the highest and that of high school employees have the lowest score. The result indicates the difference in all levels of employees education regarding continuance commitment is significant at  $p=0.025$ . Generally more educated employees have more affective commitment since their qualifications get better their sense of belongingness is improved and they have more understanding of the organization's values and attitudes. However, for continuance commitment, employees with low level of education have more costs to leave since they have no more job opportunity because of low level of education.

Regarding the relationship between working experience and organizational commitment, the analysis result is presented in Table 6.

**Table 6:** Working Experience and Organizational Commitment

	Working Experience	N	Mean	F	Sig.
<b>Affective Commitment</b>	1-3 years	214	3.4336	2.929	0.021
	4-6 years	108	3.3130		
	7-9 years	10	3.4000		
	10-12 years	8	3.5750		
	More than 12 years	40	3.6950		
<b>Continuance Commitment</b>	1-3 years	214	3.1028	1.898	0.110
	4-6 years	108	2.8759		
	7-9 years	10	3.0000		
	10-12 years	8	3.3250		
	More than 12 years	40	3.0850		
<b>Normative Commitment</b>	1-3 years	214	3.2313	2.474	0.044
	4-6 years	108	3.0802		
	7-9 years	10	3.3333		
	10-12 years	8	3.4583		
	More than 12 years	40	3.1125		
<b>Overall Commitment</b>	1-3 years	214	3.2559	2.4	0.046
	4-6 years	108	3.0897		
	7-9 years	10	3.2444		
	10-12 years	8	3.4528		
	More than 12 years	40	3.2975		

**Source:** Survey Data (2017)

Table 6 shows the effect of working experience on three components of organizational commitment. According to the results, there is significant difference in overall commitment between employees with different working experiences. However, when analyzing by each component, a significant difference is found between employees with different working experiences at a significant level  $p=0.021$  in affective commitment and  $p=0.044$  in normative commitment. It is found that the mean score of employees who have more than twelve years experiences is highest among the employee groups. It is also found that the mean score of employees who have ten to twelve years experiences is second level of commitment. The study suggests that the more the experience, the higher the affective commitment is among employees in private banks as they gain experience in the current banks, they have the opportunity for career upward in the hierarchy and getting other benefits like salary. For normative commitment, the employees who have ten to twelve years has the highest mean score of normative commitment. However, the study shows that there is no significant difference between employees with different working experiences in continuance commitment.

Table 7 summarizes the results of the testing. The results show that the demographic variables have a significant effect on the organizational commitment.

**Table 7:** Summary of the Results

	<b>Affective Commitment</b>	<b>Continuance Commitment</b>	<b>Normative Commitment</b>	<b>Overall Commitment</b>
Gender		**		**
Position				**
Educational Level	**	**		**
Working Experience	**		**	**

### **Conclusion, Implications and Recommendations**

This study showed that personal and demographic characteristics have an effect on different components of organizational commitment. Most of the obtained results of the present study are in conformity with earlier findings. Since the data were collected from banking sectors, replicating this study in other types of organizations would help in determining the validity and generality of present findings.

The results of the study can be useful almost in every organization to enhance the maximum level of organizational commitment of employees. It is necessary that management devotes reasonable time and effort to understanding their employees' different demographic factors.

In practical terms, the new knowledge gained from observing the relationship between specific demographic factors and the affective, continuance and normative commitment of the participants may be useful in attracting, selecting, placing, developing, rewarding and remunerating talented employees in banking sectors in Myanmar. The results of the study confirm that using only a single perspective to understand the impact of demographic characteristics on organizational commitment provides an incomplete picture of the real phenomena. The influence of each characteristic varied with the perspective examined, and the simultaneous examination of all perspectives provided a better understanding of the demographic influence on organizational commitment.

It may also be concluded that several demographic variables need to be used at the same time to be able to separate spurious effects from real effects. The results show that the impact of any one demographic characteristic is influenced by the presence of other variables. Any study that uses a limited number of demographic variables is likely to arrive at conclusions that may be at variance with real situation.

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## References

- Aghdasi, S., Kiamanesh, R.A. and Ebrahim, N.A. (2011) Emotional Intelligence and Organisational Commitment: Testing the Mediatory Role Occupational Stress and Job Satisfaction. *Social and Behavioural Sciences*, 29, 1965-1976.
- Al-Kahtani, S.N. (2012) An Exploratory Study of Organizational Commitment, Demographic Variables and Job & Work Related Variables among Employees in Kingdom of Soudi Arabia. *Online International Interdisciplinary Research Journal*, 3, 1-13.
- Allen, N.J. & Meyer, J.P. (1996). Affective, Continuance and Normative Commitment to the Organisation, an Examination of Construct Validity. *Journal of Vocational Behaviour*, 49, 252-276.
- Amangala, T.A. (2013). The Effects of Demographic Characteristics on Organizational Commitment: A Study of Salespersons in the Soft Drink Industry in Nigeria. *European Journal of Business and Management*, 5, 109-118.
- Channar, A.Z., Zareen, A. & Imran, A.U. (2011) Gender Discrimination in Workforce and Its Impact on the Employees. *Pakistan Journal of Commerce and Social Sciences*, 5, 177-191.
- Feldman, C.D. (1995). The Impact of Downsizing on Organizational Career Development Activities and Employee Career Development Opportunities. *Human Resource Management Review*, 5, 189-221.
- Forkuoh, S.K., Affum-Osei, E., Osei, M.A. & Addo Yaw, V.J. (2014). Employees' Commitment and Growth of Family Businesses. *International Journal of Economics, Commerce and Management*, 2, 1-14.
- Igbal, A. (2010). An Empirical Assessment of Demographic Factors, Organizational Ranks and Organizational Commitment. *International Journal of Business and Management*, 5, 16-27.
- Igbal, A. (2011). The Impact Assessment of Demographic Factors on Faculty Commitment in the Kingdom of Saudi Arabia Universities. *Journal of College Teaching & Learning*, 8, 1-13.

- Jackson, L. and Rothmann, S. (2006) Occupational Stress, Organizational Commitment, and Ill-Health of Educators in the North West Province. *South African Journal of Education*, 26, 75-95.
- Jamal, M. (2011) Job Stress, Job Performance, and Organisational Commitment in a Multinational Company. An Empirical Study in Two Countries. *International Journal of Business and Social Sciences*, 2, 20-29.
- Kumasey, S.A., Delle, E. & Ofei, B.S. (2014) Occupational Stress and Organisational Commitment: Does Sex and Managerial Status Matter? *International Journal of Business and Social Research (IJBSR)*, 4, 173-182.
- Loscocco, K.A. (1989). The Interplay of Personal and Job Characteristics in Determining Work Commitment. *Social Science Research*, 18, 370-394.
- Mamman, A., Kamoche, K. & Bakuwa, R. (2011) Diversity, Organisational Commitment and Organisational Citizenship Behavior: An Organising Framework. *Human Resource Management Review*, 22, 285-302.
- Mathieu, J.E. & Zajac, D.M. (1990). A Review and Meta-Analysis of the Antecedent, Correlates, and Consequences of Organisational Commitment. *Psychological Bulletin*, 108, 171-194.
- Meyer, J.P. & Herscovitch, L. (2001). Commitment in the Workplace: Toward a General Model. *Human Resource Management Review*, 11, 299-326.
- Meyer, J.P. & Herscovitch, L. (2001). Commitment in the workplace: toward a general model. *Human Resource Management Review*, 11, 299-326.
- Meyer, J.P., Stanley, D.J., Herscovitch, L. and Topolnytsky, L. (2002) Affective, Continuance, and Normative Commitment to the Organization: Meta-Analysis of Antecedents, Correlates, and Consequences. *Journal of Vocational Behaviour*, 61, 20-52.
- Mowday, R.T., Porter, L.W. & Steers, R.M. (1982) Employee-Organisation Linkages: The Psychology of Commitment, Absenteeism and Turnover. Academic Press, New York.
- Mowday, R.T., Steers, R.M. & Porter, L.W. (1979) The Measurement of Organizational Commitment. *Journal of Vocational Behaviour*, 14, 224-247.
- Pourghaz, A., Tamini, K.B. and Karamad, A. (2011) Do Demographic Characteristics Make a Difference to Job Satisfaction, Organizational Commitment and Burnout among Travel Agency Drivers? (A Case Study in Iran). *Journal of Basic and Applied Scientific Research*, 1, 916-923.
- Salami, S.O. (2008) Demographic & Psychological Factors Predicting Organisational Commitment among Industrial Workers. *Anthropologist*, 10, 31-38.



- Savery, K.L. and Syme, D.P. (1996) Organisational Commitment and Hospital Pharmacists. *Journal of Management Development*, 15, 14-22.
- Shore, M.L. & Martin, J.H. (1989) Job Satisfaction and Organizational Commitment in Relationship to Work Performance and Turnover Intentions. *Human Relations*, 42, 625-638.
- Siu, O. (2003) Job Stress and Job Performance among Employees in Hong Kong: The Role of Chinese Work Values and Organizational Commitment. *International Journal of Psychology*, 38, 337-347.
- Steers, R.M. (1977) Antecedents and Outcomes of Organizational Commitment. *Administrative Science Quarterly*, 22,

## **IPARTISAN BIAS IN THE ELECTION NEWS COVERAGE: ON THE STUDY OF THE GENERAL ELECTION 2015 IN MYANMAR\***

Su Mon Latt<sup>1</sup>

### **Abstract**

Free and fair elections are a core principle for democratic development. Moreover, Election is vital equipment in the lives of democratic society especially in transition period for political communication. Then, concerned the Political bias of the mass media becomes an important argument especially at the election time. So, partisan bias is a crucial question to evaluate the election process. Various researchers have studied how media bias or how political orientation runs especially in the election campaign. Thus, this study analytically evaluated the partisan bias could present in the newspaper. The content analysis method through Myanmar newspapers applies to verify the partisan bias. The findings from the pioneer study pointed out newspapers have their party supported in the election.

**Keywords:** Myanmar, Partisan bias, election process, newspapers

### **Introduction**

The primary endeavor of this research is to point out the partisan bias of newspapers in the election reporting coverage. Analyzing the Myanmar newspapers will carry on this research. Firstly, it will introduce why the idea of election is considered in this research; secondly, the reason of why 2015 election in Myanmar is chosen for this study will be discussed; and finally, it will calculate some research questions in pursuit of the objective.

First of all, it can be said that election is one of the vital components for the democratic country. In every modern society, the democratic government held the election. And, most of democratic elections are transparent and accountable. Nevertheless, the idea of elections is incomplete without media. To be a free and fair election, it is not only about to vote freely but also to engage the participatory process where voter involves in the public debate and supports the adequate information about parties and candidates.

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Therefore, the print media, broadcast media and social media provide the primary site with the role of election. This means that media have to participate in supplying the information of election and disclose sometimes hoax and fraud of the opinion polls because the public should be informed. Moreover, media is also a conduit of parties and candidates to get the interactive connection with public. Therefore, the healthy coverage of media in the election is the basic role to embark the free and fair election for the future of the democratic country.

Without democratic government, there cannot be a freedom of speech in the media. In addition, without media freedom, there cannot be a free and fair election. So, these things are not separable. The international conference World Press Freedom Day in 2005 produced a declaration that mentioned: “independent and pluralistic media are essential for ensuring transparency, accountability and participation as fundamental elements of good governance and human-rights based development”. This means that the media need to be professional, accuracy and impartiality in the coverage but there should be a guarantee for the media freedom. Media scholars argue that “the media in the complex society of the 21<sup>st</sup> century gain in significance during these periods of campaigning and voting; the professional functioning of television is therefore of utmost importance for free and fair elections” (Lange and Ward, 2003:210). It supports clear explanations that press freedom and election is related and reinforced for the process of democracy. So, in an attempt to understand and evaluate the media, this study focused on how media play the role in the election period because election is the basic ground to test the political orientations of the media.

Secondly, the environment of media in Myanmar used to the strict censorship and repression regulation. And this is why Myanmar 2015 election can be said that the country’s first and full free general election to terminate almost fifty years of military rule. The army took power in the coup in 1962, turning Myanmar into an authoritarian one-party state. The control of junta made the country a pariah state, subject to Western sanctions. This lead to the people sink into poverty and the country plunged into isolation. The National League for Democracy (NLD) led by Aung San Su Kyi, won the 1990 election, but the junta ignored the results and she was placed under the house

arrest for twenty years. The election in 2010 was boycotted by the NLD. Subsequently, Union Solidarity and Development Party (USDP) claimed victory in the election though it is neither free nor fair. The NLD contested the by-elections in 2012 and won a landslide victory and Ms. Suu Kyi was sworn into Parliament. The general election that took place on Sunday (8 November 2015) was the first contested by the NLD in 25 years. The election was for 498 seats in both houses of Parliament, as well as hundreds of seats in state assemblies. So, this point makes the researcher curious to find out the media's role in Myanmar especially in the transition period of the democracy.

Election reporting is considered as a long-term process rather than one-off event. According to a traditional electoral cycle, it can typically differentiate into pre-election, election, post-election and consolidation period. But, this study analyzes a somewhat different approach in extending the three periods of election: pre-election or campaign period, election and post-election period. The role of media is vital in each stage of the election that is concerned with the future of the country. So, election reporting can be said that a major long running news story. Meanwhile, journalists are especially responsible to report the information fairly to the public in order to make an educated decision.

The pre-election period can be said to be a developing stage for the public to get the right information about parties and candidates in order to make the right decision. Journalists are expected to inform citizens of their right to vote- why it is important for them to exercise their right and where, when and how they must vote. In addition, they will be given a chance to hear the voice of voters so that political leaders can hear their concerns. The most important thing in the pre-election process is to inform citizens about the differences in the respective policies of the political parties or candidates. The coverage of news stories among the political parties should be equal and fair. At that time, media plays the main stage to communicate the public and the party in order to hear a voice of each side. But, media becomes an issue when the candidates and parties do not have equal access. Besides, some of the media's owners who are business people show preferences for viewpoints in their political orientations. Thus, covering an election is never an easy job for journalists.

The voting on Election Day is the most crucial news event for the journalists. So, they must monitor every voter in order to get their franchise and also watch out all ballots are corralled and safely transferred for counting because the abuse of polls are common in most elections. They also observe irregularities, fraud and threats of violence on Election Day. Aftermath, monitoring of the post-election period is also as crucial as the pre-election campaign period because the country can lead to the conflict when the media spread the hate speech after the election while their favorable party failed the election. They must careful to make sure that checked and factual data is used.

Finally, this paper will analyze the election news coverage of the Myanmar 2015 presidential election. The aim of this paper is to investigate Myanmar's election news coverage focusing on partisan bias of newspapers. In pursuit of that objective, this paper will address these following questions. These questions are based on theoretical literature and empirical studies.

- (1) Do newspapers give equal coverage to political parties?
- (2) Are the newspapers focusing on the personality of the candidates or the policy of the parties?
- (3) Which journalistic style (either an interpretive style or a descriptive style) do newspapers prefer to report an election?

This research questions has been targeted to prove the partisan bias that presents in the newspapers especially in the election. To look more in-depth findings of these questions, this study proposes the following hypothesis to explore the journalists' dissemination of election news. Thus, it is possible that Hypothesis: There is a concern that newspapers have their own hidden supported or favored party.

Overall, it is hoped that a critical understanding of the key issues is exhibited. Moreover, the research questions and hypothesis are designed in order to substantiate the partisan bias of newspapers. This will be carried out through the content analysis based on the election coverage of three different newspapers. But, in this research, the behavior of partisan bias by those newspapers will not be proof and this could do in the further research. This research mainly aims to document that partisan bias is present in the election.

## **Methodology**

This study uses content analysis methodology to test the hypothesis and responses in the research questions listed above. The unit of analysis was highlighting the pre-election, election and post-election process that were expressed in three different newspapers.

Most of the researchers carried out two prominent research methods to achieve the data: positivism or quantitative method and interpretivism or qualitative method. According to the positivist paradigm researchers, knowledge is received directly through the senses and the only reliable way of knowing the world is through observation. It is widely accepted that “knowledge comes from our understanding, not directly from our experiences in it” by interpretive researchers.

Denicolo and Becker (2012:64) compare the trivial differences in two perspectives; for positivism, “reality is objective, singular and apart from/uninfluenced by the researcher who can investigate it in a value and bias-free way”. Positivist research is used for objectivity to utilize numerical forms of measurement and leads to quantifiable data. The emphasis on quantifiable data is the rationale that it is related with quantitative research. Moreover, the research design is not swayed by unpredictable human behavior. Preece (2000; 42) states that quantitative research is particularly characterized “by the counting of the occurrences or frequencies of qualities, or by determination of their mean values for numbers of individuals”. That is why this type of research is associated with the quantitative by applying experiments, surveys, and statistics.

Interpretivism hold that “reality is subjective and multiple as it is interacted with by participants in the study, including the researchers, who in turn have to recognize and declare their inevitably value- laden and biased approach” (Denicolo and Becker, 2012:64). Participation and observation by people is primary function in this research. Gunter (2000:5) identifies “it emphasizes a detailed reading or examination of the text, which could refer to a conversation, written words or pictures”. This technique focuses on interviews, observation and case study. So, this method is suitable for finding in-depth meanings.

Qualitative research is accused of being “unscientific, unrepresentative, open to bias and, even to manipulation, conscious or unconscious”(Preece,2000:43). In contrast, quantitative methods are criticized as “reductionist, as using pre-conceived or half-understood concepts and thus as open to bias or manipulation in a different way”(Preece,2000:43). Both types are useful depending on what you want to achieve and have their place, but both types cannot be perfect because of human fallibility.

Thus, it was decided that content analysis is the best method to adopt for this study because content analysis can be applied not only quantitatively but also qualitatively. Krippendorff (2004:21) defines content analysis as a research technique “for making replicable and valid inferences from data to their context”. Furthermore, Babbie et al. (2001:491) argue that content analysis is a research method that examines words or phrases within a wide range of texts, including books, book chapters, essays, interviews and speeches as well as informal conversation and headlines. There is no doubt that content analysis needs a set of texts as input, and then texts must be collected according to some theoretical and statistical rules of selection. Krippendorff (2004) asserts, “content analysis demands a systematic reading of a body of texts, images and symbolic matter, not necessarily from an author’s or user’s perspective. Therefore, content analysis entails a research method by which a researcher seeks to determine the manifest content of written, spoken, or published communication by systematic, objective, and quantitative analysis.

Gunter (2000:56, cited in Berelson, 1952:18) contemplates “content analysis as a research technique for the objective, systematic and quantitative description of the manifest content of communication”. Generally, the meaning of objective is that the researcher’s prejudgment or bias is not present in the results. That is why the findings from this always yield the same results whoever replicate it again. The term systematic means that a research may not select those pieces of content that support a hypothesis, but must reply on all that is relevant. Content analysis is quantifiable but pure quantitative analysis may not only be of unimportance. So, some researchers use forms of qualitative method to reveal deeper meanings.

Berger (1998:26) distinguishes the advantages of using content analysis stating that “it is an inexpensive method of getting information about

text". The researcher can collect the data of printed media in libraries and online archives. This is shown by the use of archive newspapers. The second advantage of using this method is easily available to attain material. According to Bertrand and Hughes (2004; 184), it is very easy to get material from the past especially for press analysis because complete archives usually exist". And, finally, this method is reliable and obstructive. Berger (1998:26) confirms, "content analysis is a way of avoiding the problem of researcher influence on individuals". So, it reduces ethical problems. Another researcher can also reproduce the results to test whether it works or not.

However, there are certain drawbacks in content analysis associated with the use of sampling. Sampling is a term to describe selecting any material to symbolize a large group allowing generalizations from the results. It is hard to tell from the sample studied whether it represents the complete range. That means there is no right rule on finding the right amount of sample size that is suitable for the research. However, there are two forms of sampling methods organized by Bertrand & Hughes (2004:66) depending on probability and non-probability condition. Probability sampling method involves a generalization of the whole group, so, repeated sampling would yield similar results and sampling error can be calculated in this method. In contrast, the non-probability sampling method cannot give knowledge whether any other sample would produce similar results; thus sample error cannot be measured in this case. So, the researcher often studies a sizeable amount of material depending on the purpose of the research to avoid this sampling problem. A major disadvantage of the content analysis is that it can lead to misinterpretation. This method can measure the manifest content but it cannot explain the nature of the process or the hidden content. Bertrand & Hughes (2004:66) assess that "content analysis does not tell how the content came to be that way". This kind of answer can be done by intellectual framework.

This test is widely available and several studies on election coverage have been used the content analysis. Berger (1998) explains that "content analysis is one of the more important techniques used in research concerning the mass media". Dunaway et al (2015) used content analysis to examine the objectivity of campaign news stories from statewide elections in three specific years. Moreover, the study carried out by Stromback (2001) used a content



analysis to compare election coverage between British and Swedish elections focusing on elite newspapers from these two countries. This study also focuses on three newspapers in each country. So, the number of choosing newspapers derives from the research by Stromback (2001) in their comparative study of election coverage in two countries. In addition, Cushion et al (2016) applied the method of combining quantitative and qualitative content analysis in order to evaluate the UK campaign. The study conducted by Stromback and Dimitrova (2006) in which they examined news coverage in election campaign in Sweden and United States. Thus, content analysis is the appropriate method for this comparative research to get valid and reliable data.

### **Media Samples**

This study used three national daily newspapers for analyzing process. The Global New Light of Myanmar, Myanmar Times and The Eleven Daily Newspapers were chosen as samples for election news. For a half-century, the government owned the Global New Light of Myanmar and now it is affiliated with a private company. Moreover, the ownership of the Myanmar Times and the Eleven Daily newspaper are private companies. Thus, these three newspapers were chosen for this research because of diverse ownership.

Only news stories were selected and counted to measure the coverage between parties from each newspaper. So, only the news concerned with the election in the headline or the first or three paragraphs. The election news from those newspapers is analyzed as pre-election, election and post-election. But, each newspaper gave an exposure of five days in Myanmar, in which for the entire election period in Myanmar, the date of October 29, 30, November 9, 16, 17 of 2015 were chosen for analysis. These dates were randomly chosen a week before the election and three days after the election. The day after Election Day was chosen in order to identify what was reported on the Election Day because newspapers and print media, cannot report live events like broadcast media. So, the choice of time for this study also covered the pre election to the post election period.

In gathering data, all of the data from the newspapers was manually selected. In all, the study comprises 104 news reports in total that includes

38 from the Myanmar Times, 22 from the New Light of Myanmar and 44 from the Eleven daily newspaper.

### **Measures**

In order to study the visibility of partisan bias in the press, the first stage of this study evaluated election news items from these three newspapers. The news items were coded to answer the question of “do the newspaper give equal news coverage to all political parties contesting the election?”. To figure out that question, election news was divided according to each political party and compared with other parties by measuring which party had the most favorable coverage.

For example, to find out whether the news report was about the NLD party, this research used the following criteria; the party’s name or one of the prominent party leader’s name mentioned in the headline, its appearance as in the lead or two or three paragraphs and finally, whether the general idea of the news was mainly aimed at that party. Another example is the headline, “Elections officially begin with early votes” by the Myanmar Times newspaper reported on 29, October of 2015. Such news is not clear which party they want to support. So, this kind of news is categorized simply as “election related news” with no preference.

To verify the alternative way of equal newspapers coverage between parties, the tone of the story is also considered in this analysis. The story is regarded as a positive story, when the story gives credit to the policy or the candidate of the specific party with good comments. The news that highlights the bad reputation of the candidate or the weakness of policy of a party in the story with bad comment from certain sources; that kind of news is labelled as a negative story. When a story neither includes the positive or the negative comment of contesting parties then it is classified as a neutral coverage.

To test the second research question, “are the newspapers focusing on the personality of the candidates or policy of the party in the election”, the second part of this study endeavored to examine more closely on whether the news covered the policy of the party or the personality of the candidates. When the news mentions the specific party’s name and the manifesto of the party, that kind of news consider as the policy of the party. The news about

the candidate's personal life or remarks made in a speech is concerned with the personality of the candidate. The news differentiates between the personality of the candidate and the policy of the party.

Moreover to look beyond a solely quantitative analysis, this study looks deeper into the election reporting style for Myanmar newspapers. Gulati et al. (2004; 243) says that "many journalists consider that it is irresponsible to describe the campaign without delving into the candidates' motivation or without exploring why particular campaign decisions were made". Therefore, the journalistic reporting style of each election news story is evaluated as either descriptive (news story told in a rather straight forward style) or interpretive (news story in which a situation is analyzed, evaluated or explained which also describing part of it).

Descriptive reporting mainly emphasizes the facts but the theme around which the story is built represents interpretive reporting because interpretive journalism goes beyond the basic facts of an event or topic to support context, analysis and possible consequences. This distinction was introduced from the measurement of interpretive journalism written by Salgado and Strömbäck (2011). For the interpretive story, the story is checked with these criteria; firstly, it includes a journalistic explanation or the reason behind action or events, secondly, the story uses at least two side of quotations and finally, it also includes the future consequences of events. The news story included the basic facts of 5Ws story (why, when, where, who and what) and the quotation that used in the story just provided only one side was coded as descriptive writing.

In brief, this chapter describes the method that is used to evaluate the deep insights of the hypothesis. Moreover, it has discussed with some explanations with a clearer picture of choosing the media samples and time periods about this study. The next stage will focus on data analysis.

### Data Presentation, analysis and findings

Firstly, this category was further analyzed on a coverage bias case depending on the number of news coverage for each of the presidential political party. The coverage of the presidential election news in pre election period disseminated from the Eleven Daily newspaper, Myanmar Times Newspaper and the New Light of Myanmar newspaper are presented in Table 1 below.

**Table 1:** Number of election news reported on Pre-Election period by Newspapers (October 29, 30 of 2015)

Categories	Eleven Daily Newspapers		Myanmar Times Newspaper		New Night of Myanmar	
	No. of news	% of total	No. of news	% of total	No. of news	% of total
NLD	16	57.14%	3	25%	1	14.28%
USDP	4	14.28%	1	8.3%	2	28.57%
Ethnic Parties	1	3.5%	3	25%	0	0%
Other related Election News	7	21.42%	5	41.66%	4	57.14%
<b>Total</b>	<b>28</b>	<b>100%</b>	<b>12</b>	<b>100%</b>	<b>7</b>	<b>100%</b>

According to Table 1 above, Eleven daily was the leading newspaper in the coverage of election with 28 news items in two days, 57.14% more than half of the total number of news covered about the NLD. In contrast, USDP got the most favored coverage than the other party in the New Light of Myanmar. Moreover, the other election related news got nearly half of the coverage (The other election related news means the coverage of UEC (Union Election Commission), Early voting process and advance polling checked news). However, in Myanmar Times newspapers, NLD and the ethnic parties coverage were the same. When the analysis took a close look on the news coverage of the political party from each newspaper, surprisingly, the results can be said that two of them gave an emphasis on the election related news than the coverage of political party. So, Myanmar newspapers mainly reported the electoral process on the pre-election period.

**Table 2:** Number of News reported on Election Day by Newspapers (November 9, 2015)

Categories	Eleven Daily Newspapers		Myanmar Times Newspaper		New Night of Myanmar	
	No. of news	% of total	No. of news	% of total	No. of news	% of total
NLD	2	28.57%	2	11.76%	0	0%
USDP	2	28.57%	2	11.76%	1	14.28%
Ethnic Parties	0	0%	3	17.64%	0	0%
Election Related News	3	42.85%	10	58.82%	6	85.71%
<b>Total</b>	<b>7</b>	<b>100%</b>	<b>17</b>	<b>100%</b>	<b>7</b>	<b>100%</b>

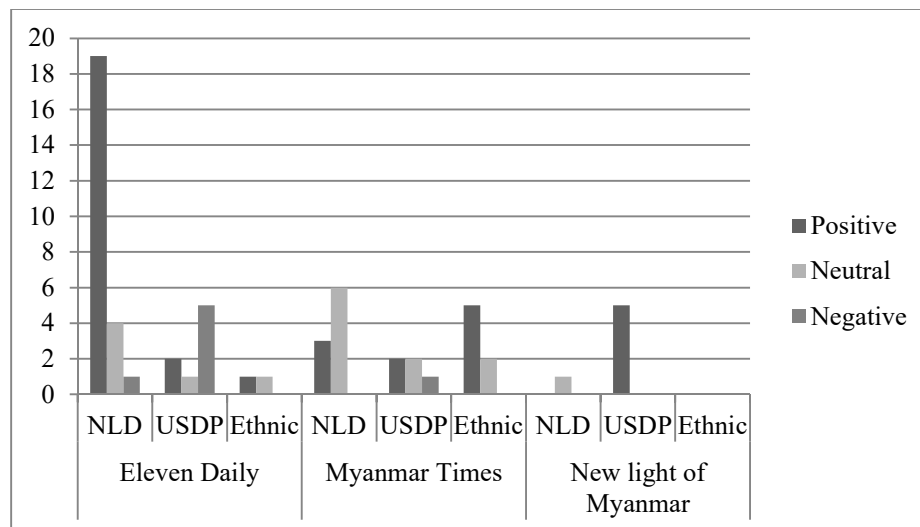
Table 2 demonstrated that there were statistically significant variations across the sample media. The interesting thing in this table was that these newspapers did not show the significant coverage between parties like the pre-election period. Moreover, the result showed the considerable percent of election related news story had been covered the most than the party's news. (The election related news story on the Election Day included about story of the voting process on the election and the story about studying the election from the external organizations like the NGOs.) NLD and Ethnic parties got 0% coverage in The New Light of Myanmar newspaper. Myanmar Times newspaper was the only one that reported on the ethnic parties.

**Table 3:** Number of News reported on Post Election period by Newspapers (November 15,16 of 2015)

Political Parties	Eleven Daily Newspapers		Myanmar Times Newspaper		New Night of Myanmar	
	No. of news	% of total	No. of news	% of total	No. of news	% of total
NLD	6	66.66%	4	44.44%	0	0%
USDP	2	22.22%	2	22.22%	2	25%
Ethnic Parties	1	11.11%	1	11.11%	0	0%
Election Related News	0	0%	2	22.22%	6	75%
<b>Total</b>	<b>9</b>	<b>100%</b>	<b>9</b>	<b>100%</b>	<b>8</b>	<b>100%</b>

According to table 3, interestingly, this correlation is related to Table 1. NLD is the most prominent coverage by Eleven Daily and Myanmar Times newspapers with 66.66% and 44.44% respectively. Less surprisingly, the NLD party and ethnic parties were placed at the bottom by The New Light of Myanmar newspapers. USDP get favorable coverage among parties as usual. (Election related news means the story of UEC announcement for the election results in the post election period.) The election related news was mostly covered by the News light of Myanmar than the other papers.

Overall, the data from the Eleven Daily newspapers displayed that it leaned the NLD party with more than half percent of total coverage in pre-election and post-election period. However, Myanmar Times Newspaper was the only one newspaper that covered the ethnic parties in all these three period. Meanwhile, The New Light of Myanmar Newspapers covered any news about it. The percent of coverage among political parties by Myanmar Times is fluctuated and do not show clearly which parties favor the most. But, The New Light of Myanmar newspaper give attention on the incumbent party, USDP. So, it can be said that The Eleven Newspapers has a strong partisan about the NLD in all three periods, and The New Light of Myanmar has only interest on the USDP party. The interesting thing is the election related news has the favorable coverage in all three period of election among all of the newspapers.

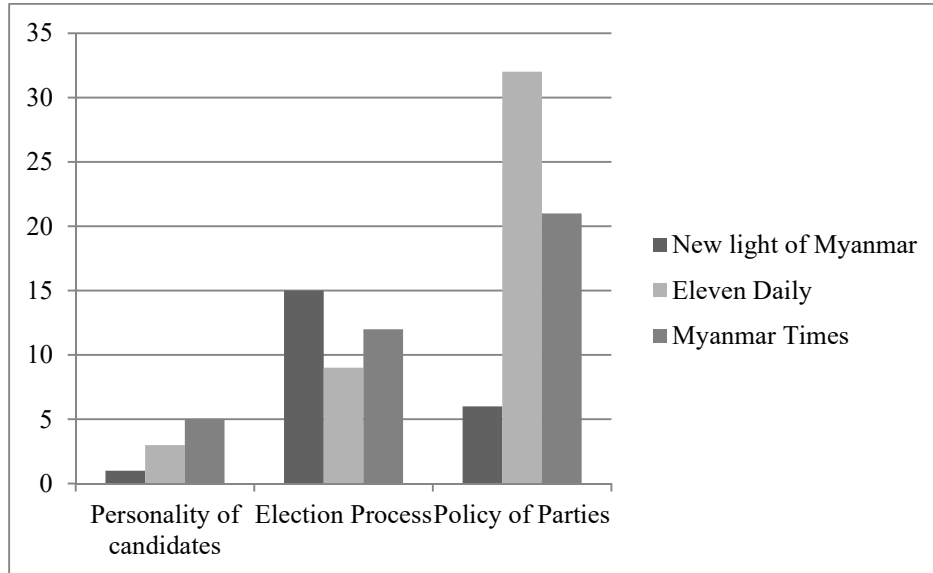


**Figure 1:** the tone of news used by Myanmar Newspapers for each party.  
(see more detail in appendix)

To confirm more about coverage bias, this study evaluates the tone of story coverage as positive, neutral and negative between political parties. The data from the figure 1 are consistent with the above table 1,2,3. As expected, the tone of story used in The Eleven Daily Newspapers about NLD is positive because NLD was mostly covered in the Eleven Daily at pre-election and post-election. As shown in figure 1, it is obvious that NLD was predominantly positive while the coverage about USDP was addressed negatively in The Eleven Daily. Most of the coverage about ethnic parties among three newspapers was not significantly different. Nevertheless, Myanmar Times newspapers covered Ethnic parties positively while New Light of Myanmar showed positive coverage about USDP on Pre-election period. Overall, this figure indicates that the coverage of news story is coherent with the tone using for the story. According to the results about the relationship between the coverage and the tone used for the story, it indicated that Myanmar newspapers have partisan bias and they do not cover the news fairly between parties.

The first step of attempting to identify the partisan bias of election news coverage in newspapers, the interesting and prominent results are emerged. As expected, the two leading political parties in Myanmar, the

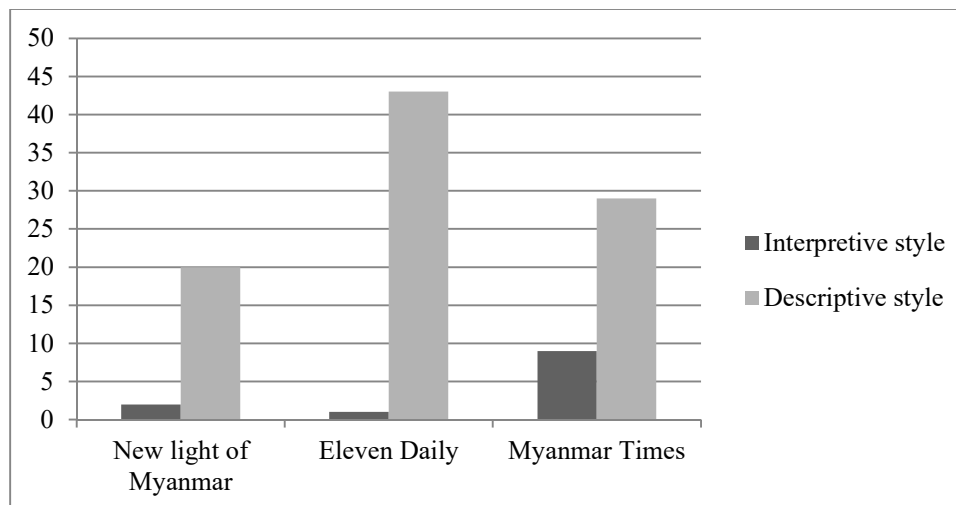
National league for Democracy (NLD) and the Union Solidarity and Development Party had the most obvious coverage in newspapers than other political parties. So, the correlation between the coverage and the tone of story was interesting because the newspapers showed significantly coverage for their supported party with a positive tone. The findings regarding with the question of “do newspapers give equal coverage to political parties?”, the finding clearly show that the newspapers have partisan bias and they have supported parties in coverage and specific tone.



**Figure 2:** main categories of election news coverage by Myanmar newspapers

In an attempt to identify the focus of newspapers whether they support the personality of candidates or the policy of parties, the data is collected all of the election news from the newspapers and differentiated into each categories. As shown in Figure 2, it illustrated the main categories covered by newspapers during in the three period of election. Obviously, these three Myanmar Newspapers did not cover very much about the personality of candidates. Eleven daily newspapers covered the most about the policy of the parties. Meanwhile, The New Light of Myanmar report the electoral process the most but the coverage of electoral process do not show big differences among newspapers.





**Figure 3:** journalistic style of election news by the Myanmar newspapers

As the last step to see whether the newspapers follow the interpretive style or descriptive style when they report election news, each of news is questioned which news reporting style is used for the election news. It obviously showed that Myanmar newspapers followed the descriptive journalistic style of news reporting. So, the journalistic style of reporting in the Myanmar newspapers was based on the factual reporting. And the gap between the descriptive and interpretive journalistic style reported in the newspapers was extremely high. But, the interpretive journalistic style was seen in the Myanmar Times newspapers than the other newspapers. Nevertheless, the majority of Myanmar newspapers use the descriptive journalistic style.

### Discussion

This section summarizes the findings according to the research questions and it is discussed as follows:

The first research questions, “Do newspapers give equal coverage to political parties?”, of this study was analyzed to identify the coverage of bias. This is the first attempt to prove the partisan bias exists in the newspapers, among all of them, The Eleven Daily newspapers supported political parties and they reported most of the election news about the NLD party. This study

concentrated on an additional check of the coverage bias by evaluating the tone of story used for a particular party. This finding indicated that the Eleven Daily newspapers used a positive tone when they reported about the NLD party. The USDP party was positively reported in the New Light of Myanmar newspapers. Thus, the findings show clearly that Myanmar Newspapers have a partisan bias.

The findings to address the second questions prove that election reporting emphasizes the policy of the parties. These findings reflect the fact that the newspapers in their coverage do not give prominence to the politics of individual candidates. Secondly, it indicates clearly that the main focus of the newspapers is on the election process. In general, it seems that Myanmar newspapers tend to introduce the reader with the process of the election in order to enable them to make the right decision when they vote their franchise. Thus, the newspaper endorse and give favorable coverage to the party they support.

Another important concern about the coverage of newspapers is the writing style of the election news. So, the third point to be noted is which journalistic style is common to their newspapers in their coverage. The journalists play a role as an observer in a descriptive style. Meanwhile, the journalists act as an analyst in the interpretive style. According to the findings, the style of election news coverage is predominately descriptive in these newspapers. But, the descriptive journalistic style is popular in the Myanmar newspapers and it acknowledges that most of election news in Myanmar newspapers depends on the facts provided by the specific sources. That can be also assumed that the journalists do not take a position to shape the news in the journalistic reporting and the story had happened in a straightforward style.

Overall, content analysis of election news from all of three newspapers has a similar trend in most of the findings. The descriptive style is mostly popular in all of them. Similarly, coverage about the policy of parties is also common among them. In addition, election related news has been covered in all three period of election. However, they also supported their favorable party by reporting a significant amount of news with positive tone coverage.

## Conclusion

The most common source of information for the public concerning elections held in democratic societies in transition around the world is the media. At that time, to be taken into account the role of media in the election, this paper examines the presence of the partisan bias in the election news coverage. It also investigates whether the newspapers have their supported party or not by using three alternative measures (i.e. the number of coverage story among party, the tone used for the story and writing style for the story). The empirical content analysis through the study of 104 election news stories by the three newspapers; New light of Myanmar, Eleven Daily newspapers and Myanmar Times newspapers has been analyzed to verify the hypothesis.

First of all, according to the analysis, only the Eleven Daily newspaper indicated a strong bias toward the NLD party although the NLD won 2015 elections and mostly retained 67% of the parliamentary seats. So, the performances of the newspapers do not led to the NLD victory. But, that was not this paper's aim. One of the papers used in the research, the New Light of Myanmar, give a favorable coverage to the incumbent party. But the Myanmar Times newspapers do not give a hint which party they support the most. Thus, according to the findings, both the Eleven Daily newspaper and the New Light of Myanmar newspapers have the partisan bias. The alternative supporting results for the hypothesis is that the tone used for the story is mainly positive for the party supported.

The second major finding to prove the hypothesis is that all three newspapers are mainly focused on the policy of the parties to give more information about the party. So, the results from this paper tested the hypothesis that the newspapers have their supported party in the election period. Finally, all newspapers gave the story a straightforward style rather than analyzed style. So, newspapers do not go beyond the facts of an event or topic to support the context.

Rivolta (2011) asserted, "Media and politics are intertwined so that most media can be labeled with respect to bipartisan lean or bias". So, election is the best suitable situation to find out the bias of the media. That is why; partisan bias exists when media favors one particular party than the others. The norm of objectivity is vital in the electoral process to be non-partisan and

balance. So, one of the newspapers in this research do not show partisan bias and focus the objective reporting in the election.

The finding from this paper is empirical and relevant to the current situation because the election is vital in the democratic country especially in a developing country like Myanmar. However, this research like any other study experienced certain difficulties and handicaps. Therefore, this paper does not draw any conclusions regarding the conditions that led to the partisan bias of the newspapers in Myanmar in their reports on the elections. Neither does it claim to answer the question as to the extent of the partisan bias present. There is a need for further empirical research on the 2020 elections in order to determine relevant factors to obtain more comprehensive and in-depth results. Further, for a more comprehensive test of this hypothesis, it would be necessary to look more systematically at how the press support the coverage for the specific party it supports. However, practices of media coverage can enrich the citizen's awareness and abilities to criticize the information they receive. Thus, the findings of this research on election news can provide guidelines for establishing criteria for best election reporting for the country.

### Reference:

- Babbie, E., et.al (2001). *The practice of social research*. Oxford University Press.
- Berger, A. A.(1998) *Media and communication research methods: An introduction to qualitative and quantitative research approaches*.4<sup>th</sup>edn. Thousand Oaks, CA; Sage Publications.
- Denicolo, P . and Becker, L.(2012) *Developing research proposals*. Los Angeles: SAGE Publications.
- Bertrand ,I. & Hughes, P. (2004) *Media research methods: Audiences, institutions, texts*. Basingstoke, Hampshire: Palgrave Macmillan.
- Dunaway, J. L., Davis, N. T., Padgett, J. and Scholl, R. M. (2015), *Objectivity and Information Bias in Campaign News*. [Intenet], 65: 770–792. Available from <<http://onlinelibrary.wiley.com/doi/10.1111/jcom.12172/abstract>>
- Gunter, B.(2000) *Media research methods: Measuring audiences, reactions and impact*. Thousand Oaks, CA: Sage Publications.
- Krippendorff, K. (2004). *Content Analysis: An introduction to its Methodology*.2<sup>nd</sup> edn. Sage Publication Inc.

- Lange, B. P and Ward, D. (eds) (2003) *The media and elections: A handbook and comparative study*. United States: Erlbaum, Lawrence Associates.
- Preece, R.A. (2000) *Starting research : An Introduction to Academic Research and Dissertation Writing*. London: Frances Printer
- Salgado, S. and Strömbäck, J., 2012. Interpretive journalism: A review of concepts, operationalizations and key findings. *Journalism*, 13(2), pp.144-161.
- Strömbäck, J. and Dimitrova, D.V. (2006) Political and Media Systems Matter A Comparison of Election News Coverage in Sweden and the United States. *The Harvard International Journal of Press/Politics*, [Internet] 11(4), pp.131-147. Available from :< <http://hij.sagepub.com/cgi/content/abstract/11/4/131>>[Accessed 2 April 2017].

### **Myanmar Newspapers**

- Daily Eleven Newspaper, October 29, 2015.
- Daily Eleven Newspaper, October 30, 2015.
- Daily Eleven Newspaper, November 9, 2015.
- Daily Eleven Newspaper, November 16, 2015.
- Daily Eleven Newspaper, November 17, 2015.
- Myanmar Times Newspaper, October 29, 2015.
- Myanmar Times Newspaper, October 30, 2015.
- Myanmar Times Newspaper, November 9, 2015.
- Myanmar Times Newspaper, November 16, 2015.
- Myanmar Times Newspaper, November 17, 2015.
- New Light of Myanmar, October 29, 2015.
- New Light of Myanmar, October 30, 2015.
- New Light of Myanmar, November 9, 2015.
- New Light of Myanmar, November 16, 2015.
- New Light of Myanmar, November 17, 2015.

## **A STUDY OF THE ARTICLE ON ENVIRONMENTAL ISSUES PUBLISHED IN MYANMAALINN DAILY AND KYEMON (THE MIRROR DAILY)**

Cho Cho Thwin<sup>\*</sup>

### **Abstract**

The media in Myanmar today have developed and there have now emerged privately-owned media companies. This paper examines the background of newspaper in Myanmar and the coverage of environmental-related issues published in state-owned media, Myanma Alinn Daily and Kyemon Daily (The Mirror Daily). How effective have been the Myanma Alinn Daily and Kyemon Daily newspapers in their coverage of environmental and climate change issues? In this study, quantification of survey and interview method was used. Data were collected through content analysis. There are a total of 245 items concerning environmental and environmentally related articles in the two newspapers. Among all the topics, climate change and global warming got the highest priority with 22% of the total articles. In 2016, environmental related reporting was not covered sufficiently in these two newspapers. But the Myanma Alinn Daily published a total of 145 items on issues related to the environment which was more than those in the kyemon Daily. In terms of the extent of coverage and types of environmental items in these two newspapers, they differed considerably and 17% of the total articles were presented with photographs. The two newspapers have played an important role in informing the community by sharing their knowledge on environmental related issues.

**Key words:** Newspaper, Articles, Environment, climate change and global warming

### **Introduction**

The Republic of the Union of Myanmar is located between North Latitude 9° 30' North and 28° 31' North and East Longitude 92° 10' East and 101° 11' East. Myanmar comprises of a union territories, seven states and seven regions. Most notably, the seven states of Myanmar are known for their ethnic diversity. Myanmar is the second largest country in Southeast Asia after Indonesia and it contains tropical monsoon climatic zones. Out of a

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population of 51 million, Myanmar boasts 135 ethnic groups recognized by the government and 117 languages. Media is the communication tool used to store and deliver information and helps identify a community's goal.

Newspapers are a means of communication between the government and the people, between countries and between communities. A newspaper typically includes news stories on local and international political events and personalities, editorials, current events, informative articles, diverse features on business, entertainment, crime news, sports news, weather news announcements, public opinions and advertisement.

Myanmar's first newspaper, the Maulmain Chronicle newspaper was first introduced for a handful of English speaking readership in 1836 in the city of Moulmein in British held Tenasserim. It was followed by the Yangon Chronicle in 1853. The first Burmese-language newspaper, the Yadanarbon Naypyidaw was started in Mandalay in independent Burma in 1874 as the official organ of the Kingdom. During the colonial period, Burma had dozens of newspaper in Burmese, English, Chinese and several Indian Languages. After 1910, the newspaper industry had grown and many newspapers emerged. The Sun, Myanma Alinn and Dr Bamaw's Bama Khit newspapers kept running during the Japanese occupation between 1942 and 1945, After the Revolutionary Council took power in March 1962, several major newspapers were nationalized and many private newspapers were closed down. There were about 40 publications including four English versions, nine Indian versions and a Chin Newspaper. Chinese and Indian publications were shut down in January 1966 under Socialist Regime.

The government established the first state-owned newspaper, The Working People's Daily, on October 1<sup>st</sup> 1963. In September 1964, Kyemon (The Mirror), Botahtaung and The Guardian were also nationalized. In the end, only six papers remained and all were owned and controlled by the military government; they were the Loktha Pyithu Nezin, the Botahtaung, the Kyemon and the Hanthawaddy in Burmese and the Guardian and the Working People's Daily in English. After 1988, on the assumption of the State responsibilities by the Tatmadaw government, The Newlight of Myanmar, Myanma Alinn and Kyemon (The Mirror) dailies continued to be published.

In March 2011, exiled media companies such as the Mizzima, the Ayeyarwaddy, the Democratic Voice of Burma and ethnic media groups have returned to Myanmar and contributed to the plurality of the media in Myanmar. In October 2012, Myanmar's state newspapers become public service media set for a revamp with a new governing body.

On March 14, 2014, the News Media Law was officially enacted and this law provides protection for journalists and reporters if they adhere to the rules of the media law. The removal of prior censorship made it possible for daily newspapers to be produced. Twenty private Burmese language daily newspapers were registered under the new printing and publishing enterprise law (PPEL) shortly after its enactment. Although the printing and publishing enterprise law (PPEL) removed many of the legal barriers preventing a pluralistic print media, the existence of state-owned print media creates an uneven economic playing field and indirectly promotes media concentration. Nowadays, not only the state-owned media but also private-owned media have emerged in Myanmar. Myanma Alinn Daily and Kyemon Daily (The Mirror Daily) are the two largest state owned print media. Due to fierce competition within the media industry only seven of the original 20 private daily newspapers are still in circulation. Total circulation of the Myanma Alinn and Kyemon in Myanmar during 2016 were 180000 and 190000 copies per publishing day. Today many countries of the world are confronted with environmental problems and issues and it's the consensus of the world scientists that most are man-made disasters. There is thus a need to raise environmental awareness among people. The media, therefore has an important role in disseminating information concerning information and knowledge about human actions that lead to climate change and global warming that cause environmental damage and degradation.

Newspaper have an obligation to fulfill the desire of the reading public on all matters that affect their life and information on environmental matter is of great public interest these days. So one of the tasks of newspapers is to provide information on the root causes of climate change and related topics such as global warming, pollution, greenhouse gas etc. It can also provide information about how each citizen can help mitigate climate change effects by not dumping garbage indiscriminately, not to waste fresh water and recycle



household utilities and thus help to protect the environment. The study paper attempts to present how effective have been the Myanmar Alinn and Kyemon Dailies newspapers in their coverage of environmental and climate change issues.

### **Objectives of the Study**

To assess how these two newspapers have treated the coverage of environmental issues.

To quantify the number of the items relating to environmental issues.

To analyze the prominence of the reported articles.

To identify themes, issues and impact of items.

### **Methodology**

In the present situation of environmental issue using the quantification of survey and interview method with leading representatives and journalists of the newspapers are used to collect the information and data. Environmental related articles printed in Myanmar Alinn and Kyemon, dailies during January 1, 2016 to December 31, 2016 were based on for analysis. The topics of the articles, date of publication and types were noted. Also, the contents of the items was studied and types of article and visual images was recorded. Finally, the findings are presented in tables and graphs and statistically analyzed (percentages).

### **Results**

In many cases environmental reporting depends primarily on the author's ability to discover and explore each issue. Based on author or journalists' articles, the editorial boards and the editors play the role of controlling information only and they advised how to present the news. They will decide whether to publish the article or not.

In Myanmar Alinn Daily and Kyemon (The Mirror Daily), there were 145 items and 104 items were published on different aspects of environmental issues during the study period, 2016. The two newspapers have focused on

providing news on environmental issue topics, although the reporting level between different topics are not the same.

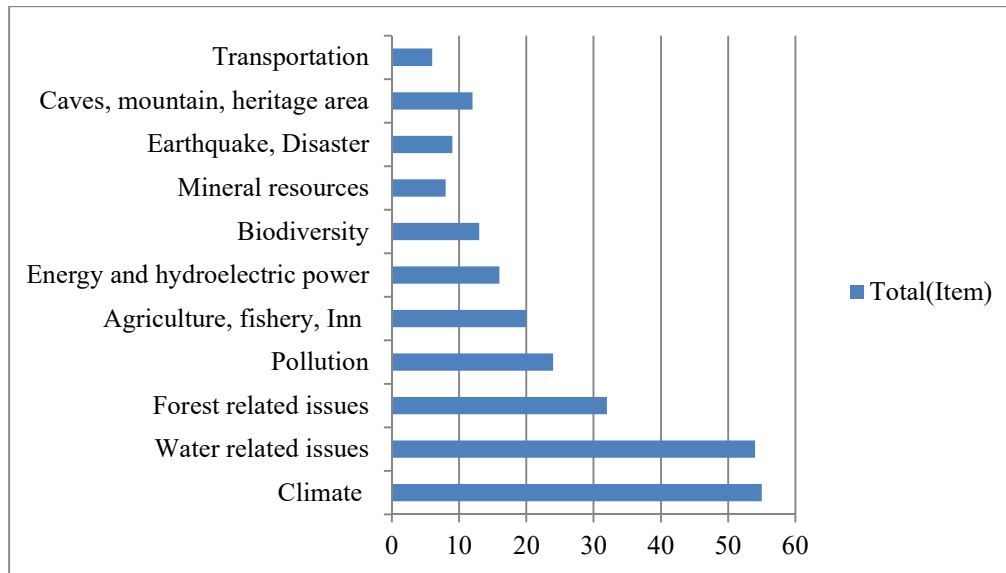
Different topics related to environment were climate, water, forest, pollution, biodiversity, mineral, energy, transportation, earthquake, heritage area, energy, hydroelectric power supply, agriculture, fish pond, cave and inn. Among all the topics presented under environment, climate issue articles got the highest priority in these two newspapers as shown in table (1). The reported articles did not mention their sources and some articles used foreign sources and the internet. Foreign news sources were dominated by Associated Press (AP), Reuters (UK), Press Trust of India (PTI) and Asian News International (ANI). In 2016, Myanmar Alinn Daily reported the highest number of environmental related articles in February, March and September as shown in table (2). In Mirror, it was in March and May as shown in table (3).

