

Practising on the Moon: Globalization and Legal Consciousness of Foreign Corporate Lawyers in Myanmar

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Abstract

This paper argues that there are two contrasting versions of legal consciousness among foreign corporate lawyers in Myanmar. The old hands—expatriates who have practised there prior to the opening-up of the country in 2011—depict an image of a fairly developed legal system and an appreciation of local law and practices. In contrast, the newcomers who came to Myanmar after 2011 tell accounts of the void of law. Contrary to the old hands who see themselves as mere translators of Myanmar's local law and practices, the newcomers assume a more active role of importers and educators of modern business law and norms to fill the void. The paper uses two theoretical models in legal consciousness studies—the “community of meaning” model and the “power and resistance” model—to explain the difference between the two groups, as well as the implication the newcomers' legal consciousness has for the globalization of law.

Keywords: legal consciousness, foreign corporate lawyers, Myanmar, globalization, practice narratives

1. INTRODUCTION

“Whatever contract you are drafting, you have to think that, OK, I am now doing a project on the moon. There is no law.” This is how Patrick,¹ a Westerner, described practising corporate law in Myanmar. It is a bit strange then that, throughout my interview with him, he talked a lot about law. What did he mean exactly when he said there is no law in Myanmar? Do other expatriates who are practising corporate law in Myanmar agree with him?²

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1. All of the names of lawyers in this article are pseudonyms.

2. In this paper, I use the terms “expatriates” and “foreign corporate lawyers” interchangeably.

Patrick is now among a large group of expatriates—from both Western countries as well as neighbouring Asian ones—who came into Myanmar after the opening-up of the economy in 2011 and marketed themselves as “local legal advisers” for foreign investors or domestic enterprises doing business with these investors. When Myanmar opened its doors in 2011 after five decades of economic isolation, foreign investors flowed into the country to take advantage of opportunities to build from scratch power plants, roads, railways, telecommunication infrastructures, oil refineries, and a modern financial system. To serve this new business demand, foreign corporate lawyers set up shop and established themselves as legal experts in Myanmar’s market. To date, they have been successful in pioneering and dominating Myanmar’s corporate legal services market due to the lack of native corporate lawyers and the absence of restrictions that would prevent foreign lawyers and law firms from providing local legal advice.

This paper explores the legal consciousness of foreign corporate lawyers in Myanmar—how they choose to invoke, resist, or ignore local law. This research topic might, at first glance, seem unconventional, since most studies of legal consciousness focus their attention on the multifaceted ways that ordinary people invoke, resist, or ignore law in their daily lives (i.e. popular legal consciousness).³ However, the legal consciousness of Myanmar’s foreign corporate lawyers deserves our attention. First, they are outsiders to the local legal system and may not share the local legal consciousness. In the past, the lack of scholarly interest in the legal consciousness of lawyers is understandably due to the assumption that lawyers, as members of a profession, share a hegemonic and largely uniform legal consciousness, such as adherence to or reliance on the law, whereas ordinary people’s legal consciousness might diverge from the hegemonic version. Yet the subject of this study is foreign lawyers who practise corporate law in Myanmar, a new jurisdiction that is not originally their own. They are neither the product of the local legal education system nor originally part of the local legal community.

Second, these foreign corporate lawyers are elite actors who play an important part in shaping the business law system of Myanmar. It is critical to point out from the start that, when they talk about law and the legal system, these foreign corporate lawyers generally mean business law and the part of the legal system that governs commercial relations. Most research focuses on the legal consciousness of ordinary people because the relevant area of law in question often directly concerns ordinary people in their day-to-day activities.⁴ However, because an elite actor like a corporate lawyer is more likely to interface with business law than an ordinary person, studying the legal consciousness of an elite actor in this context becomes highly relevant. In the case of Myanmar, studying elite actors is even more important, as the country is in the process of building a modern business law system after the opening-up of its economy in 2011. Myanmar’s evolving business law system will largely be shaped by the business and legal elites. At this stage of the country’s development, foreign corporate lawyers are at the forefront of the legal transformation process, as they currently

3. However, some scholars have argued for the broadening of the scope of investigation from ordinary citizens to a wide range of actors. McCann, for example, argued for expanding the range of people in the studies of rights consciousness to include elite actors. See McCann (2012), p. 474.