A photograph used in the news can represent a thousand of words and it can improve the value of news with the connection between the text and the picture. Observation of these newspaper showed that 17% (43 items) of the total articles (249 items) were presented with photographs. So it can be concluded that these two newspapers do not consider photo journalism as important in similar weight as shown in table (4). Other forms of the visuals included tables, graphs, diagrams and satellite images. None of the studied newspapers had a special environmental page or issue, and thus environmental articles have not been printed on a specified page so, readers have been unable to search for environmental news in a particular place.

**Table 1:** Types of total environmental related article by Myanmar Alinn Daily and Kyemon Daily

No	Types of article	Myanmar Alinn (article)	%	Kyemon (article)	%	Total(article) (Myanmar Alinn @Kyemon)
1	Climate	39	27	16	15	55
2	Water related issues	25	17	29	28	54
3	Forest related issues	16	11	16	15	32
4	Pollution	12	8	12	12	24
5	Agriculture, fishery, Inn	9	6	11	11	20
6	Energy and hydroelectric	9	8	7	7	16
7	Biodiversity	8	5	5	5	13
8	Mineral resources	8	5	-	-	8
9	Earthquake, Disaster	7	5	2	1	9
10	Caves, mountain, heritage area	6	4	6	6	12
11	Transportation	6	4	-	-	6
	<b>Total</b>	<b>145</b>	<b>100</b>	<b>104</b>	<b>100</b>	<b>249</b>

**Source:** MyanmarAlinn Daily and Kyemon Daily(January to December 2016)

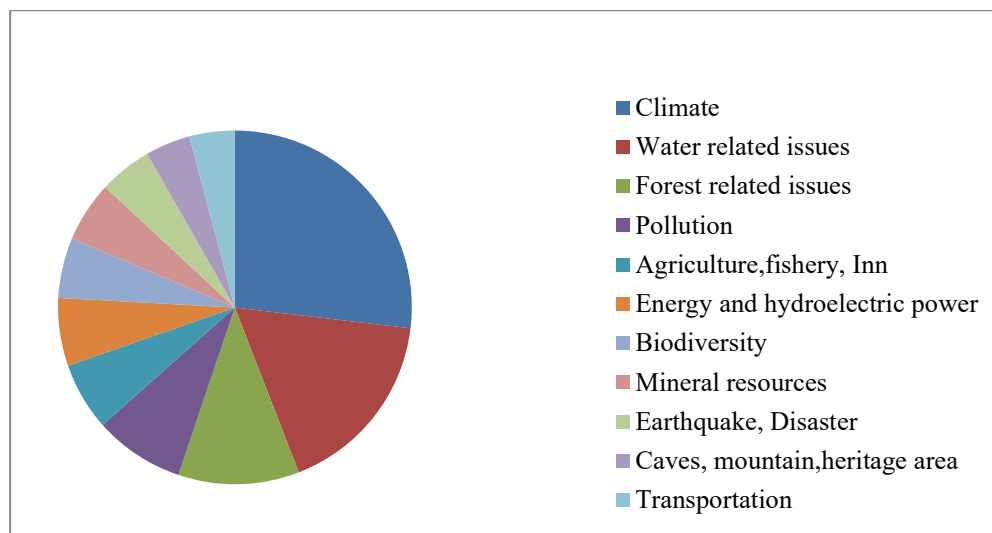
**Figure 1:** Types of total environmental related article by Myanmar Alinn Daily and Kyemon (2016)

**Source:** Based on table (1)

**Table 2:** Monthly Environmental Related Articles in Myanmar Alinn Daily (2016)

No	Types of article	January	February	March	April	May	June	July	August	September	October	November	December	Total Item
1	Climate	2	4	10	4	3	3	6	1	3	1	2	-	39
2	Water related issues	1	1	4	3	-	3	1	3	4	3	1	1	25
3	Forest related issues	2	1	2	2	2	2	-	2	2	-	1	-	16
4	Pollution	3	2	2	1	1	-	-	-	1	-	-	2	12
5	Agriculture, fishery, Inn	-	2	2	-	-	-	-	-	3	1	1	-	9
6	Energy and hydroelectric power	-	-	-	-	-	-	2	-	5	2	-	-	9
7	Biodiversity	2	1	1	-	-	3	-	-	-	-	-	1	8
8	Mineral resources	-	2	-	-	2	2	-	-	1	-	1	-	8
9	Earthquake, Disaster	-	2	-	1	1	-	-	-	2	1	-	-	7
10	Caves, mountain, heritage area	1	-	2	-	-	-	-	-	1	-	-	2	6
11	Transportation	-	-	1	-	2	1	-	-	-	-	1	1	6
	<b>Total (Article Item)</b>	<b>11</b>	<b>15</b>	<b>24</b>	<b>11</b>	<b>11</b>	<b>14</b>	<b>9</b>	<b>6</b>	<b>22</b>	<b>8</b>	<b>7</b>	<b>7</b>	<b>145</b>

**Source:** Myanmar Alinn Daily (January to December 2016)

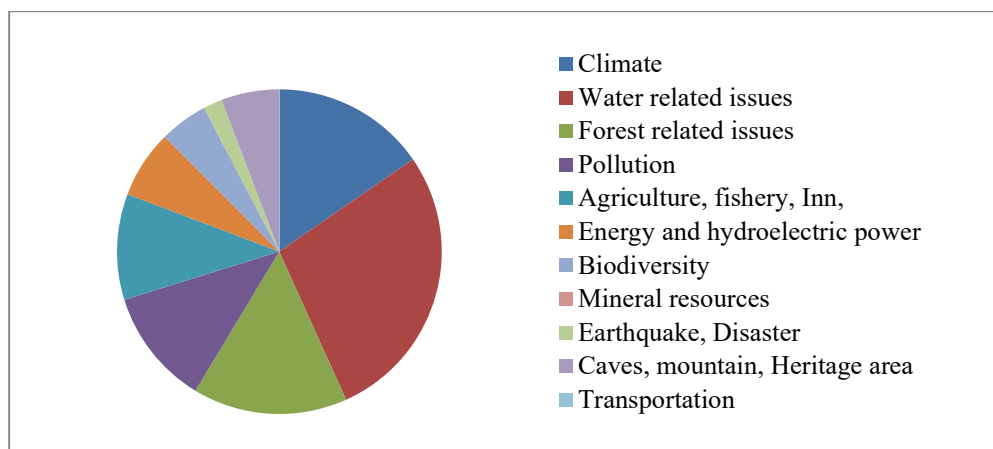
**Figure 2:** Environmental Related Articles in Myanmar Alinn Daily (2016)

**Source:** Based on table (2)

**Table 3:** Monthly Environmental Related Articles in Kyemon Daily (The Mirror Daily) (2016)

No	Types of article	January	February	March	April	May	June	July	August	September	October	November	December	Total Item
1	Climate	2	1	4	4	4	-	1	-	-	-	-	-	16
2	Water related issues	1	6	5	5	2	3	-	2	-	1	2	2	29
3	Forest related issues	4	1	1	1	1	1	1	1	1	1	1	2	16
4	Pollution	1	-	2	-	1	-	1	-	2	4	1	-	12
5	Agriculture, fishery, Inn,	-	1	2	-	2	-	1	-	2	2	-	1	11
6	Energy and hydroelectric power	2	-	-	-	2	-	-	1	1	-	-	1	7
7	Biodiversity	1	1	1	-	-	-	-	1	-	1	-	-	5
8	Mineral resources	-	-	-	-	-	-	-	-	-	-	-	-	-
9	Earthquake, Disaster	-	-	1	-	-	-	-	1	-	-	-	-	2
10	Caves, mountain, Heritage area	-	1	1	1	1	-	-	1	1	-	-	-	6
11	Transportation	-	-	-	-	-	-	-	-	-	-	-	-	-
	<b>Total</b>	<b>11</b>	<b>11</b>	<b>17</b>	<b>11</b>	<b>13</b>	<b>4</b>	<b>4</b>	<b>7</b>	<b>7</b>	<b>9</b>	<b>4</b>	<b>6</b>	<b>104</b>

**Source:** Kyemon (The Mirror) (January to December 2016)

**Figure 3:** Environmental Related Articles in Kyemon Daily (The Mirror Daily) (2016)

**Source:** Based on Table (3)

**Table 4:** Article presented with photographs by Myanmar Alinn Daily and Kyemon (2016)

No	Types of news item	Myanmar Alin (Photograph)	Kyemon (Photograph)	Total Photograph
1	Climate	1	4	5
2	Water related issues	6	6	12
3	Forest related issues	7	5	12
4	Pollution	1	-	1
5	Agriculture, fishery, Inn	1	1	2
6	Energy and hydroelectric power	-	1	1
7	Biodiversity	1	-	1
8	Mineral resources	4	1	5
9	Earthquake	1	-	1
10	Caves, mountain, heritage area	1	-	1
11	Transportation	1	1	2
	<b>Total Photograph</b>	<b>24</b>	<b>19</b>	<b>43</b>

**Source:** Myanmar Alinn Daily and Kyemon (January to December 2016)

### **Thematic representation**

In 2016, there were 27% and 15% of climate issue articles in the Myanmar Alinn Daily and Kyemon Daily (The Mirror Daily) providing information on the guidelines, policies, programs, climate change and global warming of the total of 55 items published on climate change and global warming and several types of adverse impacts were discussed in these articles. Also, the effects of global warming on human health were discussed in some articles. Moreover, some of the articles focused on widespread deforestation that contributed to large volumes of carbon emission which is an important factor in global warming and the impact of global warming on weather conditions. A large number of the articles discussed the rise of sea levels and environmental deterioration due to the melting of Arctic, Antarctic and Himalayan glaciers. This means that the rivers will soon lose significant amounts of water flow. The volume of water will become increasingly scarce, resulting in more damage to both biodiversity and local livelihoods.

Some of the article discussed the impact of Cyclone in Myanmar and analysis shows that extreme weather events, such as tornados, storms and lightning, have increased in frequency since 2006 and the number of lightning-caused deaths has also increased and the main cause of such extreme weather events is that the monsoon period has shortened, the pre-monsoon and post-monsoon periods have become longer, the likelihood of cumulonimbus clouds to form is higher which in the end creates tornadoes, strong winds, lightning and isolated heavy rain. Myanmar is potentially rich threatened by river floods, cyclones and associated weather. The Cyclone is accompanied by three destructive forces such as strong winds, heavy rains and strong storm surges. Annually, there are approximately 10 tropical storms in the Bay of Bengal from April to December. Since the year 2000, cyclones have crossed the Myanmar coast every year and department of Metrology and Hydrology assumes the month of May as the highest possible period for cyclones to across the Myanmar coast. In order to reduce cyclone risk, Rakhine State, Ayeyarwady Division and Yangon division need to make disaster protection and management plans.

Some of the items discussed in the eight-year post-cyclone Nargis period, which led to the loss of human lives, persons missing and damage. After cyclone Nargis, the Government of the Union of Myanmar, the United Nations and the Association of South East Asia Nation (ASEAN) as a Tripartite Core Group published the joint assessment report. The impact of cyclone Nargis was extremely severe loss of 84,537 human live, 53,836 persons missing and damage to property to the tune of approximately 4.1 billion USD. Reports say that summer set new heat records in some areas of the country because due to climate change.



Drought conditions due to climate change ( Photo- Kyemon Newspaper)

The frequency of information from the water related articles in each newspaper has been the Myanmar Alinn – 17% and Kyemon- 28%. Water-related articles discussed suffering loss and damage caused by storms, periodic flooding, drought and landslides which also pose challenges in terms of water quality control and waste water management. Economic growth, population increase and climate change tends to increase risk of river floods, course changes, cyclones, and longer droughts and these are key factors to be considered for future integrated water resources planning, implementation and management.

Some of the articles also discussed the shorter duration of monsoon but with heavier rainfall that cause floods along all rivers especially the major rivers during the peak monsoon period in Myanmar. The annual rainfall surpassed the normal amount significantly in Ayeyarwaddy, Rakhine, upper Sagaing, Mon, Kayah, Tanintharyi and Yangon regions. The department of Meteorology and Hydrology (DMH) has formed a committee to responsible for issuing flood warning. Media and administrative authorities of the flood prone areas which are broadcast frequently through broadcasting media.





Flood conditions in Kyone Pyaw Township, Ayeyarwaddy Division during the monsoon period

(Photo- Kyemon (The Mirror Daily))

Some other items discussed are concerned with ground water conditions(3 articles), the conditions of the north Nawindam (4 articles), Tabuhla dam (1 article) and kyaingtown waterfall( 2 articles). The water supply system and water resource management were also discussed. Four articles were about the Myitsone dam at the headwaters of the Ayeyarwaddy River. The articles also touched upon the construction of dams with the aim of reducing flood damage and drought conditions. This would also contribute to increased agricultural production.



Dam construction in Laputtar Township, Ayeyarwaddy Division  
Photo- Kyemon (The Mirror Daily)

Nine items were on how in spite of the Ayeyarwady located in the area the Central Dry Zone of Myanmar faces difficulty of water shortage and the high cost of access to water resources. This rise and fall of the waters of the river weakens the banks this leading to their collapse.

Forest related issues are equally presented in the two newspapers with 16% in both Myanma Alinn Daily and Kyemon (The mirror Daily). Some of the items were on deforestation in Myanmar. The forests of Myanmar are rich and diverse in flora and fauna and are ecologically complex. Types of forest are different depending on the physical geography such as rainfall, temperature and soil. In Myanmar, moist temperate forests are found in the eastern, northern and western regions and tropical ever green forests are abundant in the southern part of the country. The heavy cutting of trees to fire brick kilns for construction are the primary cause of deforestation. Population growth, increasing demand for fuel wood, agricultural encroachments are the other main causes of deforestation. The consequence of forest destruction leads to dramatical changes in climate. Some articles discussed the Myanmar Teak. Production of teak has become reduced gradually with a view to

improving the natural teak stock. On the export side, log export shows an upward trend except for a drop in 1991-92. The present policy is to gradually reduce log exports. Some articles also mention the occurrence of forest fire some of which are due to natural causes and others to human activities.

Forest fires destroy the woodland, wildlife, forest reserves and affects the economy. Protection of Forest grounds and resources are needed for the development of economy and existence of animals and human. Some articles deal with the situation of mangroves and coastal wetlands and how these form an interdependent complex of coastal habitats, which need to be protected from the erosive force of the sea and off-shore land-based pollution. Forest conservation helps to protect the soil erosion and keeps the weather balanced.



Forest Conservation of BagoYoma  
(Photo- MyanmaAlinn Newspaper)

The two newspapers have focused on providing environmental pollution information to the extent of 12% in Myanma Alinn and Kyemon respectively. In 2016, the two newspapers have reported frequently on wastewater pollution, garbage and garbage management, air pollution and industrial waste disposal. Other types of pollution such as soil pollution, chemical pollution and noise pollution were not largely reported. Some of the articles were concerned with water pollution that affects human health and therefore needs protection. Human diseases carried by water are caused by certain microorganisms-bacteria, viruses, protozoa that can be found in the feces or urine of a person ill with disease. Organisms found in intestinal discharges cause such diseases as typhoid, cholera, salmonellas is and

amoebic dysentery. These diseases are caused by protozoa-microscopic organisms that move by protoplasmic flows. Infectious hepatitis, caused by a virus can be transmitted by polluted water. Nowadays ill effects of public, agricultural and industrial pollution on ecosystems have been recognized. Industrial waste can include of toxic and inorganic matter, metallic and organic compounds such as pesticides of various kinds, mercury, chromium, arsenic and zinc. Overuse of nitrogen-rich fertilizer results in nitrate residues which dissolve and seep into the ground water. Water polluted by nitrates can be hazardous to human health.

The two newspapers have provided valuable information on agriculture with six articles and seven articles respectively. In 2016, some topics have mentioned infrequently, such as cultivation of paddy, tea, teak, which account for approximately 16% of the article sprinted. Only one article published in the Myanma Alinn Daily touched up fishery although most of the deep water fields in Nyaungdon Island have been converted to fish ponds in order to reduce the waste land area. Two newspapers have presented articles about Inns (shallow inland lakes, natural as man-made). Three articles highlighted the Taungthaman Inn and two on Inndawgyi and one on Moeyunggyi Inn. Fresh water fish from the inland lakes have been the food source of the people of Myanmar. Rivers, streams and fresh water wetlands are very important as habitats for fresh water fish. The release of industrial waste into rivers, stream and lake is a serious threat to sustainable fisheries. There are nine articles and seven articles related to energy and hydroelectric power presented in Myanma Alinn Daily and Kyemon (The Mirror Daily). Three articles dealt with extracting electricity from solar power and wind technology. Myanmar also has huge reserves of potential hydroelectricity with large dams and many waterfalls, Myanmar has great potential to obtain a adequate supplies of electrical power. Two articles are discussed about petrol and natural gas as a form of energy that emit nitrogen dioxide. Four articles are on coal. Offshore natural gas supply is abundant, even through coal used in Myanmar. The arguments for greater coal use reflect the reality that most of Myanmar's natural gas supply is contracted out to Thailand and China. Nowadays, natural gas has many uses for industry.

Biodiversity as a topic was given equal coverage in the two newspapers. Some item provided information on the biodiversity which as the study of the processes that create and maintain variations of wildlife. They also wrote about wetlands which are important repositories of biological diversity. Myanmar is one of the most biologically diverse country in Southeast Asia Region. Wildlife species in Myanmar consist of a over thousand species of birds and butterflies and over three hundred species of mammals and reptiles. There are thirty wildlife sanctuaries and six national parks. Nowadays, wildlife is being endangered and some have become extinct or are on the verge of extinction in the wild due to various reasons such as human intervention, habitat loss, pollution, and commercial use of wildlife and its products. Indawgyi, Inle and Moeyungyi are famous wetlands as well as important as winter habitats for migrating birds.



Migration of Snow Birds at Moeyungyi Wetland and Wildlife Sanctuary  
Photo-Myanma Alinn Daily

News and articles on mineral resources in the field of environment has not appeared much in the two newspapers. In 2016, Myanma Alinn Daily published eight articles of mineral resources, especially in the fields of bauxite exploitation. Two articles were published on jade from the northern highlands areas of Myanmar (Hpacant Area). On the issue of mineral resources and



environmental degradation, the newspapers also included the dangers of unplanned mining.

There were nine items on earthquake issues in Myanmar. Among them, three articles were about the earthquake of Bagan and a few articles are concerning about the earthquake and disaster management. Geographically, Myanmar lies in the southern parts of the Himalaya as its lies in main earth belt of the world. In Myanmar, the Sagaing fault trending roughly north-south is the most prominent active faults are situated in Western Myanmar and the Kabaw Faults is along the Kabaw Valley in the western Myanmar and the Kyaukkyan Fault located west of Nyaungcho. In Myanmar, earthquake vulnerable zones are Bago-Phyu, Mandalay-Sagaing- Tagaung, Putao-Tanaing and Kalay Myo- Homalin areas. Due to urbanization vulnerabliltyto earthquake disasters has increased in cities and a national emergency plan has been prepared for earthquake and related disasters.

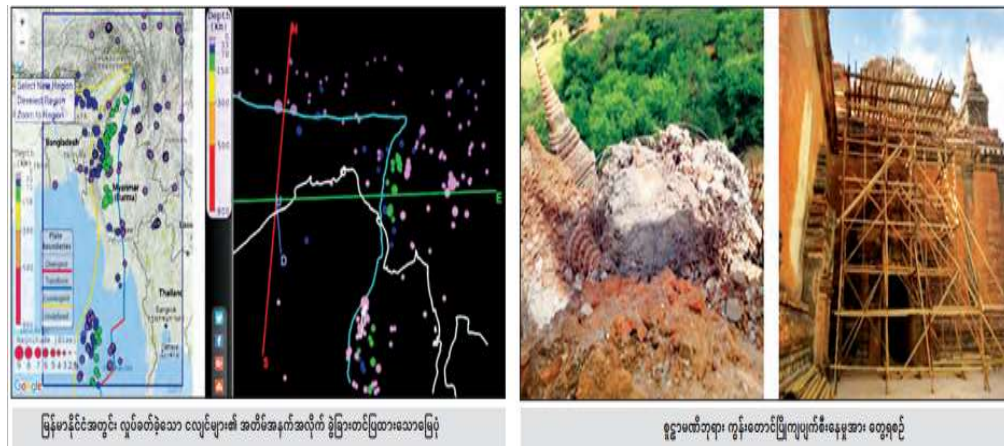


Photo-Myanma Alinn Daily

The two newspapers have reported frequently on caves (6 articles), mountains (2 articles) and heritage cites(2 articles). Nowadays systematic exploration of caves have been undertaken and caves such as the Sadan and Kawgung caves in Hpa-an are of great religion significance that attract tourists and pilgrims.

One of was on the ancient city of Hanlin Myohaung site is eleven miles (eighteen km) southeast of Shwebo District in Upper Myanmar. In

2014, the Pyu Ancient Cities were recognized by UNESCO as the country's first World Heritage site. The two newspapers in the Myanmar Alinn six articles dealt with the transportation. Among them, the two articles are discussed about the increase number of traffic congestion in the central part of the downtown area with increased emissions of CO<sub>2</sub> at increased air pollution. Other articles were concerned about highway transportation and transportation management. Urban transport planning is needed, particularly for Yangon. Several ministries responsible for the design, construction and maintenance of road infrastructure were reminded that plans should be made in advance of the expected rapid growth of the economy, and private motor vehicle ownership increases before congestion becomes more severe. For appearance, Myanmar Alinn Daily and Kyemon (The Mirror Daily) have displayed the strength of sharing information effectively although they have expressed 16% and 18% of illustration with the photographs to make a impression.

### **Discussion**

In Myanmar, the need for environmental conservation has stirred a series of actions both at the policy, legal and programme level. These actions will facilitate adaptation to climate change in the short, medium and long-term programs undertaken by the Ministry of Environmental Conservation and Forestry on several issues. Also, the Ministry of Education is including disaster risk reduction and climate change concepts and practices in school curricula and learning materials to achieve long-term positive impacts. The aim of the articles on environmental issues is to raise the awareness of communities on environmental protection and minimize the hazard and risk at the individual level. The author or journalist has an important role in disseminating information and editors play a decisive role in the orientation of environmental reporting. Newspapers and press publications should give extensive coverage to these environmental issues because their impact is pervasive and there is a need to educate and raise public awareness for prevention and protection.

The subtopic of climate change and global warming of the proportion of the environmental issues that occupies leading position of coverage in Myanmar Alinn Daily. Water and flooding, forest on several issues, various

kinds of pollution, waste, biodiversity, earthquake, hydroelectric, fuel, mining, caves, and inn etc., all these issues keep on getting reflected in the press. According to statistical study indicate that while the authors are presently high on above mention issues. In parallel to the statistics regards the unfavorable state of environmental issues in these two newspaper are concerning about the population, cities, urban planning and management and investment review.

Myanmar's population gradually increased and the population of Yangon City has been increasing steadily due to internal immigration of population from rural to urban areas. This condition considers how these environmental problems and the policies to address them fit with sustainable development. From the environmental point of view, population considerations are therefore fully integrated into aspects of planning procedures and policy-making processes. Articles on the situation in cities must also take into account the ecological impacts of its demand for resources in distant regions. Environmental related urban planning and management also has an important role in developing disaster preparedness. Editors should be considering a specialized environmental news page to encourage more environmental reporting and raise public interest as well as ministry of information should be encourage the establishment of existing networks for environmental journalists and links between journalists, scientists, skillful person, etc.

### **Conclusion**

It is concluded that the two newspapers do cover environmental issues, though the subject matter did not receive adequate coverage. Using the photographs should be consider for effective in presenting the articles of newspaper. In 2016, Myanma Alinn Daily published more environmental articles than the Kyemon but the media coverage of environmental issues in the two newspapers were not sufficient and it shows that these newspaper should be promote the publication of environmental issues related articles. No doubt, the Myanma Alinn Daily and the Kyemon Daily (The Mirror Daily) have provided useful information to the public by sharing their knowledge on environmental related issues, but as the findings show, it is still in adequate. The reports and articles are scarce in number and the information provided is superficial. As mentioned above more photographs and diagrams would make



the articles of greater interest and at the same time make it more easy to understand for the general public. So in conclusion it must be said that all responsible for the public media, including journalists and editors and others should make greater efforts to enhance both the quantity and quality of reports and articles on environmental issues.

### **Reference**

- Aye, N.N.(2008). Print Media Development in Myanmar, Yangon Institute of Economics Ministry of Education.
- Thein. H.M (2016): Myanmar Environmental Conservation Law, and Status of Environmental Rules and Guidelines Preparation, Environmental Conservation Department, Ministry of Forest Conservation and Forstry
- Ministry of Environmental Conservation and Forestry (2015): Myanmar' s Intended Nationally Determined Contribution-INDC
- Ministry of Information (2016): Myanma Alin Newspaper- January to December
- Ministry of Information (2016): Kyemon Newspaper- January to December
- Ministry of Information(2013). Copy Right and Registration. Copy Right and Registration Department, Yangon, Ministry of Information.
- UNESCO, IMS. (2016). Assessment of Media Development in Myanmar. The International Programme for the Development of Communication, Yangon, Myanmar.

## **EMERGENCE OF ETHNIC PRINT MEDIA IN DEMOCRATIC TRANSITION PERIOD (SHAN STATE)**

Zin Mar Kyaw\*

### **Abstract**

There is widespread recognition that the media has an important role in sustaining and nurturing democracy for the media in all forms can reflect the diversity of society to fulfill its democratic potential. As ethnicity is an important element of social diversity media organizations can report the concerns of every group in society and enable diverse groups to access information. The ethnic print media in Shan State reflects the Shan, Pa-O and Palaung nationals' diversity of voice and multi-culture. Among the three parts of Shan State, only the Southern Shan State has a flourishing ethnic print media, especially news journals. However, they are still facing the common challenges of access to information, few capable and trained journalists due to lack of professional training and difficulties in distribution system. Ethnic print media delivers content in local languages. Ethnic and linguistic diversity can be a challenge for media reach in ethnic areas of Myanmar. While some ethnic media reflect the State government position, some are focus on coverage of social news, conflict news and public issues in the ethnic areas. Emerging ethnic print media could serve as the bridge between the State government and majority and minority ethnic groups. Ethnic media addresses community issues that are often overlooked by mainstream media. These ethnic media are of different models because they have different aims and interests. Ethnic print media outlets face struggle for survival. The research question is that "Why is it necessary to enhance ethnic media development?" Henceforth, proper policies of the government are needed for the survival and sustainable development of ethnic media outlets. Ethnic print media in Shan State play a key role for preservation of indigenous literature and enabling the national reconciliation process in the democratic transition period.

**Key word:** ethnic, print media, Shan, Pa-O, Palaung.

### **Introduction**

Myanmar is now witnessing an emerging new ethnic media landscape, mainly in the print sector. This is important in ensuring ethnic communities have a voice in political and socio-economic affairs that affect their life. Since

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March 2011, the new government led by President U Thein Sein embarked on sustainable democratic reforms including media freedom. In one of the significant changes was the abolition of censorship in the print media on 20 August 2012. The print media were no longer required to submit their products to the Press Scrutiny and Registration Department prior to publication. Further progress was made with the introduction of the ethnic media in 2013. This was followed in 2014 by certain measures that allowed newspaper to become editorially independent.

As a consequence, a greater number of weekly journals and newspapers were published in a freer media environment. According to the data of the Printing and Registration Department of the Ministry of Information, 219 news journals were published in Myanmar in the end of 2016. Among them six news journals were published and two news agencies in Shan State. Of these three journals were registered for publication in indigenous languages. While the largest numbers of 153 journals are published in Yangon Region, the lowest number which was fewer than ten journals were published in other States especially in the ethnic region<sup>1</sup>. It is obvious that Myanmar is now witnessing the emergence of new ethnic media outlets in the regions mainly in the print sector.

The Shan State is located in eastern Myanmar and is organized into fourteen districts and five self-administrative regions. Then the entire Shan State which is composed of 83 townships and sub-townships is again classified as Eastern, Southern and Northern Shan State for administrative purposes.<sup>2</sup> Yet from the print media aspect the publication circulation and access of the people to such news media is unequal and uneven. While five news journals are published in Southern Shan State, only one news journal has been published in the Northern part of Shan State which is based in Lashio. There are no ethnic print media publications in the Eastern part of Shan State. Ethnic people have to rely on the publications of the main stream media which are mostly situated in Yangon. Ethnic print media are important because they

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<sup>1</sup> *List of Publication Permitted by Printing and Registration Department, (11-8-2016)*, Printing and Registration Department, Ministry of Information.

<sup>2</sup> (a) The 2014 Myanmar Population and Housing Census, Shan State, Census Report Vol. (3), Ministry of Immigration and Population, Myanmar, May 2015.  
(b) *Taunggyi Magazine* (2016), Myanmar Writers Association (Taunggyi).

fulfill the needs of their community; contribute towards preservation of their indigenous literature, culture and tradition and to reflect the ethnic voice on social and political issues through the media.

### Materials & Methods

Research was conducted in Shan State, based mainly in Southern Shan State. Most notably ethnic news journals have emerged and developed in Taunggyi, Southern Shan State,<sup>3</sup> and only one typical news journal in Lashio, Northern Shan State<sup>4</sup>. Therefore, the research location was chosen in Southern Shan State in order to grasp the majority of readership and diversity of ethnic voice. The key interviews were also conducted in ethnic print media outlets at Taunggyi and some ethnic media organizations based in Yangon. A total of 14 key interviews were conducted for data collecting process in Taunggyi.

The research paper aims to illuminate the emergence and development of ethnic print media industry from the ethnic people perspective and shed light to the bridge between ethnic nationals and government. This study is based on a survey of quantitative method based on the views of 500 respondents in many townships of Southern Shan State. The survey questionnaires are measured on media development indicators of UNESCO; how ethnic people have easy access of print media in rural and urban areas of Shan State, what is their preference language for ethnic print media and to what extent they read ethnic language print media, the extent of information and knowledge they get and what is their preferred ethnic language in reading newspapers and journals daily. Survey locations are especially focused on Taunggyi and surrounding townships of Hopone, Kalaw, Naung Khar, Pinlaung, Naungtayar, Sesaing, Panlong, Loilan and Mauk-mai.

### Findings

The findings of the research is that ethnic print media outlets cannot afford large expensive printing presses which are only available in Yangon

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<sup>3</sup> The Golden Gong Journal, *Kahamsae* Voice Journal, Voice of *Hsan Loi* Journal, The Voice of Shan Ni Journal, Kandawza Tai Journal, *Hsenpai* News Journal, Shan Herald Journal.

<sup>4</sup> *Marlagar* Journal

and Mandalay so that printed copies of journals have to be sent back to Taunggyi and Lashio which is time consuming and costly. Publishers encounter the common challenges of financial difficulties, which make producing a good quality and distribution difficult. These ethnic print media outlets will probably have to struggle for survival, until peace is established countrywide together with socio-economic development. In the meanwhile all stakeholders continue these efforts for ethnic media enhancement.

At present even in the media content, the aspect of pluralism is not visible perhaps due to the absence of ethnic diversity in newsrooms. This issue can lead to the escalation of misunderstanding among different ethnic communities in the region. Conflict is a key factor behind the development ethnic print media especially in Northern Shan State<sup>5</sup>. Interviews with ethnic print media outlets in Shan State said that there has been an increase of ethnic print media after 2012 due to the political change and media reform process in Myanmar, but that they still face difficulties in sustainable development of ethnic media. One of the common challenges is distribution problems and transportation costs.

The main aim of publishing ethnic journals in the Shan State is to preserve indigenous literature and ethnic language so that Shan and Pa-O ethnic media can play a critical role in peace process of Myanmar. They can establish linkage between the ethnic groups and government. Shan State government should try to improve easy access of information for local journalists, and the ethnic print media could provide coverage of local and regional news to disseminate the information to the whole country. The government should expand the space for ethnic media, including guaranteeing access to information for all journalists.

Journalists from minority ethnic groups are fairly represented across the media industry including at senior levels. The emerging ethnic media outlets are providing opportunities for ethnic journalists. But the readership level is low because ethnic print journals publish their own literature which reflects the cultural and linguistic diversity of the target area. Journals and newspapers with the largest readership are journals and newspapers printed in

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<sup>5</sup> Interview with Editor of Marlagar Journal

the Myanmar language. As a result, township reporters are faced with poor supporting from main media outlets than those working in media outlets in big cities.

For nurturing qualified journalists media training programmes are provided by the Peoples' Voice media house in collaboration with the Development of Ethnic Minority Organization (DEMO) and Southern Shan State Media Network (SSSMN). Mostly rely on the training given by *Internews*, Yangon Journalism School and Myanmar Journalism Institute. Some media outlets have close networking and linkage with the Myanmar Journalism Association (MJA) and the Myanmar Journalists Network (MJN) although there are still some that have no connection.

Concerning the issues of gender and women's participation in media, ethnic women encounter more stereotypical gender norms in the media field. Moreover, the ethnic men who hold on to outdated ideas that place of ethnic women is to preserve traditional cultural norms and disapprove of their working in the news media. Thus, women's participation is still low in the ethnic media due to outdated social norms of the region.

## Discussion

### Challenges of Ethnic Print Media

After the independence period, many news journals were published in Taunggyi. Those were Peoples' Journal, *Shan Pyay Aung Than*, *Shan Pyay Hittaing*, Capital Taunggyi, *Shan Pyay Forward*, and *Rays of Shan Pyay* (Information Department). Under the Revolutionary Council Government, the *Shan Pyay Forward* weekly journal was renamed as the *Rays of Shan Pyay* and published in tri-languages with Pa-O, Shan and Myanmar by the Information Department of the Shan State<sup>6</sup>. After 1988, there were no more private news journals, but only state-owned newspaper.

By 2011, the Eastern *Yoma* Journal was published but it was no longer to exist in Taunggyi Township. In 2012, President U Thein Sein opened the door for small media organizations and the ethnic media obtained a place

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<sup>6</sup> (a) Than Wai (Taunggyi) History of Periodicals in Taunggyi Township, *Taunggyi Magazine*, Myanmar Writer Association (Taunggyi) 2016.

in the country. With this turning point of the Myanmar media environment, six ethnic news journals started publication in Shan State after 2012. These are the *Golden Gong Journal*, *Khamsae Voice (People's Voice) Journals*, *Marlagar Journal*, *the Voice of Hsein Loi (Yoma Athan)*, *Shan Herald* and *Kambawza Tai Journal*. Although the *Voice of Shan Ni* and *Hsenpai News Journal* are Shan language news journals, they are based in Mandalay and Yangon. Currently, the *Golden Gong* and *Khamsae Voice* have been publishing in Pa-O and Myanmar languages. The *Shan Herald Journal* and *the Voice of Hsan Loi Journal* are bi-lingual publications in Shan and Myanmar. The *Kanbawza Tai News Journal* publishes in the Myanmar language. The *Voice of Shan Ni* and *Hsanpai News* journals are also published bi-lingual in Shan and Myanmar Languages as well as the *Marlagar* journal which uses the Palaung and Myanmar languages. The Southern Shan State Media Network (SSSMN) published the *Than Lwin Thway Chinn* journal in Myanmar language as a United Nations Development Programme (UNDP) project in May 2017.

At the time when this research was being conducted the print media could not adequately provide information needs to all parts of the country, most notably for the rural population in ethnic areas. Due to the country's weak communication and transportation infrastructure, print media circulation is difficult and limited especially for distribution to remote and far-flung areas. In a country with a population of 51.5 million people, the state-owned newspapers, *Myanmar Alinn* and *The Mirror*, have the largest circulation of all print media with 138,756 and 180,000 copies respectively<sup>7</sup>. In most parts of the Shan State, the majority of the people read the newspapers and journals which are distributed by main stream media of Myanmar, especially those based in Yangon.

Ethnic print media outlets are beginning to gain momentum in Shan and Pa-O languages in Southern Shan State and Palaung language in Northern Shan State. But they still face many obstacles in publication and circulation and although they are regular monthly issues, distribution is possible only on a bi-monthly or tri-monthly basis. As a result there are many left over copies and the publishers therefore face financial loss. Some have a circulation of

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<sup>7</sup> Data from records of Newspaper House (Distribution Department)

2000 to 3000. Due to budget and capacity constraints, it is a common practice for ethnic print media to re-publish translated news stories from mainstream journals rather than produce their own content. Some journals can cover diverse news and can reflect current social issues and political news. Although ethnic media outlets represent a source of information to an ethnic readership, their content is not necessarily diverse nor is it always catered to a particular ethnic group. For instance, the news contents in Pa-O news journals are mainly focused on the news of Pa-O nationals<sup>8</sup>. Thus, other ethnic people are not interested enough to read this or also are not be able to read because of language difficulties. These are the main reasons for the limited market of ethnic print media.

All ethnic print media of Shan State are published in bi-lingually in Pa-O and Myanmar or Shan and Myanmar or Palaung and Myanmar. But, the circulations of ethnic journals could not overcome the publication of main stream media. The urban populations in Shan State have easy access to publications of main stream media in their environment<sup>9</sup>. The state-owned newspapers and newspapers and journals of main stream media have quite a wide readership in Shan State.

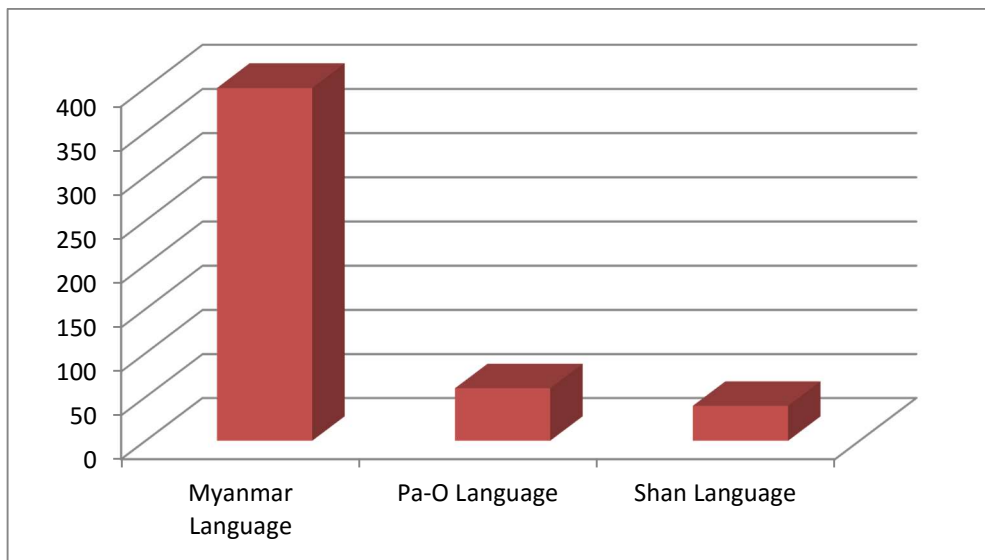
The survival of ethnic media is still challenging. Most ethnic media outlets print their copies in Yangon and Mandalay although some are printed in Taunggyi. The high printing costs and transportation charges are some of the difficulties for the ethnic media. Their circulation is limited and they cannot overcome the well-known journals of main stream media. The market constraint is that there are no big companies in rural areas to do marketing and advertising. Therefore, they are dependent on transportation, which is in itself a big problem.

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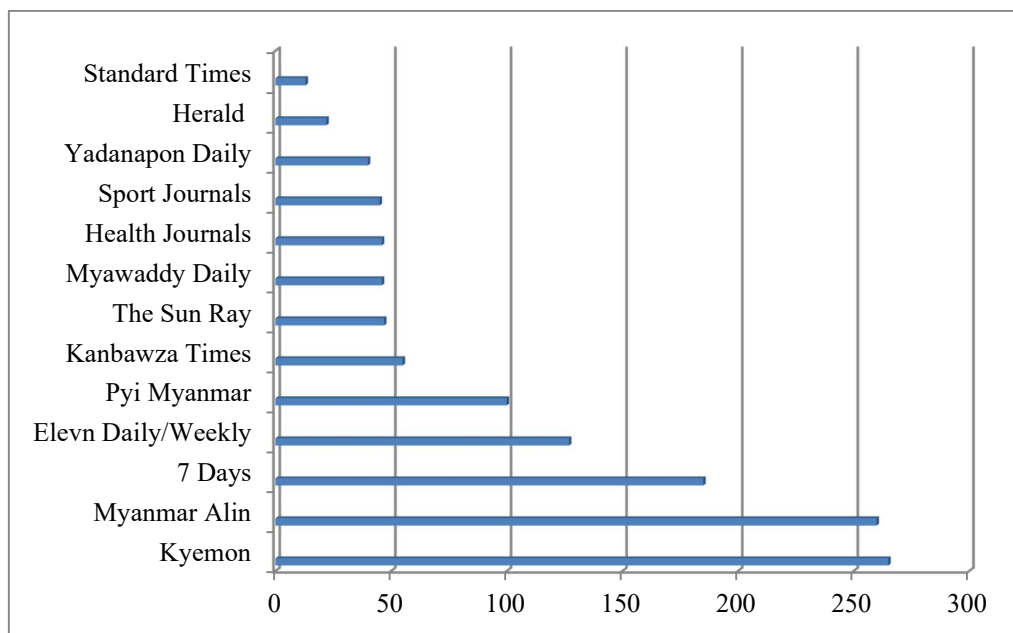
<sup>8</sup> Survey results shown in Table-1

<sup>9</sup> Survey results shown in Table-2



**Table 1:** Readership on audience preference language

**Source:** questionnaires survey on reading language in Southern Shan State

**Table 2:** Readership on Newspaper and Journals in Shan State

**Source:** Survey on *Taunggyi* Township, Southern Shan State

These eight ethnic print media used door-to-door distribution system to Shan and Pa-O subscribers. Some media houses use township sale representatives and ethnic volunteers for distribution. Although these ethnic print media are still faced the highest printing cost and transportation difficulties, they are trying to extend their distribution network to their target areas. *Marlagar* Journal which is based in Lashio distributes its journals not only in Northern and Southern Shan State but also to Bamaw and Hpa Kant in the Kachin State<sup>10</sup>. However, conflict in some ethnic areas has caused hindrances to their distribution system. *The Golden Gong* Journal is published by the Pa-O National Organization (PNO) and mainly distributes to Pa-O community the majority of whom live in the Pa-O self-administered region; and to Hopone Township, Sesaing Township and Pin Laung Township, in Southern Shan State. *The Voice of Shan Ni* is based in Mandalay and its circulation is mainly to Kachin State and Sagaing and Mandalay regions. The *Voice of Hsan Loi* and the *Shan Herald* which are based in Chiang Mai (Thailand) are distributed to most parts of Shan State. The *Kanbawza Tai* news journal which publishes in the Myanmar language has the largest circulation. It is obvious that the rate of readership depends on the use of a common language of the majority population in the region and easy access of publications.

For these reasons, the government and media stakeholders need to actively support and strengthen the ethnic media in creating a free and safe environment for media workers especially in the conflict areas of ethnic regions. The ethnic media can play a crucial role in the peace process of Myanmar. They can bridge mutual understanding between the government and ethnic communities. The development of the ethnic media needs the support of the regional governments as well as the people.

With the drastic changes in the Myanmar media landscape, regional media associations such as the Burma News International (BNI), Chin Media Network, Shan Herald Agency for News, Southern Shan State Media Network (SSSMN), Independent Ethnic Media Alliance, Southern Myanmar Journalists Network and Taunggyi Media Network have been established in the ethnic regions of the whole country. The support and assistance provided by

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<sup>10</sup> Interview with Editor of Marlagar Journal

international media organizations such as UNESCO, Internews, DW Akademie, International Media Support, FOJO: Media Institute, FHI 360 play a crucial role in Myanmar media development especially for professional and technical training in journalism and other media sectors.

With the freer media environment, the first ethnic media conference took place in Mawlamyaing, Mon State in 2013; the second conference held in Taunggyi, Shan State in 2014; the third conference was in Hakha, Chin State in 2015; the fourth conference took place in Mrauk-U, Rakhine State in 2016; and the fifth ethnic media conference was held in Loikaw, Kayah State in June 2017 respectively. These conferences help to explore issues encountered in ethnic media development in Myanmar as well as help to find solutions. In addition, the government should draw up and lay down proper policies to strengthen the ethnic media and for further media development in Myanmar. As mentioned earlier there has been an increase of several regional print publications in the whole country. On the other hand, the ethnic media outlets themselves should try to be balanced and fair by disseminating accurate and impartial news to the ethnic people. Dissemination of objective and impartial news by ethnic media can sow the seeds for development in the ethnic regions of Myanmar and thereby accelerate the peace process.

### **Conclusion**

There are over 100 national races residing in the Union Republic of Myanmar. Indigenous language, custom and social practices, vary from place to place and region to region. Ethnic media reflect these cultures especially the language and literature. Strengthening ethnic print media could be promote national reconciliation and could play a crucial role in the peace process. An important point to be noted is that there is a need three languages; Myanmar, Shan and Pa-O languages for the ethnic media in Shan State. So, each ethnic journal should have editors and reporters who have proficiency in these languages. News and items of interest to the Shan or Pa-O must be reported in their own language but translations into Myanmar would reach a wider circle of readers. Different ethnic nationals would then learn more about each other's culture and traditions and there by achieve greater understanding among them. Balance coverage of ethnic print media for the public can bring

the peace and development of State and Regions. In order to promote media in Myanmar as a platform for democratic discourse, the media must provide information for all segments of society. One way to fulfill this need is evolving community and ethnic media for the media plurality and diversity. It is important to give right to information and easy access of information to the ethnic media. Therefore developing and strengthening ethnic media needs support and assistance from the government and from all media stakeholders in the country.

### Acknowledgements

The researcher would like to especially thank the chief editors, editors and reporters of *Khamsae Voice* (People's Voice) journal, *the Golden Gong Journal*, *Kanbawza Tai News Journal*, *Shan Herald Journal*, the Voice of *Hsan Loi Journal*, the *Voice of Shan Ni Journal* and *Marlagar Journal* for their engaged interview and supporting data. Special acknowledgement should be given to the following stakeholders for their support for the readership survey on ethnic print publications in Shan State.

Development of Ethnic Minority Organization (DEMO) Taunggyi

Naung Taung Monastery, Ho Pone Township

Taunggyi Youth Center

Mentor and Mentees of International Exchange Alumni Mentorship Program 2016 (Taunggyi)

### References

*Assessment of Media Development in Myanmar* (2016) published by UNESCO and International Media Support.

*Kanbawza Tai Magazine* (2017) Kanbawza Tai News Journal Anniversary of 100 publications, Taunggyi.

*List of Publication permitted by Printing and Registration Department*, (11-8-2016), Printing and Registration Department, Ministry of Information.

*List of Published Journals*, Printing and Registration Department (1-6-2016)

*Media Development Indicators: A framework for assessing media development*, (2008) UNESCO.

*Taunggyi Magazine* (2016) Myanmar Writer Association, Taunggyi Township.

*The 2014 Myanmar Population and Housing Census, Shan State, Census Report Vol. (3)*, Ministry of Immigration and Population, Myanmar, May 2015.

Than Wai (2016) "History of Periodicals in Taunggyi Township", *Taunggyi Magazine*, Myanmar Writer Association, Taunggyi Township.

## APPENDIX (1)

**Data of Ethnic Print Media Publications in Shan State<sup>11</sup>**

<b>No.</b>	<b>Journal</b>	<b>Publication Year</b>	<b>Publication Type</b>	<b>Main Language</b>	<b>Main Distribution Area</b>
1	The Golden Gong	2011	Monthly	Pa-O and Myanmar	Shan State
2	Khamsae Voice (The People's Voice)	2013	Bi-weekly	Pa-O and Myanmar	Shan State
3	Marlagar	2013	Bi-weekly	Palaung and Myanmar	Shan State, Mandalay
4	Hsenpai News / Shan Voice	2013	Bi-Weekly	Shan	Shan State
5	Voice of Hsan Loi	2014	Monthly	Shan and Myanmar	Shan State
6	The Voice of Shan Ni	2014	Bi-weekly	Shan Ni-Myanmar	Kachin, Sagaing, Mandalay
7	Shan Herald	2014	Monthly	Shan and Myanmar	Shan State
8	Kanbawza Tai	2015	Weekly	Myanmar	Shan State

<sup>11</sup> (a) Data collected by interviewing with responsible persons of respective ethnic media outlets in Taunggyi and Yangon.

(b) *List of Publication permitted by Printing and Registration Department, Ministry of Information.*

## APPENDIX (2)

## List of Interview

No.	Persons	Organization	Date
1	John Chit Nyein (Reporter)	7 Day News Journal (Taunggyi)	7 May 2017
2	Sai Kyaw (Manager)	Voice of <i>Hsan Loi</i> Journal ( &dk;rtoH*sme,f)	7 May 2017
3	Shan Ma Lay (Reporter)	<i>Shan Herald</i> Journal (oQrf;oHawmfqifh*sme,f)	7 May 2017
4	Khun Than Aung ( Chief Editor )	<i>Khamsae Voice</i> / The People's Voice Journal (crf;om;aigif;*sme,f)	8 May 2017
5	Khun Yar Zar (Editor)	<i>Khamsae Voice</i> / The People's Voice Journal (crf;om;aigif;*sme,f)	8 May 2017
6	U Soe (Editor)	<i>Kambawza Tai</i> Journal (uarÇmZwdkif;owif;*sme,f)	8 May 2017
7	Hta Man Thi (Reporter)	<i>Kambawza Tai</i> Journal (uarÇmZwdkif;owif;*sme,f)	8 May 2017
8	Daw Mya Wun Yan (Secretary)	Southern Shan State Media Network (SSSMN)	8 May 2017
9	U Than Wai (Taunggyi)	Chairman of Myanmar Journalist Association (Taunggyi)	8 May 2017
10	U Khun Chun (Chief Editor)	<i>The Golden Gong</i> Journal (a&Tarmif;*sme,f) Secretary of Pa-O National Organization (PNO)	8 May 2017
11	Khun Htun Hla Aung (Reporter)	<i>The Golden Gong</i> Journal ( a&Tarmif;*sme,f )	8 May 2017
12	Sai Aung Myo Lwin (Editor)	<i>The Voice of Shan Ni</i> (wdkifvdkif;&Srf;eDtoH *sme,f)	10 May 2017
13	Mai Kaung Sai	<i>Marlagar</i> Journal	10 May 2017





**အများစုကောက်ခံရပြီးနောက် အများစုကောက်ခံရမည့်အရာကို ချီကန်ဖို့ အစိုးရအား၊ ထိုအား၏ စီးပွားရေးနှင့် လမ်းညွှန်မှု (မြေကပြောင်းလဲမှု)**



**ဘဝပုံ**  
ပထမကြိမ်

[illegible]

မေ့သွားတဲ့ တက်ရောက်လာသည့် (ITN) ဝတ်မှုန်  
ဥက္ကဋ္ဌ ဦးတော့ကလေးက အစိုးရအဖွဲ့အစည်း  
ရရှိမခံသောကိစ္စတွေကိုထားသော်လည်း ခုနစ်  
နှစ်က တက်လာတဲ့ နိုင်ငံခြား ပိုင်ဆိုင်မှု  
မေ့နည်းမိ လိုက်လာကြပြီး လက်ကိုင် အစိုးရ  
ငြိမ်းချမ်းရေး ဆွေးနွေးရန် စစ်တပ်ကလေး  
အစိုးရ ကျန်ခဲ့သည့် အပစ်အခတ် ရန်ပေးရန်  
လက်မှတ် အရေးယူပြီး ယူရီယန် ကိုယ် ယူရီယန်  
ရောင်းချသွားကြ ပြောသေး။

ဦးတော့ကလေး ဆွေးနွေးချီးကတော့ ပြင်ဆင်  
သော အပစ်အခတ် ရန်ပေး ပျက်စီးမှု တွေ  
ဆောက်မူရင်မူရင် ချာညာသော်လည်း လက်မှတ်ပေး  
တိုက်ပွဲတွေ မြဲမိနေသေး။ လက်မှတ် ထိုးပေး

လူမှုကွန်ရက် Facebook ပေါ်တွင် ပြန်လည်သတိပြုပေးလိုက်တဲ့အားလုံး

သွယ်ရောင်းခတ်ခဲ့ခြင်း အသိုက် နေရာတစ် လက်  
တော့ ကျွန်ုပ်တို့ စီးရီး ရှိ ဖန်တီးရန်အခွင့်အလမ်း  
ပြောင်းလဲ ဖြစ်နေပါသည်။

“အနာဂတတော့ တာဝန်ရှိ လက်စွဲစာအုပ်များ  
နဲ့ လောကကို နှုတ်ခတ်ပေးထားတာပေါ့။ ဒီတ

ခေါက်ကတော့ တာဝန်နေရာအရ၊ စစ်ရေးကိစ္စတွေ  
ကို စိတ်ထဲ ထည့်ရင်း သွားလာပုံစံတော့ စဉ်းစား  
ထားတာပဲ” ဟု ငြင်းပြောသည်။

တရုတ်မှာ ၃ >>>

နယ်စပ်ဒေသများတွင် အထူးအရေးကြီးသော အခန်းကဏ္ဍတစ်ခုမှာ အထက်တန်းကျောင်းများ ဖြစ်သည်။ အထက်တန်းကျောင်းများတွင် အထူးအရေးကြီးသော အခန်းကဏ္ဍတစ်ခုမှာ အထက်တန်းကျောင်းများ ဖြစ်သည်။ အထက်တန်းကျောင်းများတွင် အထူးအရေးကြီးသော အခန်းကဏ္ဍတစ်ခုမှာ အထက်တန်းကျောင်းများ ဖြစ်သည်။

[illegible]

11



အိတ်တံးဂ်း

# တိုင်းလိုင်ရှမ်းနီအသံ

THE VOICE OF SHAN Ni

သတင်းဂျာနယ်

အတွဲ (၁)၊ အမှတ် (၁) ၁၃၇၇ခုနှစ်၊ ဒုတိယဝါဆိုလဆုတ် ၁ ရက်၊ ဗုဒ္ဓဟူးနေ့ (၁၁.၇.၂၀၁၅) ၁၅ ရက်လွှတ်တော်ကြိမ်ထုတ်ဝေသည်

ဟုမ္မလင်းမြို့နယ် နှစ်စောကျေးရွာ တွင် မူးယစ်ဆေးဝါးဆန့်ကျင်ရေး ဘန္တုပြပွဲကို ပြည်သူထောင်ချီပါဝင် အင်အားပြ



မူးယစ်ဆေးဝါးထိုးသွင်းသုံးစွဲမှုကြောင့် HIV ကူးစက်ခံရမှု အများဆုံးဖြစ်ကြောင်းသိရ

ဟေးကန်ဒေသတွင် ပိုင်းကွဲမှုများ ဆက်တိုက် ဖြစ်ပွားနေသောကြောင့် ရွေးကောက်ပွဲ ပကျင်းပနိုင်မည်ကို ပြည်သူများစိုးရိမ်

ရှမ်းနီလူမျိုးများအတွက် သမိုင်း သစ်ရေးထိုးရမည်အချိန် သို့မဟုတ် ၂၀၁၅ အထွေထွေရွေးကောက်ပွဲ







### **Interview with Editors, Manager and Reporters in Shan State**



Chief Editor of *Khamxae* Voice Journal



Editor of *Kamsae* Voice Journal



Manager of Voice of *Hsan Loi* Journal  
**Interview with Editors, Manager and Reporters in Shan State**



Editorial team of The Golden Gong Journal



Editorial team of Kanbawza Tai Journal



Township Reporter of the 7 Days Journal

**Interview with Editors, Managers and Reporters in Shan State**



U Than Wai (Taunggyi), Chairman of Myanmar Journalist Association



Reporter of Shan Herald





## Southern Shan State Media Network (Taunggyi)



Conducting a survey to readership on ethnic journals

Voice of *Hsan Loi* Journal HouseAdvertisement of Voice of *Hsan Loi* Journal



## **PRESERVING THE CULTURAL HERITAGE A STUDY OF THE SILVERSMITH IN INLAY LAKE, MYANMAR\***

Htet Htet Aung<sup>\*\*</sup>

### **Abstract**

Culture plays multiple roles in the development of tourism and is a key tourism resource. Living culture within the local community can be defined as cultural heritage which combines the two concepts of historical ancient monuments and living heritage; arts and crafts. Knowledge and skills community recognizes as part of their cultural heritage may act as a tourist attraction to the place (UNESCO, 2006). Tourists engage with the cultural heritage as a part of their experiences, explore the traditional craftsmanship as it was performed in the distant past. This paper provides the first comprehensive study on the traditional silversmith handcraft in Inlay Lake from the cultural point of view. The study area is the *Heya-Ywama* village, which is the main silversmith site in the Inlay Lake, Myanmar. The study describes the intangible cultural practices from the tangible silverwares and explores the authenticity and commodification of cultural heritage. The results show that the *Innthal* people perceive the traditional silversmith as a part of their cultural heritage and it is an authentic heritage craft handed over to new generations, however, lack of literature on traditional methods, intellectual concerns and outside investments are presented as finding results.