4. These studies often talk about “the law” in a general sense but, in fact, they normally touch specifically upon a certain area of law. See Engel (1998), p. 140.

dominate the country's corporate legal profession—making the study of their legal consciousness a valuable research topic.

This paper also contributes to the growing socio-legal scholarship on corporate lawyers in emerging economies. Corporate lawyers in Southeast Asia are largely under-studied.⁵ This paper is the first empirical study of the emerging corporate legal bar in Myanmar. Past research on corporate lawyers in emerging economies focuses on either the structure of the corporate legal profession⁶ or the relationship between these elite lawyers and the fields of state and economic power.⁷ This paper takes a different approach by investigating the legal consciousness of corporate lawyers at an individual level. It seeks to examine the globalization of law from a starting point—the legal consciousness of individual lawyers—that may enable and sustain the entire process. In the case of Myanmar, this starting point is precisely the legal consciousness of individual expatriates who, as a group, pioneer the corporate legal services market. The transplantation of their foreign legal consciousness to the broader local legal community may, in the long run, bring about the transformation of the entire legal profession and legal system of Myanmar.

This paper will present two contrasting versions of legal consciousness among foreign corporate lawyers in Myanmar by analyzing in-depth narratives of two selected interviewees—Dan and Patrick. I will also explain how these two interviewees are representative of other interviews in the study. Dan represents the legal consciousness of a handful of expatriates who have practised in Myanmar prior to the economic reform in 2011 (i.e. “the old hands”). These old hands emphasize the sophistication and complexity of local law and practices in their narratives. The opposing and more prevalent version, given by Patrick, represents the legal consciousness of most expatriates who are practising in Myanmar today. These expatriates—foreign lawyers who came into the country after 2011 (i.e. “the newcomers”)—tend to regard local law and practices as incomplete and inadequate. In the discussion section of the paper, I will use two theoretical models in legal consciousness studies—the “community of meaning” model and the “power and resistance” model—to explain the difference between the old hands and the newcomers, as well as the implication the newcomers’ legal consciousness has for the globalization of law.

2. METHOD AND PRESENTATION

This study is a part of a larger research project on the structure and practice of the corporate legal bar in Myanmar.⁸ For this paper, I interviewed 26 foreign lawyers during three rounds

5. However, corporate lawyers in some countries of Southeast Asia are discussed as a part of a larger study of legal elites in Dezalay & Garth (2010).

6. For example, the Globalization, Lawyers, and Emerging Economies (GLEE) Project at Harvard Law School conducted research on India, Brazil, and China. See e.g. Wilkins & Papa (2013); Liu et al. (2016); Wilkins et al. (2017); Cunha et al. (2018); Stern & Li (2016). Center of the Legal Profession at Stanford Law School also conducted comparative studies on Big Law in Latin America led by Rogelio Perez-Perdomo and Manuel Gomez. See Gomez & Perez-Perdomo (2018).

7. Dezalay & Garth (2002); Dezalay & Garth, *supra* note 5.

8. My larger project will include additional interviews with native lawyers and other informants. Drawing from those interviews, I plan to focus in greater depth on the structure of the corporate legal services market and the practices of corporate lawyers in Myanmar in subsequent papers. Based solely on interviews with expatriates, this paper focuses specifically on the topic of their legal consciousness. I only provide a snapshot of the corporate legal services market in Myanmar in Part II as a short background.

of field research (June 2015, December 2015, August 2016). Except for a small number of interviews conducted with foreign lawyers working in Nay Pyi Taw, the new capital city of Myanmar, most of the interviews were conducted in Yangon, a major business city where most of the law firms are located.

Most foreign corporate lawyers in Myanmar are “newcomers” who have come to practise law in the country after the opening-up of the economy in 2011. There are only a handful of “old hands”—expatriates who have been practising in Myanmar since prior to 2011. For newcomers, I used a purposive sampling technique aimed to select respondents that include lawyers both from the West and from neighbouring countries in Asia. I also used a snowball technique to expand the number of interviewees in each group. For old hands, because of their small numbers, I have interviewed all of them. A typical interview lasted an hour, with some of them even lengthier. Interviewees include foreign lawyers from the US, the UK, the Netherlands, Germany, Singapore, Thailand, Japan, China, India, and the Philippines. Except for interviews with Thai and Chinese lawyers conducted in Thai and Chinese, the rest of the interviews were conducted in English.⁹

Interview questions were open-ended. The interview format permitted a great deal of latitude for respondents to share their “practice narratives”—stories about their experiences, their perceptions of local law, and their sense of the roles they play in the country. As with other studies of legal consciousness, the narratives an individual chooses as he or she navigates a range of interpretative options can reveal whether law (and what notion or type of law) is relevant to him or her. This type of research does not seek external validity and does not assume that the narratives are factually proven or are more accurate than competing interpretations.

Based on these interviews, I found that their legal consciousness does not vary based on their nationality, seniority, or common-civil law background, but rather based on whether they are old hands or newcomers. The old hands were striking outliers compared with the rest of my interviewees, who are newcomers. Whereas the newcomers perceive Myanmar as lacking law, the old hands emphasize the sophistication and complexity of local law and practices. To take full advantage of the richness of the interview material to elucidate the difference between these two groups, I selected for presentation two fully rendered narratives that represent the contrasting extremes in their legal consciousness. By offering in this paper the extended excerpts from these two interviews, it is my hope that readers can gain firsthand and thorough exposure to these opposing versions of legal consciousness I found in my research. Close analysis of these two rich transcripts illuminates how each of them interpret the same reality—Myanmar’s legal system—in such a different and contradicting fashion.

The downside of this approach is that it may be difficult for readers to assess the representativeness of these two interviews. To remedy this concern, Section 5 will discuss how other interviews in each group replicate or diverge from the two selected interviews. The two interviews were selected as they represent the extreme ends of the spectrum of legal consciousness I found. Other interviewees may vary in certain respects from or may not be as extreme as the two selected interviewees. But, overall, the two selected interviews are representative of each group.

9. I am fluent in Thai, Chinese, and English.

3. FOREIGN CORPORATE LAWYERS AND LAW FIRMS IN MYANMAR

3.1 *Dominance of Foreign Corporate Lawyers and Law Firms in Myanmar*

“Economic globalization” is commonly characterized by increasing integration with the rest of the world through trade, investment, and capital flows.¹⁰ The “globalization moment” takes place when a country transforms from a closed economy to an open one. In the case of Myanmar, after five decades of military rule and economic isolation, the globalization moment started in 2011 after an unexpected series of political and economic reforms that led to the easing of international sanctions and the pouring of foreign investment into the country.¹¹ Myanmar—a country with a population of 65 million—is now widely regarded by the global business community as the last frontier in Asia. It is the only sizeable Asian economy that remains distinctly underdeveloped and untapped. Foreign direct investment has surged from roughly \$1.9 billion in 2012 to a record of \$8 billion in the 2014–15 fiscal year.¹² The exponential increase in foreign direct investment has led to the emergence of new business clients for corporate law firms and lawyers.

With the opening-up of the economy, foreign lawyers and law firms have been able to gain entry and have become dominant in the country’s corporate legal services market. They are able to gain precedence even in providing legal advice about Myanmar’s law to companies seeking to invest or do business in the country. The reasons for the dominance of foreign corporate lawyers and law firms in Myanmar are as follows:

- *The absence of native corporate lawyers and law firms.* The concept of “lawyer” in Myanmar is generally synonymous with the word “advocate” in court, since their work is generally confined to criminal and civil litigation. These native lawyers practise by themselves, though they might be assisted by clerks and juniors seeking apprenticeship to fulfil their qualification as higher-grade pleader and advocate. However, there is no concept of law-firm partnership or of co-ordination or sharing among lawyers. Native lawyers are also generalists, who handle both criminal and civil cases with no particular specialization.¹³ In Myanmar, the terms “corporate lawyers” and “corporate law firms” are foreign concepts initiated by the emerging foreign lawyers and law firms serving mostly foreign business clients.
- *The absence of regulation of foreign lawyers and law firms.* In Myanmar, foreign law firms and lawyers have actively been giving advice on local legal issues. There is no barrier for them to engage in transactional and advisory work. At present, all foreign corporate law firms are registered as corporate entities under the Myanmar Companies Act (1914) with limited liability, and they are licensed to provide legal and tax advisory services.