**Key words:** Culture, Living Culture, Cultural Heritage, Authenticity, Commodification, Heritage Craft, Traditional Silversmith, Handcraft

### **Introduction**

The Inlay Lake is Myanmar's top flagship tourism destination that attracts thousands of visitors annually and has received at least 250,000 domestic and international visitor arrivals during 2013-2014. As Myanmar's combined cultural and natural tourism area, the Inlay Lake provides significant income for local, regional and national economies.<sup>1</sup> Tourism

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<sup>1</sup> Destination Management Plan for the Inlay Lake Region 2014-2019, Ministry of Hotels and Tourism, Myanmar.

<sup>\*\*</sup> Assistant Lecturer, Department of Tourism, National Management Degree College

<sup>\*</sup> Best Paper Award winning Paper in Tourism, (2017)

development has great potential for employment opportunities and poverty alleviation for Myanmar. World Travel and Tourism Council (WTTC) estimates direct and indirect tourism made up 300,000 jobs in 2012 and expects to rise to 366,000 jobs in 2022.<sup>2</sup>

During the regime of *King Tharlun* (AD 1629), the four villages named (1) *Nampan* (2) *Ywaggyi* (3) *Naungtaungand* (4) *Heya-Ywama* were founded in the Inlay Lake. The name of Inlay Lake said to have originated from these four villages (Lay-Ywar) is accepted to be the most valid evidence. Nowadays, there are 35 village tracts in the Inlay Lake; *Heya-Ywama* village is the main source of silversmith since the ancient times. Today, it is a famous site in tourist itineraries for sightseeing of silversmith workshops and showrooms. These workshops and showrooms are selling to both international and domestic tourism markets. The traditional silversmith in Inlay Lake generates high contributions to destination image, income and employment for local community and tourists' attraction.

This research is intended for the preserving of the traditional silversmith in Inlay Lake as an authentic heritage craft of the ethnic lake dwellers, *Innthar*. The study focuses on tourism product development, employment and welfare of the local community especially craftsmen who are employed in silversmith. Also the study is expected to encourage the appreciation of silversmith by both local community and tourism markets, and also encourage future studies in tourism and handcrafts.

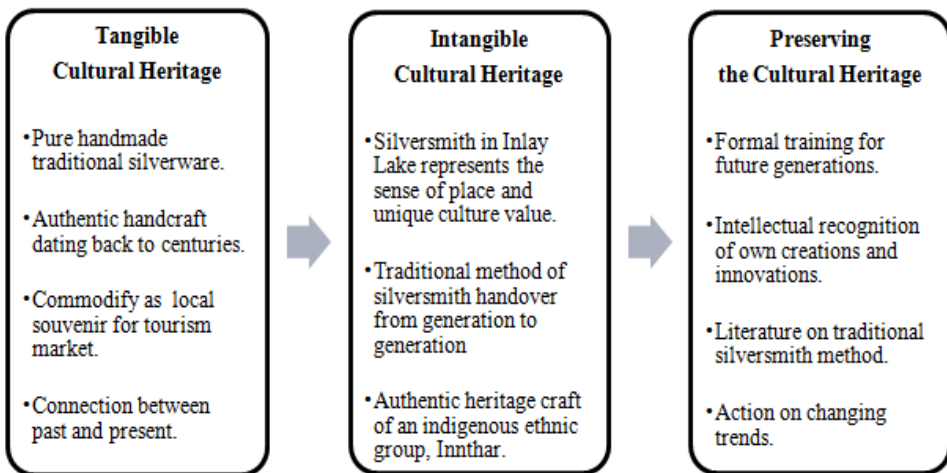
### Objectives of the Study

The objectives of this research are;

- To describe the traditional silversmith handcraft in Inlay Lake
- To express the authenticity and commodification of cultural heritage in both tangible and intangible ways
- To explore the interaction between tourism, handcrafts and cultural heritage within the community
- To find out the necessary factors for preserving the silversmith for the future.

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<sup>2</sup> World Travel and Tourism Council (WTTC), Travel and Tourism Economic Impact 2013, Myanmar.



**Figure 1:** Research Framework Model for Preserving Cultural Heritage

In this study, the tangible silverware are presented as the heritage craft that is produced from intangible practice passed down from generations. That will be considered as the main hypothesis of the study to analyze why the silversmith in Inlay Lake can be regarded as the authentic heritage craft and how silversmith contributes to the life of craftsmen and the community. Then, this study will conclude with the recommendations and the necessary factors to preserve the silversmith in Inlay Lake for the future within the balance of authentic heritage craft and tourism product.

The Cambridge Dictionary vocabulary 'handcraft', the synonym of 'handicraft', will be adopted and perceived as the study usage. Handcraft can be defined as a skilled activity in which something is made in a traditional way with the hands rather than being produced by machines in a factory, or an object made by such an activity. The primary data of the study includes the perceptions and conditions of the workshop owners, senior craftsmen, stakeholders and community members. All of them are the indigenous lake dwellers, *Innthar* and their handcraft skills are passed-down from generation to generation and the traditional silversmith method is handed over in informal learning from their ancestors. This study is based on the perceptions of (12) workshops owners, (2) senior craftsmen, (3) local stakeholders and (1) executive member of community development organization. Therefore, this

study would be only applicable to the silversmith in Inlay Lake and not the same for the silversmith in other regions of Myanmar.

## **Literature Review**

### **Cultural Heritage**

Culture is the set of distinctive spiritual, material, intellectual and emotional features of a society or social group and it encompasses, in addition to art and literature, lifestyle, way of life, value systems, traditions and beliefs. The UNESCO Universal Declaration on Cultural Diversity (2001) stated that culture takes diverse forms across time and space. The global diversity of cultures and the unique experiences they can provide is a key resource for the tourism sector; a resource which would appear to be limitless.<sup>3</sup>

Heritage is not just the past but also a representation or a reinterpretation of the past.<sup>4</sup> That is, heritage is a process through which individuals and groups negotiate the social position and place within particular societies. Heritage thus becomes a cultural tool that nations, societies, communities and individuals use to facilitate self, identity and belonging and it becomes a cultural and social framework for dealing with the past and present.<sup>5</sup> At global, national and local levels, heritage is used to define a sense of place.

Cultural community is a community that distinguishes itself from other communities by its own culture or by a variant of the generic culture. Among other possible extensions, a nation can be a cultural community.<sup>6</sup> Living culture within these communities can be defined as cultural heritage which combines the two concepts of historical ancient monuments and living heritages. Therefore, cultural heritage is the legacy of tangible physical artifacts and intangible attributes of a group or society that are inherited from

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<sup>3</sup> Mike Robinson & David Picard, *Tourism, Culture and Sustainable Development Programme*, Division of Cultural Policies and Intercultural Dialogue, Culture Sector, UNESCO.

<sup>4</sup> Dallen J., Timothy and Gyan Nyaupane, *Cultural Heritage and Tourism in the Developing World, A Regional Perspective*, Routledge, 2009.

<sup>5</sup> Laurajane Smith and Natsuko Akagawa, *Intangible Heritage*, 2009.

<sup>6</sup> Laurajane Smith and Natsuko Akagawa, *Intangible Heritage*, 2009.

past generations, maintained in the present and bestowed for the benefit of future generations.<sup>7</sup>

### **Tangible Cultural Heritage**

Tangible heritage includes buildings and historic places, monuments, artifacts and handcrafts which are considered worthy of preservation for the future. Objects are important to the study of human history because they provide a concrete basis for ideas, and can validate the history. Preserving the tangible heritage demonstrates recognition of the necessity of the past and of the things that tell its history and the place. Preserved objects also draw people in and give them a literal way of touching the past. Tangible cultural heritage is much more concerned with the historic buildings and monuments along history.

Current and dominant definitions about ‘tangible cultural heritage’ establish an international hierarchy of cultural relevance, status and sense of place. Tangible culture is seen much more to refer to ways of life and everyday practice, not only being manifest in buildings, sites and monuments. The conservation of cultural heritage focuses more on the protection and care of artworks, crafts and museum collections. Conservation activities for the art and craft works focus on preventive conservation, examination, documentation, research, treatment, and education. The scope of arts and crafts preservation becomes vital.

### **Intangible Cultural Heritage**

Intangible cultural heritage is not preserved in States’ archives or national museums. It is preserved in communities whose members practice and manifest its forms. If the tradition is still alive, vital and sustainable in the community, it is safeguarded. The parameters, definitions and applications of intangible cultural heritage are severally and collectively premised on the recognition of local and indigenous communities.<sup>8</sup> The Convention for the Safeguarding of the Intangible Cultural Heritage (ICH, 2003) defines the

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<sup>7</sup> M. Arbach, *Tangible Cultural Heritage*, As-Sawda Site in Yemen.

<sup>8</sup> Laurajane Smith and Natsuko Akagawa, *Intangible Heritage*, 2009.

intangible cultural heritage as; practices, experiences, knowledge and skills that communities recognize as part of their cultural heritage.

UNESCO's guidelines identify five categories of intangible cultural heritage including traditional craftsmanship. The intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, the interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.<sup>9</sup> The community itself becomes a phenomenon and mechanism whose continuity is sustained by the intangible heritage that is enacted. It is a cyclical and continuous phenomenon and process premised on community-based knowledge and hence the importance of ensuring that it is the community's responsibility to safeguard this invaluable intangible resource.<sup>10</sup>

### **Authenticity and Commodification**

Mac Cannell (1973) introduced the concept of authenticity to sociological studies of tourist motivations and experiences decades ago. Mac Cannell proposed that touristic consciousness is motivated by its desire for authentic experience, authenticity in the sense of 'original' or 'real'.<sup>11</sup> Commodification means making something as a product for commercial use. From the tourism perspective, commodification refers to the use of culture and cultural artifacts to make a significant amount of income and profit for a tourism destination. The interaction between tourists and local people that occurs at a certain level without losing the actual meaning, context and significance of the culture can be regarded as authentic culture.

Cultural authenticity is acknowledged as an essential driving force that motivates tourists in travelling to distant places. Authentic culture is not something which is prepared for the tourists; it is natural and existed in host society and an integral part of their culture. In this study, culture and social

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<sup>9</sup> Henrietta Marrie, *The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the Protection and Maintenance of the Intangible Cultural Heritage of Indigenous People*.

<sup>10</sup> Laurajane Smith and Natsuko Akagawa, *Intangible Heritage*, 2009.

<sup>11</sup> Hery Sigit Cahyadi, *Authenticity and Commodification of Culture at Puri Anyar Kerambitan*, Bali Province, Indonesia, Bandung Institute of Tourism, Indonesia



life are the main factors to be analyzed to fulfill the research purposes for preserving the silversmith in Inlay Lake. There are no fixed criteria to judge value and authenticity of cultural property; it must be evaluated within the cultural context to which it belongs. The meaning of authenticity acknowledges the logic behind the processes of commodification, so, the challenge that tourism faces is promoting authenticity.<sup>12</sup>(Mac Cannell, *Staged authenticity*, 1973, Pg. 589-603)

Many scholars say that the changing of culture by attracting tourists will cause the loss of a culture's authenticity through commodification and cultures that are performed as tourist attraction will lose its originality.<sup>13</sup> While commodification, on the other hands, means the eradication of local culture for the advantage of external social actors, with little returns for the local welfare. It is also argued that commodification does not necessarily destroy the meanings of cultural products, although it may change it or add new meanings to old ones.<sup>14</sup>

In this study, silversmith represents one of the good resources for tourism in Inlay Lake, but, with the expected increase of demand, the quality of the production and cultural value will decrease, and the 'practice commodified'. So it needs to preserve the quality of production and the originality of cultural heritage, in order to meet the authentic tourist experience without losing in terms of quality and cultural value. The Nara Document on Authenticity (1994) addresses the need for a broader understanding of cultural diversity and cultural heritage as it relates to the conservation. It emphasizes respect for other cultures, values, and the tangible and intangible expressions that form part of the cultural heritage.<sup>15</sup>

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<sup>12</sup> MacCannell, *Staged authenticity: Arrangements of Social Space in Tourist Settings*. American Journal of Sociology 79(3): 589-603, 1973.

<sup>13</sup> Wang, N, *Rethinking Authenticity in Tourism Experience*, Annals of Tourism Research, 26(2)349-370, 1999.

<sup>14</sup> Erik Cohen, *Authenticity and Commoditization in Tourism*, Hebrew University of Jerusalem, Israel, 1988

<sup>15</sup> UNESCO Publishing, *The UNESCO Universal Declaration on Cultural Diversity*, Paris, November 2001.

## The Heritage Craft

The UNESCO definition of handcraft is that artisanal products produced by artisans, either completed by hand, or with the help of hand tools or even mechanical means, as long as the direct manual contribution of the artisan remains the most substantial component of the finished product. Handcrafts are made from raw materials and can be produced in unlimited numbers. Such products can be utilitarian aesthetic, artistic, creative, culturally attached, decorative, functional, traditional, religiously and socially symbolic and significant.<sup>16</sup>

Craft, and the preservation of the skills that produce it, has a vital and intrinsic role to play in sustaining cultural heritage. 'Heritage craft' can be defined as practices which employ manual dexterity and skill, and an understanding of traditional materials, designs and techniques to make or repair useful things, which involves a high degree of hand-skill and produces useful objects including those products associated with material culture through to the production of artifacts.<sup>17</sup> All civilizations have developed their own traditional methods of producing goods and these have been passed generation over generation, surviving even in highly industrialized societies. Generally, the less developed the country, the more authentic the handcrafts they produce, and the larger the number of people involved in the production and marketing.

Handcraft villages are based on tourism for the following reasons; (1) Higher prices for handcrafts and craftsmen's income increase, (2) Marketing, so that more tourists know the products and buy more handcraft souvenirs, (3) Job creation for local community and poverty alleviation, (4) Preservation of tradition and cultural heritage. The International Conference on Tourism and Handicrafts held in Tehran, Iran, in May 2006 was the first international conference with specific focus on the linkage between tourism and handcrafts. The main objectives of this conference initiated a wide range of UNWTO

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<sup>16</sup> *International Symposium on Crafts and the International Market*, UNESCO/ITC, Manila, Philippines, 1997.

<sup>17</sup> Hilary Jennings, *Towards a Definition of Heritage Craft Prepared for Creative & Cultural Skills*.

objectives, including poverty alleviation, job creation and progress for women and the role of local tourism in the preservation of traditional craft.<sup>18</sup>

A craft can be regarded as a heritage craft by the following criteria; (1) Taking shape, existing and having a long-standing development in the country, (2) Assembly producing, forming craft villages or streets, (3) Having generations of skillful workers and craftsmen, (4) Having the stable technique of craftwork (5) Using the nation's materials (6) Being the typical and original product of the place with high value and quality, being the artistic and cultural products and the nation's cultural heritage with own identity<sup>19</sup>

The Award of Excellence for handicrafts (formerly known as the Seal of Excellence) was established in South East Asia in 2001 as a joint initiative by UNESCO and the ASEAN Handcraft Promotion and Development Association (AHPADA). A product that is granted the 'Award of Excellence' meets the highest level of craft excellence and is distinguished as a benchmark for craft production. As a source of exchange, innovation and creativity, cultural heritage craft can be regarded as the common heritage of people in the community and should be recognized and affirmed for the benefit of present and future generations. An international panel of crafts experts (2007) evaluates submissions based on the following four criteria;

- Excellence: Demonstrated excellence and standard-setting quality in craftsmanship.
- Authenticity: Expression of cultural identity and traditional aesthetic values.
- Innovation: Innovation in design & production, both traditional and contemporary.
- Marketability: Marketability of crafts with potential for the tourism markets.

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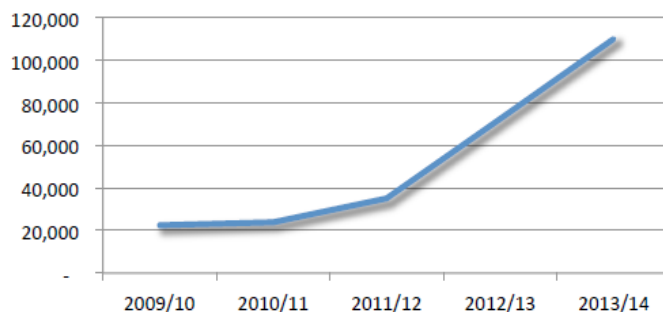
<sup>18</sup> UNESCO Publishing, A Report on the International Conference on Tourism and Handicrafts, 2006.

<sup>19</sup> Hilary Jennings, *Towards a Definition of Heritage Craft Prepared for Creative & Cultural Skills*.

## THE SILVERSMITH AND CRAFTSMEN IN INLAY LAKE

### General Tourism Data of Inlay Lake

According to the data of the Ministry of Hotels and Tourism, international tourist arrival to the Inlay Lake Region is growing year by year. Figure-2 shows the growth trend in arrivals to the Inlay Lake Region: significant growth can be seen in 2013/14 due to political changes in 2011.<sup>20</sup>



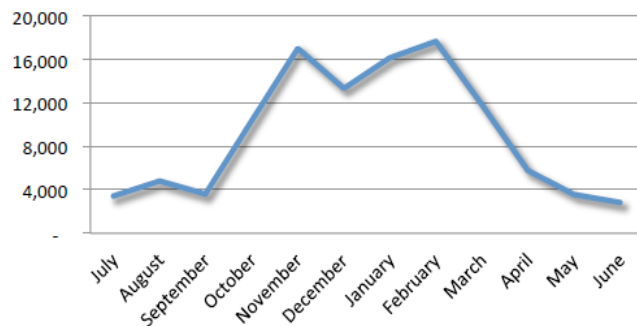
**Figure 2:** International Tourist Arrivals to Inlay Lake

**Source:** Ministry of Hotels and Tourism

The visitor arrivals by both domestic and international tourism flows are strongly increasing. Figure-3 shows monthly international arrivals based on 12 months, July 2013 to June 2014, a total of 110,245 visitors to Inlay Lake and *Nyaung-shwed* during this period.<sup>21</sup> It shows the high and low seasons clearly.

<sup>20</sup> Destination Management Plan for the Inlay Lake Region 2014-2019, Ministry of Hotels and Tourism.

<sup>21</sup> Department of Hotels and Tourism, *Taunggyi*, Ministry of Hotels and Tourism



**Figure-3:** *Nyaung-shwe* and Inlay Lake International Tourist Arrivals per Month (2013-2014)

**Source:** Ministry of Hotels and Tourism

### The Silversmith in Inlay Lake

Craft production is central to the Inlay Lake region experience. Many handcraft products have been produced in and around the Inlay Lake for centuries. According to the evidence found in the silverware with time inscriptions, the silversmith in Inlay Lake started over 170 years ago; however, it can be considered as earlier than the pre-inscriptive period of the time.<sup>22</sup>

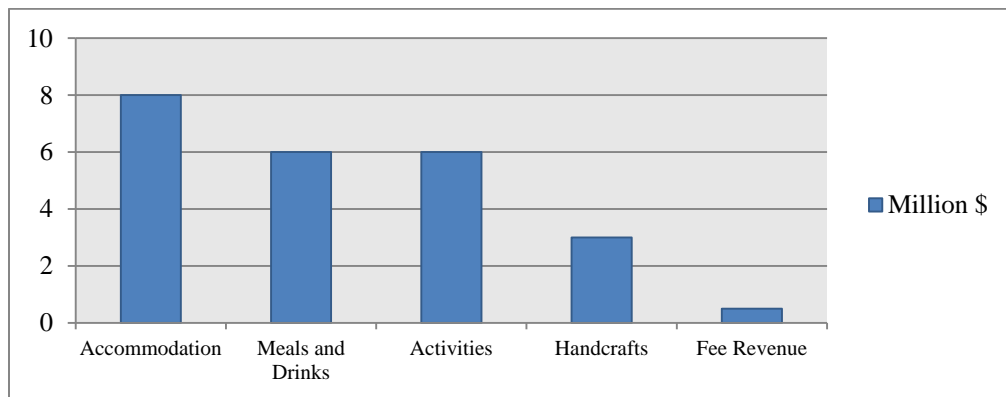
**Table-1:** The Earliest Silverwares Found in Inlay Lake with Inscriptions of Time

No.	Time		Kinds of Silverware
	AD	Myanmar Year	
1	1844	1206	A small bowl with floral motif designs (ceremonial wares)
2	1928	1290	A lime box (betel wares)
3	1934	1296	A <i>Mae-Kyaung-U</i> bowl (ceremonial wares)
4	1938	1300	A silver spoon
5	1940	1302	A lime box with half-moon shaped

**Source:** The History of Handcrafts in Inlay Lake Region, *Taunggyi University*, August 2004

<sup>22</sup> Daw Kyi Kyi Cho, Daw Sein Mi, Daw Khin Nyo Win and Daw Naw Barni, *The History of Handcrafts in Inlay Lake Region*, Department of History, Taunggyi University, Page- 6-9, August 2004.

The destination management plan for the Inlay Lake (2014-2019) described the value of tourism as one of the measurements of the benefits that tourism brings to an area. A study conducted in 2012 by the Institute for International Development (IID) concluded the following estimated annual value of tourism in the Inlay Lake Region in Figure-4. According to the study of IID, handcrafts generate 3 million \$ value in the total tourism value of 23.5 million \$. It shows handcrafts in the Inlay Lake had 12.8% of total tourism value in the region.<sup>23</sup>



**Figure-4:** Estimated Annual Value of Tourism in the Inlay Lake Region

**Source:** Destination Management Plan for the Inlay Lake

### Methods and Instruments of Silversmith in Inlay Lake

There are two types of traditional silversmith according to methods and skills, but both are the same in basic method.

- (1) **The major silversmith**, which need high professional skills, knowledge, concentration and interest especially for religious wares and special orders. Major silversmith is time consuming and major silverwares are less in demand because the religious wares are expensive and used only by higher income local people.

<sup>23</sup> Destination Management Plan for the Inlay Lake Region 2014-2019, Ministry of Hotels and Tourism.

- (2) **The minor silversmith**, which need normal professional skills, knowledge, and less concentration than the major one. Minor silversmith is less time consuming and in higher demand in both domestic and international tourists markets as souvenirs and jewellery and relatively cheaper than the major silverwares.

The main handwork in major silversmith is the use of hammer to shape and create the blown picture on the silverwares. The minor silversmith can use some mechanical tools or electrical devices in lamination and ductile silver craftworks; it can be said that the minor silversmith is easier than the major silversmith. Major silverwares are usually in traditional designs but some differ in design according to special orders. The main traditional instruments used in the silversmith of Inlay Lake are; various sizes of hummers, various hand tools and furnace (fire place). For the furnace the traditional term *Pyoun-Kout* (a kind of manual blowing instrument) was used in ancient times, but today only blowing machines or motor machines are used.

### **Raw Material and Silver Purification**

Nowadays, most silversmith workshops buy ready-made purified silver and only senior craftsmen can do the traditional silver purification method. This traditional method of silver purification was handover from generation to generation. In ancient times, the craftsmen began the learning of traditional silversmith method from the silver purification and refining pure silver from the silver ore, so, all the craftsmen learnt all the production stages of silverwares. But today, ready-made pure silver can be bought easily and most of the new generations do not need to learn the method of purifying and refining of silver from the ores.

Raw material silver ores are mainly from *Namtu* Mine and *Baw Sine* Mine. These two Mines are the biggest mines in Myanmar and the raw ores from these mines are distributed to other parts of the country. The silver ores contain four kinds of metal; Silver, Copper, Zinc and Aluminium. For the silver purification process, firstly, the ore stones are cut and crushed into pieces and put into the crucible cup and melt in 2000°C temperature. Zinc and Aluminum are light and evaporate fast, so, only two metals copper and silver remain inside the cup. To separate the silver from the copper, the metal

mixture is put in a bottle of Nitric Acid. After two days, the Copper is completely dissolved and changes colour to blue leaving a pure Silver residue at the bottom.<sup>24</sup>

### Current Condition of Silversmith in Inlay Lake

The silversmith in Inlay Lake is a traditional handcraft with a long history. There are two popular silversmith regions in Myanmar; *Ywar-Taw* in *Sagaing* Division, Central Myanmar and Inlay Lake in Southern Shan State. The prominent feature of Inlay Lake's silversmith is purely handmade and made of quality silver. The global environment and social networks affect the silversmith with the challenges of design innovation, mass production and invitation for expanding to international markets. The price of silver in Inlay Lake is higher than the world silver price because they sell the traditional handmade crafts, not silver, so, they are not valued by the weight of silver.

The silversmith workshops and showrooms in Inlay Lake are operated as small and medium enterprises (SMEs) or private home businesses. The capital investment for a silversmith workshop and showroom needs at least 100,000 US\$. The handcrafts in Inlay Lake rely completely on the tourism market, so, the more visitors to the region the more sales of handcrafts; it contributes to the livelihood of local craftsmen, workshops and showrooms.<sup>25</sup> The major silversmith craftsmen earn their livelihood by doing what they love and make a good living from sales, commissions and craftwork charges.<sup>26</sup>

### Varieties of Silverwares

The silverwares of the Inlay Lake can be categorized in *three* groups in terms of utility and production methods. Before 1988, the silverware of

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<sup>24</sup> Daw Kyi Kyi Cho, Daw Sein Mi, Daw Khin Nyo Win and Daw Naw Barni, *The History of Handcrafts in Inlay Lake Region*, Department of History, Taunggyi University, Page- 6-9, August 2004.

<sup>25</sup> U Tun Tun Oo (43), Owner, *Mya-Hinthar* Silversmith Workshop and Showroom, *Heya-Ywama* Village.

<sup>26</sup> Hilary Jennings, *Towards a Definition of Heritage Craft Prepared for Creative & Cultural Skills*.



Inlay Lake is famous only for religious wares and for the *Sao Pwa* (the Chief of the region) and very rarely as normal household ware. Only after 1988 did they come to be used as household equipment and jewellery.<sup>27</sup>

### Religious Wares

Religious silverware are mostly produced by major silversmith. Religious wares include silver Buddha statues, silver stupas, relic holders and silverwares for offerings to the Buddha and for religious ceremonial use. Religious wares can be regarded as the highest and the most difficult craftwork in silversmith. Religious wares are of high demand in religious ceremonial occasions. The complete set of religious wares for offerings to the Buddha include: the alms-bowl with cover (*Soon-Oat*), the alms-bowl without cover (*Soon-Oat*), the big tray (*Doung-Lann*), the flower pot, the drinking water cup, the rice tray with stem (*Soon-Kalat*), the crispy tray with stem (*A-Kyaw-Kalat*), the snack cup (*Saw-Shay*), the flat tray with stem (*Kalat-Pyar*), the cup for tooth-brush (*Tan-Pu*), the water pot (*Yay-Kayar*) and the small water cup.

The famous religious silverwares are the big tray (*Kalat-Kye*), the big bowl (*Pha-Lar-Kye*), the flower pots, the water glass, the arch tray (*Kalat-Khone*), the flat tray (*Kalat-Pyar*), the flower tray (*Pann-Kalat*), the relic holders (*Swal-Taw-Kyote*), the water goblet (*Yay-Takaung*), the Bodhi Banyan Leaves, Silver Stupas (*Ngwe-Sati*), Buddha Statues and stands for enshrined Buddha statues.

### Household Wares

Most of the household silverwares are ancient in design and just for exhibiting as antiques and decorations in cupboard and normally not for use. There are various kinds of household and utensil silverwares that are produced in both major and minor silversmith methods. The famous household wares include plates, spoons, forks, bowls, water cup, betel box, tray, ash-tray, cigar box, tealeaf box, soap box, tooth-stick box, salt box, jewellery box, and so on.

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<sup>27</sup> Daw Kyi Kyi Cho, Daw Sein Mi, Daw Khin Nyo Win and Daw Naw Barni, *The History of Handcrafts in Inlay Lake Region*, Department of History, Taunggyi University, Page- 6-9, August 2004.

Some household wares used for entertaining guests like tealeaf-salad box, betel box and cigar box are also produced by major silversmith.

### **Jewellery**

The jewellery is also made in silver of various designs, especially as rings, ear-plugs and ear-rings, bracelets, bangles, necklaces, locket, hair-decoration accessories and so on. *Innthal* people use various designs of fish in jewellery because fish is a part of their way of life and in ancient times they earned their living with traditional fishing using bamboo fishing nets on a traditional leg rowing boat.

### **Income, Lifestyle and Work Environment**

The life of silversmith craftsmen in Inlay Lake shows the unity of *Innthal*, preserving the traditional culture, interest and respect in their works, efforts, intellectual and cultural heritage that defines them. *Innthal* are religious people and the prayer room is the holy place in a house. Most silversmith craftsmen earn their living from silversmithing only. The normal income of a craftsman is approximately 10,000 Kyats (approximately 8 \$) per diem. In some workshops, the craftsmen get wages instead of salary on the calculation of the craftworks they have done for a day or for a week (5 days market week). The wages of a craftsman depends on working capacity and skill.

The daily working hour of the permanent craftsmen is normally 8 am to 5 pm but for the freelance craftsmen it is more flexible because they work in their own workshop and charge for the craftwork according to the estimated production time. Some of the freelance craftsmen do other work in their free time. Silversmith showrooms in Inlay Lake have their own workshops but they need to buy from other workshops when there is a high demand during the peak tourist season. Therefore, all the silversmith showrooms and workshops in Inlay Lake are interrelated and form a cultural community.

All the senior craftsmen in the groups of silversmith welcome new generations to teach and handover the legacy of traditional silversmith methods. However, the lack of literature and records on traditional method over generations tend to be the handover of traditional silversmith method in

informal way. Some craftsmen have own creations and innovative designs but they have not been recognized for their own effort; they transmit their innovations to others in order to fulfill high demand.

According to *Innthar* culture, social life is the priority in the working environment. The workshop owners and craftsmen are mostly relatives. Most of the silversmith workshops are family businesses with relatives and new generations and the relationship between owners and craftsmen are thus flexible and reliable. All the craftsmen have holidays on every religious festival and religious holidays, e.g. *Phaung-Daw-Oo* Pagoda festival days and full moon days. The craftsmen can participate in religious ceremonies, donation ceremonies and festival events; they have full rights according to their traditional culture and social life.

### **Myanmar Souvenir Association**

The Myanmar Souvenirs Association was established in 2012, its main objectives are to control the quality of souvenirs in Myanmar, to promote the use of local raw materials, to initiate the training programs for local craftsmen, to create employment opportunities for local people and to promote the growing demand in domestic and international markets. The main products of MSA are lacquer wares, silver wares and jewellery. MSA recognizes traditional silversmith of Inlay Lake as one of the traditional handcrafts in Myanmar, however, there are no formal records on the methods and kinds of handcrafts and the quality control system over the crafts.

### **The Methodology**

Qualitative research is an investigative methodologies and techniques. It can be described as naturalistic, ethnographic, field, anthropological or observation research and this type of research gives emphasis on the value of looking on variables in their natural setting where they are commonly found.<sup>28</sup> The interview plays a vital role in this investigation that the researcher typically uses for gathering data. The descriptive method is used because this

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<sup>28</sup> [www.occupytheory.org](http://www.occupytheory.org)

study is dependent upon people's creativity, habits, and desires. And also the lack of basic data from previous studies tends to focus on the qualitative research in describing the basic knowledge and forecasting the necessary information for the future.

This study is based on the ethnographic approach to qualitative data collection. Ethnographic approach studies the cultural phenomenon of human knowledge and behaviors in a particular cultural and natural setting, such as, attitudes, beliefs and practices. In data collection of this research, investigative exploratory on literature reviews, interviews and conversations with workshop owners and senior craftsmen were conducted to collect primary and secondary data. This study is the real situation in Inlay Lake from interviews with workshop owners, senior craftsmen, local stakeholders and local organization member.

The main source of data was individual interviews and in-depth interviews, which was prepared in semi-structured, open-ended questions. Deductive analysis and descriptive method is used for the conclusion and recommendation statements. The secondary data were gathered from the reference books, journals, reports, written notes and previous studies (which are not directly concerned with silversmith). Due to the lack of previous study for the silversmith in Inlay Lake, this study excludes analysis on the sales, income and taxation of the workshops and showrooms.

## **Results and Discussions**

### **Opportunities and Risks of the Silversmith in Inlay Lake**

The Inlay Lake is located in the nearby geographic locations with the two famous mines of Myanmar and the *Innthal* have high traditional handcraft skills. This could be the main reason for the originality and popularity of silversmith in Inlay Lake. In ancient times, silversmith craftsmen started their learning from the purifying and refining silver stage from the ore, but today, ready-made purified silver can be bought easily and the new generation craftsmen do not need to begin from the purifying and refining stage. Therefore, the traditional method of silver purification is at risk of decline today.

The results of the study show there are (4) groups of major silversmiths in Inlay Lake with (15) craftsmen. Among these craftsmen (11) are family members and only (4) are outsiders. So, the majority of the silversmith population in Inlay Lake is more or less a hereditary or family business. However, the learners in major silversmith are fewer and fewer today. Only some craftsmen who have a special interest do major silversmith work as professional craftsmen to maintain tradition and/or handover to generations of silversmith craftsmen. So, the traditional method of major silversmith is at risk at present.

All of the major silversmith workshops are located in *Heya-Ywama* village and the village has the potential to continue as a source of major silversmith through generations. However, one workshop named *Khaing-Shwe-Wahin Nam-Pan* village moved from *Heya-Ywama* village because the old place has less water in summer. This fact should be considered for further study because the receding of the water area and sedimentation is one of the big environmental challenges and risks of Inlay Lake.

There are a total of (12) silversmith workshops in Inlay Lake and the education level of the craftsmen are middle school level, high school level and graduate level. Interviews show only a few craftsmen are university graduates. So, the silversmith profession in Inlay Lake provides fairly equal employment to different levels of people with different educational standards, personality and language skills than other service providers in the tourism sector. However, the income of craftsmen from the handcraft profession is not very beneficial because the charges on each craftwork for craftsmen are quite low. The minimum income of craftsmen is 10,000 *Kyats* and the maximum is 100,000 *Kyats* per week; income depends on the skill, knowledge and experience of each craftsmen. A competitive system of commissions to tour guides and boat operators by showrooms has developed today which adds up to 30% to 40% of the purchase price. Therefore, in some cases, the commission of tour guides and boat drivers is more than what a craftsman charges and earns on silver ware.

According data from a previous study, there are there are total of (9) workshops in *Heya-Ywama* village. Survey results found another 3 more workshops and showrooms(2 in *Heya-Ywama* village and 1 in *Nam-Pan*

village), so, there are totally (12) workshops and showrooms listed as private small and medium enterprises. They are operated with permanent craftsmen. However, there are also many freelance craftsmen and home workshops, which are not listed. Normally, workshops have 5 to 20 permanent craftsmen and deal with freelance craftsmen in high demand season. Purchases from freelance craftsmen by each showroom are approximately about minimum 10% and maximum 30%. There are totally (97) permanent craftsmen in 12 workshops. The employment condition is 94% male and 6% female. Concerning age in the entire silversmith population, the youngest is 15 years old and the oldest is 92 years old. The work experiences of craftsmen are from young trainers to senior craftsmen with decades of experience. According to the data of the study, only (1) is a new business and all are generation businesses.

### **Handover of Traditional Method to Next Generations**

The traditional craft of silversmith in Inlay Lake is hand over from generation to generation. Senior craftsmen teach to new generations in an informal way. By informal way means transmitting knowledge and skills in practical demonstrations one by one or by groups in the work place. Silversmiths around the age 30-50 craftsmen can be regarded as senior craftsmen according to their skill and knowledge. Those around age 15 can be regarded as apprentices for the new generation with vision inherited from the senior craftsmen or family members. No training or tuition fees are charged in banning the traditional silversmith craft in Inlay Lake. Senior craftsmen teach new generations the practical way and the learning environment is still alive in traditional informal way.

### **Product Diversification and Intellectual Recognition**

As a source of exchange, innovation and creativity, cultural heritage can be regarded as the common heritage of people in a community and should be recognized and affirmed for the benefit of present and future generations. Own creations by senior craftsmen are transmitted to other craftsmen and juniors to fulfill the demand. There are no formal records or recognitions for

own creation of the craftsmen. The recognition of intellectual craft products can be an effective way for appreciation of crafts men and their creation.

Recognition should be initiated as an intellectual recognition certificate or award by the regional government or community organization concerned. It would require local government participation to coordinate the regional government with the local community to set up the principles and guidelines for the intellectual recognition certificate or award. The intellectual recognition certificate or award could contribute to 3 important factors;

- (1) The craftsmen would receive recognition as professional craftsmen
- (2) The workshops could claim originality of creation, gain good reputation and an effective marketing tool to attract tourists
- (3) The buyers buy reputable products of high quality, cultural authenticity and take pride in the place of origin and gain satisfaction.

### **Literature for the Traditional Silversmith Method**

The community creates intangible heritage itself for the continuation of the community. The community itself becomes a phenomenon and is sustained by the intangible heritage that is enacted on community-based knowledge. The traditional craft skills which were once lost may be almost impossible to recapture. The loss of knowledge can be due to three reasons;

- (1) An initial failure to conserve existing knowledge
- (2) Lack of maintenance in literature
- (3) A failure to gather knowledge while it was available

The silversmith in Inlay Lake can be regarded as a heritage craft that needs to be preserved for future generations. The lack of literature on traditional methods is one of the weaknesses in failure to preserve cultural heritage and for future development studies.

### **Changing Times and Changing Trends**

After the political changes in 2011, global awareness and visitor arrivals to Inlay Lake improved significantly. The emergence of social media and social networks also encouraged tourism development and the use of Visa Card and Master Card fostered the sale of silverware. The study data and results show that the silversmith generations in Inlay Lake want to preserve the traditional silversmith work as a pure handmade craft and do not want to change to or substitute with machinery techniques for mass production. However, to deal with international markets, the silversmith workshops in Inlay Lake may need machinery techniques to supplement traditional handmade methods for increased production to meet rising demand. It can affect the cultural authenticity of the traditional silversmith in terms of commodification.

The investments of outsiders and new businesses, such as, hotels, motor boats, handicrafts and souvenir showrooms, restaurants, resources and technologies into the Inlay Lake can affect the traditional craftsmanship and local community. The tourism income and benefit does not remain fully in the community and results in outflow of tourism income and benefit to outsiders. It tends to change socio-economic factors in Inlay Lake with many considerable factors. In this situation, the role of young people and younger generations in Inlay Lake becomes crucial. They need more knowledge, skills and education, especially in tourism development which is the main economy for the region today.

### **Interaction between Tourism, Handcrafts and Cultural Heritage**

Tourism is the 21<sup>st</sup> century's number one industry, and handcraft is one of the fastest growing activities and together they create a logical and powerful combination. Visitors are inclined to buy locally produced often traditional craft as a souvenir; so, it should be true to its place, be locally derived and produced, being made of local materials, be authentic and of good quality, and of benefit to local makers. There are 35 village tracts in Inlay Lake but only a few villages on the tourists' itinerary and sites receive the benefits and welfare of tourism. Tourism is focused in only a few areas and as tourism grows there will be more pressure on different income and living



standard within the region. The regional and local government needs to maximize tourism's contribution to regional employment and income generation and to ensure that the social and economic benefits of tourism are distributed equitably.

As a Myanmar flagship culture zone, Inlay Lake needs to attract more cultural tourists in the future. To develop tourism on cultural heritage, it needs to bring intangible culture to life and create tangible products and meaningful experiences for visitors. This creation enables the tourists to take home a complete story about the traditional crafts of the local community and its relationship to local culture, as well as the physical souvenir itself. The lake dwellers, *Innthal* understand the importance of tourism on their regional economy, so, they appreciate the value of their traditional ways of living and cultural identities. However, they need proper management of their cultural identity and empowerment in decision making. The local community needs to know transparently the effects of outside investments, the allocation of tourism benefits and welfare to the local community and the contribution of tourism into the local economy, that will enhance living standards and community development.

### **Conclusion and Recommendation**

The Inlay Lake is Myanmar's top flagship tourism destination that attracts thousands of visitors annually. Preserving the traditional handicrafts depends upon the craftsmen with a wide range of professional craft skills. The role of craftsmen is vital in the effective preservation of heritage craft. Therefore, the silversmith workshops and craftsmen in Inlay Lake should interact with the organizations of both public and private sectors as follow;

- Heritage craft businesses such as museums or historic sites.
- Heritage craft educational institutions such as the University of Culture, that are likely to contribute to skills development and transfer.
- Exhibitions that support workshops and craftsmen in advertising, marketing and sales.
- Supporting organizations such as the Myanmar Souvenir Association, Myanmar Tourism Marketing as well as with the regional government.

The literature record for the silversmith in Inlay Lake should be precise and also the tools and instruments used in the silversmith should be recorded precisely. Handover of traditional method to next generations should be gradual through more formal apprenticeships, supported by powerful and influential stakeholders, community development organizations and workshops. It should be initiated as a vocational training school in the region like the Myanmar Lacquer Ware College in *Bagan*.

The competitive system of commission to tour guides and boat operators by silversmith showrooms, in some cases, exceed payment made to skilled craftsmen. It can be said as that the silversmith craftsmen do not receive full benefit and this puts this profession at risk. Villages or township data concerning the number of home workshops and freelance craftsmen need to be accurate for analysis and future development studies. The silversmith industry in Inlay Lake is more of a generation business, so, it can be said as a living heritage of the place. However, as is has to rely mostly on tourism and visitor arrivals, can pose a risk for preserving authenticity in the future due to commodification as a tourism product rather than as a heritage handcraft.

There are no formal records or recognitions for original creations or innovations of the craftsmen. Recognition should be initiated in the form of a certificate or award for innovation or creativity. To do so, it would require local government participation to coordinate between the regional government and local community to initiate principles and guidelines for recognition. Another problem that is noted from this study is concerned with environmental factors. There is less water in summer and this fact should be considered for further study because the receding of water area and sedimentation is a big environmental challenge and risk for Inlay Lake.

The results show that the silversmith generations in Inlay Lake understand the value of heritage craft that reveals their ways of life and sense of place. In case to deal with international markets, the craftsmen should consider is to use machinery techniques for mass production for exporting and also to preserve traditional pure handmade methods for selling in the region. The improvement of technology also fosters the sale of silverwares, so, all the silversmith showrooms should make the effective use of VISA cards and Master cards with good internet connection.

The *Innthar* population was about 180,000 in 2016 and about 40% of total population relies on tourism sector directly and indirectly. The focus on tourism is in only a few areas and a few villages on the tourists' itinerary and only these sites receive the benefits and welfare of tourism development. So, the local authority needs to initiate the equal distribution of social and economic benefits from tourism. The investments of outsiders and new businesses affect the traditional craftsmanship and local community. The tourism income and benefit does not remain fully in the local community and causes outflow of tourism income and benefits to outsiders. Tourism may generate money, however looking at monetary value alone is not enough to answer the questions; where does it go and does it stay in the region and further study is recommended.

In conclusion, silversmith in Inlay Lake is the traditional cultural heritage of *Innthar*, handed over from generation to generation. It has been commodified as a tourist attraction in an authentic situation because it still use traditional methods and designs and it stands not only for economic benefit but also for a heritage craft that identifies the local community. The risks and opportunities discovered from this study and the necessary factors for preserving the silversmith suggest reasonable actions for the future of tourism development and handcraft preservation of the Inlay Lake. Future studies in tourism and cultural heritage are also recommended.

## **References**

- Dallen J., Timothy and Gyan Nyaupane, *Cultural Heritage and Tourism in the Developing World, A Regional Perspective*, Routledge, 2009.
- Daw Kyi Kyi Cho, DawSeinMi, Daw Khin Nyo Win and Daw Naw Barni, *The History of Handcrafts in Inlay Lake Region*, Department of History, Taunggyi University, Page-6-9, August 2004.
- Department of Hotels and Tourism, *Taunggyi*, Ministry of Hotels and Tourism
- Destination Management Plan for the Inlay Lake Region 2014-2019, Ministry of Hotels and Tourism.
- Erik Cohen, *Authenticity and Commoditization in Tourism*, Hebrew University of Jerusalem, Israel, 1988

Henrietta Marrie, *The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the Protection and Maintenance of the Intangible Cultural Heritage of Indigenous People*.

Hery Sigit Cahyadi, *Authenticity and Commodification of Culture at Puri Anyar Kerambitan*, Bali Province, Indonesia, Bandung Institute of Tourism, Indonesia.

Hilary Jennings, *Towards a Definition of Heritage Craft Prepared for Creative & Cultural Skills*.

Laurajane Smith and Natsuko Akagawa, *Intangible Heritage*, 2009.

M. Arbach, *Tangible Cultural Heritage*, As-Sawda Site in Yemen.

Mac Cannell, *Staged authenticity: Arrangements of Social Space in Tourist Settings*. American Journal of Sociology 79(3): 589-603, 1973.

Mike Robinson & David Picard, *Tourism, Culture and Sustainable Development Programme*, Division of Cultural Policies and Intercultural Dialogue, Culture Sector, UNESCO.

UNESCO Publishing, *A Report on the International Conference on Tourism and Handicrafts*, 2006.

UNESCO Publishing, *The UNESCO Universal Declaration on Cultural Diversity*, Paris, November 2001.

UNESCO/ITC, *International Symposium on Crafts and the International Market*, Manila, Philippines, 1997.

Wang, N, *Rethinking Authenticity in Tourism Experience*, Annals of Tourism Research, 26(2)349-370, 1999.

World Travel and Tourism Council (WTTC), *Travel and Tourism Economic Impact 2013*, Myanmar.

## Interviews

Interview in *Aung Chanthar* Silversmith Workshop and Showroom, Heya-Ywama Village, Inlay Lake, 4-2-2017.

Interview in *Khaing Shwe War* Silversmith Workshop and Showroom, Nam-Pan Village, Inlay Lake, 3-2-2017.

Interview in *Mya Hinthar* Silversmith Workshop and Showroom 2, Heya-Ywama Village, Inlay Lake, 3-2-2017.

Interview in *Mya Hinthar* Silversmith Workshop and Showroom, Heya-Ywama Village, Inlay Lake, 16-11-2016.

Interview in *Mya Hinthar* Silversmith Workshop and Showroom, Heya-Ywama Village, Inlay Lake, 3-2-2017.

Interview in *Sein Thamadi* Silversmith Workshop and Showroom, Heya-Ywama Village, Inlay Lake, 4-2-2017.

Interview in *Tun Kyal Sin* Silversmith Workshop and Showroom, Heya-Ywama Village, Inlay Lake, 4-2-2017.

Interview in *U Aung* Silversmith Workshop, Heya-Ywama Village, Inlay Lake, 4-2-2017.

Interview in *U Hla Phay* Silversmith Workshop and Showroom, Heya-Ywama Village, Inlay Lake, 3-2-2017.

Interview with *U Khin Mg Latt*, General Secretary, Save the Inlay Lake (NGO), 16-11-2016

Interview with *U Lin HteinOo*, Senior Craftsman, Heya-Ywama Village, Inlay Lake, 1-1-2017.

Interview with *U San Shwe (Shwe War Win)* Silversmith Workshop and Showroom, Heya-Ywama Village, Inlay Lake, 3-2-2017.

Interview with *U Shwe La Min*, Restaurant Owner (Once a Craftsman), Heya-Ywama Village, Inlay Lake, 31-12-2016.

Interview with *U Thaw Tar Swe*, Senior Craftsman, Heya-Ywama Village, Inlay Lake, 31-12-2016.

## **Websites**

[www.occupytheory.org](http://www.occupytheory.org)

[www.unesco.org](http://www.unesco.org)

[www.wcc-aisbl.org](http://www.wcc-aisbl.org)

## **STUDY ON HOW TO PRESERVE HERITAGE COLONIAL BUILDINGS IN YANGON**

Cho Me Maung Maung<sup>\*</sup>

### **Abstract**

Nowadays, one of the most interesting tourist attractions is site-seeing of Heritage Colonial Buildings. Thus, not only European countries but also Asian countries give priority to preserving heritage buildings. This paper describes how to preserve colonial buildings in Yangon. Among Asian countries Myanmar has a huge number of colonial buildings, because Myanmar had been under British Colonial rules for many years. These buildings feature as heritage colonial buildings and many tourists today that are greatly interested in them. In 1996, The Yangon City Development Committee was guided to list of colonial heritage buildings officially and 189 colonial buildings were listed. There are many organizations which are supervising 189 colonial buildings in Yangon, the number today that includes nineteen Ministries, trustee organizations and the Yangon City Development Committee. In this paper, two out of six colonial buildings which are supervised by the YCDC in Yangon are studied, namely the City Hall and the Bogyoke Aung San market which are in downtown Yangon. The City Hall building is still in use by YCDC's offices and the Bogyoke Aung San market has not changed much. The distinct feature of the two buildings is that age of both are over a hundred years without much need to make major repairs or renovation. It shows that the preservation work done by responsible persons concerned were efficient and effective. Furthermore, the preparations on future preservation of these buildings will be made in accordance with the guidance given by the government.