The major laws governing Myanmar’s lawyers—the Legal Practitioners Act (1880) and the Bar Council Act (1929)—are a century old, and they aim to regulate local practitioners who

10. For a discussion on globalization, see generally Scholte (2000); Steiger (2003).

11. For a background on the political and economic context of Myanmar, see generally Steinberg (2013).

12. Daboonme (2015).

13. For a background on the legal education system in Myanmar, see Zan (2008).

appear in court.¹⁴ The Legal Practitioners Act governs the admission of higher-grade pleaders (legal practitioners who can practise law in any court, except the nation's highest court); the Bar Council Act governs the admission of advocates (legal practitioners who may practise law in all courts, including the nation's highest court); while the Court Manual specifies the qualifications and admissions processes for both categories of lawyers. Admission to both categories of the profession is restricted to citizens of Myanmar.¹⁵ The number of qualified lawyers in Myanmar is about 50,000. As of August 2012, there are 8,272 advocates and 39,682 high-grade pleaders.¹⁶ Law firms owned and led by foreign lawyers often employ native lawyers who have high-grade pleader or advocate licences.

3.2 “Old Hands” and “Newcomers”

Strictly speaking, 2011 was not the first time Myanmar had been exposed to the arrival of foreign lawyers and law firms. There had been a brief period when a similar process happened during the early 1990s, albeit to a far lesser degree compared to the opening-up of the economy in 2011. Because of democratic protests and widespread economic discontent, in July 1988, the military government ended socialist policies. By November 1988, a new investment law was passed. Myanmar's attractive factors for foreign investment were there—rich natural resources and an inexpensive labour force. But, with a failed democratic election in 1990 following by the house arrest of Aung San Suu Kyi, human rights advocates effectively campaigned to shame foreign investors and governments from doing businesses with Myanmar. The US imposed sanctions on all new investments in 1997 and followed with even harsher sanctions in 2003. The EU also imposed major restrictions. There was a brief optimistic period during the early 1990s (prior to the US sanctions in 1997) when foreign investors came in to explore investment opportunities in Myanmar.

There were a handful of foreign law firms at the time. When the sanctions were imposed in 1997, most of these firms and their lawyers left the country. Only three to four foreign law firms remained, each with one or two foreign lawyers and one or two native lawyers assisting them. The foreign lawyers often flew in and out, dividing their time between the Yangon office and another office in a neighbouring country. When I asked whether there was work to do, Dan, a foreign lawyer who was in Myanmar during this period, explained that some foreign companies were grandfathered in. As he explained: “It was a pond with a few fishes. Basically we did all the work for the foreign companies that were still here.” Thus, there were still three to four tiny foreign law firms during this closed period. In this study, I have interviewed all the “old hands” from that period who are still practising in the country today.

Since 2011, the number of foreign law firms in Myanmar has grown exponentially—perhaps at a rate unprecedented in world history—from a couple to more than 30 within four years.¹⁷ There is a variety in types of law firms: a small number of global firms with offices worldwide, firms focused solely on Myanmar or the region established by expatriates, and firms from neighbouring countries. Corresponding to this variety of firms, the “newcomers”—foreign lawyers who have come into the country after 2011—are very diverse,

14. For a background on the legal profession in Myanmar, see Saffin & Willis (2017).

15. Section 3(3) and Section 7(3) of Court Manual 1999.

16. International Bar Association's Human Rights Institute (2012), p. 62.

17. Melissa Crouch also made the same observation in her recent paper, citing one lawyer as saying the (corporate legal services) market is now the most crowded in Southeast Asia. See Crouch (2017).

consisting of Western lawyers as well as Asian lawyers from neighbouring countries such as Singapore, Thailand, the Philippines, Japan, China, and India.

Foreign law firms employ both foreign and native lawyers. Whereas native lawyers might play a major role in foreign firms in other countries,¹⁸ at this stage of development in Myanmar, foreign lawyers play the leading and dominant role in the firms I studied.¹⁹ The size of the firms is relatively small—ranging from an average of less than 10 to 30 lawyers in a couple of big firms.

4. LEGAL CONSCIOUSNESS OF AN OLD HAND: THE PRACTICE NARRATIVE OF DAN

Dan's firm is in a small house hidden at the end of a narrow lane not too far from the city's centre. The only thing distinguishing it from other small houses in this obscure area is a tiny sign for a law firm with an English name. Dan's office is on the second floor. Sunlight filtered through the windows in the otherwise slightly dim room; the furniture is classic Myanmar style and made from teak. He started our conversation by saying: "You must wonder what exactly it is that I have been doing here—for twenty years."