### **Introduction**

People visiting cultural and historical resources is one of the most pervasive and fast growing sectors of the tourism industry today. Heritage tourism typically relies on living and built elements of culture and refers to the use of the tangible and intangible past as a tourism resource, such as music, dance, language, religion, folkways and cuisine, artistic traditions, and festivals and material vestiges of the built cultural environment, including

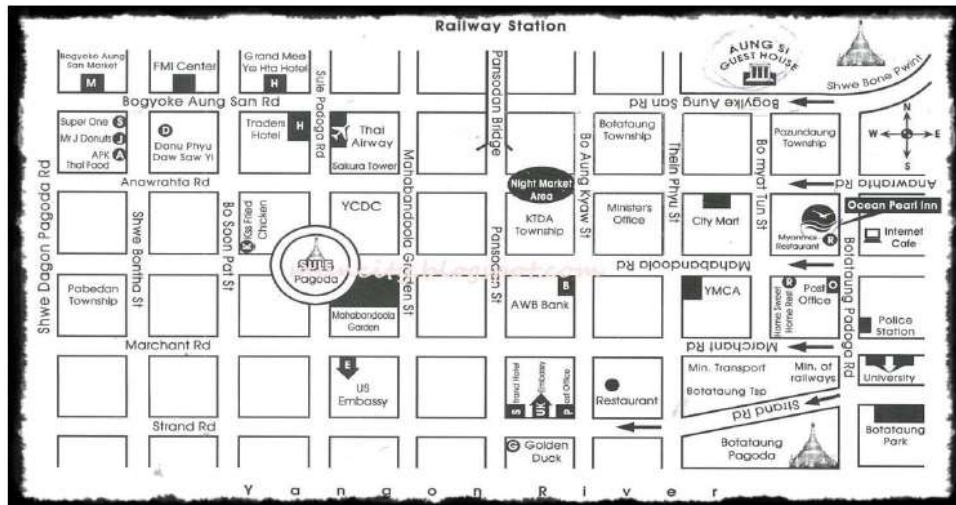
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monuments, historic public buildings and homes, farms, castles and cathedrals, museums and archeological ruins and relics.

The area of study covers the downtown area of Yangon City, between Bogyoke Aung San Road on the north, Aungmyatana Road on the west, Ayeyarmyaing Road and lower Pazuntaung Road on the east, and the bank of Yangon River on the south.

The downtown area of Yangon City is composed of six townships. Five townships of the downtown area, namely Lathar Township, Lanmadaw Township, Kyauktada Township, Pabedan Township and Seikkan Township are located in the western district. The other one, Botataung Township is situated in the eastern district. East to west aligned roads in downtown area are Bogyoke Aung San Road, Anawrahta Road, Mahabandoola Road, Merchant Road, and Strand Road. The North to South main alignment roads are Aungmyatana road, Ayeyarmyaing Road and Lower Pazundaung Road. My study area is located in Kyauktada Township and Pabedan Township. The following map shows the locations of the Yangon City Hall and Bogyoke Market which are of interest in this study.



Source: YCDC Report 3

**Figure 1:** Map of the study area

## **Literature Review**

Preserving culture heritage is as important as preserving the natural environment. While some natural realms will in fact recover from the impact of development and regenerate organically, damaged cultural heritage will not. Built heritage is a non-renewable resource that once destroyed is gone forever. This creates a unique challenge to heritage conservators and managers, who have long had to deal with throngs of tourists clambering on or vandalizing places of historic importance.

## **The Objectives of Preserving**

Observers have identified several reasons why heritage is preserved. These include countering the effects of modernization, building nationalism and preserving collective nostalgia, improving science and education, safeguarding artistic and aesthetic values, maintaining environmental diversity, and generating economic value. While each of these is important in all parts of the world, the final point, concerning economic value is the primary motive for conserving the buildings and living past in developing regions. Preservation of the historic environment and living culture is critical in today's rapidly modernizing world and given what is known about the destructive influences of mass tourism, including mass heritage tourism, heritage protection has become a more urgent item on the agenda.

## **Three Approaches to Preservation**

At present there are three approaches to preservation

1. To do nothing to the remaining structure beyond what is needed to stabilize and preserve it from harm;
2. To restore the building to a useful condition, but only by using modern construction methods that are as close to historically accurate as possible; and
3. To restore the building to a useful condition, but to use modern construction methods and materials and to make it absolutely clear where the old building ends and the new building begins.



**Objectives of the Study**

1. To obtain the list of heritage colonial buildings in Yangon.
2. To explore which organizations are supervising these heritage colonial buildings.
3. How to preserve them for longer existence and sustainability.

**Research Method**

There are so many types of organizations which are supervising 189 colonial buildings in Yangon. There are nineteen Ministries, trustee organizations and Yangon City Development Committee. In this paper, two out of six colonial buildings which are supervised by YCDC in Yangon have been studied. For study purposes, the descriptive research design is used and data collection is from YCDC, Yangon Heritage Trust (YHT) and Government organizations through face to face interview and structured questionnaire. Some data are collected by using online e-mail. The information required in this study is obtained mainly from the YCDC and observational survey made at City Hall and Bogyoke Market respectively.

**Analysis and Discussion of Findings**

The listed heritage colonial buildings are supervised by the organizations concerned to maintain and preserve the buildings for longer standing. Most organizations are government Ministries, Board of Trustees, Yangon City Development (YCDC) and a private company. Some organizations are not supervised by any specific organizations but they are controlled by the government. Table 1 represents the name of the organizations which supervise the buildings and the number each supervises.

**Table 1:** Organizations concerned for colonial buildings

<b>No.</b>	<b>Name of Institutions</b>	<b>No. of Buildings</b>
1	Ministry of Education	33
2	Ministry of Electricity and Energy	2
3	Ministry of Health and Sports	5
4	Ministry of Commerce	3
5	Ministry of Transport and Communication	8
6	Ministry of Planning and Finance	12
7	Ministry of Defence	2
8	Ministry of Foreign Affairs	7
9	Ministry of Hotels and Tourism	2
10	Ministry of Information	3
11	Ministry of Social Welfare, Relief and Resettlement	3
12	Ministry of Agriculture, Livestock and Irrigation	1
13	Ministry of Religious Affairs and Culture	2
14	Ministry of Home Affairs	2
15	Trustee	91
16	Yangon City Development Committee (YCDC)	5
17	Office of the Auditor General	1
18	Max Co. {Transferred from DHSHD}	1
19	No specific organization {Under control of the Union Government}	6
<b>Total</b>		<b>189</b>

**Source :** Yangon City Development Committee

### **Heritage Laws, Rules and Regulations**

The heritage list of YCDC was compiled in 1996 from lists of important, non private buildings and structures of over 50 years of Age, submitted by the townships. It prohibits demolishing and altering external appearances and requires prior permission for any other alteration or repair.

The Protection and Preservation of Cultural Heritage Regions Law 1998 defines a cultural heritage site as an “Ancient Monuments or Site which is required to be protected and preserved by reason of its historical, cultural, artistic or anthropological value”; Ancient Monuments as those “that have existed before 1886 or that have been determined as cultural heritage”; and an Ancient site as a “place or high ground where a town or settlement of Ancient people or Ancient Monument had existed before 1886 or which is determined as cultural heritage whether it is in the process of excavation or has not yet been excavated”.

The Law Amending the Protection and Preservation of Cultural Heritage Regions Law 2009 amended the wording to include sites “that have existed since 100 years before the date on which the department made inquiries”. These laws regulate construction, extension, destruction, alteration, renovation and maintenance of ancient monuments and monuments sites depending on their degree of importance and influence.

### **Installed Blue Plaques in Yangon**

Blue Plaque means permanent signs installed in a public place to commemorate a link between that location and a famous person, event or landmark-serving as a kind of historical marker.

Blue Plaques are one of the most effective and visible means to celebrate Yangon’s rich history. With their direct appeal to the public, the introduction of commemorative Blue Plaques have made Yangon’s history accessible to people of all ages and backgrounds.

In June 2013, Royal Philips Corporation (RPC) and the YHT announced a partnership to honor key sites throughout Yangon. Royal Phillips provided a grant of US\$ 75,000 to cover historical research, manufacturing and the installation of the plaques.

The following buildings list shows installed Blue Plaques in collaboration by YCDC, RPC and YHT.

**Table 2:** Blue Plaques installed Colonial Buildings

No.	Date of Installation	Name of the Buildings
1.	9.8.2014	City Hall
2.	19.9.2014	Ayeyarwaddy Bank (Originally Immigration and Registration Department)
3.	1.10.2014	Armenium Church
4.	16.10.2014	Central Fire Station
5.	29.5.2015	Yangon Post Office
6.	17.6.2015	Grindley's Bank (Myanmar Agricultural Bank)
7.	9.8.2015	Central Press
8.	18.9.2015	Lawkanatt Gallery Building
9.	11.12.2015	Government Technology Institute
10.	18.12.2015	Maharbandoola Park
11.	30.4.2016	Turquoise Mountain Foundation
12.	30.5.2016	India Embassy
13.	5.6.2016	Masimar Yayqu Ardu Church
14.	28.10.2016	Young Women Christian Association
15.	20.1.2017	Bogyoke Aung San Market

**Sources:** YCDC Report

The total number of blue plaque installed is 16 in number but the total number of places is 15. The difference is that double blue plaques are installed at Maharbandoola Park. Moreover, in this study only City Hall building and Bogyoke Aung San Market building are studied in detail.

### **Descriptive Study of City Hall and Bogyoke Aung San Market**

The City Hall and Bogyoke Aung San Market are colonial heritage buildings which are controlled by YCDC and the Blue Plaques have been installed on them. The Yangon City Development Committee is responsible to preserve and maintain them for long term benefit.

### **The City Hall Building**

In 1886, the city's municipal authority purchased Rippon Hall, a community dance hall located on the site of today's City Hall. The dance hall was converted for use as a municipal headquarters but, as the city expanded, so did the needs of the municipal offices, and additional space had to be rented in one of the top floor of the neighbouring department store, Rowe & Co. In 1903, the municipality purchased the land behind Rippon Hall to build an extension but it later became apparent that an entirely new building was needed: the original hall was condemned by the Health Department for being structurally unsound and overrun with "plague-infested" rats.

In 1930, the Municipal Committees held a design competition for which it set the oddly humble mandate of a building with "some pretensions to architectural beauty". Over 30 entries were assessed by Henry Seton-Morris, then Consulting Architect to the Government of Burma.

U Tin had made a name for himself through his elegant design for the popular Burmese Pavilion at the Wembley Exhibition held in London in 1924. Having worked in the Public Works Department and been apprenticed to an engineering firm in Mumbai, he would later be remembered as one of Myanmar's first Architects. The end result of his design for City Hall took on palatial form, featuring three-tiered pyatthat roofing and traditional Myanmar iconography such as peacocks and nagas.

This building has remained in use as the City Hall until the present day. During the 1950s, it was the city's largest auditorium and hosted weddings, concerts, and other ceremonies. In the 1970s, the National Library was housed there on the second floor.

The structure of the building is four storeys in total. The building has a length of 396 ft and width 260 ft. The flooring area on ground floor is 65,640 square feet, the first floor, 67,550 square feet, the second floor is 58,020 square feet and the third floor is 40,500 square feet. The car parking is located in front of the building. In the middle of the building there is a wide space which stands like a small park.

The building is occupied by the city's current municipal authorities, the Yangon City Development Committee. The building's exterior was for

many years a creamy tangerine colour that became stained with dark patches of mildew. In Mid-2011, it was repainted strikingly luminous lilac with a purple finish.

At the back entrance it is still possible to see the original insignia on the iron gates, which reads Municipal Corporation of Rangoon. Though local architects appreciate the building's historic significance, its architectural contribution is debatable: "it's an iconic building for us in Yangon, like the Eiffel Tower is to Paris," says architect U Sun Oo, Vice President of the Association of Myanmar Architects.

The Burmese additions were made after the basic plan had already been decided so there was no strong conceptual structure underpinning the design. In stylistic terms, it is certainly unique; I would call it 'Classical Revival', a recomposing of the old ornaments and components of Burmese palace and temple architect."

### **The Bogyoke Aung San Market**

According to historical records, the first municipal market was established in Botataung soon after the British took control of Yangon in 1852. However, compared to private markets such as Suratee Bazaar (now Theingyi Market) established in 1853 and Bogalay Market, the municipal market was not a success. In 1876, another municipal market was opened on Strand Road, between Shwebontha Street (formerly Moghul Street) and Shwedagon Pagoda Road (China Street).

If someone ask for the name of the most well-known market in Yangon, almost everyone would recommend Bogyoke Aung San market on Bogyoke road. Bogyoke Aung San market is not only an important marketplace for the city residents but also an attraction for international tourists.

In 1904, Rangoon Port Commissioners planned to extend their wharfs by linking up the Sule Pagoda wharf with the new wharf, which was being built on latta street (now latha street), but the plan was held up by a dispute with the Municipality about the plot of the market. After lengthy negotiations, an agreement was reached in 1920 that the site should be sold and the market

be relocated to Commissioner Road. The new site for the market was occupied by cinemas, theatres and an old tramway depot. The new market was built by well – known contractor A.C. Martin & Co.. Until the new market was completed, the Municipality continued to occupy the Strand site as tenants. In 1926, the new market named after Municipal Commissioner Gavin Scott was opened as Scott Market.

During the Japanese occupation, the market was renamed as Yan Naing Market after one of the Thirty Comrades, Bo Yan Naing. After independence, the name of the market was changed to Bogyoke Aung San Market to commemorate independence hero, General Aung San.

Facing the Bogyoke Aung San Market, there is the busy Shwe Bon Thar Street (formerly known as the Mongul Street), where most of Yangon's popular clinics are located. Next to the Bogyoke Aung San Market, there is the 9-storey FMI building. Some shops and some offices are located in that building. Then you can find the Grand Meeyahtar Housing, which is a nice place to stay in downtown Yangon. The Sule Shangrila Hotel is nearby the market at the corner of Bogyoke Aung San Road and Sule Pagoda Road.

The Bogyoke Aung San Market building is about two storeys which is made up of a length of 588 ft and width of 544 ft. There are two RC buildings, three depots with two and half storeys, four depots with two storeys and twelve one storey depots.

There are 1840 shops selling luxury items, handicrafts, foodstuffs, clothing, jewellery, souvenir shops, fashion and consumer goods. The market forms a square type base and therefore divided into the East wing, West wing, North wing and South wing. The shopping items are not categorized in the respective wings. Looking around and finding the most suitable item is fun. There are also traditional, Myanmar and Chinese food stalls in the market.

Bogyoke Market is one of the largest bazaars in Yangon. The market features colonial architecture and is the most popular attraction for tourists. It is famous for its colonial architecture and inner cobblestone. It offers a great variety of jewellery shops, antiques, handicrafts and clothing boutiques. It is also a place where locals come often, as they sell medicine, garments and all

kinds of food. According to the annual report of Bogyoke market, it is a significant contributor to the national economy.

### **Conclusion, Findings and Suggestions**

Yangon can boast of one of the world's most spectacular and distinct cityscapes with a wide variety of architectural styles and historical periods. This heritage is lived in and used by a diverse range of evolving and dynamic communities. Today, this significant cultural and built heritage is at risk of being lost as a new wave of development takes its toll.

Hundreds of historical buildings had been demolished over the previous two decades; primarily the result of unregulated development and many people feared that intensified development would threaten what remained. The country's recent political reforms provide a new opportunity to protect Yangon's urban heritage before it is too late.

In Yangon, Myanmar, there is a huge drive for modernization. In many Asian cities, and throughout the world, we have seen urban landscapes transformed, often at the expense of their building traditions and picturesque pasts. At present, the government has supported improvement of Tourism Industry Sector whose objectives could not be fulfilled effectively. Not only government support but also other organizations and institutions are required to cooperate in this area for future development.

The preservation activities are done collaboratively by YCDC, YHT and private companies'. The Yangon Heritage Trust (YHT) is a local NGO that was founded in 2012 amidst a wave of changes sweeping Myanmar. The Heritage of Yangon is not simply its well known colonial buildings. Rather it is the dynamic environment of both people and places that comprise the lively streetscapes, close-knit neighborhoods, and iconic views of its historic downtown area.

Yangon is at a tipping point. This city can become one of the most livable and economically profitable cities in Southeast Asia through the well planned combination of modern development and heritage conservation.

Currently the City Hall Building is used for government Offices under YCDC. It is obvious that it is one of the limitations to the preserving work.



Entrance to the building generally is only allowed to Government staff and local people concerned to do business with these departments, but entrance of foreigners/tourists is not allowed. So, removal of these departments in this building to other suitable place(s) need to be considered for maintaining and preserving heritage colonial buildings. In addition, this building should be promoted as one of the destinations just like the Colosseum in Rome, Italy. The YCDC instructed all staff to follow rules and regulations, for example, restriction of smoking in this area, protection of unnecessary heavy movements and noise pollution. Since, it had been built in 1936 there was no significant changes in the structure and regular maintenance was not in evidence.

Currently, Bogyoke Aung Market is one of the largest bazaars in Yangon. The market features colonial architecture and is the most popular attraction for tourists. It is famous for its colonial architecture and inner cobblestone pathways. It offers a great variety of jewellery shops, antiques, handicrafts and clothing boutiques. It is also a place where locals come often, to buy medicine, garments and all kinds of food sold here. Bogyoke Market looks strong enough to with stand natural disaster such as earthquake and even storms such as the cyclone Nergis. Preservation work has been carried out annually that is painting and minor repairs as required. Moreover, earthquake resistance measures by YCDC is underway.

The current heritage monument list of Yangon is based on the traditional concept of heritage conservation with emphasis on single monuments or buildings of a architectural or historical importance. Meanwhile, modern scientific concepts worldwide additionally knowledge the importance of private, community-oriented and public sites and ensembles of cultural, socio-economic or architectural importance such as traditional markets like Bogyoke Aung San Market , significant pre and post independence private downtown ensembles are ethnic clan houses, traditional shop-houses and restaurants, zayats and dhamma halls, storage buildings and jetties on the river bank. They make up the unique, authentic character of Yangon embedded in local communities and contribute to social cohesion and they are at stake. The time is ripe to set up a culturally adapted concept of

heritage conservation under transformation conditions, which emphasizes people, communities, identity, activities and daily culture.

Honestly, these will be overcome by cooperation and coordination with the people, organizations, institutions concerned and hopefully this will support in preserving Heritage Colonial Buildings properly.

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### **References**

#### **Books**

1. Falconer, John; Luca Invernizzi Tettoni (2000). *Burmese design and architecture*. Tuttle Publishing. p. 78. ISBN 9789625938820.
2. Sarah Rooney, 2012 “ *30 Heritage Buildings of Yangon* ” , published in association with the Association of Myanmar Architects,.

#### **Journals**

- "Heritage listing for 16 Yangon Div. pagodas". 7-Day News (in Myanmar). 18-02-2010.
- "Third Regional EST Forum: Presentation of Myanmar" (PDF). *Singapore: Ministry of Transport, Myanmar*. 17–19 March 2008.
- "Burma's new capital stages parade". *BBC News*. 27 March 2006. Retrieved 3 August, 2006.

**Magazine**

Yangon City Development Committee annual magazine 2010.

**Reports**

Census Report. *"The 2014 Myanmar Population and Housing Census 2"*. Naypyitaw: Ministry of Immigration and Population. May 2015. p. 31.

Report of an International Conference *"Building the Future: The Role of Heritage in the Sustainable Development of Yangon"* held in Yangon, Myanmar, January 15-17, 2015.

*"Special Reports: Heritage List"*. The Myanmar Times. 29-10-2001.

## **ANALYSIS ON LAWS RELATING TO FRANCHISE BUSINESS IN MYANMAR\***

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### **Abstract**

The research proposes to analyse legal protection and the ways how to develop franchise businesses in Myanmar and how to overcome the legal barriers to be effective these businesses in Myanmar. Franchising is the practice of using brand name of another firm and business strategies. The need for developing franchise business as a strategy to promote SME sector is to reform and enact the laws relating to franchise business. Franchising can support not only small and medium-sized enterprises (SMEs) sector but also foreign and local investments. In order to develop franchising in Myanmar, there are many barriers to overcome. This research will contribute to addressing the weakness of legal protection and enforcement, to proposing to the policy makers and legal expertise to consider franchising as a strategy for economic development of Myanmar, and educating the entrepreneurs to be qualified to compete with foreign entrepreneurs. Thus, the research is conducted by applying analytical method and qualitative method.

**Keywords:** Franchise business, franchising, franchisors, franchisees, foreign investment, franchise agreement, franchising law, intellectual property law, trade secret and trademarks, consumer protection and competition law

### **Introduction**

To enter foreign markets as one of the former biggest challenges has now released. Most countries have welcomed foreign investment to their countries. Improvements in infrastructure all over the world have made more feasible products and transporting goods. In that case, it needs to take into account external risks and internal parameters to comprehend its market strategies, basic competencies, and financial implications.

Franchising is a system to expand business and distribute goods and services, and also an opportunity for operating a business under a branded or trade name. The beginning of franchise business was originated in the 18th

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Century when Benjamin Franklin and Thomas Whitmarsh introduced the first franchise. However, the widespread use of franchise strategies commenced in the United States around 1850 when Singer Sewing Machines planned to sell its products throughout the United States.

“At the time, the “franchising” element (Product and Brand) consisted only of the right to use the brand name at the store and sell the product. Then General Motors and Coca-Cola began to use the franchising concept to expand the markets to which they could sell their products. The largest expansion of franchising occurred in the late 1940’s at the end of World War II. In the 1950’s, major fast food chains like Burger King, McDonald’s and Dunkin Donuts began to appear. By the 1960’s onward, these and other American fast food chains began their expansion into international markets.”<sup>1</sup>

In franchise system, the partners, franchisors and franchisees, are interdependent on each other and on one’s purposes and performance to achieve their same aims. In addition, a successful franchise provides benefits not only to the franchisees and franchisors but also to the customers. As it can provide know-how and employment, it is an alternative way to enhance the small and medium-sized enterprises (SMEs) sector of a country and to flow foreign investment in a country.

Internationally, franchising is a successful model and very popular in developed countries and some ASEAN countries such as Malaysia, Indonesia, Singapore, Thailand and Vietnam. Although franchising is one of the prospective ways to help drive economic development of a country, it possesses advantages and disadvantages on franchisors and franchisees.

In addition, there are three types of franchising. They are product distribution franchise, business format franchise and management franchise. Most of the famous and successful franchise businesses are based on business format franchise and product distribution franchise.

In some countries, like Finland and Germany, franchising is viewed as an entrepreneurial activity. Some literatures mentioned that franchising has

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<sup>1</sup> Olafemi Ayopo Olotu, Reinventing Business Growth through Franchising in Developing Economies: A Study of the Nigerian Fast Food Sector, *International Journal of Marketing Studies*, Vol. 3, No. 1; February 2011, p. 164.

many characteristics overlapping with the small and medium-sized enterprises policy programme.

In Myanmar, there are some franchise businesses although franchising is still in its infancy level and starting to boom rapidly. Foreign investors can take advantage by doing franchise businesses in Myanmar taking help from local entrepreneurs as franchisees and there is lower risk than doing their owned businesses or investments. However, there are many barriers such as political instability, lack of efficient banking system, lack of specific economic policy, and poor legal protection and enforcement.

As a result, the government should pass the effective Intellectual Property Law that plays the major important role to induce the franchise business and foreign investment as well as practice robust enforcement. Hence, local entrepreneurs should be educated to do franchise businesses to expand and start their businesses, and be qualified to compete with foreign entrepreneurs as well as legal institutions should be reformed.

### **Research Method of the Study**

Analytical method and qualitative method are used to conduct the research. The study intends to introduce the modern business system and to contribute to the Myanmar entrepreneurs for doing franchise business by enhancing economic development. Thus, the comparative case study on Thailand and Vietnam is necessary to point out how their franchise systems work and how local laws are provided. The primary data for the study is collected by surveying some local franchisees, and secondary data is collected from legal journals, articles, literature books and some reliable online sources.

### **Problem Statement**

Developing countries should take into account the importance of franchising for their economic development.<sup>2</sup> During Myanmar's economic

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<sup>2</sup> Guriqbal Singh Jaiya, The Importance of Intellectual Property for the Competitiveness of SMEs, 2003.  
([http://www.wipo.int/edocs/mdocs/sme/en/wipo\\_bak\\_03/wipo\\_ip\\_bak\\_03\\_www\\_34145.pdf](http://www.wipo.int/edocs/mdocs/sme/en/wipo_bak_03/wipo_ip_bak_03_www_34145.pdf).)

transaction, priority must be given to removing economic controls, encouraging foreign and local investment and exports, removing structural impediments to entrepreneurship, encouraging and facilitating the use of technology, improving and producing skilled labour through education and training, providing all forms of access to credit, and improving the country's infrastructure. More areas of the economy should be opened to the private sector along with improved regulations, laws and policies for businesses.

By franchising, the franchisee needs little time to establish the brand and does not need to worry about managing the shop because the franchisors support training to the franchisees and staff. This is one of the advantages of franchising. For example, if a person has enough money to run a food shop but does not have experience in it, he can franchise a brand from an established one.

At this moment franchising system cannot be separated of small and medium-sized companies. That is why small and medium-sized companies through the franchising system are essential components of economic development. Nowadays the government should take into account franchise businesses in promoting the SMEs development and investment flows in Myanmar.

To increase the number of franchise businesses, there are many barriers. One of the major barriers is laws and regulations. It is essential to evaluate the maturity of the legal protection because franchise businesses are based on principal and agent relationship and lack of legal protection can lead to a lack of trust and free riding problems. Additionally, comparativeness of market system is also one of the barriers to develop franchising system in Myanmar.

Thus, the government should enact separate Franchising Law. Even though franchising law cannot be provided in Myanmar, some existing laws relating to franchising are already available but just need to be applied effectively and efficiently. If these needs are fulfilled, Myanmar would be an easier place to build a franchise business domestically and internationally. At present, Myanmar is receiving a lot of attention from the international community. As economic opportunities increase, some foreign investors will be interested in doing franchise businesses to invest in the country.

## **Franchising Laws: Thailand, Vietnam and Myanmar**

### **The Role of Domestic Laws relating to Franchising in Thailand**

In Thailand, there is no specific provision for franchise operations in Thailand. However, this does not mean that franchise relationships are wholly uncontrolled. The Ministry of Commerce regularly announces plans to commence drafting regulations. Legal franchising issues are dealt with under civil and commercial laws. Nevertheless, the most recent draft of new franchise legislation defines a franchise as: “the operation of a business in which one party called a franchisor agrees to let the other party, the franchisee, use its intellectual property rights, or to use its rights to operate a business during a specified time or in a specified area, such operation being under the direction of the franchisor’s business plan, and the franchisee having a duty to reimburse the franchisor.”<sup>3</sup>

“Thailand is generally a "freedom of contract" jurisdiction where judges rarely attempt to look beyond the specific terms of a mutually agreed written contract to determine the intent of the parties at the time of agreement. However, there are mandatory provisions in franchise agreements such as quality control provisions and written grants of trade mark usage rights.”<sup>4</sup>

Drafting a franchise agreement will cover consideration of the Civil and Commercial Code, the Trade Competition Act (1999), the Unfair Contract Terms Act (1997), the Trademark Act (1991), as amended by the Trademark Act (No 2) (2000) and the Trademark Act (No 3) (2016), the Copyright Act (1994) as amended by the Copyright Act (No 2 and 3) (2015), the Patent Act (1979) as amended by the Patent Act (1992) and Patent Act (1999), Product Liability Act (2008), the Foreign Business Act (1999), the Trade Secret Act (2002), the Direct Selling Act and the Revenue Code (2002) and the Act Relating to Price of Merchandise and Service (1999).

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<sup>3</sup> Thom Thi Mai Nguyen and Huong Thi Thanh Nguyen, Tilleke & Gibbins, “Vietnam”, Franchise in 33 jurisdictions worldwide, Philip F Zeldman, Getting the Deal Through Franchise, 2013, p. 227.

<sup>4</sup> Alan Adcock, Tilleke & Gibbins, Franchising in Thailand: overview, 2016. (<http://www.uk.practicallaw.thomsonreuters.com/franchising-guide>)



Ministerial regulations that execute and supplement these Acts are also helpful to the courts in handling franchising disputes. However, after the franchisor and the franchisee finalize terms in a franchise agreement and commence executing those terms, Thai courts will generally defer to the contract's terms, unless doing so would violate law or public policy. Thai courts have great discretionary power in determining whether contract terms unreasonably restrict the right of (or excessively create a burden on) a contracting party under Section 5, Unfair Contract Terms Act (UCTA).<sup>5</sup>

Franchise agreement could be interpreted as “agent – principal relationship”. Thai Civil and Commercial Code provisions require that if the agent, in the course of their appointment, commits any wrongful act to another party, the principal will be solely responsible or jointly liable. To avoid misinterpretation of the franchisor-franchisee relationship as an agent-principal relationship, an explicit statement must be made in the franchise agreement that the relationship arising from the agreement could not by any means be interpreted as an agent-principal relationship.<sup>6</sup>

If a franchisee does not meet the satisfaction of the provisions of the agreement, he or she should not be permitted to close its unit without jurisdiction and then to reopen under a different name and compete against the former franchisor with the know-how obtained through experience to the franchise system.

It is required to define the scope of confidential information. Without a clear meaning, there is a risk that valuable information will enter the public domain.

Under the Foreign Business Act, “a foreign owned company or a company where majority ownership belongs to foreigners is permitted to carry out franchising business activities only after obtaining applicable foreign business licenses from the Thai Ministry of Commerce (MOC)”.

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<sup>5</sup> Alan Adcock, Tilleke & Gibbins, Franchising in Thailand: overview, 2016.  
(<http://www.uk.practicallaw.thomsonreuters.com/franchising-guide>)

<sup>6</sup> Chanvitaya Suvarnapunya and Pattama Jarupunphol, Getting the Deal through Franchise 2018, Law Business Research Ltd, 2017, pp. 150-153.  
([http://www.franchise.org/sites/default/files/F2018 Thailand.pdf](http://www.franchise.org/sites/default/files/F2018%20Thailand.pdf).)

In addition, intellectual property rights play the major role of a franchise agreement and have to be clearly defined in the agreement. After defining these rights, the parties to the agreement have to determine the enforceability of such rights, especially to make clearly who is entitled to take actions against third-party infringers. An unclear practical problem that arises with a Franchising Agreement is whether such an agreement may be registered with Department of Intellectual Property (DIP) or not. Regarding this issue, there are no clear court decisions. Trademark and its licensing agreements should also be registered with the DIP to be prevented from copying or imitation by civil or criminal proceedings. When a franchise agreement is terminated, a franchisor may discover that the franchisee has filed similar trademarks that may compete with his or her marks. Thus, a correct understanding of the scope of the intellectual property rights is essential.<sup>7</sup>

In order to protect trademarks and know-how, “the Thai Trademark Act imposes civil and criminal penalties on those who infringe the rights of the trademark owner. The licensing of a trademark must be made in the form of a written licensing agreement registered with the Thai authorities. Know-how is protected under the Trade Secret Act of 2002”.<sup>8</sup>

“In Thai courts, there are two opposing points of view. Some judges consider the trademark licence agreement to be inseparable from the franchising relationship. In this case, if the franchise agreement (including the trademark licence) is not registered, the agreement is void. However, other judges consider the trademark licence agreement as part of the franchise agreement.”<sup>9</sup> “Moreover, if the provisions regarding trademark use are not registered, they will be void, but the franchise agreement will survive. Generally, franchisors will enter into a separate short form trademark licence agreement with the franchisee and register that agreement with the

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<sup>7</sup> Stephen Frost and Teerakarn Noichiaum, Bangkok International Associates, “Franchising in Thailand – Seventh heaven or something else!”, 2012, p.1.

<sup>8</sup> Chanvitaya Suvarnapunya and Pattama Jarupunphol, Getting the Deal through Franchise 2016, Law Business Research Ltd, 2015, p. 136.  
([http://www.franchise.org/sites/default/files/F2016 Thailand.pdf](http://www.franchise.org/sites/default/files/F2016%20Thailand.pdf).)

<sup>9</sup> Alan Adcock, Tilleke & Gibbins, Franchising in Thailand: overview, 2016.  
(<http://www.uk.practicallaw.thomsonreuters.com/franchising-guide>)

Department of Intellectual Property. Thailand does not currently have any specific legislation regulating franchise agreements. Therefore there are no franchise disclosure requirements, governmental approval requirements, or registration or other filing requirements.”<sup>10</sup>

Therefore, in order to develop franchise businesses, legal provisions and effective legal enforcement are very important. In this case, Thailand has other effective provisions for franchise operations although there are no specific provisions for franchising. To make a clear and binding franchise agreement, additionally, Intellectual Property Law plays a major role. It is suggested to disclose information on both parties to the agreement, so as not to take any advantage like free riding of franchisee and to build trust between the parties although there is no certain disclosure law for franchising.

In conclusion, to grow and expand in Thailand for foreign goods and services as well as Thai goods and services in overseas markets, franchising model could maintain its growth with sufficient government plans dealing with intellectual property rights, tax, disclosure and termination of agreement.

### **The Role of Domestic Laws relating to Franchising in Vietnam**

Vietnam has emerged as one of the most attractive countries in Asia for franchisors seeking to expand their business. Franchising was not legally recognized until 2005 but franchising activities have steadily increased since the adoption of the Commercial Law in 2005, which, for the first time, provided a legal framework for franchising. The Vietnamese market has become even more enticing since the country joined the World Trade Organization in 2007.<sup>11</sup>

Till 2005, Vietnamese law did not provide a clear basis for franchising arrangements, but the passage of Decree No. 35 and Circular No. 09 in 2006 laid the basis for franchising to develop in Vietnam. The new decree provides for key concepts in franchising, requirements of franchise agreements and State administration of franchises.<sup>12</sup> The relevant requirements of these laws

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<sup>10</sup> Ibid

<sup>11</sup> <http://www.wileyrein.com/practices-Franchise.html#InternationalSeries>

<sup>12</sup> Doing Business in Vietnam: 2013 Country Commercial Guide for U.S. Companies, International Copyright, U.S. & Foreign Commercial Service and U.S. Department of State, 2013.

include conditions for franchising, franchise agreement, franchise disclosure documents, and registration requirements for franchise activities.<sup>13</sup>

“The legal definition of a franchise refers to a commercial activity whereby a franchisor authorizes and requires a franchisee to conduct on its own behalf the purchase and sale of goods or provision of services. In accordance with this activity, the purchase and sale of goods or the provision of services must be conducted according to the method of business organization specified by the franchisor, and must be associated with the trademark, trade name, business know how, business mission statements, business logo and advertising of the franchisor, and finally, the franchisor has the right to control and offer assistance to the franchisee in the conduct of the business.”<sup>14</sup> “The Commercial Law defines franchising as a commercial arrangement under which a party grants another party the right to carry out the business of selling its goods or supplying services under the following conditions:

- (i) The franchisee may carry out the business under a format determined by the franchisor, and may affix the franchisor’s trademarks, trade names, business logos, slogans, and advertisements at the franchisee’s business premises; and
- (ii) The franchisor has the right to control and assist the franchisee in carrying out the franchised business.”<sup>15</sup>

In order to satisfy Vietnamese law, a franchise agreement should include: (1) details of franchise rights; (2) the rights and obligations of the franchisor; (3) the rights and obligations of the franchisee; (4) the franchise price, periodic franchise fee, and method of payment; (5) the term of the franchise agreement; and (6) renewal, termination, and dispute resolution

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([http://export.gov/vietnam/build/groups/public/@eg\\_vn/documents/webcontent/eg\\_vn\\_063160.pdf](http://export.gov/vietnam/build/groups/public/@eg_vn/documents/webcontent/eg_vn_063160.pdf))

<sup>13</sup> Thomas J. Treutler and Nguyen Thi Thuy Dung, Tilleke & Gibbins, “International Franchising: Vietnam”, Juris Publishing, 2013, p.8

<sup>14</sup> Thom Thi Mai Nguyen and Huong Thi Thanh Nguyen, Tilleke & Gibbins, “Vietnam”, Franchise in 33 jurisdictions worldwide, Philip F Zeldman, Getting the Deal Through Franchise, 2013, p. 227.

<sup>15</sup> Russin & Vecchi, International Legal Counsellors, “Legal Framework for Franchising in Vietnam”, 2013, p.3.

procedures. The licensing of industrial property or intellectual property rights may be dealt with in a separate agreement and is governed by the Law on Intellectual Property.<sup>16</sup>

Under these laws, franchisors are subject to certain conditions, including: “either a franchisor or a sub-franchisor must have been in operation at least one year; the franchised goods or services must not be prohibited from sale or supply and must be within the business lines registered with the authorities; and the franchising activity must have been registered with the competent authority”.<sup>17</sup> Moreover, “the document for franchise disclosure is legally known as the “franchise description document (FDD) under these laws. The basic terms and conditions of the franchise agreement are also requested to be disclosed”.<sup>18</sup>

As a prerequisite to franchising in Vietnam, the foreign franchisor should register a trade mark in Vietnam; otherwise, it will not have enforceable trade mark rights in the jurisdiction. If the trademark license agreement is not registered, it cannot be enforced against third-party infringers, although it can still be enforced amongst the parties to the trade mark license agreements. Only trademarks registered in Vietnam can be licensed in Vietnam. In theory, if the franchisor has not registered any intellectual property, it may not be able to engage in franchising in Vietnam. Yet unregistered trademarks may be protected if they are considered “well-known” in the jurisdiction.<sup>19</sup>

As a civil law system, Vietnam does not have the ‘good faith’ concept. Alternatively, the Civil Code of Vietnam provides principles for the establishment of a civil relationship, covering franchise relationships. These principles comprise, among others, the principle of free undertaking and

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<sup>16</sup> <http://www.wileyrein.com/practices-Franchise.html#InternationalSeries>

<sup>17</sup> Thom Thi Mai Nguyen and Huong Thi Thanh Nguyen, Tilleke & Gibbins, “Vietnam”, Franchise in 33 jurisdictions worldwide, Philip F Zeldman, Getting the Deal Through Franchise, 2013, p. 227.

<sup>18</sup> Ibid, p. 227.

<sup>19</sup> Thomas J. Treutler and Nguyen Thi Thuy Dung, Tilleke & Gibbins, “International Franchising: Vietnam”, Juris Publishing, 2013, p. 14.

agreement, the principle of equality, the principle of goodwill and honesty, and the principle of respect for good morals and traditions.<sup>20</sup>

However, business culture in Vietnam is traditionally based on trust and relationships, and many small businesses still rarely consider legal implications of their conduct. Therefore the requirement of disclosure seems to offer little assistance to small businesses, but imposes great costs on the franchisor to produce such documents and deliver them to the franchisee.<sup>21</sup>

Vietnam's legal framework encourages the development of commercial activities, including franchising. There is intense local interest among both large and small entrepreneurs to be a franchisee of an international franchisor. The legal framework for franchising is all but complete. With the World Trade Organization (WTO) now in place and with interest in franchising growing both within and outside of Vietnam, it seems that conditions are right for franchising to flourish.<sup>22</sup>

Vietnam's government recognizes franchising as a good opportunity for foreign businesses to introduce their brands to the Vietnamese market, as it is a favorable avenue for small and medium sized Vietnamese entrepreneurs to embark on new ventures and with lower capital investment. With the passage of several franchise laws and decrees, franchising businesses have become more widespread in recent years, with a number of foreign and domestic franchise brands operating in the market. Among laws relating to franchising, intellectual property law plays a very important role.

### **Overview of Franchising in Myanmar**

Franchising can be a good solution when there is a need to grow private owned enterprises or small and medium-sized enterprises within a short time. In addition, it is making easy to expand their franchise businesses.

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<sup>20</sup> Thom Thi Mai Nguyen and Huong Thi Thanh Nguyen, Tilleke & Gibbins, "Vietnam", *Franchise in 33 jurisdictions worldwide*, Philip F Zeldman, Getting the Deal Through Franchise, 2013, pp. 228-229.

<sup>21</sup> Thomas J. Treutler and Nguyen Thi Thuy Dung, Tilleke & Gibbins, "International Franchising: Vietnam", Juris Publishing, 2013, p.7.

<sup>22</sup> Russin & Vecchi, *International Legal Counsellors*, "Legal Framework for Franchising in Vietnam", 2013, p.7.

Franchise businesses would promote Myanmar economic development. Additionally with the legislation opening Myanmar to foreign investment, franchise businesses will assume a greater role in the overall economy.

Since 1990s, foreign and local franchise businesses had been started in Myanmar. But it did not long last. In addition, most of the foreign companies withdrew from Myanmar with many reasons in the late 1990s. Although Myanmar Foreign Investment Law 1988 (the old one) had already passed earlier than some ASEAN countries, Myanmar foreign investment left behind.

One of the foreign franchisors in Myanmar, Pepsi Cola, decided to enter as a joint venture with Myanmar Golden Star Co. in 1991. It was a product distribution franchise. In 1997 Pepsi Cola was withdrawn by U.S government because of U.S sanctions on Myanmar for abusing of human rights.<sup>23</sup> Therefore, in this case, to do a franchise business in Myanmar political stability and legal protection with strong enforcement are important.

Although franchising was not popular in Myanmar, business systems like franchising were introduced in Mandalay in the 1940's. The notable one is "Mandalay Meeshay (noodle salad)", fast food.<sup>24</sup> However, nobody in Myanmar recognized it as a franchise business (Business Format Franchise).

In recent times, there are some foreign franchisors such as CP, Lotteria, KFC, Marry Brown, B.B.Q Chicken and Chewy Junior, Ya Kun Coffee and Toast, MGOU, Pingu's English Myanmar, Eton House International Pre-School, Yangon as well as local franchisors like MCC computer training centre (Myanmar Computer Co. Ltd – education services), KMD Computer Group, Miami Grill and so on.

In case of MCC computer training Centre, it has specific franchise enquiry form to apply to be a franchisee. It is a service franchise and the franchisor provides the lecture notes, and other Intellectual things. In such a case, Myanmar needs to pass Intellectual property law to protect franchisors from infringing their intellectual property rights and free riding from them.

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<sup>23</sup> [http://www.irrawaddy.org/research\\_show.php?art\\_id=457](http://www.irrawaddy.org/research_show.php?art_id=457) (13/09/2013)

<sup>24</sup> Interview with Grandson of the Mandalay Meeshay owner, U Chit Myoe. Mandalay, 13/10/2013.

In addition, Franchising is also a way of foreign companies to enter the local market. In order to increase FDI inflows in Myanmar, the government has already passed the new investment law. Yet FDI inflows have remained very poor and the economic outlook for Myanmar does not look very promising when compared to other countries in the region and members of the Association of Southeast Asian Nation (ASEAN) in which Myanmar became a member in 1997. Therefore, the government need to focus on the foreign investors and local investors or entrepreneurs to do franchise businesses as a better solution.

This study analyzes advantages and disadvantages of private owned enterprises and franchise businesses. The following table shows the result of analysis.

<b>Private owned Enterprise</b>	<b>Franchise Business</b>
High risk	Low risk
Independent	Not totally independent, but interdependent
No Free riding	Free riding
Less job creation	More job creation
No need to have Trust	Need to have trust
No need to have incentives	Need to have incentives
Large amount of Capital (High Start-up cost)	Rational Capital or less Capital (Low Start-up cost)
Need more time to start up	Need short time to start up

### **Franchising Model and SMEs development in Myanmar**

SMEs are important for the structural change of a country from being agriculture based to industrial and service-oriented. Moreover, Myanmar SME sector is still weak. The barriers or issues are difficulties to access financing, lack of knowledge and environmental awareness, failure to adopt technology, poor infrastructure, increasing global and regional competitiveness and unskilful labour. To solve these issues, franchising is the most important options for Myanmar.

Franchising is not banned by Myanmar law, but there are not many franchise businesses in Myanmar. After 2010, although some foreign



franchisors have started their business with local franchisees in Myanmar, the franchising model is not much familiar with local entrepreneurs to expand their businesses domestically and internationally. Only a few small local companies operate local franchises, although there is strong interest among local business people in franchising opportunities.

This study argues that franchising model can promote SMEs development in Myanmar. Features of franchising adjoin to the SME Policy. Franchising model can create employment by training and educating the labours, create entrepreneurial opportunities for women in particular, create efficiency and competition, lower the threshold to entrepreneurship, and be a form of internationalization.<sup>25</sup>

Therefore, Myanmar also needs to set up franchise market in Myanmar, not only for foreign franchise businesses but also for local franchise businesses to develop SMEs sector that plays very important role of economic development in a country. In addition, franchise business can grow faster than private owned business.

### **The Role of Domestic Laws relating to Franchising in Myanmar**

Among the barriers, one of the barriers to develop franchise business in Myanmar is lack of legal provisions and protection. In Myanmar, there is no specific legislation dealing with franchising. For franchising agreement or contract, only Myanmar Contract Act is applied. In addition, weak of arbitral awards is one of the issues for foreign franchisors to do businesses with local franchisees. Trusteeship between franchisor-franchisee is very important. To get long term relationship between these two parties, maturity of legal enforcement of a country is a major element.

There are no specific provisions for intellectual property law in Myanmar yet. Although Copyright Law has been enacted in Myanmar since 1914, it is poorly enforced. In case of trademark protection, trademark can be registered but issues related with early use of mark and registered mark still

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<sup>25</sup>Gerard Cliquet, George Hendrikse, Mika Tuunanen, Josef Windsperger (Editors), "Economics and Management of Networks, Franchising, Strategic Alliances, and Cooperatives", Physica-Verlag, A Springer Company, 2007, p. 226.

exist. Intellectual Property Law is essential for franchise business. There are some laws which are relating to Franchise business although there is no specific franchising law. Generally they are Investment Law 2016, Arbitration Law 2016, Competition Law 2015, Consumer Protection Law 2014, Export and Import Law 2012, Foreign Exchange Management Law 2012, Law of Taxation and Myanmar Companies Act 1914.

The intellectual property rights that are licensed in a franchising arrangement almost always include trademarks and copyright, and often include trade secrets, industrial designs and patents depending on the nature of the business.<sup>26</sup> Although Myanmar has only drafts on Intellectual Property Law, there are some provisions relating to the intellectual property rights under the Myanmar Investment Law 2016. Regarding to investment, intellectual property rights under any laws, including technical knowhow, patent, industrial designs, and trademarks are included under Section 40 (d) of the Myanmar Investment Law 2016. In franchising model, intellectual property law plays an important role. The reason is that franchisors have to allow using their trademarks, trade secret and technical know-how to the franchisees by mutual agreement on franchise contracts as well as disclosure documents.

By Section 56 (b) of the Myanmar Investment Law, “Foreign investors may transfer the following funds abroad relating to the investments made under this Law: proceeds, profits from the asset, dividends, royalties, patent fees, license fees, technical assistance and management fees, shares and other current income resulting from any investment under this Law”. Royalty fees and patent fees are essential in doing franchise business. Therefore, there is no specific provision for franchising but some are relating with this model. In addition, although there is no Intellectual Property Law, some provisions relating to intellectual property rights are included in Myanmar Investment Law.

Under Section 59 of the Myanmar Investment Law, “Any transfer of funds shall be allowed only after paying all tax obligations imposed on the amount to be transferred in accordance with the stipulated tax laws.” As

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<sup>26</sup> WIPO, In Good Company Managing Intellectual Property Issues in Franchising, 2012, p.8.

franchising is a type of business, it has to pay tax. Most of the franchisors are from foreign countries so that they need to pay the tax under Myanmar Investment Law.

Including arbitration clauses in franchise agreements is increasingly common these days. With the enactment of the Arbitration Law 2016, foreign arbitral awards are now enforceable in Myanmar in accordance with the country's obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards under Sections 45 and 46 of the above Law.<sup>27</sup>

Section 13, 15, 16, 17, 18, 19, 23, 25, 29 of the Myanmar Competition Law 2015 are also relating with franchise business to some extent.

According to Section 13 (f) of the Myanmar Competition Law 2015, any person shall not carry out the act of restraining or controlling on production, market acquisition, technology and development of technology and investment which cause act of restraint on competition. According to the nature of franchising model, as franchisors can control the franchisees and they are interdependent, but they are bound by franchising agreements as well as disclosure agreement, franchisors has authority to control fairly to some extent under the agreement. However, there is no provision of unfair contract terms in Myanmar. Therefore, some agreements can be unconscionable ones from the side of franchisors and franchisees need to consider carefully before concluding the franchising agreement.

Section 10 of the Consumer Protection Law 2014 states the conditions with which the entrepreneur shall, in selling and buying, not deceive or mislead the consumers. Regarding this provision, franchising businesses have to provide the safe products to the consumers.

Therefore, all classes of customers can enjoy the goods and services but another important thing is controlling quality and product safety. In this case, consumer protection law and competition law play the important roles.

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<sup>27</sup> Sher Hann Chua, *Franchising in Myanmar: Navigation the Local Requirements*, 2016. ([http:// www. 2016\\_IC\\_Nov\\_Franchising in Myanmar.pdf](http://www.2016_IC_Nov_Franchising_in_Myanmar.pdf))

Section 5 of the Export and Import Law 2012 provides that “No person shall export or import restricted, prohibited and banned goods.” Under Section 6 of the said law, without obtaining license, no person shall export or import the specified goods which is to obtain permission. Section 7 of the above said law states that “A person who obtained any license shall not violate the conditions contained in the license.”

Under the Section 4 Commercial Tax Law 1990, the tax shall be charged on the goods produced in the country, the services carried out in the country and the imported goods. In addition, Section 5 of the said Law, the tax due under section 4 shall be responsible to be paid by the relevant producer, service provider or importer. As most of franchisees in Myanmar are local franchisees, they need to pay tax on the imported goods.

Franchisors should sign non-disclosure agreements with potential franchisees prior to sharing their franchise disclosure documents. Section 27 of the Myanmar Contract Act 1872 appears to prohibit the inclusion of exclusivity and non-complete clauses in franchise agreements by stating that “every agreement by which any one is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void”.

Therefore, domestic laws relating to franchise business can be applied in Myanmar until the specific franchising law is enacted, the intellectual property law however should be enacted as soon as possible.

### **Findings**

Nowadays franchising in Myanmar is still in its infancy. In Myanmar there are local franchisors and franchisees as well as foreign franchisees. According to interviews with foreign franchisees, the common problem is choice of law in franchise contract as governing law. Most of them choose third country's law as the choice of law in contract, especially Singaporean law. The reason is that there is no intellectual property law in Myanmar and the foreign franchisors rely on Singaporean law with its strong protection and well-organized provisions and regulations. Another barrier is that exchange rate seems to be stable but shows considerable fluctuation. That is why local

franchisees have to face exchange rate problem. Most local franchisees are master franchisees who can allow sub-franchisees in territory of Myanmar.

For local franchisors, they are not willing to do franchise business because they do not want to share their small amount of profit. In addition, trust between the parties plays very important role in franchise business. To build trust, the role of legal enforcement should be strong and firm. From legal point of view, there is no transparency in Myanmar. In addition, there are no specific procedures for doing business. For instance, to register the business, some registered their businesses with their company's name, some with their trade name. Registration of franchise business is not practiced in Myanmar and just registered as normal business.

### **Recommendation**

Therefore, to develop franchising model in Myanmar, the government should reform the institutions especially legal institution, adopt the economic policy and enact Franchising Law, Intellectual Property Law and other laws relating to franchising, enhance tourism sector, control political stability, and maintain good international relations. Besides, like Vietnam and Thailand, Myanmar should have the strong enforcement and accountability by enforcing the existing laws.

### **Conclusion**

To summarize, although there are many barriers to develop economy in Myanmar as well as franchising model, the most important barrier is to reform legal institutions that plays an important role to develop franchising as well as economy in Myanmar. Nowadays, Government is trying to enact necessary laws to enhance economic sector. As franchising model can promote Myanmar economic by supporting SME sector, government needs to enact laws for franchise business, especially intellectual property law even if specific franchising law is not passed like Thailand. But like Vietnam, if Myanmar Government can promulgate specific franchising law, it will be very useful and effective in supporting development of franchise business. At that time, foreign franchise business in Myanmar will be easy to carry out as

Thailand and Vietnam without doubtless on legal enforcement and accountability.

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### **References:**

#### **Laws**

Arbitration Law 2016  
Investment Law 2016,  
Competition Law 2015  
Consumer Protection Law 2014  
Export and Import Law 2012  
Foreign Exchange Management Law 2012  
Commercial Tax Law 1990  
Myanmar Companies Act 1914  
Myanmar Contract Act 1872

#### **Books**

Inbar Pizanti and Miri Lerner, "Examining Control and Autonomy in the Franchisor-Franchisee Relationship", *International Small Business Journal*, 2003.

Thom Thi Mai Nguyen and Huong Thi Thanh Nguyen, Tilleke & Gibbins, "Vietnam", *Franchise in 33 jurisdictions worldwide*, Philip F Zeldman, *Getting the Deal Through Franchise*, 2013.

Thomas J. Treutler and Nguyen Thi Thuy Dung, Tilleke & Gibbins, "International Franchising: Vietnam", *Juris Publishing*, 2013.

Gerard Cliquet, George Hendrikse, Mika Tuunanen, Josef Windsperger (Editors), "Economics and Management of Networks, Franchising, Strategic Alliances, and Cooperatives", Physica-Verlag, A Springer Company, 2007.

Russin & Vecchi, International Legal Counsellors, "Legal Framework for Franchising in Vietnam", 2013.

Doing Business in Vietnam: 2013 Country Commercial Guide for U.S. Companies, International Copyright, U.S. & Foreign Commercial Service and U.S. Department of State, 2013.

USA, Doing Business and Investing in Vietnam Guide: Strategic and Practical Information, Volume, International Business Publications, Business & Economics, 2009.

WIPO, In Good Company Managing Intellectual Property Issues in Franchising, 2012.

### **Law Journals**

Ramon Diaz-Bernardo, IE Business School, Spain, "An Analysis Of Three Confronting Theories To Explain Franchising Supply", Journal of Business & Economics Research – March 2012 Volume 10, Number 3 © 2012 The Clute Institute.

Dean R. Manna, Alan D. Smith, David P. Synowka, Robert Morris University, "Exploring Agency Theory Implications With Franchising", Journal of Business & Economics Research – April 2006 Volume 4, Number 4.

Shelby D. Hut and John R. Nevin, "Trying Agreements in Franchising", Journal of Marketing, Vol. 39, No. 3 (Jul 1975).

International Journal of Marketing Studies, Vol. 3, No. 1; February 2011

### **Specific Online Sources**

Hui-Heng Chen, Department of Marketing, Fortune Institute of Technology, Kaohsiung Taiwan, "The Development of International Franchise Network", undated, ([www.jgbm.org/page/15](http://www.jgbm.org/page/15) Hui-Heng Chen.pdf)

U.S. Franchise Law Basics, see- <http://franchiselaw.net/startups/usfranchiselawbasics.html>, Accessed:15/10/2013.

<http://www.wileyrein.com/practices-Franchise.html#InternationalSeries>

Sher Hann Chua, Franchising in Myanmar: Navigation the Local Requirements, 2016. ([http://www.2016\\_IC\\_Nov\\_Franchising in Myanmar.pdf](http://www.2016_IC_Nov_Franchising_in_Myanmar.pdf))

[http://www.irrawaddy.org/research\\_show.php?art\\_id=457](http://www.irrawaddy.org/research_show.php?art_id=457) (13/09/2013)

[www.practicallaw.com/franchising-guide](http://www.practicallaw.com/franchising-guide)

[http://www.wipo.int/edocs/mdocs/sme/en/wipo\\_bak\\_03/wipo\\_ip\\_bak\\_03\\_www\\_34145.pdf](http://www.wipo.int/edocs/mdocs/sme/en/wipo_bak_03/wipo_ip_bak_03_www_34145.pdf).

<http://www.franchise.org/sites/default/files/F2018Thailand.pdf>.

<http://www.franchise.org/sites/default/files/F2016Thailand.pdf>.

## **STATES PRACTICES ON CORPORATE CRIMINAL LIABILITY: UK, AUSTRALIA, INDIA, MYANMAR**

Aye Mya Kyi<sup>\*</sup>

### **Abstract**

A corporation is a legal entity that the law treats as having its own legal personality. As a legal person, a corporation can engage in unlawful behavior and can be investigated by authorities, prosecuted and convicted of a criminal offence. Criminal liability needs to be imposed on a company for a crime its has committed. That is why most modern criminal law system foresee the possibility to hold the corporation criminally liable for the perpetration of criminal offences. Corporate criminal liability means the liability imposed upon the corporation for any criminal act done by an authorized person to act as the company or by its representative. Corporate criminal liability is not a universal feature of modern legal systems. The countries that do impose criminal liability of some kind on corporations adopt varying approaches to the form and scope of this liability. These country are UK, Australia, India etc.. In Myanmar, there is no explicit provision relation to criminal liability of corporation in Penal Code or other statutory provisions like any other countries. To handle these problems, the specific law or provisions in relation to corporate criminal liabilities should be established in the relevant laws.

**Key Words:** corporate, criminal liability, Penal Code, statutory provision.

### **Introduction**

A company is a type of corporation. In simple language, corporation means a group of individuals coming together to carry on a business .It is a creation of law, a business entity recognized by law. In fact, most corporations that are used to carry on business are referred to in some countries as companies, and in others as corporations.

A company or corporation is a legal person and that is why a company can hold property in its own name and enter into contracts in its own name. It can commence or defend legal proceeding in its own name.

But there is a problem in relation to it defending legal proceedings in its own name except in the case of civil proceedings .This is because a

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company being inanimate has no mind capable of entertaining criminal intent. Hence, it has no capacity to commit crime. Thus, the term “corporate crime” refers to a crime committed by a person authorized to act as the company or by its representative. Corporate criminal liability is liability imposed upon the company for any criminal act done by such natural person.

The theory of corporate criminal liability holds that liability is attributed to corporations for faults of individuals. But, a corporation has long been recognized as a legal personality that is distinct from its shareholders. This has created difficulties in how to hold these artificial legal personalities criminally liable. The major obstacle to holding companies liable is that the criminal law was developed to punish individuals. The application of human-based concepts, such as *actus res* and *mensrea*, to corporations was always going to prove problematic.

Corporate criminal liability is not a universal feature of modern legal systems. Some Countries, including Brazil, Bulgaria, Luxembourg and the Slovak Republic, do not recognize any form of corporate criminal liability. Other countries, including Germany, Greece, Hungary, Mexico and Sweden, while not providing for criminal liability, nevertheless have in place regimes whereby administrative penalties may be imposed on corporations for the criminal acts of certain employees. The countries that do impose criminal liability of some kind on corporations adopt varying approaches to the form and scope of this liability. In this context, the legal system of India, the United Kingdom, Australia and Myanmar will be examined and discussed.

### **States Practices on Corporate Criminal Liability**

Corporate criminal liability is not a universal feature of modern legal systems. Some Countries, including Brazil, Bulgaria, Luxembourg and the Slovak Republic, do not recognize any form of corporate criminal liability. Other countries, including Germany, Greece, Hungary, Mexico and Sweden, while not providing for criminal liability, nevertheless have in place regimes hereby administrative penalties may be imposed on corporations for the criminal acts of certain employees. The countries that do impose criminal liability of some kind on corporations adopt varying approaches to the form and scope of this liability.

The following is an account of how the laws in common law countries, although generally similar, vary from each other in the context of corporate criminal liability.

### Corporate Criminal Liability in India

Courts in India were hesitant to attribute criminal liability to a company for an offence that required a criminal intent and they were of the opinion that they could not prosecute companies for offences that entailed a mandatory sentence of imprisonment because the corporation could not be criminally prosecuted for offenses requiring *mensrea* as they could not possess the requisite *mensrea*.

The Supreme Court in *Asst. Commissioner v. Velliappa Textiles Ltd.*<sup>1</sup> held by a majority decision that the company cannot be prosecuted for offences which require imposition of a mandatory term of imprisonment coupled with fine. The Supreme Court further held that where punishment provided is imprisonment and fine, the court cannot impose only fine.

In *A K Khosia v. S Venkatesan*,<sup>2</sup> two corporations were charged for committing fraud under the India Penal Code. The Magistrate issued orders against the corporations and the Court observed that in order to prosecute corporate bodies, there were two pre-requisites, the first being that of *mensrea* and the other being the ability to impose the mandatory sentence of imprisonment. A corporate body could not be said to have the necessary *mensrea*, nor can it be sentenced to imprisonment as it has no physical body.

In *Zee Tele films Ltd. v. Sahara India Co. Corp. Ltd.*,<sup>3</sup> the Court dismissed a complaint which was filed against Zee Tele films under Section 500 of the IPC. In this case, it was alleged that Zee had telecasted a program which was based on falsehood. The court held that *mensrea* was one of the essential elements of the offence of criminal defamation and that a company could not have the requisite *mensrea*.

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<sup>1</sup> (2003) 7SCC 405.

<sup>2</sup> (1992) Cr.L.J. 1448.

<sup>3</sup> (2001) 3 Recent Criminal Report 292.

In *Motorola Inc. v. Union of India*,<sup>4</sup> the Bombay High Court quashed a proceeding against a corporation for alleged cheating and the court concluded that it was impossible for a corporation to form the requisite *mensrea*, which was the essential ingredient of the offense. Thus the corporation could not be prosecuted for cheating under section 420 of the IPC.

In this case of the Assistant Commissioner, *Assessment-II, Bangalore & Ors.v. Velliappa Textiles*,<sup>5</sup> a private company was prosecuted for violation of certain sections under the Income Tax Act. Sections 276-C and 277 of the income Tax Act provided for a sentence of imprisonment and a fine in the event of a violation. The Supreme Court held that the respondent company could not be prosecuted for offences under certain sections of the Income Tax Act because each of these sections required the imposition of a mandatory term of imprisonment coupled with a fine and the court could not only impose a fine on the corporation. After strict interpretation, the Court held that a corporation did not have a physical body to be imprisoned and therefore could not be sentenced to imprisonment.

The observations by the courts in the foregoing cases were that a corporation, unlike a person, could not have the *mensrea* required to be found guilty of a crime and neither could it be imprisoned as it was not a physical entity. Also, where a sentence called to a mandatory term of imprisonment plus a fine, only a fine without imprisonment could not be awarded, because in the Court's opinion such a sentence has to be imposed in full and not in part only. However, the opinion of the Court differed from this in the following case.

In *Oswal Vanaspati & Allied Industries v. State of U.P.*,<sup>6</sup> the Full Bench of the Allahabad High Court held that a company being a juristic person cannot obviously be sentenced to imprisonment as it cannot suffer imprisonment. The question that requires determination is whether a sentence of fine alone can be imposed on it under Section 16 of the Act or whether such a sentence would be illegal and hence cannot be awarded to it. It is settled law that sentence or punishment must follow conviction and if only corporal

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<sup>4</sup> 2004 Cri L J 1576.

<sup>5</sup> 2004 1 Comp. L.J. 21.

<sup>6</sup> 1993 1 Comp LJ 172.

punishment is prescribed a company which is a juristic person cannot be prosecuted as it cannot be punished. If, however, both sentence of imprisonment and fine is prescribed for natural persons and juristic persons jointly then though the sentence of imprisonment cannot be awarded to a company, the sentence of fine can be imposed on it.<sup>7</sup>

Thus, it cannot be held that in such a case the entire sentence prescribed cannot be awarded to a company as a part of the sentence, namely, that of fine can be awarded to it. Legal sentence is the sentence prescribed by law. A sentence which is in excess of the sentence prescribed is always illegal but a sentence which is less than the sentence prescribed may not in all cases be illegal. Thus, the Indian courts were divided in their opinion as to whether a company could be held criminally liable or not.

The legal difficulty arising out of the above situation was noticed by the Law Commission and in the 411st Report of Law Commission of India the Law Commission suggested an amendment to Section 62 of the India Penal Code by adding the following lines:

“In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only”.

“In every case in which the offence is punishable with imprisonment and any other punishment not being fine and the offender is a corporation, it shall be competent to the court to sentence such offender to fine.”

In this section, “corporation” means an incorporated company or other body corporate, and includes a firm and other association of individuals.

But this bill prepared on the basis of the recommendations of the Law Commission lapsed and it did not become law. However, few of these recommendations were accepted by parliament and by suitable amendment some of the provisions in the taxation statutes were amended. The Law Commission has tried consistently to find a formula which would solve the

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<sup>7</sup> Corporate criminal liability – the issue revisited in the context of recent Supreme Court decision, V K AGGARWAL, [www.icsi.edu/webmodules/programmes](http://www.icsi.edu/webmodules/programmes).

problem of fixing appropriate punishment for the Corporations which commit an offence, this has been done with a view to punish a corporation where mandatory minimum punishment is both punishment and fine. In such a case it needs to be fixed as to how the law courts would advance if this question comes up before them.<sup>8</sup>

But the view of the courts on corporate criminal liability was changed in the landmark case of *Standard Chartered Bank and Ors. V. Directorate of Enforcement*.<sup>9</sup> In this case, Standard Chartered Bank was prosecuted for the alleged violation of certain provisions of the Foreign Exchange Regulation Act, 1973 and the Supreme Court did not go by the literal and strict interpretation rule required to be done for the penal statutes and held that the corporation could be prosecuted and punished with fines, regardless of the mandatory punishment required under the respective statute.

Finally, the Court decided that as the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company.<sup>10</sup>

After the decision of the Standard Chartered Bank case, the courts were generally of the view that the companies would not be exempted from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is a mandatory imprisonment.

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<sup>8</sup> Analysis of Corporate Criminal Liability in India, The Lex-warrier in >Article, online law journal, ISSN 2319-8338, Sabani Panda, Research Associate.

<sup>9</sup> ([2005] 4 SCC 530).

<sup>10</sup> Angira Singhvi, Corporate Crime and Sentencing in India: Required Amendments in Law National Law University, Jodhpur, India, international journal of criminal justice sciences, Vol 1 Issue.2 July 2006.

In *Iridium India Telecom Ltd. v Motorala Incorporated and Ors*,<sup>11</sup> the Hon'ble Supreme Court held that a corporation is virtually in the same position as any individual and may be convicted under common law as well as statutory offences including those requiring *mensrea*. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. In this case, it was also held that the corporations can no longer claim immunity from criminal prosecution on the grounds that they are incapable of possessing the necessary *mensrea* for the commission of criminal offences.

Thus, the criminal intent of the 'alter ego' of the company or corporate body, i.e. the person or group of people that guide the business of the company would be imputed to the corporation. It is now an established legal position in Indian that a corporation can be convicted of offences that require possession of a criminal intent, and that a corporation cannot escape liability for a criminal offence merely because the punishment prescribed is imprisonment and fine.

But it is always a controversial issue that Corporations cannot be sentenced to imprisonment and since, there is no explicit provision relating to it, the Supreme Court have held in various cases that it is better to impose fine upon the corporation even in the cases where there is a punishment for imprisonment. The imposition of fines may be made in four different ways as provided in the IPC. It is the sole punishment for certain offences and the limit of maximum fine has been laid down, in certain cases, it is an alternative punishment but the amount is limited in certain offences, it is imperative to impose fine in addition to some other punishment and in some it is obligatory to impose fine but no pecuniary limit is laid down. Section 357, Cr PC, empowers a Court imposing a punishment of fine or a sentence of which fine

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<sup>11</sup> AIR 2011 SC 20.

forms a part to order payment of compensation out of the fine recovered to a person for any loss or injury caused to him by the offence.<sup>12</sup>

Environmental degradation arising out of industrial pollution in recent years has become a positive danger to social security. Thus, legal provisions have been incorporated in the Indian Code, to punish industrial and business organizations which pose a danger to public life by polluting water, and District Magistrates can initiate proceedings against the offender under Section 133 of the Code of Criminal Procedure, 1973.

Section 16 of Environment (Protection) Act, 1986 and Section 47(2) of the Water (Prevention and Control Pollution) Act, 1974 also explicitly lay down provisions for the offences by companies. It states companies can be prosecuted under certain circumstances and thus, reflects the concept of vicarious criminal liability.

The Black Money (Undisclosed Foreign Income and Assests) and Imposition of Tax Act, 2015(Black Money Act) has provided that if Indian residents do not disclose and declare tax on their assets and income from foreign sources, they are liable to be criminally prosecuted. Companies as well as individuals are subject to the Black Money Act. Section 56 of the Black Money Act provides for vicarious liability. An identical provision can be found in Prevention of Money Laundering Act, 2002.

Corporate liability may appear incompatible with the aim of deterrence because a corporation is a fictional legal entity and thus cannot itself be “deterred”. In reality, the law aims to deter the unlawful acts or omissions of a corporation’s agents. To defend corporate liability in deterrence terms, one must show that it deters corporate managers or employees better than does direct individual liability.

In India there was no prosecution of the corporations for offences requiring *mensrea* before 2005. But after the *Standard Chartered Bank &ors v Directorate of Enforcement &Ors*(2005) case it has been held, there was no immunity from prosecution for companies merely because the prosecution was in respect of offences for which the punishment prescribed was

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<sup>12</sup> Sabani Panda, Analysis of Corporate Criminal Liability in India, The Lex-warrier in >Article, online law journal, ISSN 2319-8338, Research Associate .

mandatory imprisonment. Therefore, it is now an established legal position in India that a corporation can be convicted of offences that require possession of a criminal intent, and that company or corporation cannot escape liability for a criminal offence, merely because the punishment prescribed is 'imprisonment and fine'.

### **Corporate Criminal Liability in UK**

Corporate manslaughter is a criminal offence in English Law, being an act of homicide committed by a company or organization. In general, in English criminal law, a juristic person is in the same position as a natural person, and may be convicted for committing many offences. The Court of Appeal confirmed in one of the cases following the Herald of Free Enterprise disaster that a company can, in principle, commit manslaughter, although all defendants in that case were acquitted.<sup>13</sup>

The common law test to impose criminal responsibility on a company only arises where a person's gross negligence has led to another person's death and (under the "identification doctrine") that person is a "controlling mind", whose actions and intentions can be imputed to the company (that is, a person is in control of the company's affairs to a sufficient degree that the company can fairly be said to think and act through him).<sup>14</sup> This is tested by reference to the detailed work patterns of the manager, and the job title or description given to that person is irrelevant, but there is often no single person who acts as a "controlling mind", particularly in large companies, and many issues of health and safety are delegated to junior managers who are not "controlling minds".<sup>15</sup>

Corporate Criminal Liability for Manslaughter originated from the Herald of Free Enterprise disaster. On 6 March 1987, 193 people died when the Herald of Free Enterprise capsized. Although individual employees failed in their duties, the Sheen Report severely criticized the attitude to safety prevalent in P&O, stating: "All concerned in management...were at fault in that all must be regarded as sharing responsibility for the failure of

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<sup>13</sup> R. V. P & O Ferries (Dover) Ltd (1991) 93 Cr App Rep 72

<sup>14</sup> Section 1(3) of the Corporate Manslaughter & Corporate Homicide Act 2007.

<sup>15</sup> Tesco V. Nattrass [1972] AC 153.



management. From top to bottom the body corporate was infected with the disease of sloppiness.<sup>16</sup>

In English law, proving corporate manslaughter and securing a conviction of an individual where the corporation involved is a small concern are easier where it is easier to identify a “controlling mind” (in *R v OLL Ltd*, 1944, about the Lyme Bay canoeing tragedy, managing director Peter Kite was convicted), but efforts to convict people in large corporate entities tends to fail as the management structure is more difficult. Instead, the prosecution stands more chance of pursuing a case successfully if it prosecutes simply on the grounds of a safety breach under the Health and Safety at Work Act 1974.

The Corporate Manslaughter and Corporate Homicide Act 2007 is a landmark in law. For the first time, companies and organizations can be found guilty of corporate manslaughter as a result of serious management failures resulting in a gross breach of a duty of care, since the Act states that, “a breach of a duty of care by an organization is a gross breach if the alleged conduct amounts to a breach of that duty that falls far below what can reasonably be expected of the organization in the circumstances”.<sup>17</sup>

Under the new Act, Prosecutions would be of the corporate body and not individuals<sup>18</sup>, but the liability of directors, board members or other individuals under health and safety law or general criminal law, would be unaffected. And the corporate body itself and individuals could still be prosecuted for separate health and safety offences.

This being so, Companies and organizations should keep their health and safety management systems under review, in particular, the way in which their activities are managed and organized by senior management. The Institute of Directors and HSE have published guidance for directors on their responsibilities for health and safety: ‘Leading health and safety at work: leadership actions for directors and board members’.

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<sup>16</sup> Herald of Free Enterprise, Report of Court No 8074 (Sheen Report), London: HMSO.

<sup>17</sup> Section 1(4) (b) of the Corporate Manslaughter & Corporate Homicide Act 2007.

<sup>18</sup> Section 18 of Corporate Manslaughter & Corporate Homicide Act 2007.

The Organizations concerned with the Corporate Manslaughter Act are:

- (a) The Corporation;
- (b) A department or other body listed in schedule 1;
- (c) a police force ;
- (d) a partnership, or a trade union or employer's association, that is an employer

There are no new duties or obligations under the Act, nor is the new offence part of health and safety law. It is, however, specifically linked to existing health and safety requirements.

Under the Corporate Manslaughter Act, the offence is concerned with corporate liability and does not apply to directors or other individuals who have a senior role in the company or organization. However, existing health and safety offences and gross negligence manslaughter will continue to apply to individuals. Prosecutions against individuals will continue to be taken where there is sufficient evidence and it is in the public interest to do so.

In relation to Penalties, Penalties will include unlimited fines<sup>19</sup>, remedial orders and publicity orders. A remedial order will require a company or organization to take steps to remedy any management failure that led to a death. The court can also impose an order requiring the company or organisation to publicise that it has been convicted of the offence, given the details, the amount of any fine imposed and the terms of any remedial order made. The publicity order provisions will not come into force until the Sentencing Guidelines Council has completed its work on the relevant guidance.<sup>20</sup>

The first corporation convicted under the CMCH Act was *Cotswold Geotechnical (Holdings) Ltd.*<sup>21</sup> The deceased was an engineer who entered trial pits to take soil samples without a second person present when the pit collapsed. The defendant was a small company run by a sole director. The defendant was fined £500,000 and the company soon went into liquidation.

<sup>19</sup> Section 1(6) of the Corporate Manslaughter & Corporate Homicide Act 2007.

<sup>20</sup> [www.hse.gov.uk/faqs, about corporate manslaughter.](http://www.hse.gov.uk/faqs/about_corporate_manslaughter)

<sup>21</sup> *R v Cotswold Geotechnical (Holding) Ltd* [2011] All ER (D) 100.

Cotswold Geotechnical Holdings appealed against the Judge's decision. However this was turned down in May 2011 with the Judge in the Court of Appeal holding the original fine.<sup>22</sup>

The second convicted corporation was *JMW Farms Ltd*, a small firm that pleaded guilty and was fined £187,500.<sup>23</sup> On 15<sup>th</sup> November 2010, a JMW Farms employee Robert Wilson, was tragically killed when he was struck by a metal bin which fell from the raised forks of a forklift truck and suffered fatal crush injuries. The joint investigation by the Health and Safety Executive Northern Ireland and the Police Service of Northern Ireland found that it was not possible to insert the lifting forks into the sleeves of the bin, as the forks were too large and incorrectly spaced causing the bin to fall. JMW Farms pleaded guilty to the offence under the Corporate Manslaughter and Corporate Homicide Act 2007 ("the Act") and was fined £187,500 and ordered to pay £13,000 in costs. The total sum having to be paid within six months<sup>24</sup>.

In *MNS Mining Ltd*, January 2013, The Crown Prosecution Service (CPS) was prosecuting both the manager and the company who operated the Gleision Colliery, the scene of a tragic accident in which four miners lost their lives. On 19 June 2014 MNS Mining was found not guilty of corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007, following a three month trial at Swansea Crown Court. The mine manager, Malcolm Fyfield, employed by MNS was found not guilty of gross negligence manslaughter. The company was on trial for four offences of corporate manslaughter and the mine manager with four offences of manslaughter.

In *Linley Developments*, September 2015, Hertfordshire building firm, Linley Developments has been sentenced for the corporate manslaughter of a worker who was crushed when a structurally unsound retaining wall collapsed. The company's managing director and project manager were both also given suspended prison sentences after pleading guilty to breaching CDM Regulations. It was heard in court how 28-year-old Gareth Jones died instantly

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<sup>22</sup> [www.cqms-Ltd.co.uk/news/landmark, corporate manslaughter prosecutions.](http://www.cqms-Ltd.co.uk/news/landmark_corporate_manslaughter_prosecutions)

<sup>23</sup> R v JMW Farm Limited [2012] NICC 17.

<sup>24</sup> [www.cqms-Ltd.co.uk/news/landmark, corporate manslaughter prosecutions.](http://www.cqms-Ltd.co.uk/news/landmark_corporate_manslaughter_prosecutions)

on 30 January 2013 when a wall collapsed on him in on Mile House Lane in St Albans. Two days before the incident, managing director Trevor Hyatt visited the site to find that the foundations for the store room would leave the floor at a higher level than in the adjoining building. Project manager Alfred Baker suggested putting in a step but the client said he would prefer them at the same level. Two workers told Mr. Hyatt that, if they were to dig lower, they might need to underpin the footing of the existing wall. He told them to dig to a lower level regardless. Trevor Hyatt, 50, of Letty Green, Herford was given a six month prison sentence, suspended for two years, after pleading guilty to breaching Regulations 28 and 31 of the Construction (Design and Management) Regulations. He was also fined £25,000 with £7,500 in costs. Alfred Barker, 59, of Gazeley, Suffolk was given a six month prison sentence, suspended for two years, after pleading guilty to breaching Regulations 28 and 31 of the Construction (Design and Management) Regulations. He was ordered to pay costs of £5,000.

Linley Developments was fined £200,000 and ordered to pay costs of £25,000 after pleading guilty to corporate manslaughter on 7 September. It was allowed to pay the fine over six years. The judge also made a publicity order against the company.<sup>25</sup>

In the Corporate Manslaughter & Corporate Homicide Act 2007, the law has bound the courts to impose only a fine on companies as a form of punishment for the crime. Moreover, since other than fines, penalties also include remedial orders and publicity orders, the CMCH Act has now made it possible to impose criminal liability on corporations for the crime of corporate manslaughter resulting from senior management failure.

### **Corporate Criminal Liability in Australia**

The Criminal Law in Australia focus on the notions of *mensrea* and *actusreus* as the components of a criminal offence. Accordingly, a corporation as an artificial entity cannot act nor can it possess a guilty mind excepts through its officers and agents. If corporations are to be made criminally

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<sup>25</sup> [www.cqms-Ltd.co.uk>news>landmark, corporate manslaughter prosecutions](http://www.cqms-Ltd.co.uk>news>landmark, corporate manslaughter prosecutions).

liable, then the law has to create a way through which criminal liability can be attributed to them. In response to this need, the criminal law in Australia has introduced and recognized the notion of vicarious liability. Borrowing from Civil Law principles, it is now well established that a corporation can be held vicariously liable for the act of its employees provided that they have acted within the scope of their employment. Under this doctrine of vicarious liability, corporations are made criminally liable as a principal offender not because of their own “direct action” but because of the “action of another person”. It has been stated that there is no doubt that in Australia the vicar’s criminal actions may be attributed to the employer in reliance upon the doctrine of vicarious liability.

But for this type of vicarious liability to be imposed various requirements need to be established. First, this liability can only be attached to the corporation when the relevant law intends to impose vicarious liability. Secondly, the employee, officer or agent must have committed the offence in question in the course of his or her employment or authority. Thirdly, the employee needs to have the relevant state of mind required in the definition of the offence committed under the Australian Criminal Law.

In Australia, Division (12) of the Criminal Code Act 1995, states that:

- (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as set out in this part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
- (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.<sup>26</sup>

If a physical element of an offence is committed by an employee, agent, or officer or body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.<sup>27</sup>

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<sup>26</sup> Division 12 (1, 2) of the Australian Criminal Code Act 1995

<sup>27</sup> Dr. Mouaid AL-Qudah, Corporate Criminal Liability under the Criminal Laws, Issue No.37-January 2009, Journal of Sharia & Law.

Section 12.2 imposes vicarious liability upon the corporation for the physical elements (though not the mental element) of the offence when committed by any employee, agent or officer within the actual or apparent scope of employment. This departs from the Tesco principle, where the physical elements of the offence must be attributable to a high-level officer. Under Section 12.3(1) of the Criminal Code, the requisite element of fault in an offence, characterized by, for example, intention, knowledge or recklessness, is established on the part of the body corporate itself, where the body corporate has “expressly, tacitly or impliedly authorized or permitted the commission of the offence”.<sup>28</sup>

Authorisation or permission for the commission of an offence may be established on, *inter alia*, the four bases set out in Section 12.3 (2) of Corporate Manslaughter and Corporate Homicide Act, 2007.

Several non-exclusive means by which such authorization or permission can be established are set out in Section 12.3(2). The first two methods parallel the Tesco principle, through proof that the board of directors or a high managerial agent “intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence”. In the case of the “high managerial agent”, however, the corporation may escape the attribution of intention for the acts of a maverick within the organization, if the corporation can show it exercised due diligence to prevent the conduct.

Section 12.3(2)(a) and (b) (regarding the conduct of a corporation’s board of directors or ‘high managerial agents’) essentially maintain the ‘identification’ approach (although the fact that the physical element of offences committed by any employee, agent or officer, rather than only a senior officer, is attributable to the corporation, is a departure from the identification approach as applied in the UK). Sections 12.3(2)(c) and (d), however, represent a new approach to corporate criminal liability, in that they

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<sup>28</sup> Jennifer Hill, *Corporate Criminal liability in Australia: An Evolving Corporate Governance Technique?*, 2003. *Journal of Business Law*, p. 16.

are founded on the corporation's own wrongdoing, in the form of deficiencies in its 'corporate culture'.<sup>29</sup>

'Corporate culture' is defined as an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.<sup>30</sup>

At first blush, the contours of the form of corporate liability established via "corporate culture" are very broad and very different from those under the Tesco principle. The concept of "corporate culture" focuses on blameworthiness at an organizational level, in the sense that the corporation's practices and procedures have contributed in some way to the commission of the offence. For liability to be attributed to the corporation by these means, there is no level in the corporate hierarchy beneath which attribution of liability to the corporation is impossible. Rather the key issue will be whether the organizational structure of the corporation was such that the relevant act of non-compliance could occur at any level.<sup>31</sup>

The Criminal Code itself sets out some relevant factors in determining whether a tainted corporate culture existed within the corporation.<sup>32</sup>

Section 12.4(3) of this Act, Provides that: negligence may be evidenced by the fact that the prohibited conduct was substantially attributed to:

- (a) Inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- (b) Failure to provide adequate system for conveying relevant information to relevant persons in the body corporate.

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<sup>29</sup> Allens Arthur Robinson, 'Corporate Culture' as a basis for the criminal liability of corporation, for the United Nation special representative of the Secretary-General on Human Rights and Business, Feb 2008, pp. 15-16.

<sup>30</sup> Ibid.

<sup>31</sup> Jennifer Hill, 'Criminal liability in Australia: An Evolving Corporate Governance Technique?' 2003, *Journal of Business Law* P 17.

<sup>32</sup> Section 12.3(4) of Corporate Manslaughter and Corporate Homicide Act 2007

The approach adopted in the above provisions constitute a significant step in developing and clarifying standards of corporate criminal liability, it gives rise to new questions that may reveal the need for further reform.<sup>33</sup>

The extension of liability for all offences within the Criminal Code to corporations was introduced primarily in response to the difficulties in determining the situations in which the requisite mental and conduct elements of a crime could be attributed to a corporation for the purposes of establishing criminal liability. Pursuant to the House of Lords decision in *Tesco Supermarkets Ltd v Natrass*<sup>34</sup>, which has been followed by Australian Courts, attribution of the requisite mental and conduct elements to the corporation resulting in personal corporate liability will occur where those elements can be traced to the board of directors, managing director or persons to whom full management powers have been delegated (the Tesco principle). A recognition of the limitations of the Tesco principle in relation to large corporations resulted in the abandonment of the principle under federal legislation, in favour of broad vicarious liability for the actions of employees acting on the corporation's behalf. Thus, criminal liability of corporations at common law only exists at the state level. At the federal level, common examples of corporate crime involve breaches of the *Corporations Act 2001* (Cth) and *Trade Practices Act 1974* (Cth) (*TPA*) (particularly in relation to competition and consumer protection law).<sup>35</sup>

Thus, in Australia, a corporation may be found guilty of corporate criminal liability under the Criminal Code Act 1995 which provides that, "A body corporate may be found guilty of any offence, including one punishable by imprisonment".

The Act imposes vicarious liability on the corporation for the physical elements of the offence when committed by any employee, agent or officer within the scope of his employment. This differs from the identification

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<sup>33</sup> Dr. Mouaid AL-Qudah, Corporate Criminal Liability under the Criminal Laws, Issue No.37-January 2009, Journal of Sharia & Law.

<sup>34</sup> [1972] AC 153.

<sup>35</sup> Brief on corporations and human rights in the Asia-Pacific region, Allens Arthur Robinson, United Nations Special Representative of the Secretary General for Business and Human Rights, Aug-2006.



principle (as applied in the UK) where only the offence committed by a senior officer is attributable to the corporation.

If negligence is the fault element of the offence and it cannot be attributed to any individual employee, agent or officer, the fault may be attributed to the corporation if its conduct is found to be negligent when the aggregation theory is applied; that is by aggregating the conduct of any number of its employees, agents or officers.

### **Corporate Criminal liability in Myanmar**

A corporation has long been recognised as a legal personality that is distinct from its shareholders. This has created difficulties in how to hold these artificial legal personalities criminally liable. The major obstacle to holding companies liable is that the criminal law was developed to punish individuals. The application of human-based concepts, such as *actus reus* and *mens rea*, to corporations was always going to prove problematic.

In the Myanmar Penal Code section 11 states that:

“The word “person” includes any company or association, or body of persons, whether incorporated or not”. Therefore, this Code applies to any body corporate. But there is no other section in the code relating to the criminal liability of corporations.

Company is a legal person. As such, it has no physical existence and so cannot be imprisoned. Therefore, if the body corporate commits an offence punishable with imprisonment only, it obviously cannot be imprisoned. Therefore special provision should be made in order to hold a company accountable. Notwithstanding this point, however, there is no provision in the Penal Code that addresses the issue of what action can be taken against a company that commits an offence that is punishable with imprisonment. This deficiency is also present in other laws.

Corporations may also have criminal liability outside the terms of the *Penal Code* such as liability for environmental damage. Other acts expressly state that employees or directors can be held liable for the acts of a company, for instance, the Foreign Exchange Regulation Act, states that where a company commits an offence under the Act, every director, manager and

secretary will be punishable as if they committed the offence, unless they can prove that the offence was committed without their knowledge. The Act provides for imprisonment of up to three years and fines.<sup>36</sup>

With regard to money laundering, provisions can be found in Section 59 (a) of the Myanmar Anti Money Laundering Law, 2015 which state that no prosecution taking of action by criminal, civil, disciplinary or administrative means on reporting organizations or their directors, officers or staff who submit reports or provide information in good faith in accord with the provisions of this Law for the breach of the provisions of banking, professional secrecy and agreement.

In India companies as well as individuals are subject to Prevention of Money Laundering Act, 2002 and the Black Money Act.<sup>37</sup>

Therefore, Indian Black Money Act is more complete than Myanmar Anti Money Laundering Law 2015, in relation to corporate criminal liability.

The most common examples of corporate crime involve cases of environmental pollution and dangerous industrial practices, as well as other breaches of workplace safety. In particular, corporate breaches of legislation relating to fair trading, food production and handling, building and construction, as well as environment protection legislation and workplace health and safety laws should result in criminal sanctions against the company.

In this connection, a prominent event involving gross manslaughter and environmental pollution occurred in Hpakant, Kachine state. These areas, migrant small-scale miners earn a living by searching for jade in piles of waste soil on the mountainside.

On November 21, 2015, around 3 am, a landslide occurred next to the mountain of dump soil which was about 200ft high; by 300ft. 70 in which miners were sleeping were buried. Just 5 huts escaped the landslides. At the

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<sup>36</sup> Allens Arthur Robinson, Brief on Corporations and Human Rights in the Asia-Pacific Region, prepared for Professor John Ruggie, United Nations Special Representative of the Secretary General for Business and Human Rights, Aug-2006.

<sup>37</sup> Section 56 of Black Money Act 2015 and Section 70 of the Prevention of Money Laundering Act 2002.

time of Counting, the death toll had risen to 104. But many more people were still missing.<sup>38</sup>

This accident occurred at the mountain of dump soil, which had been dumped by a mining company. The mining company had been dumping waste soil day and night without following any regulations for safe dumping from a technical point of view.

In order to prevent disasters the cited case from happening, mining companies should dump waste soil systematically, and should be held criminally liable for death caused by their negligent dumping of waste soil. It is, therefore, necessary to include the criminal liability of company in relevant laws and regulation. For instance, provisions on corporate criminal liability should be included in the Myanmar Gemstone Law 1995.

On the other hand, there may be environmental damages because of negligent dumping of waste soil. Therefore, Environmental Conservation Law should be inserted Criminal Liability of Company for environmental damage of negligent dumping of waste soil.

A senior Technical and Policy Analyst of the Myanmar EITI, pointed out weaknesses in the technology used for dumping soil from mines, suggesting the adoption of a long term policy for dumping soil. The Ministry of Mines has adopted rules for the dumping of soil but has been weak in monitoring and enforcing these rules.

In reviewing this event, it may be seen that the company was at fault and should take responsibility for their negligent conduct in failing to obey the rules for the dumping of soil.

Incidentally, there are no provisions relating to criminal liability of corporations or responsible persons in the Myanmar Gems Stones Law, 1995 nor in the Environmental Conservation Law, 2015 or Penal Code under which such cases of mineral excavation and the use of polluting explosive can be tried.

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<sup>38</sup> Aye Min Soe, Huge Landslide Killed 30, The Global New Light of Myanmar, Vol. II, No.215, 22<sup>nd</sup>Nov,2015, p. 1.

On January 25, 2016, a landslide at a monastery in Mayangon Township caused the death of three people. The incident occurred around 9:45 am when six workers were digging around a 25 foot high earthen wall in preparation for the construction of a retaining wall.<sup>39</sup>

In this case A construction expert said that “the deadly tragedy happened because the workers have no experience in this kind of work, and there are few worksite safety measures in place”.

A criminal case no 97/2016, State v Aye Min and 3, was brought in Mayangon township court with charges under section 174 of the criminal procedure code. This section deals with police to inquire and report on suicide.

The same event had occurred on at Future Mandalay Pullman hotel construction worksite. The scaffolding gave way on June 20 at the Mandalay Hotel construction site, killing two workers and injuring another 18 peoples.<sup>40</sup>

The case, *Win Bo v Nwae Oo Maung*, criminal case no 1226/2015, was brought in Chan Mya Tharzi township court.

In this case, “Nwae Oo Maung, the contractor of Nyan Family Construction, was sued under section 337, 338 and 304(a) of Penal Code. These charges relate to causing minor and grievous hurt by acts endangering the life or personal safety of others, as at least 18 workers were injured and two died.<sup>41</sup>

But, in fact, there was 22 workers were injured and two died.

In this case, there was the collapse of scaffolding. In relation to such a collapse a Mandalay based engineer speculated that it was likely caused by miscalculating about how much weight could be supported by the steel rods used to build the structure.

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<sup>39</sup> Zaw Gyi (panita), *The Global New Light of Myanmar*, Vol. II, No.279, 25<sup>th</sup>, Jan, 2016, p. 2.

<sup>40</sup> Myat Nyein Aye, workplace safety in need of update, *Myanmar Times*, 1<sup>st</sup> July 2015, [www.mmtime.com](http://www.mmtime.com).

<sup>41</sup> Zarni Mann, Pull Man Hotel contractor sued After deadly scaffold collapse, [www.irrawady.com](http://www.irrawady.com)>News> Burma.

“There may have been a failure in the scaffolding because the pipes were too small to support the weight, and the base was too high off the ground,” He said, explaining that other factors, could also have been present such as groundwork that was not sturdy enough to support the structure.

The case was eventually withdrawn by the aggrieved person. Cases of this kinds adversely affect the country’s labour force but there are no remedies under law because of the lack of specific health and safety at workplace Law in Myanmar.

In these kinds of cases, generally police stations prosecute cases under section 304(a) of the Penal Code because there is no separate safety law.

In Myanmar, there was no separate Health and safety Law in workplaces. But, there are health and safety provisions in the Factories Act 1951 which however does not cover all workers in all work places. The draft of Health and Safety at Workplace Law was issued on 24 February 2017 which is applicable to the construction and engineering businesses.

Another case of the same type if the case of *State v Thant Zin Oo or Won Chaung*, opened as criminal case no 149/2016 in Mayangon Township Court. In this case, the defendant, Won Chaung was charged under section 174 of the Criminal Procedure Code which relates to suicide.

According to facts of this case, the incident occurred at Moe Htet Myint Construction in Kone Myint Thar (10), Mayangon Township in Yangon. In this case, Won Chaung was not a construction worker but a worker who was to install a crane. Won Chaung had fallen down from the 8<sup>th</sup> floor on the way to installing crane because a piece of three-ply wood had broken. In this case, there was no legal remedy available because there was no Specific Safety Law. Therefore, in such kinds of cases there are no applicable laws to prosecute Construction Company that fail to protect the safety of workers.

## Conclusion

Upon studying the corporate criminal liability systems of other countries, it is seen that in India there was prosecution of the corporations for offences requiring *mensrea* before 2005. But after the Standard Chartered Bank &ors v Directorate of Enforcement &Ors (2005) case it has been held, that there was no immunity from prosecution for companies merely because the prosecution was in respect of offences for which the punishment prescribed was mandatory imprisonment. Therefore, it is now an established legal position in India that a corporation can be convicted of offences that require possession of a criminal intent, and that a company or corporation cannot escape liability for a criminal offence, merely because the punishment prescribed is ‘imprisonment and fine’.

No amendments or additions have been made to the Indian Penal Code with regard to corporate criminal liability. Nevertheless, it has been noticed that provisions contained in some other laws permit the prosecution of companies for criminal liability. These other laws are the Black Money Act 2015, the Prevention of Money Laundering Act 2002, the Environment Protection Act 1986, the Water (Prevention and Control Pollution) Act 1974, etc.

In Australia, a corporation may be found guilty of corporate criminal liability under the Criminal Code Act 1995 which provides that, “A body corporate may be found guilty of any offence, including one punishable by imprisonment”. In Australia under the Criminal Code Act, 1995, a corporate body may be found guilty of any offence, including one punishable by imprisonment. The corporation is held vicariously liable for the physical element of an offence committed in the scope of his employment, by any one of its employees (not just a senior officer). By this method, attribution of liability to the corporation is made possible for an offence committed by any employee, regardless of the employee’s rank within the hierarchy of the corporation.

The Act imposes vicarious liability on the corporation for the physical elements of the offence when committed by any employee, agent or officer within the scope of his employment. This differs from the identification

principle (as applied in the UK) where only the offence committed by a senior officer is attributable to the corporation.

If negligence is the fault element of the offence and it cannot be attributed to any individual employee, agent or officer, the fault may be attributed to the corporation if its conduct is found to be negligent when the aggregation theory is applied; that is by aggregating the conduct of any number of its employees, agents or officers.

The Australian Criminal Code 1995 provides comprehensively for corporate criminal liability. In addition, corporate criminal liability is also addressed by other laws in Australia. For e.g the Proceeds of Crime Act, the Clean Water Act 1970, etc.

In the U.K., since the enactment of the Corporate Manslaughter and Corporate Homicide Act in 2007, companies can now be found guilty of corporate criminal liability. Punishment includes unlimited fines, remedial orders and publicity orders.

But in Myanmar there are no explicit provisions relating to the responsibility of a company in cases of criminal offences. Therefore, it is necessary to enact explicit provisions relating to the criminal liability of companies in the Penal Code, or in relevant laws or to provide a specific law for the criminal liability of companies like in the U.K or Australia.

In Myanmar, largely because of the recent emergence of public companies it essential to make appropriate provisions for the criminal liability of corporation. Further, the change required in the law to accommodate this development is of such dimensions that legislative action, rather than reliance on evolution of the common law is required.

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## References

### Laws

- The Anti Money Laundering Law, 2015
- The Indian Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.Act, 2015
- The Indian Prevention of Money Laundering Act, 2002
- The Health and Safety at Work Act, 1974(UK)
- The Corporate Manslaughter & Corporate Homicide Act, 2007 (UK)
- The United Kingdom Trade Descriptions At 1968
- The A Criminal Code Bill for England and Wales 1989
- The US Model Penal Code
- The Australia Criminal Code, 1995
- The Australia Crimes Act, 1914

### Books and Article

- Herald of Free Enterprise, Report of Court No 8074 (Sheen Report), London: HMSO.
- David Kershaw, Company Law in Context, Oxford University Press (2009),
- Analysis of Corporate Criminal Liability in India, The Lex-warrier in >Article, online law journal, ISSN 2319-8338, Sabani Panda, Research Associate.
- V K AGGARWAL, Corporate criminal liability – the issue revisited in the context of recent Supreme Courtdecision, [www.icsi.edu/webmodules/programmes](http://www.icsi.edu/webmodules/programmes).
- Corporate Crime and Sentencing in India: Required Amendments in Law by Angira Singhvi, National Law University, Jodhpur, India, international journal of criminal justice sciences, Vol 1
- Issue.2 July 2006.
- Dr. Mouaid AL-Qudah, Corporate Criminal Liability under the Criminal Laws, Issue No.37-January 2009, Journal of Sharia & Law.
- Jennifer Hill, Corporate Criminal liability in Australia: An Evolving Corporate Governance Technique? ,.Journal of Business Law, 2003.



Allens Arthur Robinson ,Corporate Culture’ as a basis for the criminal liability of corporation, for the United Nation special representative of the Secretary-General on Human Rights and Business, Feb 2008, .

Aye Min Soe, Huge Landslide Killed 30, The Global New Light of Myanmar, Vol. II, No.215, 22<sup>nd</sup>Nov 2015, p. 1.

Zaw Gyi (panita),The Global New Light of Myanmar, Vol. II, No.279, 25<sup>th</sup>, Jan,2016, p. 2.

Myat Nyein Aye, workplace safety in need of update, Myanmar Times,1<sup>st</sup> July 2015,www.mmttime.com.

Zarni Mann, Pull Man Hotel contractor sued After deadly scaffold collapse,www.irrawady.com>News> Burma.

### **Website**

[https://en.m.wikipedia.org>wiki>Corp](https://en.m.wikipedia.org/wiki/Corp), Corporate Manslaughter in English Law.

[www.cqms-Ltd.co.uk>news>landmark](http://www.cqms-Ltd.co.uk), corporate manslaughter prosecutions

[www.hse.gov.uk>faqs](http://www.hse.gov.uk), about corporate manslaughter

## CONTRACT OF INDEMNITY

Zar Chi Hlaing\*

### Abstract

A contract is an agreement enforceable by law. Indemnity is making good of a loss. Contract of indemnity is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. Most contracts of insurance belong to the general category of contracts of indemnity. A contract of indemnity is a special type of contract, such as marine insurance, fire, etc. On the other hand, the contract of insurance which is not contract of indemnity, such as life insurance, personal accident insurance and sickness insurance. In all contracts of insurance, whether marine or non-marine, which are contracts of indemnity, the insurer is entitled to be subrogated to the rights of the assured and to a contribution from other insurers where he has paid the whole of the loss or more than his proportionate share of it.

**Key words:** “indemnity”, “making good”, “contract of indemnity”, “subrogation” and “contribution”

### Introduction

Some contracts of insurance are in the nature of contracts of indemnity and some are not. In the case where the contract of insurance is not a contract of indemnity, the amount recoverable is not measured by the extent of the assured's loss, but is payable whenever the specified event happens, irrespective of whether the assured in fact sustains a pecuniary loss or not, as in the cases of life insurance, personal accident insurance and sickness insurance. On the other hand, the amount recoverable is measured by the extent of the assured's pecuniary loss in the case of a contract of indemnity.

Indemnity is compensation for damage or loss. In the legal sense, indemnity may also refer to an exemption from liability for damages. The concept of indemnity is based on a contractual agreement made between two parties, in which one party agrees to pay for potential losses or damages caused by the other party. The principle of the contract of indemnity is the

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cardinal principle upon which the whole contract is founded, and from which the rules relating to the right of claim under a policy emanate.

According to the principle of indemnity, an insurance contract is signed only for getting protection against unpredicted financial losses arising due to future uncertainties. An insurance contract is not made for making profit else its sole purpose is to give compensation in case of any damage or loss. In an insurance contract, the amount of compensations paid is in proportion to the incurred losses. The amount of compensations is limited to the amount insured or the actual losses, whichever is less. The compensation must not be less or more than the actual damage. Compensation is not paid if the specified loss does not happen due to a particular reason during a specific time period. Thus, insurance is only for giving protection against losses and not for making profit. However, in case of life insurance, the principle of indemnity does not apply because the value of human life cannot be measured in terms of money.

The right of subrogation and contribution are corollaries of the principle of indemnity. The rights and liabilities of the parties are dictated by this basic concept, and the amount recoverable by the assured, which is measured by the extent of his pecuniary loss, is also governed by it. According to the principle of subrogation, when the insured is compensated for the losses due to damage to his insured property, then the ownership right of such property shifts to the insurer. This principle is applicable only when the damaged property has any value after the event causing the damage. The insurer can benefit out of subrogation rights only to the extent of the amount he has paid to the insured as compensation. The contribution is, similar to subrogation, to prevent the assured from recovering more than the whole loss. Therefore, if the assured recovers the whole loss from one insurer which he could have recovered from the other, the insurers are permitted to contribute rateably.

### **Nature of the Contract of Indemnity**

Indemnity is defined as “protection against damage or loss, especially in the form of a promise to pay for anything that happens”.<sup>1</sup>

Contract of indemnity is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person.<sup>2</sup>

Most contracts of insurance are contract of indemnity. All contracts of insurance are contingent contracts. A contingent contract is a contract to do or not to do something if some event, collateral to such contract, does or does not happen. Contingent contracts cannot be enforced by law unless and until that event has happened.<sup>3</sup>

One basic feature governing an insurance contract is that the contract is made with reference to the occurrence of a specified event, the occurrence of which is uncertain. This forms the fundamental basis of the contract. It insures against the possible occurrence of a specified event.<sup>4</sup>

The fundamental characteristic found in all insurance contracts, namely, that the contract is made with reference to the occurrence of an uncertain event, is not a characteristic unique to insurance contracts but is also found in other types of contracts. A contract which shares this common characteristic is a contract of wager. In essence, there is very little to distinguish an insurance contract from a wagering contract. If the assured has no interest whatsoever in the marine adventure, the contract which he has entered into will be deemed to be by the way of gaming or wagering.

If a policy is silent as to how an insured is to be paid, the courts will generally apply the principle of indemnity. In practice, an insurance policy will expressly provide that an insurer agrees to indemnify an insured for the insurer's liability. Thus, an insured who sustains a loss under an insurance policy is entitled to be indemnified by the insurer.

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<sup>1</sup> Oxford Advanced Learner's Dictionary, 7<sup>th</sup> Edition, 2005.

<sup>2</sup> Section 124 of the Myanmar Contract Act, 1872.

<sup>3</sup> Section 32 of the Myanmar Contract Act, 1872.

<sup>4</sup> Poh Chu Chai, General Insurance Law, Singapore, Utopia Press Pte Ltd, 1<sup>st</sup> Edition, 2009, p.3.

One of the underlying principles of insurance law is the doctrine of “Proximate Cause”. The application of the doctrine will vary according to whether the issue to be decided is “the loss was caused by a peril insured against” or “the loss was caused by an excepted cause”.

The law on the subject of causation in marine insurance, as contained in the Marine Insurance Act 1906, states that “subject to the provisions to this Act and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, as subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.”<sup>5</sup>

According to *Chalmers*, it should be noted that by “proximate” cause is not meant the latest, but the direct, dominant, operative and efficient one. If this cause is within the risks covered, the insurers are liable in respect of the loss, if it is within the perils excepted the insurers are not liable. A loss may be the combined effect of a whole number of causes, but for the purposes of insurance law, one direct or dominant cause must wherever possible be singled out. The time honoured *maxim causa proxima non remota spectatur* must be understood to have this meaning.

Marine insurance is a contract of indemnity and the amount of indemnity is a matter of agreement between the parties. When a loss takes place, the sum which the assured can recover is called the measure of indemnity which will vary according to the nature of the loss. The assured must have an insurable interest in the subject-matter insured. In a contract of marine insurance the underwriter undertakes, in consideration of a premium, to indemnify the assured against loss occasioned by peril incident to a marine adventure. In order to measure the indemnity, especially with regards to the doctrine of proximate cause, forms of loss and valued or unvalued policy have to be considered.

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<sup>5</sup> Section 55 (1), of the Marine Insurance Act, 1906.

### **Main Types of the Contract of Indemnity**

The basic concept of a contract of marine insurance is expressly provided in section 1 of the Marine Insurance Act 1906 as follows;

“A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.”

This section defines “in manner and to the extent thereby agreed” is to give effect not simply to an agreement but to the exact intentions of the parties to that agreement so far as they can be ascertained on the true construction of the contract. This will depend partly on the application of general principles and rules of contractual construction. But that will be subject to at least two particular qualifications.

First, the particular principles and rules of the law of marine insurance apply, as does the general law of insurance so far as it does not differ. Secondly, since there is widespread use in the area of marine insurance contracts of a familiar range of specific standard forms, individual contracts will be, and will have the advantage of being, construed in the light of previous judicial interpretations of the standard clauses incorporated.<sup>6</sup>

The view of Dr. Susan Hodges upon the definition of the contract of marine insurance should be noted. She said:

“The operative word here is ‘indemnity’. A contract of marine insurance is essentially a contract of indemnity. This is the cardinal principle upon which the whole contract is founded, and from which the rules relating to the right of claim under a policy emanate. The rights and liabilities of the parties are dictated by this basic concept, and the amount recoverable by the assured, which is measured by the extent of his pecuniary loss, is also governed by it. The very purpose of effecting a policy of insurance, marine or non-marine, is for indemnity of loss.”<sup>7</sup>

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<sup>6</sup> F.D. Rose, *Marine Insurance: Law and Practice*, 2<sup>nd</sup> Edition, Routledge, 2013, p.8.

<sup>7</sup> Susan Hodges, *Law of Marine Insurance*, Great Britain, Cavendish Publishing Ltd., 1996, p.1.

Marine insurance is considered one of the oldest of the many forms of commercial protection. The contract of indemnity is the key principle of marine insurance and judges have used this principle confidently in solving many marine insurance problems. In insurance law, the indemnity principle operates to ensure that an insured is fully indemnified for a loss. The principle is also applied to prevent an insured from making a profit from his own losses.

The foresaid remark that the assured shall not be more than fully indemnified was confirmed in *Castellian v Preston*<sup>8</sup> where a house was damaged by fire whilst it was in the process of being sold, the vendors not only received an indemnity from their insurers, but also, later, despite the fire, the full amount of the purchase money from the buyers. Not unreasonably, the underwriters sought from the vendors a return of the payment they had made to them on the basis that they, the vendors, had, in fact, suffered no pecuniary loss. In this, the insurers were successful.

In above case, Mr Justice Brett said that “the contract of insurance contained in a marine or fire policy is a contract of indemnity and of indemnity only, and this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified”.<sup>9</sup>

### **Insurer’s rights on Contract of Indemnity**

#### **Right of Subrogation**

All contracts of indemnity may be subjected to subrogation which basically, means substituting one creditor for another. In contracts of marine insurance, once the insurer has paid the assured a claim in respect of a loss he is subrogated to all the rights and remedies of the assured. These rights and remedies relate to compensation or recover from third parties for loss caused by them. Following a total loss he may also take over what remains of the property, but in the event of a partial loss he acquires no proprietary interest in

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<sup>8</sup> (1883) 11 QBD 380.

<sup>9</sup> Susan Hodges, Cases and Materials on Marine Insurance Law, London, Cavendish, First Publishing, 1999, p. 5.

the property. This means that irrespective of the kind of loss, the insurer is entitled to recover no more than he has paid.

Although the right of subrogation is a statutory right which the insurer is entitled to upon indemnifying the assured, it could be that issues might arise regarding the insurer's right to recovery from a third party. Therefore, insurers usually require a letter of subrogation from the assured authorizing them to institute proceedings to effect recovery in the name of the assured, but at their expense.

The right of subrogation is for the insurer to "stand in the shoes" of the assured in order to recover the whole or part of the claim paid from the party, other than the assured, responsible or partly responsible for the accident causing the loss. In other words, subrogation means substituting one creditor for another. Additionally, the insurer is also entitled to succeed to any contractual rights the insured has against a third party. Subrogation rights are acquired by the insurer for all losses paid whether they are total or partial losses but the insurer who pays a partial loss acquires no proprietary rights.<sup>10</sup>

Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss.<sup>11</sup>

Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to the Act, by such payment for the loss.<sup>12</sup>

There is a clear distinction between total loss and partial loss. In both kinds of loss, underwriters are subrogated to all the rights and remedies of the

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<sup>10</sup> James A.O' Shea, *Marine Claims*, Redwood Press Ltd, London, 1991, p. 3/6.

<sup>11</sup> Section 79(1) of the Marine Insurance Act, 1906.

<sup>12</sup> Section 79(2) of the Marine Insurance Act, 1906.



assured, but following a total loss the underwriters may also take over what remains of the property. In the event of partial loss, however, they acquire no proprietary interest in the property. It appears from section 79 that a further distinction is drawn between total and partial losses, in that sub-section (2) limits the right of subrogation for partial losses to in so far as the assured has been indemnified by such payment for the loss. No such limitation appears in sub-section (1) relating to total losses, and, therefore, by inference, it does not apply to total losses, but this view has been rejected by the courts. Whilst the insurer is entitled to recover, by way of subrogation, damages from a third party in respect of a partial loss, such subrogation rights do not extend to cover compensation for which he has not paid a claim.

In *Wong v Utah Home Fire Ins Co*<sup>13</sup>; the rights to which underwriters are entitled on payment of a total loss are of two kinds: rights of ownership (by abandonment) of whatever remains of the subject matter insured, and rights against third parties (by subrogation). There is no obligation on the part of underwriters to exercise these rights and sometimes it is not to their advantage to do so. If rights of ownership are exercised by underwriters, they must also take over any liabilities which attach to the property. An example of this would be the liability of removing a wreck the cost of which might prove to exceed the value of the wreck. Where an insurance company pays a loss in full and assumes control of the vessel, the insurance company becomes the owner of the vessel, just as a purchaser who buys the wreck from the owner after the disastrous event.

Therefore, it can be seen that by abandonment insurers can make a profit if they sell the remains of the subject-matter insured for more than the insured value, but by subrogation they are entitled to keep only up to the amount to which they have indemnified the assured. As the issue of abandonment cannot arise in the case of a partial loss, there is no prospect to the insurer of acquiring any proprietary rights. This is confirmed as follows:

In the event of a partial loss, the only rights and remedies conferred on the insurer are in respect of that portion of the loss for which the insurer has

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<sup>13</sup> (1960) AMC 649.

indemnified the assured. The insurer has no proprietary rights in any part of the subject-matter remaining.

An insurer's right of subrogation constitutes a legal right but the right is legally enforceable only with equity assistance. A right of subrogation accrues to a person who indemnifies another under an indemnity contract. Under his right of subrogation, an insurer is entitled to every right an insured has against a third party including rights in contract and tort. An insurer can exercise his right of subrogation by either suing a third party in an insured's name or taking an assignment of the insured cause of action.

An insurer's right of subrogation arises after the insurer accepts liability or indemnifies an insured for an insured loss. If an insurer does not settle an insured's claim but disputes the claim, no right of subrogation accrues to the insurer. An insurer's right of subrogation is an implied contractual right at common law but this right is only enforceable with equity's assistance. An insured owes a duty not to undermine or jeopardise an insurer's right of subrogation. An insurer right of subrogation is prejudiced if an insured voluntarily gives up his contractual or tortious rights against a third party or admits liability to the third party.

### **Right of Contribution**

The right of contribution applies to all contracts of indemnity, if the insured has taken out more than one policy on the same subject-matter. According to this principle, the insured can claim the compensation only to the extent of actual loss either from all insurers or from any one insurer. If one insurer pays full compensation then that insurer can claim a proportionate claim from the other insurers. So, if the insured claims the full amount of compensation from one insurer then he cannot claim the same compensation from the other insurer and make a profit. Secondly, if one insurance company pays the full compensation, then it can recover the proportionate contribution from the other insurance company.

Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under the contract.<sup>14</sup>

According to this section, the phrase “for which he is liable under his contract” means whether this refers to his maximum potential liability in respect of any one loss, or to his independent actual liability in respect of the particular loss.

In case of double insurance, each underwriter is bound to contribute with the other underwriters and if one of the insurers has paid more than his proportion of the loss, he is entitled under section 80(2) to maintain an action for contribution against the other insurers. In this regard the Act states that:

“If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.”<sup>15</sup>

Where an assured is over-insured by double insurance under valued policies, he may in the event of a total loss either recover in the first place from the policy with the larger agreed value and make no claim under the other policy or he could obtain payment in full under the policy with the lower agreed value and give credit for the amount so recovered and claim the balance of the insured value under the other policy.

When the same risk is insured by two or more insurers and an insured loss is fully paid by one insurer, he is entitled to contribution from the other insurers who have not paid. An insurer’s right of contribution is not based on contract but arises from principles of equity that persons who are liable for the same loss should contribute equally toward the loss.

An insurer’s right to claim contribution from another insurer arises only if there is double insurance, where the risk insured and the person insuring are the same. An insurer has no right to contribution if the persons insuring the risk are different even though the risk insured may be the same.

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<sup>14</sup>Section 80(1) of the Marine Insurance Act, 1906.

<sup>15</sup>Section 80(2) of the Marine Insurance Act, 1906.

In *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co*<sup>16</sup>; goods in a warehouse were insured by their owner, and also by the warehouseman to cover his liability *vis-à-vis* the owner. The goods were destroyed and the owner's insurers paid the policy money. They then sued the warehouseman's insurers for a refund of what they had paid the owner of the goods.<sup>17</sup>

Held that the action succeeded, and the defendants' contention that they need only contribute a proportion failed. This was a case of subrogation, not contribution. The insurer had to pay what without the insurance his assured would have been legally bound to pay, and since the warehouseman was liable to the owner of the goods, his insurers were liable to compensate the insurers of the owner.<sup>18</sup>

Contribution occurs where the same assured insures the same interest with more than one insurer. The contribution is, similar to subrogation, to prevent the assured from recovering more than the whole loss. Therefore, if the assured recovers the whole loss from one insurer which he could have recovered from the other, the insurers are permitted to contribute rateably.

An insurer is only entitled to contribution from a co-insurer if both insurers are on risk at the time of the loss. If only one insurer is on risk at the time of the loss, there is no right to contribution. When a risk insured by two or more insurers is for the same amount, the extent of insurer's liability is easily ascertained by applying the equality principle. This principle is difficult to apply when the levels of liability assumed by the insurers are different.

### **Issues on Contract of Indemnity in Myanmar**

#### **Issues on Marine Insurance**

With regard to the marine insurance in Myanmar, ship and freight covers can be acquired only at Myanma Insurance. Marine Cargo is permitted to private insurance companies. Institute Cargo Clause (C) (1.10.82) is used for marine cargo and Institute Time Clause Hull (1.10.83) is used for ships.

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<sup>16</sup> (1877) 5 Ch D 569.

<sup>17</sup> NJJ Gaskell, C Debattista and RJ Swatton, *Chorley and Giles' Shipping Law*, London, Pitman Publishing, 8<sup>th</sup> Edition, 1987, p.544.

<sup>18</sup> *Ibid.*

The following events illustrate the current indemnity issues in marine insurance in Myanmar.

In 2016, the Alternator of the No/1 Generator of the “M.V Myit Kyi Na” burnt out at port of Myeik during the time of manoeuvring while G/E 1 and G/E 3 were running in parallel and were fully loaded. It was noticed that sparks and smoke were being emitted from the Alternator. Then generators were stopped and urgent extinguishing of the sparks and flame was carried out with fire extinguishers. The inspection showed a fault in the winding of the alternator.

The damage survey carried out on No. 1 alternator showed that

- (1) the stator winding burnt out and damaged
- (2) the rotor winding needed to be serviced

The above damaged items needed to be repaired or renewed at the earliest occasion or opportunity.

In this event, the vessel was fully loaded. Over loading is a question of fact and this fact is not included under the heading of the “perils of the sea” in the policy (1.10.83) according to the surveyor’s report. So, the insurance company was not liable to pay for the cost of repair of the engine.

In 2015, the “M.V Dawei” whilst discharging a break-bulk cargo of cement in bags, suffered damage to her No. 1 Crane by the rough handling, carelessness and negligence of the stevedore.

According to the surveyor’s report, both right jibs and left jibs were damaged which came into contact with No. 2 Crane while swinging outboard with the cargo sling.

In this event, the damage was caused by the negligence of the stevedore according to the surveyor’s report, the master’s report and the deck log book entry. The negligence of the stevedore was not covered by policy (1.10.83). So, the insurer was not liable for this damage.

In 2013, the “M.V Han Lin” lost her starboard side anchor & chain whilst alongside at Sulae Port when the ship’s bow passing a buoy in strong currents and with insufficient main engine power was unable to control the

starboard anchor chains which came out forcefully. A starboard chain 10 shackle was parted from the end of the chain locker and lost in the river.

In this case, according to the surveyor's report the loss of the starboard side anchor & chain 10 shackle was due to the strong current and insufficient main engine power. The case of, "strong current" is contained as the "perils of the sea" under clause 6.1 of the policy (1.10.83). Also, normally, if insufficient ship's engine power is due to unseaworthiness, it is excluded in the policy but in this instance, it was not expressly excluded in the policy. However, there were two chains of events; strong currents and insufficient engine power. The cause of loss in this case was due to strong current because if there has not been a strong current, there would have been sufficient engine power. Thus, the insurer was liable to pay compensation for the loss.

According to the above events, "proximate cause of loss" is the question of fact which was settled by the surveyor's report and the master's log book. Myanmar's marine insurance conflicts are settled according to the marine surveyor's report on the findings that refer to the Marine Insurance Act 1906 and to the British Common Law.

### **Issues on Fire Insurance**

A fire insurance policy is also based on the contract of indemnity. According to the principle of the contract of indemnity, subrogation and contribution are applied in fire insurance. In Myanmar, fire insurance cover is popular one among insurance covers. There have been some disputes between the assured and the insurance company.

In 2015, an oil mill in HlaingTharYar Township, Yangon was damaged by fire due to the overheating of the straw stove. The insured machinery was totally lost but raw materials were partially lost. The depreciation value of raw materials and the cost of hiring the adjuster are questions of fact in this event. Finally, without hiring the adjuster, the insurance company and the assured negotiated to pay the depreciation value of raw materials according to the list of goods, the insurance company and the coinsurers agreed to proportionately contribute to the compensation between them.

In this event, it has been noted that the method of adjustment of the depreciation of goods is a question of fact. Other questions which arise are how to confirm the cause of the fire and how to apply the right of subrogation. Here, the company did not hire an adjuster because the adjuster's fee is very expensive. Instead, they negotiated the amount of depreciation according to the contract. The cause of the fire was confirmed by the police station and fire station report.

Two years ago, one of the supermarkets in Yangon was damaged by fire. This supermarket was insured under a valued policy. The fire was caused by a child, according to the fire station and police station report. The assured claimed his insurance cover for damage. A conflict arose between the supermarket and the insurance company regarding a difference in the depreciation value. They hired the services of an adjuster company to settle the matter. Finally, the insurance company compensated the supermarket for the damage according to the assessment of the adjusters.

In this case, not only the supermarket's depreciation value but also the adjuster fee was proportionately contributed to by the original insurance company and six coinsurers.

It has been noted that, in the above case involving fire insurance in Myanmar, the source of fire was confirmed by the approval letter of the fire station and the police station and the issue of assessment of the depreciation value of the building was confirmed by the adjusters's decision. The right of subrogation did not apply because the person who caused the fire was a minor, according to official reports.

In 2015, one of the houses in Chan Aye Thar Zan Township in Mandalay caught fire through the short circuit of an electric wire of the house next door. The owner of the house did not lose the whole house but some of the rooms were destroyed by the fire. The source of the fire was confirmed by the police station and the fire station. The insurance company paid the value of the depreciation of the house to the owner.

In this case, the depreciation value of the house was decided by the engineers of the insurance company. The cause of the fire was confirmed by the official records.

According to the above events, the most common issue found in fire insurance cases in Myanmar is the adjustment of depreciation which is settled by hiring adjusters or by negotiation. Actually, the amount of depreciation is the indemnity for loss. So, it should be settled by the principle of the contract of indemnity. But, there are some difficulties in using the applicable law and precedents.

### **Issues on Comprehensive Motor Insurance**

In Myanmar, if different persons insure their cars in different insurance companies and there is a loss or damage, they apply the Knock for Knock agreement for convenience of prosecution. Knock for Knock means insurance companies are liable to their insured car. They do not prosecute each other whether they may be at fault or not. The following events show issues on prosecution of comprehensive motor insurance.

A motor accident occurred in Kalay, in March 2017, at Yan Choon Hill while the driver of the vehicle was sending rocks from Kalay to Kalaywa. The Car was insured under a valued policy and was being driven by the owner. While driving along the hillside, something went wrong with the engine and the car fell off the cliff. The car driver, the assured, died. The insurance company paid his family for the total loss of the car and took over the proceeds of the damaged car.

In this event, the insurance company applied the right to ownership by abandonment according to the principle of contract of indemnity.

Another event of a motor accident happened in Hmawbe, Yangon in 2016. The accident was caused by the car driver of the car braking suddenly. So, the car behind, the insured car, could not control its speed and collided with the car in front. The assured had insured his car with an undervalued policy. The undervalued agreement was contained a comprehensive motor insurance policy. The value of the insured's car was 250 lakhs but the insured value was equal to 70 % of the actual value of car. The cost of repairs was 19 lakhs. The insurance company actually paid to the assured only 1,330,000 ks, which was 70 % of the actual value of the insured car.



Therefore, the assured did not receive the entire pecuniary indemnity covering his loss.

In 2015, an insured car was damaged in a headon collision. This car did not have a car registration licence and neither did the driver have a licence. But the assured and the driver of the other car came to an agreement for the other driver to pay the assured a compensation of 120 lakhs. The insured value of car was 120 lakhs. The insurance company paid a total loss of 120 lakhs to the assured. The driver who was at fault did not pay the compensation. The insurance company did not directly sue the wrongdoer for compensation. So, the insurance company requested to the assured to sue the other driver for payment of the agreed compensation. As the compensation for damage is a civil action, the cost of court and other lawyer fees would have amounted to more than the amount of compensation. Finally, the wrongdoer paid the insurance company 15 lakhs instead of 120 lakhs.

The insurance company had paid the total loss but could not sue the wrongdoer directly, due to a question of law. The measure of indemnity of marine insurance, fire and motor insurance is the matter of agreement between the parties under contract of indemnity. The right of subrogation and contribution may be applied in contract of indemnity based insurances.

### **Conclusion**

In Myanmar, there are many conflicts in respect of the contract of indemnity. Mostly contracts of indemnity are used in insurance market in Myanmar. Myanma insurance market came into being in 2013 with 11 private insurance companies being granted licenses by the Insurance Business Regulatory Board (IBRB) to write both life and non-life insurances such as Endowment Life, Fire, Comprehensive Motor, Cash in Safe, Cash in Transit, Fidelity Guarantee, Marine Cargo, Health, Snake Bite, Sportsman Life, Special Travel and Group Life. Therefore, now the market is about 4 years old, during which period of time public awareness of insurance has steadily grown. Before its advent, for about 60 years the state-run Myanma Insurance was the sole insurance enterprise in the country, underwriting necessary insurance covers. Now, Myanma insurance provides about 30 kinds of insurance and private insurance companies provides about 14 kinds of

insurance. Marine, fire and comprehensive motor insurance are based on the contract of indemnity under common law practice in Myanmar.

Myanmar has a relatively low volume of export trade and is more depend on import trade. Some exports of goods are carried out under the FOB system and imports under the system of CIF. So, marine insurance charges flow to foreign countries. The Myanma economy is still struggling even to reach the first stage of what the economist call, the take-off period, and accordingly, the role that insurance plays within the economy is currently small. The development of the state economy is the most important factor required to grow the marine insurance industry. One other factor that could contribute to the development of the marine insurance industry in Myanmar, would be to permit export trade to be carried out on a CIF basis only, in future. Some of Myanmar's marine insurance conflicts are settled according to the marine surveyor's report on the findings which is negotiation system that refers to the Marine Insurance Act 1906 and to the British Common Law.

The laws and rules relating to insurance in Myanmar are the Myanma Insurance Law (1993), the Insurance Business Law (1996), the Insurance Business Rules (1997), the Life Insurance Rules (1976), the Third Party Liability Insurance Rules (2003) and the Arbitration Law (2016) which is one of the modes to solve insurance issues. The parties agree to settle under the arbitration clause in the policy. Until now, there has been no case which has been decided by arbitration.

Almost all contracts of insurance are based on contract of indemnity except in cases of life and accident. The contract of indemnity is based on the agreement between the parties. Moreover, the contract of indemnity is based on the occurrence of a specified event which is uncertain and the assured must have an insurable interest in the subject matter of the contract.

The contract of insurance, marine or fire policy is a contract of indemnity and of indemnity only, and this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified.

Subrogation and contribution are corollaries of the principle of indemnity. According to right of subrogation, the insurer is entitled to upon

indemnifying the assured, it could be that issues might arise regarding the insurer's right to recovery from a third party. Therefore, insurers usually require a letter of subrogation from the assured authorizing them to institute proceedings to effect recovery in the name of the assured, but at their expense. On the other hand, the insurer's right of contribution based on the principle of equity. This right is used between coinsurers under contract of indemnity. So, the assured cannot get more than indemnity. The contracts of indemnity are contracts which are commonly used in insurance contracts except life, accident and sickness insurance.

The right of the third party to subrogation is a statutory right in the UK. It is an implied contractual right at common law. In Myanmar, this right is not given by statute but it is a contractual right under contract of indemnity.

The current indemnity issues in Myanmar are the adjustment of depreciation, the hiring of adjusters, ascertaining cause of loss and prosecution. Among these, adjustment of depreciation and hiring of adjuster are questions of fact. Ascertaining of cause of loss and prosecution are questions of law. According to the policy, Arbitration is the first mode to settle the disputes between the assured and insurance company. But this mode is not easy to implement in Myanmar because of the appointment of Arbitrators whether person or institution. The second mode is to go to the Court.

In conclusion, this research has shown that there is still a need in Myanmar for professionals such as arbitrators, lawyers, surveyors and claim adjusters.

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## References

- Marine Insurance Act, 1906.
- Myanmar Contract Act, 1872.
- Myanmar Arbitration Law, 2016.
- Dr. T. Paramasivan, Principles and Practice of General Insurance, 4<sup>th</sup> Edition, 2008.
- E.R. Hardy Ivamy, Chalmers' Marine Insurance Act 1906, London, Butterworths, 7<sup>th</sup> Edition, 1971.
- E.R. Hardy Ivamy, Marine Insurance, London, Butterworths, 2<sup>nd</sup> Edition, 1974.
- F.D. Rose, Marine Insurance: Law and Practice, Routledge, 2<sup>nd</sup> Edition, 2013.
- Indira Carr, International Trade Law, USA & Canada, Cavendish Publishing, 3<sup>rd</sup> Edition, 2005.
- Leo D'arcy, Carole Myrray and Barbara Cleave, Schmitthoff's Export Trade or the Law and Practice of International Trade, London, Sweet & Maxwell, 10<sup>th</sup> Edition, 2000.
- Ozlem Gurses, Marine Insurance Law, Routledge, 1<sup>st</sup> Edition, 2015.
- Pamela Sellman (Ed), Law of International Trade Textbook, London, HLT Publications, 6<sup>th</sup> Edition, 1995.
- Poh Chu Chai, General Insurance Law, Singapore, Utopia Press Pte Ltd, 1<sup>st</sup> Edition, 2009.
- Susan Hodges, Cases and Materials on Marine Insurance Law, Great Britain, Cavendish Publishing Ltd, 1999.
- Susan Hodges, Law of Marine Insurance, Great Britain, Cavendish Publishing Ltd, 1996.
- Castellian v Preston 1883) 11 QBD 380.
- Wong v Utah Home Fire Ins Co (1960) AMC 649.
- North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co(1877) 5 Ch D 569.

## ISSUES RELATING TO PROTECTION OF INDUSTRIAL DESIGNS

Khin Thinn Thinn Oo\*

### Abstract

Industrial design renders an object attractive or appealing. Commercial success of a product depends on industrial design. Novelty, originality and visual appeal are essential if an industrial design is to be registered. Its aesthetic features should not be imposed by the technical functions of the product. Industrial designs may potentially be protected through design patents, trade dress, and copyright. Industrial design rights are granted to the creator of designs to reward them for their effort and investment in manufacturing the product. The holder of this legal title has the exclusive right to make, import or sell any objects to which the design is applied. They can authorize others to exploit the design and bring a legal action against anyone using the design without authorization. This research paper will discuss the issues relating to the recognition and protection of industrial designs as objects of intellectual property, the relation between industrial designs and other objects of intellectual property.

**Keywords:** Industrial Design, Novelty, Visual appeal, Design patents, Trade Dress, and Copyright.

### Introduction

Intellectual property deals with a broad range of creations of the human mind which often have a high economic relevance when applied in industry and commerce. Intellectual property covers objects that range from works of art and other artistic intellectual creations, to technical solutions, to signs and business identifiers used in trade to distinguish persons, goods and services. Industrial designs are a particular object of protection in the intellectual property gamut, and enjoy special recognition and treatment. Although the intellectual creations that constitute the objects of protection under intellectual property are quite varied and generally well-defined, they are confined to those that have achieved legal recognition.

The purpose of legal protection of industrial design is that strong design protection will lead to increased innovation and creativity by providing

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designers with an economic incentive to develop better products. Although industrial design law is a distinct aspect of intellectual property law, it shares some characteristics with patent law and some characteristics with copyright. Subject matter that is protected under industrial design law in one country may be protected under patent law, copyright law, or even unfair competition law on another.

This paper is intended to study the identification and clarification of some of the issues connected with the protection of industrial designs and their relation to other objects of intellectual property. It may also facilitate the industrial design protection in Myanmar and particular aspects for further analysis after enacting the Industrial Design Law.

### **Material and Methods**

A descriptive, comparative and an analytic method are applied in this paper. The materials used for the purpose of the research are books, articles (including articles on the Internet), conventions, treaties, agreements and case-law.

### **The Concept of Industrial Designs**

An industrial design refers to the ornamental or aesthetic aspects of a useful article. A design may consist of three-dimensional features, such as the shape or surface of an article, or two-dimensional features, such as patterns, lines or color. Industrial designs are applied to a wide variety of industrial products and handicrafts: from technical and medical instruments to watches, jewelry and other luxury items; from house wares and electrical appliances to vehicles and architectural structures; from textile designs to leisure goods.<sup>1</sup>

The work of industrial designers can be seen in almost all manufactured goods including cars, televisions, coffee makers, cellular phones, furniture, and computers. Design is increasingly recognized as key to

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<sup>1</sup> Looking Good: An Introduction to Industrial Designs for Small and Medium-sized Enterprises, 2005, WIPO, p.3.

bringing ideas to the market and transforming them into user-friendly and appealing products or services.<sup>2</sup>

To be protected under most national laws, an industrial design must be new or original and non-functional. This means that an industrial design is primarily of an aesthetic nature, and any technical features of the article to which it is applied are not protected by the design registration. However, those features could be protected by a patent.

Industrial designs developed into a distinct object of intellectual property because of their peculiar nature aimed at satisfying both aesthetic and functional purposes when incorporated in a tangible product. Industrial designs are at the crossroads of art and technology, since the designers of industrial products strive to create products whose shape or appearance will satisfy the aesthetic preferences of consumers as well as their expectations with regard to the functional performance of those products. Although the design that gives a product its particular shape and aspect will be conceived to meet both functional and non-functional criteria simultaneously, many laws provide that only the non-functional features will be covered by industrial design protection. This reflects different policy options regarding the desirability to give legal protection to, on the one hand, technical achievements and, on the other, aesthetic creations.<sup>3</sup>

Industrial designs normally express the personal taste and style of their designers. Moreover, works of art applied to useful products can in certain cases be assimilated to industrial designs. Because such artistic expressions are applied to industrial products that perform specific utilitarian functions, industrial designs are also closely linked to technical creations.

### **International Provisions Concerning the Protection of Industrial Designs**

International convention relating to protection of intellectual property provides many ways of protection of industrial design. But, there is no universally accepted definition of industrial design and uniform system of

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<sup>2</sup> [https://ec.europa.eu/growth/industry/intellectual-property/industrial-design/protection\\_en](https://ec.europa.eu/growth/industry/intellectual-property/industrial-design/protection_en).

<sup>3</sup> [www.wipo.int/edocs/mdocs/sct/en/sct\\_9/sct\\_9\\_6.doc](http://www.wipo.int/edocs/mdocs/sct/en/sct_9/sct_9_6.doc).

protection. This results in many difficulties in advancing toward the uniform international protecting of designs, though the following treaties and agreements concerning design protection are currently in force.

### **Paris Convention for the Protection of Industrial Property, 1883**

The Paris Convention deals with industrial designs in Article *5quinquies*. This provision merely states the obligation of all member countries to protect industrial designs. Nothing is said about the way in which this protection must be provided. Member countries can therefore comply with this obligation through the enactment of special legislation for the protection of industrial designs. They can, however, also comply with this obligation through the grant of such protection under the law on copyright or the law against unfair competition.

### **Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement 1994)**

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) became effective in 1994 and is administered by the World Trade Organization (WTO). It imposes minimum standards for the protection of intellectual property in general. However, only two provisions of TRIPS directly refer to industrial design protection. Art 25 TRIPs sets forth the “Requirements for Protection”, whereas Art 26 TRIPs defines the “Scope of protection”.

Article 25 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement 1994) states “Requirements for Protection”. Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.

Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain



such protection. Members shall be free to meet this obligation through industrial design law or through copyright law. Article 26 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement 1994) states the way of protection and the duration of protection.

### **The Hague Agreement Concerning the International Deposit of Industrial Designs**

The Hague Agreement was first concluded in 1925 and consists of several individual treaties. It was last revised in 1999 with the adoption of the Geneva Act. The Hague Agreement's purpose is to simplify registration of industrial designs for several countries. Therefore, it provides an international deposit system that allows national design proprietors to obtain protection in all member states by filing one application and depositing one sample. The eligibility for and scope of protection, however, are subject to the national laws of the member states in which protection is sought.<sup>4</sup>

The applicant is thus relieved of the need to make a separate national deposit in each of the States in which he requires protection, thus avoiding the inherent complication of procedures that vary from one State to another. The Hague Agreement offers designers and other design owners a simplified and economic system for the protection of designs in a large number of countries. The 1999 revision of the Hague Agreement gives Member States additional flexibility to maintain certain conditions applicable under their national design laws.

### **Locarno Agreement Establishing an International Classification for Industrial Designs**

The Locarno Classification, established by the Locarno Agreement (1968), is an international classification used for the purposes of the registration of industrial designs. The eleventh edition of the Classification entered force on January 1, 2017. The Locarno Classification is "solely of an administrative character" and does not bind the contracting countries "as regards the nature and scope of the protection afforded to the design in those

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<sup>4</sup> <http://www.wipo.int/treaties/en/registration/hague/>

countries”.<sup>5</sup> The Locarno Agreement requires the industrial property office of each contracting country to “include in the official documents for the deposit or registration of designs, and, if they are officially published, in the publications in question, the numbers of the classes and subclasses of the international classification into which the goods incorporating the designs belong”.<sup>6</sup> Recommendations of the Committee of Experts deal with the manner in which the classes and subclasses should be indicated in the said documents and publications.

### **Berne Convention for the Protection of Literary and Artistic Works (1886)**

The Berne Convention became effective in 1886 and was the first major international copyright treaty. Art 2 (1) of the Berne Convention provides a non-exclusive list of works protectable under copyright law. Industrial design is not specifically regulated in the Berne Convention but might fall under the concept of “applied art” that is not further defined in the convention. According to Art 2 (7) of the Berne Convention it is in the discretion of the signatory states whether they want to protect industrial design as applied art, and if so, to set the conditions of protection. Interestingly, however, the Berne Convention concludes that industrial design should be protected as artistic work, and therefore under copyright law, in the event that the signatory state’s laws are silent as to the form of protection offered for industrial design. As a result, in case of doubt, industrial design should be protected under copyright law. The Berne Union countries first agreed to protect applied art as a separate category of work like to copyright at the Brussels Conference to revise the convention in 1948.

They agreed to add works of applied art to the protectable subject matter of the Convention, but each country retained the right to define applied art, to limit the duration of copyright in applied art, and also to distinguish between protectable applied art and a category called “designs and models”-- which could be subject to a more restrictive industrial property regime.

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<sup>5</sup> Article 2(1) of Locarno Agreement 1968.

<sup>6</sup> Article 2(3) of Locarno Agreement 1968.

Thus, although it was agreed that applied art should be subject to copyright protection, the 1948 Brussels Conference did not require countries to protect all industrial design under copyright law. Countries could choose to write *sui generis* design laws to protect industrial design, and even if they used the copyright scheme as a basis for design protection, these countries could still limit the duration of protection of applied art as opposed to fine art. The change to Berne in 1948 was probably the high point of the “unity of art” approach to design protection. This movement lost momentum after 1948--both inside and outside the Union--as countries sought to pass *sui generis* laws and protect design as a type of industrial property. This trend was a rejection of the full copyright approach and perhaps a recognition of the growing importance of industrial designs with the need for more short-term protection.<sup>7</sup>

### Protection of Industrial Designs

In most countries, an industrial design must be registered in order to be protected under industrial design law. As a general rule, to be registrable, the design must be “new” or “original”. Generally, “new” means that no identical or very similar design is known to have existed before. To be protected under most national laws, an industrial design must be new or original and nonfunctional. This means that an industrial design is primarily of an aesthetic nature, and any technical features of the article to which it is applied are not protected by the design registration. The objective novelty countries themselves even differ from one another as to the qualifications to which this notion is subject.

In Ireland, Benelux, and the United Kingdom, there are limitations in space; the design has to be new in the State concerned. In Denmark and Portugal, is a time criterion; the design is deemed to be new if no identical form has been used or protected since a certain point in the past. In Benelux and Germany, a design is not new if it is known to the national circles specialized in the relevant sector, which is an interesting concept. Now, an additional criterion to novelty is also required in some of the Community Countries. It must be “original” in the United Kingdom and Ireland in the

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<sup>7</sup> [https://www.wipo.int/edocs/mdocs/sct/en/sct\\_9/sct\\_9\\_6.doc](https://www.wipo.int/edocs/mdocs/sct/en/sct_9/sct_9_6.doc)

sense that it differs in more than immaterial details or common variants. It must have "physionomiepropre" (own appearance) in France; it must give the product a "special ornament" in Italy; and in Germany, it must have what is called "eigentumlichkeit" (individual character), implying some creative effort on the part of the designer.<sup>8</sup>

### **Industrial Designs and Patent**

Design patents only protect the ornamental aspects of the patented design. Therefore, a design patent will not protect functional aspects. This requirement does not present a problem for designs that are clearly ornamental, but for designs that incorporate ornamental and functional aspects in the same product, courts have had trouble distinguishing between the protectable ornamental aspects and the unprotectable functional aspects. This problem is particularly applicable to the work of industrial designers because the products they design will inevitably have both functional aspects and ornamental aspects. Therefore, the ability and willingness of the courts to develop rules to extract the protectable ornamental aspects of a design is crucial to the successful protection of industrial design through design patents, but courts have not yet developed an easily applied rule in this area.<sup>9</sup>

In sum, design patents do offer advantages, but these advantages only benefit the designers and manufacturers of products that meet the requirements of a design patent and have characteristics that make obtaining a design patent feasible. Ultimately, for many products, design patents simply are not the solution to the need for the protection of industrial design.

### **Industrial Designs and Copyright**

Industrial designs are closely related to works of art, and it might be assimilated to works of applied art. Industrial designs can be regarded as a

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<sup>8</sup> Hugh Griffiths, Overview of Developments in Europe on Industrial Design Protection Fordham Intellectual Property, 1993, Media and Entertainment Law Journal, Volume 4, Issue 1, Article 25, p.362.

<sup>9</sup> Regan E. Keebaugh, Intellectual Property and the Protection of Industrial Design: Are Sui Generis Protection Measures the Answer to Vocal Opponents and a Reluctant Congress, 2005, Journal of Intellectual Property Law, Volume 13, Issue 1, Article 8.

form of artistic expression. Industrial designs may also be protected as works of art under copyright law. While industrial designs are usually embodied in industrial and consumer products, they may also be embodied in works of handicraft. Handicrafts and other forms of traditional arts expressed in tangible products are automatically protected by copyright as works of art or applied art, and may also be protected as industrial designs.<sup>10</sup>

Three approaches may be considered in relating copyright and *sui generis* design rights: cumulative protection, separation of regimes, and partial overlap. (i) Cumulative protection (based on the theory of “unity of art”) proposes a total and automatic application of both the copyright and the special industrial design regimes to industrial designs. (ii) Separation of regimes (based on the theory of “separability” or “dissociation”) proposes a clear separation of protection regimes, such that industrial designs may only be protected by special design legislation because the artistic expression, if any, cannot be separated from the article in which it is embodied. (iii) Partial overlap would allow copyright protection for industrial designs that meet the standards of works of art, although the required level of artistic merit might not be easily met in practice.<sup>11</sup>

Work of arts includes an object and/or the features of an object. Handicrafts may have utility or “functional features” in addition to aesthetic features. Exclusive rights in an industrial design may, under certain laws, also be acquired on the basis of original creation of the design, or first fixation or embodiment of the design in a product or in a document. Such systems plainly adopt the basic principle of copyright law, whereby exclusive rights are generated upon creation of a literary or artistic work, without any formality or procedure. These systems have the clear advantages of simplicity and economy, since there is no initial cost to obtain exclusive rights. Arguably, one disadvantage of those systems would come from the need to prove authorship and entitlement at the time of litigation proceedings. Registration of a design, or even a simple deposit thereof, would help by

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<sup>10</sup> Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), 2002, Industrial Designs and Their Relation with Works of Applied Art and Three-Dimensional Marks, WIPO SCT 9/6, p.3.

<sup>11</sup> W.Cornish, D. Llewlyn, T. Aplin, Intellectual Property: Patents, Copyrights, Trade Marks and Allied Rights, London, 2010.

establishing a rebuttable presumption of ownership in favor of the right holder.<sup>12</sup>

For designers, the great benefit of copyright protection over design patent protection is that no registration or other formalities are required to obtain copyright, the protection period is long, and the required level of originality of the design is much lower than the patent law standard. However, the line between copyrightable applied art and non-copyrightable industrial design is the most important and difficult boundary in any system for the protection of industrial design. In the U.S., because of fears of the anticompetitive nature of providing long term copyright protection, the role of copyright in protecting industrial design has been almost eliminated.

Cumulative protection by copyright and industrial design rights is therefore possible for the non-functional features of product configuration. Likewise, the shape of a product may theoretically enjoy overlapping protection as an industrial design and as a (three-dimensional) mark. However, for this to happen, the shape in question must be capable of functioning as a mark, i.e., it must allow consumers to distinguish goods on the market.<sup>13</sup>

Industrial design can also be protected under copyright law, thus there is a possibility to obtain simultaneous and concurrent protection. This means that even though any designs fail to obtain industrial design protection, but in some jurisdictions they can be covered by copyright law. Copyright protection is automatically available, without formalities, upon the creation of a design in the form of drawing, a photograph, data, a sculpture or a 3-dimensional shape. However, even while copyright gives a longer term of protection, unlike industrial design rights generally, in principle copyright laws protect the creations only against direct reproduction and not against independent development of a similar design. In another jurisdiction, trademark laws also may be applied to protect 3-D marks, including trade dress, if they are

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<sup>12</sup> Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), 2002, *Industrial Designs and Their Relation with Works of Applied Art and Three-Dimensional Marks*, WIPO SCT 9/6, p.4.

<sup>13</sup> Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), 2002, *Industrial Designs and Their Relation with Works of Applied Art and Three-Dimensional Marks*, WIPO SCT 9/6, p.3.

distinctive signs capable of distinguishing goods with respect to the origin of the goods to avoid from deceiving consumers. In some jurisdictions, laws of unfair competition, including the common law of passing off, would also apply to industrial designs.<sup>14</sup>

### **Industrial Designs and Trademark**

Protection for industrial design can also be found under trademark law. This protection comes in the form of trade dress protection. Trade dress defines as "the overall appearance and image in the marketplace of a product or a commercial enterprise." Trade dress encompasses many characteristics of a product including color, size, weight, texture, shape, and graphics, or a combination of these characteristics. When the trade dress of a product becomes so popular that consumers begin to associate the particular dress with the source of the product, the trade dress can then be protected under trademark law. Like copyright and design patent protection, protection of industrial design through trade dress law has advantages and disadvantages. One of the major advantages of trade dress protection of industrial design is that registration is not required to enjoy the protection trademark law offers.<sup>15</sup>

The function of industrial designs is to make utilitarian, industrial and consumer products more pleasing to the eye, i.e., more aesthetically attractive to prospective buyers. Beauty of appearance adds not only aesthetic value but also commercial value to any product. That value becomes real when an article embodying a particular design can command a higher market price than a functionally identical product having a different shape or aspect.

Some designers have turned to trademark protection for industrial design. Commentators have argued that trademark law is not the best place for protection of design: "the problem is this: protection of industrial design, unless kept firmly tied to source recognition as a trademark, easily slides into an unpredictable system of monopoly awards for successful designs, uninhibited by the statutory standards of copyright law or design patent law."

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<sup>14</sup> Budi Suratno, *Industrial Design Protection in Indonesia: A Comparative Study of the Law on Industrial Design Protection between Japan and Indonesia*, 2004.

<sup>15</sup> [http://www.wipo.int/wipo\\_magazine/en/2008/01/article\\_0006.html](http://www.wipo.int/wipo_magazine/en/2008/01/article_0006.html).

A trademark enjoys potentially perpetual protection without the need for patent novelty, or even originality under copyright law.<sup>16</sup>

The problem is that in their attempts to ensure that trademarks do not provide designers with monopolies over non-distinctive features, the courts have rendered trademarks useless for protecting market-entry designs while in some ways strengthening their use for well-established designers who can use them to monopolize particular design features.<sup>17</sup>

Unlike industrial design rights, rights in a mark may be extended indefinitely in time, through continuous use to distinguish goods or services on the market, and periodic renewal of the mark's registration. Such perpetual exclusive rights in marks are not, however, detrimental to competition, since it is not necessary to copy or use someone else's mark to be able to produce and sell the same goods competitively.

### **Industrial Design and Unfair Competition**

A degree of formality-free exclusivity in the exploitation of a product design may also be attained through the law on the repression of unfair competition. Notwithstanding the principle that any creation that is not covered by copyright, a design right or a patent is in the public domain and hence free for anyone to copy, in certain cases unfair competition principles may be invoked to prevent copying. In particular, slavish or systematic imitation of a competitor's products in a manner that may be regarded by a competent authority as contrary to honest commercial practices, could be enjoined. Distinguishing fair competitive copying from unfair slavish or parasitic imitation is not easy. However, certain unfair competition laws and court decisions may effectively allow an unregistered product configuration to be protected against unauthorized copying.

Passing off is another form of Unfair Competition, is arguably the most important, its occurs most often in practice, the Paris Convention singles

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<sup>16</sup>[http://www.esa.int/About\\_Us/Law\\_at\\_ESA/Intellectual\\_Property\\_Rights/Protection\\_against\\_unfair\\_competition](http://www.esa.int/About_Us/Law_at_ESA/Intellectual_Property_Rights/Protection_against_unfair_competition).

<sup>17</sup> Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), 2002, Industrial Designs and Their Relation with Works of Applied Art and Three-Dimensional Marks, WIPO SCT 9/6, p.3.



out as one of the main forms of unfair competition against which protection should be granted. In Article 10 *bis*(3) of the Convention requires countries to grant protection against all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor. Passing off takes place where a trader represents to the public that her enterprise, goods or services are that of her competitor or are connected with competitors. To determine whether a trader conduct amount to passing off, one has to enquire whether the public is likely to be confused into believing that her enterprise, goods or services are, or are connected with that or her competitor. Passing off should not be looked at in notation. In practice statutory remedies often overlap with the common law remedy against passing off.

### **National Law Relating to Protection of Industrial Designs**

Some industrial designs are business assets that can increase the commercial value of a company and its products. The more the successful the design is, the higher its value to the company. In some ASEAN countries, industrial designs are protected by Design Law. In other countries, they are protected by some kinds Intellectual Property Law. In Singapore, Malaysia, Philippines and Indonesia, industrial designs are protected by Design Law. But in Brunei and Thailand, they are protected under Intellectual Property Law. In some countries, the designs are protected in different category such as textile designs are protected by Textile Design Protection Rules.

In Japan, industrial designs are protected primarily under the Design Law but depending on their types, partly under the Copyright Law, the Unfair Competition Prevention Law and the Trademark Law. Because the principle of examination is employed for designs, the Design Law, in fact, serves a great role in the protection of designs. Both the EU and Australia have *sui generis* forms of design protection. In both these countries, design systems are independent of the preexisting copyright or patent protection regimes. In the

US, design patents are protected using United States Patent Law (35 USC). There is no independent design law.<sup>18</sup>

As in the United States, the concept of design protection is incorporated into the law based on patent-oriented approach. It is however questionable whether this legislative concept prevails in the wider world. In European countries, design laws are copyright-oriented and EU rules on designs have been drafted based on a design-oriented approach. This means that the protection of designs varies widely both in form and type, in a way incomparable with patent and trademark protection. This results in many difficulties in advancing toward the uniform international protecting of designs, though the treaties and agreements concerning design protection are currently in force.

In most countries all over the world, industrial design needs to be registered in order to be eligible for the protection. However, due to different point of views in terms of national directions and legal infrastructures in any respective countries, it is common that there are some differences regarding to administrative and substantive procedures applied to administer of Industrial Design Protection in each country. In order to minimize such differences and to provide public with a highly assurance on the protection of Industrial Design and further nurturing the industry of any country, a comparative study on the administration of such an IPR field is a necessity to improve the quality of protection itself.<sup>19</sup>

### **Term of Protection**

By protecting an industrial design, the owner is ensured an exclusive right against its unauthorized copying or imitation by third parties for a period of time, which is typically for 5 years with the possibility of renewal, up to a maximum of 15-25 years depending on the particular national law. The TRIPs provides for protection of a minimum of 10 years. Once a design is registered,

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<sup>18</sup>[https://www.jpo.go.jp/torikumi\\_e/kokusai\\_e/training/textbook/pdf/Legal\\_Protection\\_of\\_Industrial\\_Designs\(2001\).](https://www.jpo.go.jp/torikumi_e/kokusai_e/training/textbook/pdf/Legal_Protection_of_Industrial_Designs(2001).)

<sup>19</sup> Budi Suratno, *Industrial Design Protection in Indonesia: A Comparative Study of the Law on Industrial Design Protection between Japan and Indonesia*, 2004. Mr. Riichi Ushiki, *Legal Protection of Industrial Design*

the term of protection is generally five years, with the possibility of further periods of renewal up to, in most cases, 15 years. This varies from ten years in Spain; fifteen years in Benelux, Denmark, Ireland, and Italy; twenty years in Germany; twenty-five years in the United Kingdom; fifty years in France; and nobody quite knows in Portugal, but it seems to be more or less indefinite.

### **Protection of Unregistered Designs**

In the US, Australia and Japan unregistered designs may only be protected through trademark and copyright law. In EU, unregistered designs are protected through the unregistered community design route. Unregistered community designs are suitable mainly for small companies or freelancers to protect their products for a short period, for example, fashion since the registration process is costly and time consuming.

The protection of unregistered designs is basically aimed at protection against imitation and fraud. Imitation and fraud occurs as marketing begins where the response of consumers may be easily influenced, especially in the case of fashion-related business. If it is recognized that such designs must be protected for a period longer than 3 years, such design protection can be transferred to long-term protection as a registered design within 12 months from the start of marketing. It should be understood that such selective transfers of protection systems may not be realized under legislation according to the copyright approach.<sup>20</sup>

### **Findings**

Although industrial design can be protected through design patents, copyright, and trade dress, all of these methods of protection have limits and difficulties that render them inadequate for the protection needs of industrial designers. The criteria for protection differ from one country to another. The examiner or court faced difficulty to determine whether the design is perceived as an aesthetic feature rather than as a functional part of the product itself.

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<sup>20</sup>Mr. Riichi Ushiki, Legal Protection of Industrial Designs, Patent Attorney USHIKI International Patent Office, 2001, Japan Patent Office.

Design is important for consumers who often choose a product based on how it looks. Well-designed products create an important competitive advantage for producers and companies that invest in design tend to be more profitable and grow faster. In order to encourage producers to invest in designs, there needs to be accessible, modern and effective legal protection for their design rights.

There is no practical position of protecting patents and designs in Myanmar although there has been the Science and Technology Development Law 1994. Burma Patents and Designs Act 1945 was repealed in 1993. At the present, the Office of the Attorney-General is drafting the bills on the IP laws in compliance with the TRIPs Agreement. Because, Myanmar is a member of WTO, WIPO, and ASEAN.

Under section 18(f) of the Registration Act, industrial design may be registered with the Registry of Deeds and Assurances by means of Declaration of Ownership and followed by Cautionary Notice. Publication of Cautionary Notice in a local designated newspaper based on registration is the sole process to remind the public. From September 1, 2017, the registration of industrial design was not allowed. Because of the lack of promulgated law, rules and regulations, this process is used for any possible passing-off and infringement of industrial design rights.

### **Conclusion**

Nowadays, commercial success of a product largely depends upon its attractiveness and visual appeal. Design nourishes creativity in the industrial and manufacturing sector and helps to expand commercial activities ultimately leading to economic development. So, companies use intellectual property laws to protect industrial designs which are important tools for branding. Brand names affirmed by industrial designs have become the most important strategic factor for an increasing number of companies.

An effective system of protection also benefits consumers and the public at large, by promoting fair competition and honest trade practices, encouraging creativity and promoting more aesthetically pleasing products. Protecting industrial designs helps to promote economic development by

encouraging creativity in the industrial and manufacturing sectors, as well as in traditional arts and crafts. Designs contribute to the expansion of commercial activity and the export of national products.

Protecting industrial designs helps to promote economic development by encouraging creativity in the industrial and manufacturing sectors, as well as in traditional arts and crafts. Designs contribute to the expansion of commercial activity and the export of national products. Protection of Industrial designs can be relatively simple and inexpensive to develop and protect. They are reasonably accessible to small and medium-sized enterprises as well as to individual artists and crafts makers, in both developed and developing countries.

A worldwide effort also started to develop a model design law or agreed set of principles when the World Intellectual Property Organization (WIPO) was created. Many countries were interested in creating specific design protection laws. However, the reform movement failed out without setting a clear international standard. As a result, the international legal framework does not give sufficient guidance as to the definition of design and the nature of protection.

Because of the improvement of industrial designs work, lives more comfortable, pleasurable and efficient. Currently, protection for industrial design can be found under copyright law, patent law, and trademark law. Each of these areas of intellectual property law provides a different level of protection, and each has distinct advantages and disadvantages when compared to other forms of protection for industrial design. Despite the protection that each of these areas of law provides for industrial design, the consensus among intellectual property scholars and industrial designers is that none provides a level of protection that adequately serves the needs of the design community.

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## **References**

### **Conventions and Agreements**

- Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPs Agreement).
- Paris Convention for the Protection of the Industrial Property (1883).
- The Berne Convention for the Protection of Literary and Artistic Works, 1886.
- The Hague Agreement Concerning the International Deposit of Industrial Designs, 1925.
- The Locarno Agreement Establishing an International Classification for Industrial Designs, 1968.

### **Books**

- Budi Suratno Industrial Design Protection in Indonesia: A Comparative Study of the Law on Industrial Design Protection between Japan and Indonesia.
- Hugh Griffiths, 1993, Overview of Developments in Europe on Industrial Design Protection Fordham Intellectual Property, Media and Entertainment Law Journal, Volume 4, Issue 1, Article 25.
- Judy Winegar Gons, 2014, Intellectual Property Principles and Practice, Nathan Associates Inc.
- Looking Good: An Introduction to Industrial Designs for Small and Medium-sized Enterprises, 2005, WIPO
- Max Ng Chee Weng, Daniel Lim Ying Sin and Adrian Loke Weng Hong, 2002, Law for Business Series Intellectual Property, LexisNexis.
- Mr. Riichi Ushiki, Legal Protection of Industrial Designs, Patent Attorney USHIKI International Patent Office, 2001, Japan Patent Office.
- Sharifa Sayma Rahman, 2014, Industrial Design in Different Jurisdictions: A Comparison of Laws, journal of Intellectual Property Rights, Vol 19.
- Susanna Monseau, 2012, The Challenge of Protecting Industrial Design in a Global Economy, Texas Intellectual Property Law Journal, Vol.20, No.3.

### **Sources from Internet**

<http://www.ipos.com>.

<http://www.wipo.int/treaties/en/registration/hague/>

[http://www.wipo.int/treaties/en/registration/hague/summary\\_hague.html](http://www.wipo.int/treaties/en/registration/hague/summary_hague.html)

[http://www.wipo.int/wipo\\_magazine/en/2008/01/article\\_0006.html](http://www.wipo.int/wipo_magazine/en/2008/01/article_0006.html)

[https://ec.europa.eu/growth/industry/intellectual-property/industrial-design/protection\\_en](https://ec.europa.eu/growth/industry/intellectual-property/industrial-design/protection_en).

[https://ec.europa.eu/growth/industry/intellectual-property/industrial-design/protection\\_en](https://ec.europa.eu/growth/industry/intellectual-property/industrial-design/protection_en).

[https://www.wipo.int/edocs/mdocs/sct/en/sct\\_9/sct\\_9\\_6.doc](https://www.wipo.int/edocs/mdocs/sct/en/sct_9/sct_9_6.doc)

## **ENVIRONMENTAL ISSUES OF MINING ACTIVITIES IN MYANMAR**

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### **Abstract**

The paper analyzes the environmental impacts by the different types of mining methods which are used to extract the mineral resources in Myanmar. Behind the success of national economy by exploring its mineral resources, the local people suffer the negative impact of mine projects. The environmental legal system and associated regulations are the basic means to the prevention and after-closure of mine projects. The lack of the environmental impact assessment (EIA), international environmental conservation standards and vocational training for environmental management plan represents a very serious gap in protection for communities nearby the mine sites. This study explains how to implement the international standards and CSR commitments for the environmental issues by mining activities. As a result, the contractual relationship between the State and mine enterprises is a completely key area of focus for environmental responsibilities before the deal and throughout the mine business.

**Key words;** *environmental impacts, CSR commitments, contractual relationship*

### **Introduction**

Myanmar Mines Law allows to do mine business such as mineral prospecting, exploration and feasibility studies, large-scale, small scale and medium scale productions, pearl culturing and production, manufacturing and marketing of jewelry and finished products, such as statues and carvings in respect of metallic ore minerals, Industrial minerals and non-metallic raw minerals, Precious and semi-precious gemstones and Fuel minerals. The mine explorations can cause the environmental impacts on fresh water resources, air, soil, forest, biodiversity and cultural heritage. In the mine sites, the social issues such as land displacement, land compensation, safety issues on mine workers, resultant damage to health and remedial health care costs are occurred on the view of human rights. These issues are directly impacted to

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the local people as well as the habitual residents of the mines with a wide range of politics, health, human rights, rule of law, gender and demographics. Myanmar government has taken the concrete steps to address some of the issues by establishing the legal framework and the institutional responsibilities.

### **Materials and Methods**

This research based on the analytical study of national legislation and international framework on the environmental degradation and human rights impact. This paper analyzes the legislation to mitigate the environmental impacts by mining activities in Myanmar. It observe show to implement the International Environmental Standards and how to take the environmental responsibilities by government and mine businesses in Myanmar.

### **Research Finding**

This paper explores that the mineral license holders relaxed their standards for the environmental issues. Myanmar Government needs to revise its Environmental Conservation Law and Rules in the light of the State's environment and natural resources. And then, the most basic Law, Mines Law and Environmental Conservation Law provide the environmental responsibilities by the Environmental Impact Assessment and Environmental Safety Health plan. The paper found that, on the one hand, the mining enterprises need to do prior permission scheme, EIA, SIA, CSR and mine closure plans and on the other hand, the concerned ministries need to do monitor compliance on those.

### **Mineral Resources and Occurrences in Myanmar**

Myanmar has considerable mineral resources of antimony, barite, coal, copper, gold, iron, lead, monazite, natural gas, nickel, petroleum, silver, tin, tungsten, and zinc. Myanmar's minerals include: Metallic ore minerals such as Iron and metal for steel alloys - Fe, Mn, Cr, Ni, Mo; Base and non-ferrous metals - Pb, Zn, Cu, Sn, W, Sb, Ti; Precious and rare metals - PGM, Au, Ag, Nb, Ta; Industrial minerals and non-metallic raw minerals-Chemical and fertilizer minerals - barite, fluorite, gypsum, rock salt; Ceramic and refractory

minerals - clay, limestone, dolomite, feldspar, quartz and glass sand; Construction and building materials - decorative stones, road materials, limestone for cement: Precious and semi-precious gemstones; Ruby, sapphire, jade, diamond: Fuel minerals-Oil, natural gas, oil shale, coal base. The mining industry is regulated by the Ministry of Mines, which control the all mining activities<sup>1</sup>.

The vast majority of mineral reserves are located in the country's northern regions. Myanmar has long been a major tin-tungsten producing country in SE Asia. More than 120 Sn-W occurrences have been recorded in Myanmar as primary, secondary alluvial and eluvial deposits. World class porphyry copper deposits at Monywa area are being conducted to bulk mining and producing cathode copper. Myanmar has a variety of Pb-Zn mineralization including well-known Bawdwin deposit. The distribution of antimony deposits in Myanmar are mainly in Shan, Kayah, Kayin and Mon States.

Major minerals produced and exported are cathode copper, refined lead, refined silver, zinc concentrate, refined tin, tin concentrates, tin-wolfram mixed concentrates and coal while gold iron and steel, limestone and industrial /minerals and barites are produced for domestic consumption<sup>2</sup>. Limestone in Myanmar has been mostly deposited in rock formation. The limestone quality is good enough to produce. Ornamental stones and the estimated ore reserve in the whole country are about 563 million tons. Gemstones such as rubies, sapphire, colored gemstone and jade are also exported. Myanmar Mineral policy is to boost up present production, to fulfill the growing domestic needs, to increase foreign exchange earnings, and to invite participation in terms of technical know-how and investment from sources within the country and abroad.

### **Process of Mineral Exploration**

A mining operation begins with prospecting and exploration -- stages with long periods of investment and high risk of failure. However, prospecting and exploration are necessary forms of investment and insurance for the future

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<sup>1</sup> Myanmar Investment Commission; Myanmar Investment Guide, 2014, P.11.

<sup>2</sup> Ibid, P.18.

of any mining company. The principal objective of mineral exploration is to find economic mineral deposits that will appreciably increase the value of a mining company's stock to the shareholders on a continuing basis, or to yield a profit to the explorer. For an established mining company, this may entail discovery or acquisition of new ore reserves and mineral resources to prolong or increase production or life of the company, to create new assets and profit centers by product and/or geographic diversification.

Methods of mining can be divided into various classes; open pit mining, glory holing, strip mining, auger mining, hydraulic mining, drilling systems and surface techniques. Open Pit Mining is a term properly applied to a surface mining method in which reclamation is deferred until all, or nearly all, of the deposit is removed within economic limits. Underground mining has the potential for tunnel collapses and land subsidence. It involves large-scale movements of waste rock and vegetation, similar to open pit mining. Glory Mining involves a mine opening at the surface from which ore is removed by gravity through raises connected to adit haulage ways beneath, and tramming the ore to the surface. Strip Mining is surface mining in which reclamation is contemporaneous with extraction. Area Mining or strip mining is generally carried out on a large scale, and consequently is low-cost by removing coal, clay, phosphate, oil-shale, etc. from thin seams exposed in deep trenches or high-walls in strip mines. Hydraulic Mining involves directing a high-pressure stream of water, via a MONITOR or nozzle, against the base of the placer bank. Rotary Percussion is fast and the least expensive method. A hammer transmitting its force through drill rods to a rotating drill bit which does the penetration. Diamond Core Drilling is slower and more expensive than rotary percussion (RC) drilling, but provides more useful and accurate samples of a mineral deposit as to the rock-mineral types and relations, and rock structures and characteristics<sup>3</sup>.

To sum up, mining is a destructive process due to exploration. Mineral exploration methods vary at different stages of the process depending on the size of the area being explored. The environmental impacts are occurred by the different mining methods. In the process of extracting minerals,

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<sup>3</sup>Rocky Mountain Mineral Law Foundation, *Science and Technology Series*; An Introduction to Geology and Hard Rock Mining, Dr. Willard Lacy, P-26

underground mining is a less environmentally destructive means of gaining access to an ore deposit. While most large-scale mining projects involve open-pit mining, many large underground mines are in operation around the world. The most of Myanmar mines are used the methods of open pit mining, underground mining, strip mining and drilling. All of the mining projects have environmental impacts depending on the mining methods.

### **Mine Business in Myanmar**

The mineral businesses such as prospecting, exploration, productions including small scale, large scale and subsistence production, and mineral processing are granted to do by the Myanmar Mines Law 1994 and the Amending Law 2015. The small and medium scale productions are only for the citizens and not for the foreigners who can do mine business in large scale production, feasibility study and mineral processing<sup>4</sup>. Large scale production is the commercial production of minerals which requires the technical know-how and methods with the permit terms at least 15 years up to 50 years<sup>5</sup>. Medium Scale production is prescribed the terms till 15 years on the commercial mineral production<sup>6</sup>. Small Scale production is the commercial production of minerals which requires the technical know-how and methods with the permit terms below 10 years<sup>7</sup>. Subsistence production is mineral production used by the hand tools or instrument which is not by the horse power generator machine<sup>8</sup>. Mineral processing is the beneficiation of ore or mineral to improve their grade or their value which includes the operation of mineral dressing, concentration, smelting, refining to obtain the mineral concentrates and refined metals<sup>9</sup>. Feasibility study is the analysis and assessment on the mineral occurrence where the mineral exploration is done<sup>10</sup>.

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<sup>4</sup> The Law Amending the Myanmar Mines Law 2015, Pyidaungsu Hluttaw Law No.72/2015, December 24, 2015.

<sup>5</sup> S.2(g) of the Law Amending the Myanmar Mines Law 2015.

<sup>6</sup> S.2(h), Ibid.

<sup>7</sup> S.2(i), Ibid.

<sup>8</sup> S.2(i), Ibid.

<sup>9</sup> S.2(i), Ibid.

<sup>10</sup> S.2(e), Ibid.

Mineral exploration means the defining and gaining knowledge of the size, shape, location, quality and quantity of a mineral deposit<sup>11</sup>.

The holder of mineral production permit shall pay royalty on the value of the mineral sold within the rates mentioned below as determined by the Ministry: for gold, platinum, uranium and other precious metallic minerals that the Ministry may, with the approval of the Government prescribed by notification from time to time at the rate of 5%; for silver, copper, tin, tungsten, nickel, iridium, rhodium, niobium, tantalum, palladium, ruthenium, columbium, thorium, cadmium, and other metallic mineral that the Ministry may, with the approval of the government prescribe and publish by notification from time to time at the rate of 4%: for iron, zinc, lead, antimony, aluminum, arsenic, bismuth, chromium, cobalt, manganese and other metallic mineral that the Ministry may, with the approval of the Government prescribe and publish by notification from time to time at the rate of 3%: for industrial mineral or stone at the rate of 2%<sup>12</sup>.

In the Law Amending Myanmar Mines Law, it is found that the environmental and social impact assessment must be done by the investors of mineral productions. The permit holder of mineral production shall comply with the rules prescribed under the law in respect of carrying out not to harm the socio-economy of the local people and to be the least environmental impacts; making the funds for the yearly environmental preservation; and contributing the reserve funds for the soil maintenance, land resettlement and environmental conservation on and after the mine closure<sup>13</sup>. The Director General, chief inspector, shall make the inspection on the plans of environmental impact and social impact of the mineral exploration, mineral prospecting, mineral production and mineral processing<sup>14</sup>.

To increase the country's mineral exploration and production for State's economy, the Government invited the foreign investors to do business in Mining sector. At present, the Investment Law has been enacted by the

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<sup>11</sup> S.2(d), Ibid.

<sup>12</sup> S. 17 of the Law Amending the Myanmar Mines Law 2015.

<sup>13</sup> S.16, Ibid.

<sup>14</sup> S.23, Ibid.

Pyidaungsu Hluttaw on 18<sup>th</sup> October 2016 by repealing the foreign investment law and citizen investment law.

### **Environmental Impacts of Mining Activities**

Mining operations mobilize large amounts of material, and waste piles containing small size particles are easily dispersed by the wind. Mineral exploration has great effect on the quality of air, contamination of water resources, soil pollution, loss of biodiversity and forest resources, sedimentation and mining waste problems due to the blasting rock to get the mineral resources from the earth. Large-scale mining has the potential to contribute significantly to air pollution, especially in the operation phase. All activities during ore extraction, processing, handling, and transport depend on equipment, generators, processes, and materials that generate hazardous air pollutants such as particulate matter, heavy metals, and carbon monoxide, sulfur dioxide, and nitrogen oxides.

Surface water changes in quality (especially in terms of drinking water and such uses as agriculture and other water-intensive industrial/commercial operations), discharge quantities such as stream flow regime fluctuations with sharper flow peaks and reduced dry season flows, stream channel alterations from erosion and slumping, and runoff including wash-off or hazardous chemical leachates (such as sulfates, sulfides, and salts) from unrehabilitated and poorly revegetated mine dumps and discard areas and the interrelated problems involving the release of heavy metals (including lead, copper, mercury, aluminium, selenium, zinc, uranium, nickel, chromium, and others) and acids, especially sulfuric, into nearby water bodies where excess acid generation overwhelms the natural buffering capabilities present in adjacent land and water resources.

Topographic modifications include the large-scale removal of soil, vegetation, and overburden to access ore or other mineral deposits and create nearby sites for tailings storage, water storage dams and reservoirs, and waste disposal pits. Soils change in characteristics through accelerated wind and water erosion, sharply increased acidity and salt content, development of nutrient deficiencies or imbalances, compaction, surface crustiness, or desiccation. Soils can be removed partially or entirely, altered, indurated,

contaminated with toxins, or otherwise adversely affected by road building or mining construction to certain depths below the surface such that short-term and even mid-term recovery following reclamation is problematic.

In the process of extracting coal or minerals, thousands of acres of landscape are destroyed. Plants and trees are sloughed away by mining equipment and animals lose vital habitat areas. Flora and fauna alterations to and loss of native habitats for indigenous fauna and flora, vegetation cover, invasion by alien plant/animal species, altered plant community species composition, contamination and destruction of entire food webs. Disturbances of natural, quasi-natural, or cultural landscapes inevitably result in changes in composition and structure of plant species, disrupt soil strata, and stimulate invasion by disturbed-site plant species that in turn can alter composition of local invertebrate and other associated species and habitat<sup>15</sup>.

The mining process removes plant growth that would deter erosion and this allows the excess sediment to wash down. Once in streams the excess sediment covers the stream bed and blocks sunlight by making the water murky. Because sunlight cannot reach the bottom, algae stops growing and the fish and small animals that feed on algae starve. The process continues up the food chain reducing the type and amount of living things in the waterway<sup>16</sup>.

Generation of tailings and other wastes that may release toxic elements or be mobilized by erosive forces; Gaseous emissions from mineral processing, methane emissions from mine openings, fumes from coal seam fires; Damage to heritage sites; and Destruction of adjacent habitats arising from the development of camps, towns and services stimulated by the mining project<sup>17</sup>. There are so many incidents that are caused by the mining activities in Myanmar. Among those, this research paper analyzes three environmental problems in the areas of large scale mining projects.

As of November 2010, excavation of iron deposit on Pinpet Mountain in Taunggyi Township, southern Shan State seems imminent as bulldozers

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<sup>15</sup> <https://www.sgu.se/en/mineral-resources/>

<sup>16</sup> <https://www.sgu.se/en/mineral-resources/>

<sup>17</sup> Overview of Best Practice Environmental Management in Mining; Best Practice Environmental Management in Mining; Environment Australia, 2002, p-15

have begun clearing the area. Farmers at the site are being displaced and there are fears of further forced relocation. Construction of an iron factory has begun. A 250-mile pipeline transferring natural gas to the iron factory has destroyed villagers' farmlands along the route<sup>18</sup>. The Tigyit coal mine in south eastern Shan state, just 13 km from Inle Lake, is Myanmar's biggest open pit coal mine, producing 2,000 tons of coal daily. There is also a coal fired power plant in Tigyit which is slated for use at the Iron mining factory in Taunggyi. Polluted water from the mine and waste from the power plant flow via the Balu creek into Inle Lake, however as yet there has been no study on the impact of the project on the lake.

In Tenasserim Region's Dawei District, residents of MyaungByo village faced the severe environmental damage to their farmlands caused by the tin mine's wastewater. The lands of the ethnic Dawei village have been affected by increasing amounts of wastewater ever since Myanmar Pongpipat took over the Heinda mine. The creeks and rivers got shallow, many species of plants and animals went extinct and many of plantations, houses, wells and religious buildings were destroyed due to waste and sediment. In 2012, there was more flooding causing further destruction of houses, plantations and water sources along the Myaung Byo creek, which is now filled with waste and sediment from the mining project. The impoverished families complained of a sharp drop in income due to a loss of farmland, while their health suffered from a lack of drinking water because wells had been contaminated by wastewater<sup>19</sup>.

Letpadaungtaung Copper Mine Project is situated about 7 miles of Nyaung-Pin-Gyi Port in Sarlingyi Township of Monywa District in Sagaing Region. In April 2011 Norinco finished a "Production Sharing Contract" with the Union of Myanmar Economic Holdings Ltd (UMEHL) for the rights to implement copper production project in Monywa. On May 2011, Chinese embassy announced the confirmation of the production sharing agreement for Monywa copper mine. The copper mine uses an advanced process called the

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<sup>18</sup> Burma's Environment: People, Problems, Policies, The Burma Environmental Working Group (BEWG) 2011, P.60.

<sup>19</sup> [www.earthrightsinternational.com](http://www.earthrightsinternational.com).



solvent extraction-electro winning (SX-EW) method. In basic terms, copper ore is mined, crushed and stacked on an allegedly 'impermeable' liner.

The local people from four villages began the protest to stop the project in June 2012 with the representatives of 26 villages. In September 2012, over 5000 villagers participated in protest at the letpadaung copper mine. Protestor demanded the copper mine to be closed by claiming it had led to environmental destruction, forced relocation and illegal confiscations<sup>20</sup>. There were about 124 times of protests during that 2012. Myanmar government formed the Investigation Commission by Presidential Notification. In respect of the investigation into the environmental protection standards in place at the Project, Commission members examined soil samples taken from within the Project area and also from a number of neighboring pits. The commission also met with representatives of the Myanmar Environmental Institute and presented with data in relation to fauna, air pollution, water quality, sediment samples, existing baseline air quality, project development and environmental management.

In the cases of much environmental destruction in Myanmar Mining sector, many environmental problems give rise to human rights violations. Environmental sustainability and the promotion of human rights are closely intertwined and complementary objectives that are at the core of sustainable development. The right to healthy environment is now recognized in S.45 of the 2008 Constitution that the Union shall protect and conserve natural environment. This constitutional right confers the substantive rights such as the rights to life, health, food, water, culture and procedural rights such as Rights to access to information, participation in decision-making, and access to justice.

### **Environmental Responsibilities for Mining Activities in Myanmar**

Environmental protection should always be the primary objective in seeking development. The issue of economic development is intertwined with that of corporate responsibility and good corporate governance. It is obvious that the business company who does not practice such responsible conduct

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<sup>20</sup> <http://www.charltonslaw.com/en/lawyers/index.htm>

cannot contribute to the economic development of the state. The main responsibility is to obey the provisions of the Law and the terms of the contract. They have the responsibilities in carrying out the environmental conservation, protection in the project and its environment in accordance with the existing laws, managing the system to dispose industrial waste from the factories, contributing the funds for Corporate Social Responsibilities (CSR) and submitting the reports to the Ministry concerned and MIC.

The Environmental Conservation Law 2012 vests the responsibility to stipulate environmental quality standards on the Ministry of Natural Resources and Environmental Conservation as follows: suitable surface water quality standards in the usage in rivers, streams, canals, springs, marshes, swamps, lakes, reservoirs and other inland water sources of the public; water quality standards for coastal and estuarine areas; underground water quality standards; atmospheric quality standards; noise and vibration standards; emissions standards; effluent standards; solid wastes standards; other environmental quality standards stipulated by the Union Government<sup>21</sup>. In respect of mineral resources, the relevant Government departments and Government organizations have to carry out the conservation, management, beneficial use, sustainable use and enhancement of regional cooperation<sup>22</sup>.

If it is found that a holder of the prior permission fails to comply with any of the terms and conditions relating to environmental conservation contained in the prior permission, the Ministry may pass any of the following administrative penalties: causing to comply with in accord with the terms and conditions after warning, causing to sign the bond; causing to comply with in accord with the terms and conditions after paying a fine.<sup>23</sup> The Ministry may, with the approval of the Union Government, exempt or relieve any Government department, organization or private business from complying with any provision contained in this Law for the interests of the Union and its people<sup>24</sup>.

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<sup>21</sup> S.10 of the Environmental Conservation Law 2012.

<sup>22</sup> S.18, Ibid.

<sup>23</sup> S.25, Ibid.

<sup>24</sup> S.36 of the Environmental Conservation Law 2012.

As the mining sector is included in the prohibited activities under MIC Notification No.26, the foreign investor in mining sector shall perform the specific condition ruled by the relevant Ministry for recommendation<sup>25</sup>. According to Rule 67, the investor needs to obtain the approval of the Ministry concerning the environment impacts<sup>26</sup>. Mining Enterprises need to prepare Initial Environmental Examination (IEE) and Environmental Impact Assessment (EIA) report, depending on IEE report, before submitting application for MIC Permit to Myanmar Investment Commission (MIC) under Investment Law 2016. Investors also need to carry out social impact assessment (SIA) studies and prepare reports before submitting application for MIC permit for projects in Myanmar.

Manufacturing of minerals is included in the list of economic activities which required the Environmental Impact Assessment<sup>27</sup>. Foreign investor has the main duty to make the EIA report that included the information necessary for decision-making on an executive summary; results from EIA studies; information on data gaps and major sources of uncertainties; technical appendices; and visual aids and easy-to-read text. In the Environmental Conservation Rule 2015, large scale production shall make the EIA report with the environmental management plan<sup>28</sup> and take the certificate of the performance of the environmental conservation<sup>29</sup>. The investor who invests in large scale mining production shall abide by applicable laws, rules, procedures and best standards practiced internationally so as not to cause damage, pollution, loss to the natural and social environment and not to cause damage to cultural heritage<sup>30</sup>.

In making the EIA report, foreign investment company should follow the principles of International Association for Impact Assessment (IAIA). EIA process should provide for: Screening- to determine whether or not a proposal should be subject to EIA; Scoping- to identify the issues and impacts that are likely to be important and to establish terms of reference for EIA;

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<sup>25</sup> Notification No.26/2016 by Myanmar Investment Commission, 21<sup>st</sup> March 2016

<sup>26</sup> Rule 67 of Environmental Conservation Rule 2014

<sup>27</sup> MIC Notification No.50/2014, 14<sup>th</sup> August 2014.

<sup>28</sup> Rule 2 (p) of the Environmental Conservation Rule, 2015.

<sup>29</sup> Rule 3, Ibid.

<sup>30</sup> S.65 (g) of the Investment Law 2016

Examination of alternatives- to establish the preferred or most environmentally sound; Impact analysis - to identify and predict the likely environmental, social and other related effects of the proposal; Mitigation and impact management - to establish the measures that are necessary to avoid, minimize or offset predicted adverse impacts; Evaluation of significance- to determine the relative importance and acceptability of residual impacts (i.e, impacts that cannot be mitigated). Preparation of environmental impact statement (EIS) or report- to document clearly and impartially impacts of the proposal, the proposed measures for mitigation; Review of the EIS- to determine whether the report meets its terms of reference, provides a satisfactory assessment of the proposal(s) and contains the information required for decision making; Decision making- to approve or reject the proposal and to establish the terms and conditions for its implementation. Follow up - to ensure that the terms and condition of approval are met; to monitor the impacts of development and the effectiveness of mitigation measures<sup>31</sup>.

As Myanmar is a signatory state of the Stockholm Declaration on Human Environment 1972 and Rio Declaration on Environment and Development 1992, environmental policy was adopted in 1994 and Myanmar Agenda 21 was issued in 1997. But, there is no provision for environmental impacts of mining activities but for environmental provision on other factors. Then, Myanmar is a member country of World Bank Group and International Finance Corporation (IFC), foreign investors in Mining sector should apply the 2007 Environmental, Health and Safety (EHS) Guidelines and 2012 Performance Standards of IFC. The EHS guidelines are applied by their respective policies and standards on the waste water management, hazardous materials management, control of air emission, land contamination, energy conservation and emergency preparedness and response. The multinational corporations shall have the Environmental Management Policy and Plan by following up the EHS Guidelines.

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<sup>31</sup> Impact Assessment Inter-organizational Committee on Guidelines and Principles; 1994, Guidelines and Principles for Social Impact Assessment, Environmental Impact Assessment Volume 12, No. 2, 107-152.

As the mine explorations are used the volatile organic compounds, ozone depleting substances and greenhouse gas, compressed gas, flammable liquids and solids, oxidizing substances and toxic materials, and heavy machinery equipments, the enterprises have to perform the regulatory requirements; technical feasibility and cost effectiveness of the available options for prevention, control and release of emission; wastewater management including the industrial wastewater, process wastewater, storm-water and sanitary wastewater; water conservation program, i.e, water monitoring/ management techniques, process and cooling/heating water recycling, reuse and other techniques and sanitary water conservation techniques; internationally-accepted hazard assessment such as Hazardous Operations Analysis (HAZOP), Failure Mode and Effects Analysis (FMEA) and Hazard Identification (HAZID); noise monitoring program preferred method for controlling noise from stationary sources; risk management actions involving the risk screening, interim risk management, detailed quantitative risk assessment, and permanent risk reduction measures; and plan for community health and safety which means the projects including the life and fire safety systems, health and education facilities, transport project of hazardous materials, disease prevention and emergency preparedness and response plan<sup>32</sup>.

In the Performance standards of IFC, standard 1, Assessment and Management of Environmental and social Risks and Impacts, establishes the importance of (i) integrated assessment to identify the environmental and social impacts, risks, and opportunities of projects; (ii) effective community engagement through disclosure of project-related information and consultation with local communities on matters that directly affect them; and (iii) the client's management of environmental and social performance throughout the life of the project. The clients, mine enterprises, should conduct the Environmental and Social Assessment and Management System (ESMS) incorporated with the policy; identification of risks and impacts; management

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<sup>32</sup> Environmental, Health, and Safety (EHS) Guidelines; General EHS Guidelines, International Finance Corporation, 2007.

programs; organizational capacity and competency; emergency preparedness and response; stakeholder engagement; and monitoring and review<sup>33</sup>.

In accordance with the IFC performance standard 1, the mine enterprises should have the overarching policy defining the environmental and social objectives and principles that guide the project to achieve sound environmental and social performance. The risks and impacts identification process will be consistent with good international industry practices. The client will establish the management programs that will describe mitigation and performance improvement measures and actions. The process of identification of risks and impacts will consist of an adequate, accurate, and objective evaluation and presentation, prepared by competent professionals. The ESMS will maintain an emergency preparedness and response system so that the enterprises will prepare to prevent and mitigate any harm to people and/or environment. The clients will establish the procedures to monitor and measure the effectiveness of the management program, as well as compliance with any related legal and/or contractual obligations and regulatory requirements. Moreover, the enterprises will develop and implement a Stakeholder Engagement Plan that is scaled to the project risks and impacts and development stage, and be tailored to the characteristics and interests of the Affected Communities<sup>34</sup>.

Mine Enterprises have to consider the sustainable development for the civil society by performing the Corporate Social Responsibility (CSR). Due to the voluntary character of CSR, management activities and corporate performances essentially depend on how social and environmental concerns are perceived among both companies and stakeholders. Corporate Social Responsibility (CSR) focuses on business impacts on society and environment, and development of society along with business. In today's world for a successful project execution and running a business successfully, a sustainable program development is very importance and here since project inception stage due attention to CSR is a key for success, optimizing profits,

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<sup>33</sup> Performance Standard 1, Assessment and Management of Environmental and social Risks and Impacts, International Finance Corporation, 2012.

<sup>34</sup> Performance Standard 1, Assessment and Management of Environmental and social Risks and Impacts, International Finance Corporation, 2012.

developing local resources, and minimizing cost and time over-run due to societal disputes.

Thus, an important activity for governments is to raise awareness for CSR and to build the respective capacities among both groups. Improve disclosure and transparency: Reliable information on the economic, social, and environmental corporate performances is a prerequisite for investors, regulators, employees, suppliers, and customers (including public procurers) so that they can favour those who take CSR seriously. Governments can play a key role in improving the quality and dissemination of the respective CSR reports. By considering the economic, social, environmental, and/or other ethical criteria in investment decisions, socially responsible investment merges the concerns of a broad variety of stakeholders with shareholder interests<sup>35</sup>.

In doing research on environmental impacts in mining sector, Myanmar had poor legal framework and technical capacity to adequately regulate environmental impacts of such a large and environmentally sensitive project until Environmental Conservation Law 2012. Especially, environmental quality standards and the framework for environmental impact assessments had not been adopted. The main reason why the cases were occurred in the foreign investment on mining sector was that EIA did not look at the cumulative impacts of these projects on people living in the area. After the Environmental Conservation Law 2012 and Investment Law 2016, the foreign investors have to perform the international standards and EIA standards by national laws and procedures. This would require a well-intentioned, institutionally sound and genuine democratic government that could demonstrate a real commitment to human rights, the environment, transparency and development.

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<sup>35</sup> Following up the World Summit on Sustainable Development Commitments on Corporate Social Responsibility; Options for action by governments, Fanny Calder and Malaika Culver well, 2005, P.14.

## **Conclusion**

In order to reduce the environmental degradation, the Environmental Conservation Law 2012 and Environmental Conservation Rules 2014 establish a broad framework for environmental protection. Although the laws promote environmental conservation standards, there are still lacks in the environmental quality and conservation standards and rules for waste management and disposal, requirements for polluters to pay for damages. Then, the Foreign Investment Law 2016 provides a “prior permission scheme” for business that can cause environmental impacts, mine safety management plan and mine closure plan for lasting socio-economic benefits but it makes investor hardship whether the permission can get or not. And then, it is found that EIA requirements outlined in the 2012 Environmental Conservation Law and 2015 EIA Procedure are reflected in MIC decision-making processes regarding the granting of permits and approvals. Thus, existing Myanmar National Laws are well developed to promote investment and to protect environment and natural resources. However, present in Myanmar, CSR activities are very weak because of the lack of CSR policy in most of the mine enterprises. As a result, the contractual relationship with the State and mine enterprises is a completely key area of focus for HRDD before the deal and throughout the process of companies’ operations. In addition to this, government must take into account both the judicial and non-judicial mechanisms when addressing business-related human rights abuses caused by environmental issues.

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## References

### International Conventions

Stockholm Declaration on the Human Environment 1972

Rio Declaration on Environment and Development 1992

### Laws

Myanmar Mines Law (1994), State Law and Order Restoration Council No.8/94, 6<sup>th</sup> October 1994

Environmental Conservation Law (2012), Pyidaungsu Hluttaw Law No.9/2012, 30<sup>th</sup> March 2012

Environmental Conservation Rule, (2014), Ministry of Environmental Conservation and Forestry Notification No.50/2014, 5<sup>th</sup> June 2014

Myanmar Investment Law (2016), Pyidaungsu Hluttaw Law No.40/2016, 18<sup>th</sup> October 2016

Law Amending the Myanmar Mines Law (2015), Pyidaungsu Hluttaw Law No.72/2015, 24<sup>th</sup> December 2015

### Notifications

Myanmar Investment Commission (MIC) Notification No.50/2014, 14<sup>th</sup> August 2014

Myanmar Investment Commission (MIC) Notification No.26/2016, 21<sup>st</sup> March 2016

### Books

The Burma Environmental Working Group (BEWG), Burma's Environment: People, Problems, Policies, Wanida Press, 2011

Environmental Management in Mining; Environment Australia, 2002

International Finance Corporation, Environmental, Health, and Safety (EHS) Guidelines; General EHS Guidelines, IFC, 2007

Fanny Calder and Malaika Culverwell, Following up the World Summit on Sustainable Development Commitments on Corporate Social Responsibility; Options for action by governments, 2005

Guidelines and Principles for Social Impact Assessment, Environmental Impact Assessment Volume 12, Special Publication Series No. 2 by International Assessment for Impact Assessment, May 2003

Impact Assessment Inter-organizational Committee on Guidelines and Principles; 1994

Myanmar Investment Commission; Myanmar Investment Guide, 2014

Performance Standard 1, Assessment and Management of Environmental and social Risks and Impacts, International Finance Corporation, 2012

### Websites

<https://www.sgu.se/en/mineral-resources/>

<http://www.charltonslaw.com/en/lawyers/index.htm>

<http://www.earthrightsinternational.com>

## **SUPPRESSION OF THE FINANCING OF TERRORISM**

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### **Abstract**

Terrorism is a global problem of today. Suppression of the financing of terrorism is a core strategy to combat the terrorists and terrorist organizations. This dissertation analyzes the cases to point out that money is the oxygen of terrorism or terrorist organizations and combating the flow of even small amount of money may save lives. In this regard, the International Convention for the Suppression of the Financing of Terrorism (1999) is the most important element in the international legal norms to combat the financing of terrorism. Myanmar has signed this convention on 16, October, 2006. Besides, as a party to twelve international counter-terrorism instruments, Myanmar enacted the Counter Terrorism Law, 2014 and the Anti Money Laundering Law, 2014. The Counter Terrorism Law includes the offences provided by twelve international terrorism treaties including the offences of the financing of terrorism as one of these offences. But it has no detailed provisions relating to the procedure of identifying and freezing the terrorist assets, institutional measures such as customer due diligence, record keeping and suspicious transaction of the financial sector to enhance financial transparency, and functions and power of Financial Intelligence Unit (FIU) to operate effectively. The Anti-Money Laundering Law, 2014 provides laundering of money and properties derived from commission of any of offences relating to the terrorism. It does not indicate the financing of terrorism as a separate crime. It cannot cover the financing of terrorism as the nature of money laundering and terrorist financing are slightly different. Therefore, these two Laws are not comprehensive laws to suppress the financing of terrorism. Myanmar should extend the Anti-Money Laundering Law by including the specific terrorist financing offence or adopt the specific Anti-Terrorist Financing Law in line with the international norms and standards to prevent and protect terrorist attacks and the financial system in Myanmar effectively.

**Key words:** terrorism, terrorist financing, money laundering

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**Research Questions**

- (1) What are the differences between the nature of terrorist financing and money laundering?
- (2) What are the international norms and standard to combat the financing of terrorism?
- (3) How to protect the financial system against the terrorist financing as the preventive measure of financial institutions?
- (4) What are the legal frameworks to suppress the financing of terrorism in Myanmar?

**Research objective**

The objective of research paper is to point out that money is the oxygen of terrorism or terrorist organization, and combating the flow of even small amount may save lives, and to analyze the current legal framework to suppress the terrorist financing in Myanmar.

**Research Methodology**

This research paper analyzed the international legal norms and national laws in Myanmar. It also cited the text books and other materials published by scholars.

**Introduction**

Terrorism is a threat to world peace affecting the whole of humanity. It has a long history, but targets, victims, perpetrators, causes and justifications for the use of terror have changed. International community attempts to combat the terrorism, terrorist acts, and terrorist organizations in various ways. There are many international instruments to expand financing of terrorism (FT), and also to focus its energy and expertise on the worldwide effort to combat it.

## **Nature of Terrorism**

Terrorism should not be confused with traditional warfare. Whether treated as crimes or acts of warfare, terrorist conduct is distinguishable by reason of its focus, participants, and victims.<sup>1</sup>

Approaching terrorism as warfare, a target is selected because it has military value and will achieve a specific military objective. In modern warfare, a specific target is attacked or destroyed because the action serves a specific military necessity, achieves a specific result (utility) and leads to a specific goal (objective) while limiting collateral damage (proportional use of force) to the civilian population.<sup>2</sup> Besides, one can be less concerned with the aspect of individual guilt, and an approximate assessment of guilt and intelligence are sufficient. The focus is not on a single perpetrator, but rather on proper identification of the enemy.<sup>3</sup>

When terrorism treated as the crime, criminal acts are normally focused upon a particular goal with a final end. Terrorist acts have, in contrast, shown themselves to be generally continuous, given the much longer-term motivations of terrorist organizations. While criminal acts are targeted, terrorist ones are often indiscriminate.<sup>4</sup>

There is also a difference between terrorism and war crimes. An example of a war crime is an army invading a town to purge it of enemy forces, and while doing so intentionally killing unarmed civilians and non-combatants. Although this action is both immoral and criminal, it is not terrorism. In this example, people were killed because members of the army lost control of themselves, not to intimidate other towns or the society as a whole to achieve a political objective.<sup>5</sup>

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<sup>1</sup> <http://www.springer.com>.

<sup>2</sup> Arthur H. Garrison, *Criminal Justice Studies*, 2003, Vol. 16(1), p-42.

<sup>3</sup> A. Conte, *Human Rights in the Prevention and Punishment of Terrorism*, DOI 10.1007/978-3-642-11608-7\_2, # Springer-Verlag Berlin Heidelberg 2010, p-9.

<sup>4</sup> A. Conte, *Human Rights in the Prevention and Punishment of Terrorism*, DOI 10.1007/978-3-642-11608-7\_2, # Springer-Verlag Berlin Heidelberg 2010, p-10.

<sup>5</sup> <http://cjc.delaware.gov/terrorism/history.shtml>.

## **Definition of Terrorism**

According to UN Security Council Resolution 1566 (2004), terrorism is the criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act.<sup>6</sup>

The United States has defined terrorism under the Federal Criminal Code. In Section 2331 of Chapter 113(B), defines terrorism as: "...activities that involve violent... or life-threatening acts... that are a violation of the criminal laws of the United States or of any State and... appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and...(C) occur primarily within the territorial jurisdiction of the United States..."<sup>7</sup>

And, according to James Adams' definition, a terrorist is an individual or member of a group that wishes to achieve political ends using violent means, often at the cost of casualties to innocent civilians and with the support of only a minority of the people they claim to represent.<sup>8</sup>

## **Type of Terrorism**

Terrorism occurs due to indefinite causes and in different types. Three of them are of relevance and significant: the nationalist/ separatist terrorism (e.g. Palestinian Liberation Organization (PLO), Provisional Irish Republican Army (IRA) and Tamil Tigers (LTTE)), which aims at political self-determination. The ideological terrorism (e.g. The Revolutionary Armed Forces of Columbia and Red Army Fraction (RAF), as well as other right- or left wing terrorist), which attempts to change the political, economical or social system.<sup>9</sup> The religious terrorism commits terrorist activities to conduct

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<sup>6</sup> UN Security Council Resolution No.1566 (2004).

<sup>7</sup> Section 2331, the Federal Criminal Code, the United States

<sup>8</sup> James Adams, *The Financing of Terror*, 1988, p-10.

<sup>9</sup> Wilkinson, *Terrorism Versus Democracy, The Liberal State Response*, 2001, p- 20.

religious goals (e.g. Al. Quida).<sup>10</sup> Nevertheless, some terrorist groups combine these different components (e.g. hamas).<sup>11</sup>

### **Financing of Terrorism**

The term “financing of terrorism” is defined broadly by the World Bank and International Monetary Fund (IMF) as “the financial support, in any form, of terrorism or of those who encourage, plan or engage in it.”<sup>12</sup>

Money is important for a terrorist organization to survive and especially to operate. It can be found the various forms of terrorist financing. Terrorist groups gain financial resources primarily from (i) state-financing (i.e., state sponsorship of terrorism), (ii) financing by legitimate means (e.g., from legitimate business, charities), and (iii) financing by unlawful means (e.g. drug trafficking, kidnapping extortion). Therefore, to understand and enable to successfully disrupt the funding of terrorist and terrorist organizations, their source of funding must also be traced.

Money is important for a terrorist organization to survive and especially to operate.<sup>13</sup> After the unsuccessful World Trade Center attack of 1993, one of the conspirators, Ramzi Yousef, claimed that if he had had more money, he would have been able to purchase more explosives. With a bigger bomb, he might have been successful in toppling the tower into other buildings. But because of cash-problems, the attack failed, killing six people and injuring over 1,000. This anecdote highlights the importance of money for terrorism.<sup>14</sup>

Similarly, the terrorists who used two pressure cooker bombs during the Boston Marathon on April 15, 2013, also planned to travel to New York City to bomb Times Square. Running out of funds, the two brothers turned to other crime—they carjacked a Mercedes-Benz SUV and stole \$800 in cash

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<sup>10</sup> Jae-myong Koh, *Suppressing Terrorist Financing and Money Laundering*, 2006, p-2.

<sup>11</sup> Hoffman, *Inside Terrorism*, 1999, p-87.

<sup>12</sup> Paul Allan Shoot, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, 2<sup>nd</sup> edition, The International Bank for Reconstruction and Development/The World Bank/ The International Monetary Fund, 2006, p- I-2.

<sup>13</sup> Steve Kiser, *Financing Terror An Analysis and Simulation for Affecting Al Qaeda's Financial Infrastructure*, the Rand Corporation, 2005, p-4, <http://www.rand.org/>.

<sup>14</sup> Michael Freeman, *Financing terrorism: case studies*, Ashgate Pub Co, 2012, p-3

from the carjacking victim, which eventually led to their demise. These are examples of money's importance in perpetrating terrorist attacks that injure or kill massive amounts of people.<sup>15</sup>

### **The Differences between Terrorist Financing and Money Laundering**

There are different stages involved in money laundering and terrorist financing. Money laundering is the process by which criminals attempt to conceal the true origin and ownership of the proceeds of criminal activities.<sup>16</sup> The typical money laundering stages are (1) place money in the financial system, without arousing suspicion; (2) move the money around, often in a series of complex transactions crossing multiple jurisdictions, so it becomes difficult to identify its original source; and (3) then move the money back into the financial and business system, so that it appears as legitimate funds or assets.<sup>17</sup> The purpose of money laundering is to accumulate wealth in such a manner that it appears legitimate.

The typical stages involved in terrorist financing are the collection of funds, the dissemination of funds to the terrorist cells and the use of funds. The purpose of terrorist financing is not to accumulate wealth, but to fund actions designed to make a statement of importance, such as drawing attention to a political viewpoint.

The laundering of criminal funds aims at giving a legal appearance to dirty money, whereas funds used to support terrorism may originate from legitimate sources, criminal activities, or both. Such legitimate sources may include donations or gifts of cash or other assets to organizations such as foundations or charities that in turn are utilized to support terrorist activities or terrorist organizations.<sup>18</sup>

However, criminal assets and terrorist assets represent the same threats to financial systems and public institutions, and it is clear that the strategies designed to fight criminals when they channel their funds through

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<sup>15</sup> Karolina Lula, *Terrorized Into compliance: Why Countries submit To financial Counterterrorism*, 2013, p-3.

<sup>16</sup> [http://en.wikipedia.org/wiki/Terrorism\\_financing](http://en.wikipedia.org/wiki/Terrorism_financing).

<sup>17</sup> <http://www.fsc.gov.im/aml>.

<sup>18</sup> [http://en.wikipedia.org/wiki/Terrorism\\_financing](http://en.wikipedia.org/wiki/Terrorism_financing).

financial systems may apply with the same success in combating terrorist financing cases.<sup>19</sup>

### **International legal framework to suppress the financing of terrorism**

On October 1989, as the new strategies of international efforts, the United Nations Security Council Resolution-1267 call on all member states to freeze funds and other financial resources of the Taliban and Al-Qaeda, and associated entities and individuals. Since then, international community targeted the assets of terrorism as the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain. They need funds for "planning, recruitment, procurement and preparation, delivery of materials, communications, persuasion, propaganda, incitement, and infrastructure of safe houses/sleeper cells". Terrorists fund themselves from great varieties of sources. By limiting the resources available to terrorist groups by effective financial control may prevent some attack from taking place; stopping the transfer of even small amount of money may save lives, or at least can reduce the possible impact of attacks what cannot be prevent.

On December 1999, the International Convention for the Suppression of the Financing of Terrorism was adopted by the General Assembly. It is the most important element in the international arsenal of legal norms to combat the financing of terrorism. It recognizes that financing is the heart of terrorist activity, and it paves the way for concerted action and close cooperation among law enforcement agencies, financial authorities and States.

Under this Convention, Member States requires taking measures to protect their financial systems from being misused by persons planning or engaged in terrorist activities. All financial institutions must be committed to combat financing of terrorism. The international financial institutions and inter-governmental organizations issued and declared the effective recommendations and standards to be compliant by the Financial Institutions, Non-Financial business and Professions, and Non-Profit Organizations to prevent terrorist organizations from accessing their financial services, and assist governmental enquiries.

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<sup>19</sup> Jean-François Thony, Money Laundering And Terrorism Financing: An Overview, 2000, p-4.



To reinforce the 1999 convention, United Nations adopted UNSC Resolutions 1373 and 1390 directing member states to criminalize financing of terrorism and adopt regulatory measures to detect, deter and freeze terrorist assets.

After 9/11 attack in US, a variety of other international efforts aimed at terrorist financing. In addition to the international conventions, regional conventions are established to combat the financing of terrorism. The Financial Action Task Force (FATF), an inter-governmental body, expand its mandate beyond money laundering to include the financing of terrorism (FT), and also to focus its energy and expertise on the worldwide effort to combat it.

According to Article 2(1) of the International Convention for the Suppression of the Financing of Terrorism (TF Convention), any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

- a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

The Annex to the Convention sets out the list of the nine international treaties as follows;

- (1) Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.
- (2) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.
- (3) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
- (4) International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
- (5) Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.

- (6) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.
- (7) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.
- (8) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.
- (9) International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

According to Article 2 (1) (b), any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

On 13 January 2007, Association of Southeast Asian Nations (ASEAN) Convention on Counter Terrorism (2007) was signed by all ASEAN countries in Cebu.<sup>20</sup> The objective of this Convention is to provide the framework for regional cooperation to counter, prevent and suppress terrorism in all its forms and manifestations and to deepen cooperation among law enforcement agencies and relevant authorities of the Parties in countering terrorism.<sup>21</sup>

The FATF' eight Special Recommendations (SR) on Terrorist Financing can be found as follow,

**SR I. Ratification and implementation of UN instruments** - Each country should take immediate steps to ratify and to implement fully the 1999 United

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<sup>20</sup> International Instruments related to the Prevention and Suppression of International Terrorism, United Nations, New York, 2008.

<sup>21</sup> Article 1, ASEAN Convention on Counter Terrorism (2007).

Nations International Convention for the Suppression of the Financing of Terrorism. Countries should also immediately implement the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts, particularly United Nations Security Council Resolution 1373.

**SR II. Criminalizing the financing of terrorism and associated money laundering** -each country should criminalise the financing of terrorism, terrorist acts and terrorist organisations. Countries should ensure that such offences are designated as money laundering predicate offences.

**SR III. Freezing and confiscating terrorist assets** - Each country should implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts.

**SR IV. Reporting suspicious transactions related to terrorism** - If financial institutions, or other businesses or entities subject to anti-money laundering obligations, suspect or have reasonable grounds to suspect that funds are linked or related to, or are to be used for terrorism, terrorist acts or by terrorist organizations, they should be required to report promptly their suspicions to the competent authorities.

**SR V. International cooperation** - Each country should afford another country, on the basis of a treaty, arrangement or other mechanism for mutual legal assistance or information exchange, the greatest possible measure of assistance in connection with criminal, civil enforcement, and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organisations.

**SR VI. Alternative remittance** - Each country should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, should be licensed or

registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions.

**SR VII. Wire transfers** - Countries should take measures to require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account number) on funds transfers and related messages that are sent, and the information should remain with the transfer or related message through the payment chain.

**SR VIII. Non-profit organizations** - Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

- i. by terrorist organisations posing as legitimate entities;
- ii. to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and

to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organizations

### **Case study**

With regard to the liability of financial institution relating to terrorist financing, the case, **Linde v Arab Bank**<sup>22</sup>, focuses on the 39 deaths and 102 injuries of US citizens in 24 attacks during a period of escalated violence in Israel and Palestine, mostly during the early 2000s. the plaintiff argue that the bank is responsible for allegedly transferring funds linked to Hamas, a Palestinian militant group, effectively aiding and abetting acts of terrorism. This case is a unique civil suit with implications for both financial institutions and diplomatic ties in the region, said Loretta Napoleoni, an Italian journalist who has spent decades tracking the funds of terrorist organizations.

With regards to the requirement of records of transactions, **Rachid Ramda**, editor of the Al-Ansar journal in London, was convicted for

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<sup>22</sup> Linde v. Arab Bank, 2004.

association with subway bombing in Paris in 1995. Part of the evidence of a Western Union money order receipt for a transfer of \$5,000 to one of the bomber, which was found in Ramda' lodging and bore his fingerprint.<sup>23</sup>

In **US Vs Holy Land Foundation for Relief and Development (HLF)**<sup>24</sup>, the organizers of the Holy Land foundation were convicted in a federal court in Texas for the offence defined in American law as material support for terrorism.

In Australian case, **Transcript of proceeding, R v Vinyagamoothy & Ors, Supreme Court of Victoria, Coglan J, 31 March 2010**,<sup>25</sup> in December 2009, Aruran Vinyagamoothy, Sivarajah Yathavan and Armugan Rajeevan pleaded guilty to offences under the Charter of the United Nations Act 1945 for making assets available (directly or indirectly) to the Liberation Tigers of Tamil Eelam (LTTE), an entity proscribed for the purposes of that Act. It was alleged that the defendants had played a role in the collection and transfer of \$1,030,259 in donations to the LTTE between 13 December 2002 and 12 October 2004. Mr Vinyagamoothy had also been indicted for making an estimated \$97,000 worth of electronic components available to the LTTE was a proscribed entity in other countries and the 'complex structuring used to transmit funds suggested as much'. Yathavan and Rajeevan were sentenced to a term of imprisonment of one year, but released in three year good behaviour bonds. Vinayagamoothy was sentenced to a term of three years, but released on a four year good behavior bond.

In January 2016, Indonesian state prosecutors told a Jakarta court that they were seeking a life sentence for the 72-year-old cleric Abu Bakar Bashir, the spiritual leader of Islamist militants in South East Asia, for helping finance a "terrorist training camp".

The Indonesian Muslim cleric Abu Bakar Bashir, known as the spiritual leader of radical Islamists who carried out the 2002 Bali bombings, has been sentenced to 15 years in prison for supporting a jihadi training camp

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<sup>23</sup> United Nations Office on Drugs and Crimes, Digest of Terrorist Cases, United Nations, 2010.

<sup>24</sup> US Vs Holy Land Foundation for Relief and Development (HLF), November, 2008

<sup>25</sup> Transcript of proceeding, R v Vinyagamoothy & Ors, Supreme Court of Victoria, Coglan J, 31 March 2010.

uncovered last year. Abu Bakar Bashir's conviction for incitement of terrorism followed two unsuccessful attempts over the past eight years to link him to terror activities, including a conviction that was later overturned in the Bali attacks that left 202 people dead.<sup>26</sup>

The 9/11 event in the US warned all states that terrorism with international network become a major non- traditional security threat in the 21 century. In the aftermath of the September 11, 2001 terrorist attacks against American targets, the question of the financing of terrorism took on a new dimension.<sup>27</sup> U.S. government is organized to fight terrorist financing include intelligence, law enforcement, designation and asset freeze, and various diplomatic initiatives. One of the most important aspects of the U.S. effort is the public designation of terrorists and their supporters and the freezing of their assets. So far, the United States has designated some 384 individuals and entities.<sup>28</sup>

Regarding the enforcement, as it is declared by Wayne<sup>29</sup>, approximately \$147.4 million had been frozen internationally and \$65 million seized in assets internationally as of 13 July 2005. Most of this money belonged to the Taliban regime and some \$59 million seemed to be associated directly with Al-Qaeda. While in the three months after 11 September 2001 \$112 million in alleged terrorist funds were frozen, only \$4 million were frozen in the two years that followed. Seized funds represent only a small fraction of the total funds available to terrorist organizations.<sup>30</sup>

### **Countering the Financing of Terrorism in Myanmar**

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<sup>26</sup> The National World, Sunday January 24, 2016.

<sup>27</sup> Louis Forget, *Combating the Financing of Terrorism, Money Laundering and Terrorism Financing*, May 10, 2002, p-1

<sup>28</sup> E. Anthony Wayne, *Internationalization The Fight*, USA Journal, pp-6-7

<sup>29</sup> Testimony by Assistance Secretary of State for Economic and Business Affairs E. Anthony Wayne Before the Senate Committee on Banking, Housing, and Urban Affairs, "Money Laundering and Terrorist Financing in the Middle East and South Asia", 13 July 2005. This is the only available data concerning the amount of money, because while states have been reporting to CTC, as they are not obliged to do, they have not specified the amounts. (Third Report of the Monitoring Team, 14)

<sup>30</sup> Şener Dalyan, *Combating the Financing of Terrorism: Rethinking Strategies for Success*, *Defence Against Terrorism Review*, Vol. 1, No. 1, Spring 2008, p-144.

As a party to twelve international counter-terrorism instruments, Myanmar promulgated the Counter Terrorism Law 2014 and criminalizes within the scope of twelve international terrorism conventions including the offences of the financing of terrorism as one of the offences. Besides, terrorist financing are also criminalized as the predicate offence to money laundering in the Anti-Money Laundering law 2014.

Under Section 41 of the Counter Terrorism Law, 2014, whoever, in committing or to commit an act of terrorism, acts any of the followings to support or to facilitate such offence, amounts to an offence of financing of terrorism;

- a) collecting or receiving or supporting or sending or transferring unlawfully the funds by any means with the intention that they should be used or in the knowledge that they are to be used, in full or in part, directly or indirectly which is gained lawfully or unlawfully or both, by any terrorist or any terrorist group.
- b) using or possessing unlawfully of money, assets or service by any means with the intention that they should be used or in the knowledge that they are to be used, in full or in part, directly or indirectly, by any terrorist or terrorist group.
- c) concealing, moving abroad or transferring to other's name the asset knowingly or with reasons to know that it is stored or maintained or controlled by a terrorist group or a terrorist or any other person on behalf of them.
- d) attempt, abetment, instigation, organizing, providing, directing others to commit any offence or participation as an accomplice in committing any such offence contained in sub-sections (a), (b) and (c).<sup>31</sup>

Under Section 42 of this law, whoever acts, knowingly or with reasons to know, any of the followings, amounts to an offence of financing of terrorism:

- a) transaction or transfer in any means, directly or indirectly, of an asset owned by any terrorist group or any terrorist;

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<sup>31</sup> Section 41, The Counter Terrorism Law, 2014.

- b) involving in or facilitating, directly or indirectly, any transaction of an asset owned by a terrorist group or a terrorist;
- c) providing financial service or other related services involving an asset of a terrorist group or a terrorist, for the benefit of or under the direction of a terrorist group;
- d) possessing or keeping knowingly an asset which is owned by a terrorist group or a terrorist under his control;
- e) failing to reveal the information without proper reasons to the Central Committee and relevant working committee, or any member of force in respect of transaction and transfer in any other mean of an asset owned by a terrorist group and a terrorist;
- f) failing to report the existence of a terrorist and, money and assets owned by a terrorist group, communication or it is believed to be communicated with them;<sup>32</sup>

Under Section 43(a) of this law, whoever transacts or transfers by any means or attempts to transfer an asset owned by a terrorist group or a terrorist or fails to reveal the information in respect of such act without proper reasons to the Central Committee and relevant working committee or any member of the force, amounts to an offence of financing of terrorism.<sup>33</sup>

Under Section 44 of this law, notwithstanding any act of terrorism occurs or is attempted to commit or collected fund is actually used in committing an act of terrorism or collected or provided fund is connected with any act of terrorism in respect of any offence contained this chapter, it shall be deemed an offence is committed.<sup>34</sup>

Whoever commits an offence of financing of terrorism contained in sections 41 and subsection (a) to (d) of section 42 shall, on conviction, be punished with imprisonment for a term from a minimum of 10 years to a maximum of imprisonment for life and shall also be liable to fine.<sup>35</sup>

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<sup>32</sup> Section 42, Ibid

<sup>33</sup> Section 43(a), The Counter Terrorism Law, 2014.

<sup>34</sup> Section 44, The Counter Terrorism Law, 2014

<sup>35</sup> Section 50(j), The Counter Terrorism Law, 2014.



Whoever commits an offence financing of terrorism of contained in sub-sections (e) and (f) of section 42 shall, on conviction, be punished with imprisonment for a term from a minimum of 3 years to a maximum of 7 years and shall also be liable to fine.<sup>36</sup>

Whoever commits failure to reveal the information contained in sub-section (a) of section 43 without proper reasons shall, on conviction, be punished with imprisonment for a term from a minimum of 3 years to a maximum of 7 years and shall also be liable to fine.<sup>37</sup>

Section 5(d) of the Anti-Money Laundering Law 2014, provides that laundering of money and properties derived from commission of any of offences relating to the terrorism shall be applicable to this law.<sup>38</sup>

Concerning with the criminalization of the financing of terrorism, the Anti-Money Laundering law does not indicate the financing of terrorism as a separate crime. It designated as the predicate offences of the money laundering. The nature of money laundering and terrorist financing is different. The sources of terrorist financing can be legally such as from foundation, charities. It does not need to commit the criminal activities and need to be laundered. To take action the terrorist financing effectively according to the objectives of this law, it is needed to expand to criminalize the financing of terrorism separately.

Under Section 69(c) of the Anti-Money Laundering Law, the Central Bank of Myanmar may issue the necessary directives, procedures and by-laws related to the Anti-money Laundering and Counter Financing of Terrorism in line with the Anti-money Laundering Law (2014) from time to time.<sup>39</sup>

Financial Institutions must disclose the information in accord with the provisions provided by the Anti-Money Laundering Law and Counter Terrorism Law.<sup>40</sup>

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<sup>36</sup> Section 52(b), Ibid.

<sup>37</sup> Section 52(c), The Counter Terrorism Law, 2014.

<sup>38</sup> Section 5(d), Ibid.

<sup>39</sup> Section 69(c), Ibid.

<sup>40</sup> Section 81(a)(xiii), the Financial Institution Law, 2016

### **Discussion**

As a party to twelve international counter-terrorism instruments, Myanmar promulgated the Counter Terrorism Law 2014 and the Anti-Money Laundering Law 2014. However, according to FATF' Improving Global AML/CFT Compliance; on-going process 2016, Myanmar is still listed in jurisdictions with strategic deficiencies. Therefore, Myanmar should review the adequacy of legal resources to determine whether it is sufficient to prevent and suppress the financing of terrorism.

### **Conclusion**

Combating the financing of terrorism under the Anti-money Laundering law, it criminalizes the financing of terrorism as the predicate offences of money laundering. Besides the preventive measures of the financial sector that covers customer due diligence, record keeping, suspicious transaction requirements, and wire transfer of the reporting organizations, banks and financial institutions. But it cannot work well to combat the financing of terrorism so as the terrorist financing does not need actually to commit the criminal activities and need to be laundered.

The Counter Terrorism law criminalized the offences provided in twelve international terrorism treaties including the offences of the financing of terrorism as one of these offences. But, the counter terrorism law does not design the reporting organizations and does not include the regulatory measures of the financial sector to prevent the scope for using financial system to collect and transfer funds for terrorism purpose. Moreover, this law should make ensure that the competent authority would enable to identify, detect, freeze, seize and forfeit the proceeds of terrorism or terrorist acts, the property used in terrorism, in terrorist acts or by terrorist organizations, and property intended or allocated for use in terrorism, in terrorist acts or by terrorist organizations described in Article-8 of TF convention, Special recommendation-III of the FATF and para-1(c) of United Nations Security Council Resolution 1373 as it is the backbone of the combat against the financing of terrorism.

As the institutional measures, the role of financial intelligence unit is very important in combating the financing of terrorism. The capacity of the financial intelligence unit should be improved by giving training to ensure a fully operational and effectively functioning on suspected terrorist financing cases because the strategy of combating the financing of terrorism was introduced very recently.

The Central Bank and financial institutions should comply with the Anti-Money Laundering law to enhance financial transparency and to prevent terrorist organizations from accessing their financial services and assist government and their agencies in their enquiries. On the other hand, it can contribute to the protection of the reputation of both banks and financial institutions by preventing and deterring the misuse of their financial system so as to raise or flow of fund to the terrorists or terrorist organizations.

Nowadays, combating terrorism and terrorist financing are addressed as a collective effort on the part of all members of the international community. Therefore, Myanmar should consider its soundness of legal resources, and prevent and suppress the terrorist acts and financial system by extending the Anti-Money Laundering Law to include the specific terrorist financing offence or by enacting the specific Anti-Terrorist Financing Law in compliance with the international norms and standards.

## **References**

### **Laws and Acts**

The Anti-Money Laundering Law, 2014  
 The Central Bank of Myanmar Law, 2013  
 The Counter Terrorism Law, 2014  
 The Financial Institution Law, 2016

### **International Instruments**

The United Nations Convention for the Suppression of the financing of Terrorism, 1999.  
 Association of Southeast Asian Nations (ASEAN) Convention on Counter Terrorism, 2007.  
 The United Nations Security Council Resolution 1267  
 The United Nations Security Council Resolution 1373

**Books**

- .A. Conte, Human Rights in the Prevention and Punishment of Terrorism, DOI 10.1007/978-3-642-11608-7\_2, # Springer-Verlag Berlin Heidelberg 2010,
- Steve Kiser, Financing Terror An Analysis and Simulation for Affecting Al Qaeda's Financial Infrastructure, the Rand Corporation, 2005, <http://www.rand.org/>.
- Paul Allan Shoot , Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, 2<sup>nd</sup> edition, The International Bank for Reconstruction and Development/The World Bank/ The International Monetary Fund, 2006
- United Nations Office on Drugs and Crimes, Digest of Terrorist Cases, United Nations, 2010.
- Michael Freeman, Financing terrorism: case studies, Ashgate Pub Co, 2012
- Jae-myong Koh, Suppressing Terrorist Financing and Money Laundering, 2006.

**Articles and Journals**

- Arthur H. Garrison, Criminal Justice Studies, 2003, Vol.16(1)
- The National World, Sunday January 24, 2016
- Louis Forget, Combating the Financing of Terrorism, Money Laundering and Terrorism Financing, May 10, 2002,
- E. Anthony Wayne, Internationalization The Fight, USA Journal
- Karolina Lula, Terrorized Into compliance: Why Countries submit To financial Counterterrorism, 2013
- Wilkinson, Terrorism Versus Democracy, The Liberal State Response, 2001
- James Adams, The Financing of Terror, 1988.
- Jean-François Thony, Money Laundering And Terrorism Financing: An Overview, 2000.
- Hoffman, Inside Terrorism, 1999

**Internet website**

- <http://cjc.delaware.gov/terrorism/history.shtml>
- [http://en.wikipedia.org/wiki/Terrorism\\_financing](http://en.wikipedia.org/wiki/Terrorism_financing).

**Cases**

- Linde vs. Arab Bank, PLC, United States District Court, E.D. New York, 706 F.3d 92(2013)
- US vs Holy Land Foundation for Relief and Development (HLF), November, 2008
- Transcript of proceeding, R vs Vinyagamoothy & Ors, Supreme Court of Victoria, Coglán J, 31 March 2010

## **ASSESSMENT OF INTERNATIONAL CONVENTIONS RELATING TO LAND TRANSIT OF LANDLOCKED STATES**

Htet Htet Zaw\*

### **Abstract**

Under the definition defined in Article 124 (1) of the United Nations Convention on the Law of the Sea 1982, landlocked state is a state having no sea coast. Under this definition itself, landlocked states have relied on the transit state for the outlet of the sea which is the cheapest transportation mode, and freedom of transit is most crucial for these states than other factors. Because of shipping is still playing a central role in global trade, geographic location also remains significant. As a result of their geographical disadvantage, landlocked states face specific challenges in their attempts to integrate into the global trading system. Mainly because of goods coming from or going to a landlocked state are subject to additional trade barriers such as lengthy border-crossing procedures, weak legal and institutional arrangements, poor infrastructure, a lack of information technology, an underdeveloped logistics sector and a lack of cooperation with neighbouring transit countries, they face the disadvantages which they can't solve themselves. These problems faced by landlocked states have over the years been addressed by the international community through, inter alia, the adoption of international legal instruments aimed at easing the economic burden suffered by them. In this study, it will be assessed the international conventions relating to land transit of landlocked states.

**Key Words:** landlocked states, transit, disadvantage, barriers, assess, international legal instruments

### **Introduction**

The great oceans of the world; the Pacific, Atlantic, Indian and Arctic, constitute a single interconnected expanse, one continuous body of salt water. The oceans and their marginal seas which cover almost 71% of the Earth's surface and constitute a vast area of communication, a source of living and non-living resources, and an important object of scientific research, have long been an indispensable arena for intercourse between human communities.

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Before the onset of air traffic and instantaneous communication, people, goods, and ideas travelled the world by ship. Today, even with advances in technology, seaborne commerce remains the linchpin of the global economy, as more than 90% of global trade is carried by sea.

And today, due to globalization and the resulting economic integration, all countries of the world have become part of a “global village.” This integration of world economies has proven to be a powerful means for countries to promote economic growth and development and to reduce poverty. However, since landlocked states are states without direct coastal access to the sea, they cannot enjoy the interests from the ocean and the Sea and face very specific challenges including maritime trade.

At present there are 43 states having no sea coast; 16 in Africa, 13 in Europe, 12 in Asia and 2 in Latin America. Compared with their coastal neighbouring countries, they start their trading “career” with numerous disadvantages from the outset. The situation is almost always aggravated when being landlocked coincides with other factors such as remoteness from major markets, tropical climates, considerable distance from the coast, poor infrastructure, or an inadequate policy, legal or institutional environment. In today’s competitive world, landlocked countries generally face a difficult situation.

While some countries, including a few developed Landlocked States in Europe, have benefited from their central location, the majority of Landlocked Developing Countries, however, still face the constraints imposed by geography and remains on the periphery of major markets. So the 32 Landlocked Developing Countries are often characterized by lower per capita incomes when compared to their transit neighbors and 17 of them are classified as least developed.

For Landlocked States, free access to the sea, the key to international trade, is linked to the question of transit: goods originating in Landlocked States directed toward the coasts, or entering Landlocked States from the sea, must traverse the territories of bordering countries. In other words, their geographical location means that the access of these states to the principal maritime ways is always indirect; they are obliged to rely on transit through the territory of other states. As a result of their geographical disadvantage,

Landlocked States face specific challenges in their attempts to integrate into the global trading system. Mainly because of goods coming from or going to a landlocked country are subject to additional trade barriers such as lengthy border-crossing procedures, weak legal and institutional arrangements, poor infrastructure, a lack of information technology, an underdeveloped logistics sector and a lack of cooperation with neighbouring transit countries, they face disadvantages which they cannot solve themselves. This problem has for a long time, been of major concern to Landlocked States.

The principle objective of International law being to maintain relations among nations and its ultimate goal being to maintain peace, security and progress for all people, cooperation between them is a matter of common interest. Moreover, the progress in International Law, has guaranteed the same right of transit in relation to free access to and from the sea, since the sea has been accepted as the common heritage of all mankind and accessibility, equitable distribution and effective utilization of such common resources irrespective of the geographical construction whether coastal or landlocked, is the spirit of the same.

As a consequence, the international community has, over the years, adopted several international legal instruments ensuring freedom of transit, thereby facilitating Landlocked States gain access to seaports via transit traffic through neighbouring countries. Although many multilateral, regional and bilateral treaties have been signed following the recognition of freedom of transit for the Landlocked States, in this study, it is only assessed the international conventions with multilateral character.

Access to and from the sea and passage rights across the territories of states have been the subject of various international conferences and several international conventions which form the basis for the principle of freedom of transit with multilateral character; commencing with the Barcelona Convention and Statute on Freedom of Transit 1921, Article V of the GATT 1947, the New York Convention on Transit Trade of Landlocked Countries 1965, and the United Nations Convention on the Law of the Sea 1982. The 1958 Convention on the High Seas is often considered a fifth major instrument dealing with the issues, but most of its relevant provisions have been incorporated into the Law of the Sea Convention.

Although some of these conventions do not solely provide for Landlocked States, the parties of these conventions, whether coastal or landlocked, may enjoy freedom of transit through other contracting States.

Aims and Objectives of this study are to study the main challenges and problems of Landlocked States, to assess the international conventions relating to landlocked states and to analyse the advantages and disadvantages of these international conventions. This research limits to the multilateral conventions and land transit of the Landlocked State only.

In this research, it will be analytically studied that what are the main challenges and problems Landlocked States are facing in general and which International Conventions address to the land transit of Landlocked States and finally how do these international conventions effect and can solve the problem of Landlocked State.

### **The Convention and Statute on Freedom of Transit (the Barcelona Statute) 1921**

International land transportation, in so far as it includes not only overland bilateral transport but also overland transit transport across one or more countries, underscores the need for recognizing freedom of transit as a universal need rather than as a need specific to Landlocked States. The universal nature of the need for freedom of transit was firstly recognized in the Convention and Statute on Freedom of Transit 1921, although with several important restrictions.

The Barcelona Convention and Statute on Freedom of Transit is an International treaty signed in Barcelona on 20 April 1921; the treaty ensures freedom of transit for various commercial goods across national boundaries. It was registered in League of Nations Treaty Series on 8 October 1921. It went into effect on 31 October 1922 and the convention is still in force at present. The Barcelona Convention, at present, has 50 states parties, among them 12 are landlocked states.

It did not specifically cater to the particular needs of Landlocked States, and applied only to railway and waterway transport, thus excluding land transport. That Convention, furthermore, received only a limited number



of ratifications. The failure of the Barcelona Convention, which focused primarily on Europe, to address road transport, excluded extensive portions of Africa and Asia, continents that are largely dependent on overland routes to and from the sea.<sup>1</sup>

The Barcelona Statute provides a framework for agreements dealing with transit. It requires that all contracting states facilitate the freedom of transit by rail or internal navigable waterways. This requirement includes, under Article 2, routes in use across territories under their jurisdiction that are convenient for international transit. The contracting states are permitted to apply reasonable tariffs on the traffic in transit, regardless of the point of departure or destination of the traffic. But these tariffs must be fixed so as to facilitate international traffic.<sup>2</sup>

Moreover, under Article 4, the taxes, facilities, or restrictions may not depend directly or indirectly upon the nationality or ownership of vessels, or means of transport utilized for a journey. Article 5 authorized a contracting State to disallow transit of passengers or goods otherwise prohibited in its territory. Article 6 removed any obligation for a contracting State to allow freedom of transit to a non-contracting State. Article 7 empowered contracting States to impose temporary restrictions on freedom of transit in case of an emergency affecting the safety of the State or the vital interests of the country.

This Statute does not prescribe the rights and duties of belligerents and neutrals in time of war under Article 8. The Statute shall, however, continue in force in time of war as far as such rights and duties permit.<sup>3</sup> Clearly, the regime established by the Barcelona Statute confirms the intention of states to recognize, for Landlocked States, a right of transit in the bordering territories.

Although the Barcelona Statute requires observance of the principle of freedom of transit by all possible means, signatories to the Barcelona

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<sup>1</sup> Helmut Tuerk, 'Reflections on the Contemporary Law of the Sea', Martinus Nijhoff Publishers and VSP (2012), p-52.

<sup>2</sup> Uprety, K, 'From Barcelona to Montego Bay and Thereafter: A Search for Landlocked States' Rights to Trade through Access to the Sea -A Retrospective Review', Singapore Journal of International & Comparative Law (2003) 7 p-204.

<sup>3</sup> M. Sinjela, Freedom of Transit and the Right of Access for Landlocked States: The Evolution of Principle and Law, 12 Georgia Journal of International Comparative Law, (1982), p-36.

Convention can depart from that principle. Under Article 9, when serious events affect the security or vital interests of the transit country, for instance, it may disregard the Statute for a limited time. According to Article 6 and 21, a State may also refuse to allow transit of goods or passengers for public health or public security reasons, or under the authority of general international conventions, or pursuant to decisions of the League of Nations.

Although the Barcelona Conference provided a promising start for securing an internationally recognized right of transit, from the Landlocked States' point of view several deficiencies were evident in its scope and coverage. First, it would have served these countries well had the right of transit been declared of universal application, rather than confined to States party to the convention. A second major limitation was that the Convention only applies to railway and waterway transport. The failure to address road transport excluded extensive portions of Africa and Asia which are largely dependent on overland routes to and from the sea. Another criticism of the Convention was directed at the great prominence it accorded transit problems of Landlocked States in Europe, thereby failing to take sufficient account of the distinct position of States in the new world.<sup>4</sup>

It should be noted that the Barcelona Statute concerns only water and rail transport, it is not applicable to non-rail overland or air transport. Moreover, it does not deal with the "right" of free access. It only deals with the "freedom" of access. It appears that the Statute tried, within the framework of a treaty, to establish equilibrium between the principle of freedom and the principle of sovereignty of states.

While equality of freedom of transit was recognized, the interpretation of this concept was restricted, the general reason for this being the desire to reserve benefits to those who ratified or acceded to the convention, and had thus assumed its obligations. Furthermore, the right of free transit was not absolute, not overriding the rights and duties of belligerents and neutrals in time of war, not applying to passengers or goods excluded for reasons of health or public security, and not affecting provisions of conventions "relating

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<sup>4</sup> M. Sinjela, 'Freedom of Transit and the Right of Access for Landlocked States: The Evolution of Principle and Law, 12 Georgia Journal of International Comparative Law, (1982), p-36.

to the transit, export or import of particular kinds of articles” or in pursuance of general Conventions intended to prevent any infringement of industrial, literary or artistic property, or relating to false marks, false indications of origin, or other methods of unfair competition. While article 13 of the Statute provided for the settlement of disputes, it should be noted that the Convention and Statute were products of a divided international community, not only split between those who favored liberal and restrictive treatment toward non-signatories, but fractured along regional lines.<sup>5</sup>

Nevertheless, the Convention, despite its insufficiency, can be considered an important step for the international community toward the formation of a universal law as well as a set of minimum standards in the international transit transport sector.

### **The General Agreement on Tariff and Trade (GATT) 1947**

After World War II, several important events and trends conjoined improved access to the sea for landlocked states. For one thing, a relatively new concept emerged, that access to the sea is essential for the expanding of international trade and economic development. Therefore, world international organizations attempted to recognize the free access and freedom of transit to and from the sea.

The GATT 1947 which was a self-executing agreement not subject to ratification, came into force on January 1, 1948, deals with transit transport in its Article-V, especially freedom of transit. Article V of the GATT provides the most important provisions in the field of international transit, including of road vehicles and the goods they carry. Currently, 164 states including 24 Landlocked States are parties to it. Although not specifically dealing with Landlocked States, it reaffirms the principles laid down by the Barcelona Statute. But the important difference between GATT and the Barcelona Statute is that the word sovereignty does not appear at all in the seven

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<sup>5</sup> Simuel Pyeatt Menefee, “The Oar of Odysseus”: Landlocked and Geographically Disadvantaged States in Historical Perspective, *California Western International Law Journal*, Volume 23 1992-1993, Number 1, Published by CWSL Scholarly Commons, 1992, p-38-39.

paragraphs of this Article, while the Barcelona Statute recalls the sovereign right of states.

The GATT 1947 (outside but linked to the UN system) deals with freedom of transit in its Article V. Article V of the GATT, therefore only refers to so called through-transit, i.e. transit in the GATT context, normally involves at least three states. Article V ensures that goods shipped from Country A to Country C may pass through Country B on their way to Country C. This guarantee is particularly important for landlocked countries. Freedom of transit also covers means of transport. Whilst some conventions and legal texts exhaustively list means of transport others, such as GATT Article V don't.<sup>6</sup>

The Article V of the GATT provides for freedom of transit for all member countries without specifically mentioning landlocked countries. It regulates the conditions a Member may impose on goods transported through its territory by another party to a foreign destination. The basic objective is to allow for freedom of transit through the territory of each Member for transports to or from the territory of other Members.<sup>7</sup>

In Article V (2), it provides for the freedom of transit of goods, vessels and other means of transport across the territory of Member States, via the routes most convenient for international transit, with no distinction based on flag of vessel, origin, departure, entry, exit, destination, or ownership of the goods, vessels or other means of transport involved.

Furthermore, transit Members shall, under Article V (3), not be subject to any unnecessary delays or restrictions and shall be exempted from any duties and charges relating to transit. An exception is made in regard to charges for transportation or those that are commensurate with administrative expenses entailed by transit or with the cost of services rendered. According to Article V (4), all charges and regulations imposed on traffic in transit have to be reasonable with regard to the conditions of the traffic. And under Article V (5), WTO members are also obliged to treat such traffic to, or from the

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<sup>6</sup> UNCTAD, 'Freedom of Transit', (UNCTAD Trust Fund for Trade Facilitation Negotiations, Technical Note 8, Rev2, 2009).

<sup>7</sup> WTO, 'Article V of the GATT 1994 – Scope and Application' (Note by the Secretariat, G/C/W/408, 2002) 4.

territory of any other member, no less favourably than traffic in transit to or from any third country with respect to transit charges, regulations and formalities.

Article V (6) of the GATT accords also the outlines that in the case of transit, member states shall grant treatment “no less favorable than that which would be accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party.” And then, paragraph<sup>7</sup> exempts the operation of aircraft in transit from the application of Article V. Air transit of goods (including baggage), on the other hand, does fall within the scope of Article V.<sup>8</sup>

Although the provisions of GATT do not depart significantly from those of the Barcelona Statute on Freedom of Transit, there are two main differences. In the definition of traffic in transit, the Barcelona Statute includes persons as well as goods, but the GATT is concerned, not only with the railways and navigable watercourses, but also all means of land transportation. However, like the Barcelona Statute, there is no mention of or special consideration for the needs of landlocked States in its Article V. All parties to GATT enjoy this freedom of transit on the basis of reciprocity.

It appears that the obligation in Article V is that goods in transit are not to be unduly interfered with, nor discriminated against, by the transit state. Therefore, the Barcelona Statute, and the GATT share the same objective: general regulation of transit transport. Among these three instruments, two have only entered into force but the remaining one also has obtained the status of customary law; their influence on the issue of free access to the sea, and thus on promoting international trade, is considerable.

### **The UN Convention on the High Seas 1958**

A further important step regarding the relationship between landlocked countries and the sea was the adoption of the four Geneva Conventions on the Law of the Sea of 1958, by the First United Nations Conference on the Law of the Sea. Chronologically, the UN Convention on the High Seas 1958 is the

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<sup>8</sup> Ibid, p.7.

third International Convention that recognized the right of access to the sea of Landlocked States and entered into force in 1962.

Under Article 3 of the Convention on the High Seas, it reads:

“1. In order to enjoy the freedom of the seas on equal terms with coastal states, states having no sea-coast should have free access to the sea. To this end states situated between the sea and a state having no sea-coast shall have by common agreement with the latter and in conformity with existing international conventions accord:

- a) To the state having no sea-coast, on a basis of reciprocity, free transit through their territory; and
- b) To ships flying the flag of that state treatment equal to that accorded to their own ships, or to the ships of any other states, as regards access to seaports and the use of such ports.

2. States situated between the sea and a state having no sea-coast shall settle, by mutual agreement with the latter, and taking into account the rights of the coastal state or state of transit and the special conditions of the state having no sea-coast, all matters relating to freedom of transit and equal treatment in ports, in case such states are not already parties to existing international conventions.”

This article was in favour of land-locked States, however it depended on contingent agreement and on the good will of the coastal States concerned.

And this provision marked the first recognition of the special needs of Landlocked States in an international treaty of universal character. But the weak language coupled with the word ‘should’, the requirement of reciprocity and the explicit requirement of a bilateral agreement with the transit state to make the right of free access effective attracted criticism from Landlocked States. It broadly reflected the various provisions of previous treaties dealing with Landlocked States. The weaknesses outlined above with regard to the Barcelona Statute were not remedied by this Convention. The rights of

Landlocked States still remained non self-execution and dependent on the good will of transit States.

Therefore, this First United Nations Conference on the Law of the Sea (UNCLOS- I), apart from the now undisputed recognition of the right of Landlocked States to their own flag on the seas, however, produced only a rather meagre result, namely Article 3 of the Convention on the High Seas 1958. For these reasons Landlocked States attempted to seek a separate convention dealing with their transit transport problem, and the result of that effort was the 1965 United Nations Convention on Transit Trade of Landlocked States.

### **The UN Convention on Transit Trade of Landlocked States (the New York Convention) 1965**

The UN Convention on Transit Trade of Landlocked States (the New York Convention) 1965, is the first multilateral instrument devoted exclusively to the special transit problems of Landlocked States. This Convention developed under the auspices of UNCTAD, specifically addresses the transit transport issues of Landlocked States. The Conference of plenipotentiaries adopted the Convention on Transit Trade of landlocked states on 8 July 1965. The Convention entered into force on 9 June 1967 following its ratification by the required minimum of two landlocked and two transit States having a sea-coast. It has thus far been adhered to by 43 States with 23 Landlocked States, among them only 22 coastal States, some of which do not even border a landlocked country. This was the first international Convention to deal specifically with the problem but, while it certainly gave a measure of “status” to it, it did not offer a solution. Its effectiveness is limited, moreover, by the fact that few transit states have ratified or acceded to it.

The main purpose of the New York Convention was to incorporate into treaty law the rights and obligations of landlocked States and their transit neighbors with regard to the movements of goods in international transit, and then to generate universal acceptance of the Convention.<sup>9</sup>

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<sup>9</sup> Uprety, Kishor, ‘The Transit Regime for Landlocked States: International Law and Development Perspectives’, The World Bank, Washington, D.C(2006), p-71.

The Convention on Transit Trade of Landlocked States, in its preamble, recalls Article 55 of the Charter of the United Nations which required it under this Article to promote conditions of economic progress and solution of international economic problems. The 1965 New York Convention starts with a relatively long preamble that reproduces excerpts of the resolution of the 11th UN General Assembly, the eight principles of the 1964 UNCTAD, and Article 3 of the 1958 Convention on the High Seas. Most of the clauses in fact derive from the Barcelona Statute and some are identical. What distinguishes the 1965 Convention from the Barcelona Statute is that application of the New York Convention is more specific. The Barcelona Statute deals with transit in general, without specifically referring to Landlocked States; the New York Convention deals with Landlocked States access to and from the sea.<sup>10</sup>

Principle I of the New York Convention 1965 is as follow;

“The recognition of the right of each land-locked State of free access to the sea is an essential principle for the expansion of international trade and economic development”

This is enhanced in the fourth principle, which states that;

“In order to promote fully the economic development of the land-locked countries, the said countries should be afforded by all States, on the basis of reciprocity, free and unrestricted transit, in such a manner that they have free access to regional and international trade in all circumstances and for every type of goods. Goods in transit should not be subject to any customs duty. Means of transport in-transit should not be subject to special taxes or charges higher than those levied for the use of means of transport of the transit country.”

But relating to these two principles, it had already weakened in substance under Principle V that states:

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<sup>10</sup> Uprety, K, ‘From Barcelona to Montego Bay and Thereafter: A Search for Landlocked States’ Rights to Trade through Access to the Sea -A Retrospective Review’, Singapore Journal of International & Comparative Law (2003) 7, p-212.



“The State of transit, while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind.”

Therefore, these principles are interdependent, and each must be interpreted with due consideration to the others.

As in the negotiation of the previous international instruments, the main obstacle in the New York Convention to recognition of the right of access resided in the territorial sovereignty of transit States. Simply, the right of access could be granted to neighbors only if the sovereignty of the transit States was guaranteed. To some extent, this explains the contradiction between the first and fifth principles of the New York Convention preamble.<sup>11</sup> To counterbalance the first principle, which recognizes freedom of access, the fifth principle affirmed the sovereign rights of transit States by emphasizing that the principles were interdependent.

Regardless, the Convention on Transit Trade of Landlocked States has modernised and amplified the Barcelona Convention for its application to transit trade of the Landlocked States. For instance, in Article 1, it is provided that;

“The term "traffic in transit" means the passage of goods including unaccompanied baggage across the territory of a Contracting State between a land-locked State and the sea when the passage is a portion of a complete journey which begins or terminates within the territory of that land-locked State and which includes sea transport directly preceding or following such passage. The trans-shipment, warehousing, breaking bulk, and change in the mode of transport of such goods as well as the assembly, disassembly or reassembly of machinery and bulky goods shall not render the passage of

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<sup>11</sup> Uprety, K, ‘From Barcelona to Montego Bay and Thereafter: A Search for Landlocked States’ Rights to Trade through Access to the Sea -A Retrospective Review’, Singapore Journal of International & Comparative Law (2003) 7, p-212.

goods outside the definition of "traffic in transit" provided that any such operation is undertaken solely for the convenience of transportation. Nothing in this paragraph shall be construed as imposing an obligation on any Contracting State to establish or permit the establishment of permanent facilities on its territory for such assembly, disassembly or reassembly."

This Article includes not only the passage of goods but also the passage of unaccompanied baggage in the definition of "traffic in transit". And even a Landlocked States may become a state of transit, if 'traffic in transit' of another Landlocked States passes through its borders. There is a specific qualification of 'traffic in transit' as the passage of goods, etc. between a Landlocked State and the sea when the passage is a portion of a complete journey which begins or terminates within the territory of that Landlocked State and which includes sea transport directly preceding or following such passage.

Similarly, in its Article 1(d), it provides for quite a broad definition of the term "means of transport" which includes any railway stock, seagoing and river vessels and road vehicles, porters and pack animals where the local situation so requires and if agreed upon by the Contracting States concerned, other means of transport and pipelines and gas lines when they are used for traffic in transit within the meaning of this article.

Perhaps the most important of all is the guarantee in the Article for traffic in transit and means of transport.<sup>12</sup> It has stipulated that measures taken for regulating and forwarding traffic across the territory of contracting states shall facilitate traffic in transit. It has also provided passage across or access to the territory of contracting States of persons whose movement is necessary for traffic in transit.

Article 2(1) establishes that;

"Freedom of transit shall be granted under the terms of this Convention for traffic in transit and means of transport. Subject to the other provisions of this Convention, the measures taken

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<sup>12</sup> S P, Subedi, 'The United Nations and the Trade and Transit Problems of Landlocked States,' in M I Glassner (ed), *The United Nations at Work* (1998), p-143.

by Contracting States for regulating and forwarding traffic across their territory shall facilitate traffic in transit on routes in use mutually acceptable for transit to the Contracting States concerned.”

Therefore, under Article 2(1), freedom of transit shall be granted under the terms of this Convention for traffic in transit and means of transport, and such traffic to be provided on routes in use mutually acceptable for transit to the Contracting States concerned.

And Article 2 (2) provides that;

“The rules governing the use of means of transport, when they pass across part or the whole of the territory of another Contracting State, shall be established by common agreement among the Contracting States concerned, with, due regard to the multilateral international conventions to which these States are parties.”

So under Article 2(2), other rules governing means of transport also are to be established by agreement among or between the contracting parties concerned and under Article 2(3), each Contracting State shall authorize, in accordance with its laws, rules and regulations, the passage across or access to its territory of persons whose movement is necessary for traffic in transit.

Except in cases of *force majeure*, contracting States must take measures necessary to avoid delays or restrictions of traffic in transit; where such obstacles should arise, the Convention mandates mutual cooperation among the competent authorities for their expeditious removal.<sup>13</sup>

Paragraph 4 of Article 2 provides that the passage of traffic in transit across the territory of contracting states shall be permitted in accordance with the principles of customary international law or applicable international conventions and with their internal regulations.

Article 3 of the New York Convention provides;

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<sup>13</sup> M. A. Sinjela, “Freedom of Transit and the Right of Access for Landlocked States”, 12 Georgia Journal of International and comparative Law (1982), p- 41.

“Traffic in transit shall not be subjected by any authority within the transit State to customs duties or taxes chargeable by reason of importation or exportation nor to any special dues in respect of transit. Nevertheless on such traffic in transit there may be levied charges intended solely to defray expenses of supervision and administration entailed by such transit. The rate of any such charges must correspond as nearly as possible with the expenses they are intended to cover and, subject to that condition., the charges must be imposed in conformity with the requirement of non-discrimination laid down in article 2, paragraph 1.”

According to this Article, the Transit State must not levy any customs duties or other taxes on transit traffic except the dues corresponding to the expenses for supervision and administration necessitated by the traffic in transit.

“The Contracting States undertake to provide, subject to availability, at the points of entry and exit, and as required at points of trans-shipment, adequate means of transport and handling equipment for the movement of traffic in transit without unnecessary delay.”

As a means of protecting Landlocked State, Article 4 obligates transit states to provide the means of transport so that the traffic in transit may be effectuated without unjustified delays, and requires that the tariff for such facilities be equitable.

There are two noteworthy provisions in the Convention. One is Article 4 which requires States Parties “to provide, subject to availability, at the points of entry and exit, and as required at points of trans-shipment, adequate means of transport and handling equipment for the movement of traffic in transit without unnecessary delay.” The other one is Article 7 which requires States Parties to take all measures “to avoid delays in or restrictions on traffic in transit. Should delays or other difficulties occur in traffic in transit, the

competent authorities of the transit State or States and of the land-locked State shall co-operate towards their expeditious elimination.”<sup>14</sup>

The New York Convention also contains several technical details. For instance, under Article 5, the transit states must use simplified documentation and special procedures with regard to traffic in transit. They must provide warehousing facilities, under Article 6 and by mutual agreement with Landlocked State, they may grant free zones or similar facilities under Article 8. The New York Convention also includes situations allowing the prohibitions on access for Landlocked State. Such prohibitions, according to Article 11, may be imposed by transit states for reasons related to public order, for the protection of their essential security interests, in the occurrence of some serious events (this being defined as a situation endangering the political existence and the safety of contracting state) (under Article 12), in case of war, or due to obligations deriving from international or regional treaties to which the contracting transit state is a party under Article 13.

Last but not least important is the compulsory dispute settlement provision of Article 16. Under this Article, any dispute which may arise with respect to the interpretation or application of the provisions of this Convention which is not settled by negotiation or by other peaceful means of settlement within a period of nine months shall, at the request of either party, be settled by arbitration.

However, in many other respects, this Convention repeats the language and substance of the Barcelona Statue and Article V of the GATT. It accepts the principle of reciprocity, does not define the legitimate interests of transit States and requires a bilateral agreement with the transit State on actual modalities of transit. Moreover, the effectiveness of this Convention is rather limited since only a very few transit States have ratified it. Thus it is difficult to state that this Convention created an unfettered universal right of land-locked States to freedom of transit across the territory of transit States.

The New York Convention has the merit of being the first multilateral agreement that deals exclusively in a single instrument with the specific

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<sup>14</sup> S P, Subedi, ‘The United Nations and the Trade and Transit Problems of Landlocked States,’ in M I Glassner (ed), *The United Nations at Work* (1998), p-143-144.

problems of transit trade. It does not, however, contain any significant innovation, and the influence of former international conventions is evident.<sup>15</sup>

On the whole, although all states recognized and were beginning to address the problem of being landlocked for developing economies, those states that did not face the problem themselves did not want to make the economic or sovereign concessions necessary to assist Landlocked Developing Countries gain freer access to global trade. The Convention did, however, adopt an important document, whose preamble clearly states a principle that highlights the importance of access to the sea for development: “The recognition of the right of each land-locked State of free access to the sea is an essential principle for the expansion of international trade and economic development.” While it was a noble attempt to address the problem and international law surrounding it, the document was not ratified by nearly as many coastal states as was originally hoped.<sup>16</sup>

Although the New York Convention contains a few weak elements, which resulted from the intransigence of transit states, it does attempt to deal specifically with the transit problems of states deprived of access to and from the sea. Furthermore, although it has been criticized, the New York Convention shows that enforceable rules for transit rights of landlocked states can indeed be formulated in the framework of a multilateral convention intended to be universal in scope. Since even this document did not fully satisfy the concerns of Landlocked States, they kept pressing for a more satisfactory international regime dealing with their rights during the nine years of negotiation in the Third United Nations Conference on the Law of the Sea (UNCLOS III).

### **The United Nations Convention on the Law of the Sea 1982**

Compared to the several previous attempts made to the international level for securing the transit rights of the Landlocked States, the UN

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<sup>15</sup> Uprety, Kishor, ‘The Transit Regime for Landlocked States: International Law and Development Perspectives’, The World Bank, Washington, D.C(2006), p- 74.

<sup>16</sup> Breanna Long, United Nations Conference on Trade and Development, Landlocked Development Countries, Institute for Domestic & International Affairs, Inc. (IDIA) (2008), p-4.

Convention on the Law of Sea seems to be a more comprehensive and existing document for securing the same right and the rights relating to access to and from the sea. The adoption of the Law of the Sea Convention 1982 marked a milestone in the development of the law of the sea. For the first time, there was a single, comprehensive treaty governing all uses of the seas and oceans. Moreover, the Convention represented a revolution in the manner in which international law is made.

The United Nations Convention on the Law of the Sea (UNCLOS) is a significant input to the rule of law. It already forms a substantial part of current international law. It sets out principles and norms for the conduct of relations among States on maritime issues. As such it contributes immensely to the maintenance of global peace and security. It has been described as a “Constitution for the Oceans” and is widely considered to be a most significant achievement of the international community, and is ranked together with the Charter of the United Nations.

The Convention in its part X, has incorporated the provisions regarding the right of free access to the sea for Landlocked States. The United Nations Convention on the Law of the Sea (UNCLOS) 1982 has often been referred to as a “package deal” because of the circumstances in which it was negotiated, including the many different issues.

The UNCLOS 1982, together with the Implementing Agreement relating to the provisions of Part XI of the Convention, adopted in 1994, is a success story. Its success is not only determined by the number of States that have signed the Convention and the Agreement, or ratified or acceded to it, and that number is already remarkable; the Convention’s success is also determined by its general acceptance by States, which is ventured to say is universal. More importantly for a law making treaty such as this Convention, its success is measured by its tangible achievements, i.e., by its widespread and consistent and uniform application in State practice.

Although the existence of the right of Landlocked States to access to and from the sea had been acknowledged by a majority of states in the several earlier treaties, it’s internationally binding status, particularly from the aspects of practicality of enforcement, still needed improvement. The Landlocked State therefore continued to demand a formulation that was more valid,

objective, and universal. In this context, attempts towards reformation of the status of the right of access were made by the Third United Nations Convention on the Law of the Sea 1982.<sup>17</sup>

It was signed on December 10, 1982 after 14 years of negotiations to which more than 150 countries representing all regions of the world participated. The Convention entered into force on November 16, 1994. It had attracted 167 contracting parties including EU and 26 Landlocked States. The 1982 UNCLOS is the international agreement that resulted from the third United Nations Conference on the Law of the Sea (UNCLOS III). Since the UNCLOS II held in 1960 failed to achieve anything significant, negotiation were continued at the UNCLOS III which lasted from 1973 through 1982.

During the nine years of negotiations in UNCLOS III, a number of proposal were put forward by individual States, both landlocked and transit States, as well as group of States, outlining their negotiation positions. While the Landlocked States were keen to secure an unfettered right of free access to and from the sea, many transit States were anxious to have their sovereignty and territorial integrity preserved and not affected by the demands of Landlocked States. One other contested issue between the Landlocked State and transit States was the question of reciprocity. While the Landlocked States argued that their right of free access to and from the sea and their freedom of transit should not be subject to reciprocity, many transit States were insisting that reciprocity was the basis for any cooperation between the Landlocked States and transit States.

UNCLOS III is remarkable for its coverage and extent. Participating in the deliberations were 165 States (plus Namibia), three Territories, eight National Liberation Movements, 26 Specialized Institutions and other intergovernmental organizations, and 57 nongovernmental organizations (NGOs) as observers. It was the largest diplomatic conference ever convened. The duration of the Conference is also noteworthy: It lasted 9 years, in which there were 11 formal sessions totaling some 88 weeks of continuous negotiations, as well as numerous unofficial inter-sessions. The length of the

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<sup>17</sup> Uprety, Kishor, 'The Transit Regime for Landlocked States: International Law and Development Perspectives', The World Bank, Washington, D.C(2006), p- 75-76.



Conference should not be a surprise. The work to be accomplished was great.<sup>18</sup>

The overall result of the intense negotiating effort at the Third United Nations Conference on the Law of the Sea is certainly far from wholly satisfying the interests and needs of landlocked States, as their views are only to some degree reflected in UNCLOS. The Convention, however, constitutes the only solution on which agreement with the coastal States was possible and which nevertheless to a certain, albeit rather narrow, extent reflects the legitimate demands of Landlocked States.<sup>19</sup>

Since the aim of UNCLOS III was to adopt a convention on the Law of the Sea by consensus, it was necessary for all individual States as well as various groups of States to adopt a give and take policy during the negotiations. The negotiated provisions on Landlocked States of the 1982 UN Convention on the Law of the Sea are contained in Part X, Articles 124 to 132.

The provisions of Part X share to some extent the narrow scope of the relevant articles of the 1958 Geneva Convention on the High Seas and the 1965 New York Convention on Transit Trade, but at the same time improve the legal situation of the landlocked States. This Convention is a general and universal convention which regulates all parts and virtually all uses of the oceans. It is a comprehensive and complex document that covers issues ranging from a state's rights over foreign ships in its territorial waters to who controls minerals at the bottom of the ocean.

This convention is also an international agreement dealing with all traditional aspects of ocean governance and uses. It deals with Landlocked States only briefly and the rights of access to the sea are outlined in detail in Part X of the Convention. It has few other provisions that could be implicitly linked with the right of access.<sup>20</sup>

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<sup>18</sup> Upreti, Kishor, 'The Transit Regime for Landlocked States: International Law and Development Perspectives', The World Bank, Washington, D.C(2006), p- 79.

<sup>19</sup> Helmut Tuerk, 'Reflections on the Contemporary Law of the Sea', Martinus Nijhoff Publishers and VSP (2012), p-57.

<sup>20</sup> Upreti, Kishor, 'The Transit Regime for Landlocked States: International Law and Development Perspectives', The World Bank, Washington D.C(2006), p- 85-86.

Part X of the United Nations Convention on the Law of the Sea 1982 (Article 124-132) concerns specially a number of rules concerning the right of access of Landlocked States to and from the sea.

The core provision of this Part is Article 125, which enshrines the right of access by landlocked countries to and from the sea, and freedom of transit through the territory of transit States by all means of transport. The main provision in this regard is to be found in Article 125(1) of the 1982 convention. It provides that:

“Land-Locked states shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this convention including those relating to the freedom on the high seas and the common heritage of mankind. To this end, Land-Locked states shall enjoy freedom of transit through the territory of transit states by all means of transport.”

Therefore the key effects of Article 125(1) are; first, it guarantees the right of free access to and from the sea to landlocked states, second, it also guarantees to them freedom of transit without any prerequisite if this freedom is to be exercised in relation to the right of free access to and from the sea and third, breaking from the Barcelona tradition, it eliminates the requirement of reciprocity.

However, the provision of Article 125(2) which substantially reduced the force of the above paragraph specifically emphasizes as follow;

“The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit State concerned through bilateral, sub-regional or regional agreements.”

The right of access is, however, contrary to the 1965 Convention, made contingent upon bilateral, sub-regional or regional agreements between the landlocked States and transit States, laying down the terms and modalities for exercising freedom of transit.<sup>21</sup>

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<sup>21</sup> Helmut Tuerk, ‘Reflections on the Contemporary Law of the Sea’, Martinus Nijhoff Publishers and VSP (2012), p-58.

Some scholars confirm that Article 125(2) provides for a *pactum de contrahendo*, but what is the scope of the obligations of the transit States? It is possible to impose an obligation to negotiate, but can one impose an obligation to conclude? This is one of the thorniest issues in international law. Also, what happens if Landlocked States and a transit State cannot reach agreement? The Convention remains silent.<sup>22</sup>

As in the other conventions, under Article 124 (1) (d), the “means of transport” means;

“(i) railway rolling stock, sea, lake and river craft and road vehicles;

(ii) where local conditions so require, porters and pack animals.

These means are defined in the same manner as in the 1965 Convention as comprising railway rolling-stock, sea, lake and river craft and road vehicles and, where local conditions so require, also porters and pack animals, omitting such important means as aircraft and pipelines.

And under Article 124 (2);

“Land-locked States and transit States may, by agreement between them, include as means of transport pipelines and gas lines and means of transport other than those included in paragraph 1.”

This paragraph is relatively flexible because landlocked states and transit states may, by agreement, include as means of transport pipelines and gas-lines and means of transport other than those included above.

Furthermore, where there are no means of transport in transit states to give effect to the freedom of transit or where the existing means (including the port installations and equipment) are inadequate in any respect, the transit states and landlocked states concerned may cooperate in constructing or improving such means of transport. Because this part clearly provided in its Article 129;

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<sup>22</sup> Uprety, K, ‘The Transit Regime for Landlocked States: International Law and Development Perspectives’, The World Bank, Washington, D.C, p- 86.

“Where there are no means of transport in transit States to give effect to the freedom of transit or where the existing means, including the port installations and equipment, are inadequate in any respect, the transit States and land-locked States concerned may co-operate in constructing or improving them.”

Moreover under Article 128,

“For the convenience of traffic in transit, free zones or other customs facilities may be provided at the ports of entry and exit in the transit States, by agreement between those States and the land-locked States.”

In essence, UNCLOS codifies modern customary international law; it reflects the law of the sea in written form. Similarly, it implies the requirement that the transit States cooperate with Landlocked States.<sup>23</sup> The provisions of Article 124(2), 125(1) and 128 of this Convention contemplate regulation between the Landlocked States and transit States.

Some articles provide expressly for cooperation. Article 129 foresees cooperation between transit States and Landlocked States in constructing means of transport to give effect to the freedom of transit of Landlocked States. Article 130 requires such cooperation in the expeditious elimination of delays or other technical difficulties of traffic in transit.

However, pragmatic analysis of the provisions of UNCLOS III shows that most of the rules set by the Convention could already be found in the earlier Conventions (the Barcelona Convention, the GATT, the High Seas Convention, or the New York Convention). For instance, such is the case of the exclusion of application of the MFN clause under Article 126, exemption from custom duties, taxes, or other charges under Article 127; equal treatment in maritime ports under Article 131; the grant of greater warehousing facilities under Article 132; and assignment of the free zones or other customs facilities to bilateral agreements under Article 128.

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<sup>23</sup> Uprety, K, ‘The Transit Regime for Landlocked States: International Law and Development Perspectives’, The World Bank, Washington D.C, p- 94.

A major deficiency of UNCLOS 1982 undoubtedly concerns the treatment of ships flying the flag of landlocked States in the ports of a transit State. Pursuant to Article 131 these ships are only accorded treatment equal to that of other foreign ships, whereas Article 3 of the 1958 Convention on the High Seas provided for combined most-favored nation or national treatment, whichever was more favorable to the vessel. That rule of UNCLOS only means that vessels may not be discriminated against in maritime ports for the sole reason that they fly the flag of a landlocked State. Accordingly, this provision amounts to no more than a corollary of the right of landlocked countries to sail ships under their own maritime flag. Furthermore, provisions on legally guaranteed access to those ports from the sea are lacking. And as with previous conventions, the transit states are not obligated to ensure transit for Landlocked States. Essentially a convenient transit for Landlocked States may be refused, at any time by transit states.<sup>24</sup>

But all aspects of the freedom of transit mentioned above are limited by Article 125 (3) that transit states exercise full sovereignty over their territory. Therefore, a transit state may act to protect its 'legitimate interests' and based on that insist that agreements regarding terms and conditions for exercising the freedom of transit be made.

Hence, the UNCLOS sets out a legal rule in favour of transit rights for land-locked States. On the other hand, it is not altogether clear that landlocked States have a legal right of access to the sea across the territory of transit States that have ratified only the High Seas Convention 1958, or across the territory of transit States that have ratified neither the law UNCLOS nor the High Seas Convention 1958. And it is to be noted that none of the Central Asian landlocked States has adhered to UNCLOS and that several landlocked States, particularly in Africa, have signed the Convention without so far ratifying it.

Possibly UNCLOS III may be advantageous for some Landlocked States that are also transit States, but for most of the Landlocked States in Africa, Asia, and South America, it is a disappointment. In general, the

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<sup>24</sup> Helmut Tuerk, 'Reflections on the Contemporary Law of the Sea', MartinusNijhoff Publishers and VSP (2012), p-59-60.

Landlocked State had a vital interest in the attempt of UNCLOS III to improve their transit position, but their hopes were in vain.

### **Conclusion**

The four major international legal instruments mentioned in this research, which address the issue of land transit transport, all contain several provisions which are advantageous for Landlocked States, such as improving transport means, providing exemptions from customs duties and taxes, etc. However, on the other hand, various areas deficiencies can also be identified with regard to the right of transit and the right of access to the sea of Landlocked States.

The Barcelona Convention confines the right of transit to rail and waterways transport and does not apply the right to road transport. This means that Landlocked States which depends on land routes to the sea cannot benefit from this Convention. Also, the right of provided by the Convention applies only to States parties to the Convention and is not a universal right.

The shortcoming of the GATT lies in the fact that the freedom of transit it provides is the good only, not for passengers and the freedom covers all member countries without specifically mentioning Landlocked States. Thus, there is no special consideration for the needs of Landlocked States. But, unlike the Barcelona Convention, the GATT does not mention State sovereignty while the sovereign right of the States is referred to in the Barcelona Convention.

The main obstacle in the New York Convention is that the right of transit and access depends on guaranteeing the sovereignty of the transit State and requires a bilateral agreement between the two parties. This could lead to restitutions on transit for Landlocked States.

The weak point of the UNCLOS 1982 is that it requires bilateral, sub-regional or regional agreements laying down the terms and modalities for exercising the freedom of transit. This requirement could lead to difficulties being faces by a Landlocked States in the event that it is unable to reach an agreement with the transit State.

Another major deficiency of the UNCLOS 1982 is that it grants ships flying the flag of Landlocked States treatment only equal to that of other foreign ships instead of MFN treatment as granted by the UN Convention on the High Seas 1958.

Therefore, although these all conventions are provided for solving the problems of Landlocked States, there are raised many issues to be addressed from their provisions.

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### **References**

#### **International Conventions and Legal Instruments**

- Convention and Statute on Freedom of Transit 1921
- General Agreement on Tariffs and Trade (GATT) 1947
- United Nations Convention on the High Seas 1958
- Convention on Transit Trade of Land-Locked States 1965
- United Nations Convention on the Law of the Sea 1982

#### **Books and Articles**

- Breanna Long, United Nations Conference on Trade and Development, Landlocked Development Countries, Institute for Domestic & International Affairs, Inc. (IDIA) (2008).
- Helmut Tuerk, 'Reflections on the Contemporary Law of the Sea', Martinus Nijhoff Publishers and VSP (2012).

- M. Sinjela, 'Freedom of Transit and the Right of Access for Landlocked States: The Evolution of Principle and Law, 12 Georgia Journal of International Comparative Law, (1982).
- S P, Subedi, 'The United Nations and the Trade and Transit Problems of Landlocked States,' in M I Glassner (ed), *The United Nations at Work* (1998).
- Simuel Pyeatt Menefee, "The Oar of Odysseus": Landlocked and Geographically Disadvantaged States in Historical Perspective, *California Western International Law Journal*, Volume 23 1992-1993, Number 1, Published by CWSL Scholarly Commons, (1992).
- Upreti, K, 'From Barcelona to Montego Bay and Thereafter: A Search for Landlocked States' Rights to Trade through Access to the Sea -A Retrospective Review', *Singapore Journal of International & Comparative Law* (2003) 7, p-212.
- Upreti, Kishor, 'The Transit Regime for Landlocked States: International Law and Development Perspectives', *The World Bank*, Washington, D.C(2006).
- WTO, 'Article V of the GATT 1994 – Scope and Application' (Note by the Secretariat, G/C/W/408, 2002) 4.

### **Report of the United Nations**

- UNCTAD, 'Freedom of Transit', (UNCTAD Trust Fund for Trade Facilitation Negotiations, Technical Note 8, Rev2, 2009).

### **Internet Websites**

- 'Atlas of Africa.', [www.atlas of africa.com](http://www.atlas of africa.com)
- 'Atlas of Asia.', [www.atlas of asia.com](http://www.atlas of asia.com)
- 'Atlas of Europe', [www.atlas of europe.com](http://www.atlas of europe.com)
- "List of Landlocked Developing Countries." UN.ORG (2014), <http://www.un.org/special rep /ohrlls/lldc/list.htm>
- "UN recognition of the problems of land-locked developing countries." UNCTAD, <http://www.un.org/special rep/ Ohrlls/lldc/default.htm>
- 'Issues in International Land Transport', UNESCAP, [www.unescap.org.com](http://www.unescap.org.com)
- List of Double Landlocked Countries, UN.ORG (2014), <http://www.un.org/specialrep/ohrlls/lldc/list.htm>.
- List of Least Developed Countries, UN.ORG (2014), <http://www.un.org/specialrep/ohrlls/lldc/list.htm>.
- "Developed Countries", <https://en.m.wikipedia.org/developed countries/>

### **Case**

- 'Right of Passage over Indian Territory', (Merits) I.C.J. Reports, 1960, (India v Portugal)