Dan is an "old hand" at corporate legal advising in Myanmar. He had worked in other developing countries before coming to start his practice in Myanmar in the early 1990s. He saw, at the time, how promising Myanmar was in terms of business opportunities as the country signalled its interests in welcoming foreign investors. He was ultimately correct, albeit 20 years early. Nonetheless, he believed it was worth it to come to the country early, as experience matters for a successful practice in this challenging jurisdiction:

To understand the country, you have to start then. What I decided to do at that time was to come and get my feet wet and try to get involved with everything that I could. I tried to learn about the country and to learn about its laws and how to do the things that I have done in several other countries. ... It is a question of how to understand the people, the legal system, the jurisprudence, the band of laws that we need to deal with. It takes quite a few years to learn. So a slow period like that was a good time to learn.

For Dan, he came into the country with the understanding that he needed to learn and get himself accustomed to local law. He focused only on the areas of law where he needed to serve his business clients. He learned by doing with the help of native lawyers. He had a comparative framework in mind, based on his knowledge of how to do similar things in other countries. But he viewed comparative knowledge as essential for understanding how Myanmar's law is different, rather than for promoting or justifying the implantation of foreign law.

Unlike the newcomers who entered the country after 2011, Dan did not perceive a lack of law in Myanmar. Instead, he highlighted that Myanmar has its own developed legal system dating back to the colonial period under British rule.²⁰ To illustrate his point, Dan compared Myanmar with other emerging countries in the region:

Myanmar has a very complex legal system. It's got a lot of laws. It is different from Cambodia or Vietnam. Somebody in 1975 killed almost everyone over forty in Cambodia. Vietnam is similar

18. For example, US law firms abroad increasingly rely on local lawyers. See Silver et al. (2009).

19. Historically, the dominance of foreign corporate lawyers in the domestic corporate legal services market could also be found in Brazil beginning in 1913. See Krishnan et al. (2016).

20. For an overview of the legal system of Myanmar, see generally Crouch (2014).

to Cambodia in that it has a long war period. So how about law in those countries? Not much has survived. Basically, the NGOs came into those countries and established the new legal system from scratch. That is why it is great for foreign lawyers in those countries. You and I can set up a law firm in Cambodia right now and start doing deals and we can do a lot, because the system is much more embedded for us. Myanmar is not like that at all. It has its own original legal history.

For him, Myanmar is different from Cambodia and Vietnam because it has a rather developed legal system. It is wrong to assume that there is a void of law in Myanmar.

Because of his emphasis on the sophistication of local law, Dan acknowledged the need to rely on the help of native lawyers who know “the nitty-gritty” of the law. His perception of law is also practical and fluid. Law, for him, seems to encompass the practices on the ground, rather than just the law on the books. As his examples show, there are many unwritten rules and policies in Myanmar. From his perspective, these unwritten rules and policies fall within a broad notion of “law.” He recounted these concrete examples to show the importance of understanding local law and practices:

Example: Company Acquisition. The company was a local company that has been operating for many years. It was a gentleman who ran it in an old style. The foreigner who wanted to acquire this business hired a local office of one of the “Big Four” accounting firms to check the books. ...

The accountants were tearing their hair out. They had a nervous breakdown. There were no books in this company. But if you have experience here, you will know that this is normal. What does it take to accomplish this acquisition? It takes a profound knowledge, but not of international M&A law. Instead, it takes a profound knowledge of local real estate law, tax law, and contract law in Myanmar in a way that you could not have if you are a foreign M&A expert.

Example: Transferring of Shares in Local Companies. [A private equity firm] already paid the Burmese two million dollars [to acquire a Myanmar company]. I told them it is a little late for me to help you since you have already paid him two million dollars. They got a contract. But by unwritten policies in Myanmar, foreigners can’t take shares in Myanmar’s companies. Where is that in the law? No place. Just that the company administrative department would not allow it.

Now we know everybody is endorsing their shares. Sure you can endorse your shares. Then the original owner can go to the director of the company administrative department and say “I lost my document.” So it does not mean you own them. Endorsement of shares does not mean too much here.

There is a way to deal with some of these issues beforehand. For example, I can perhaps do it as an asset acquisition in some ways. But it is not as easy as that. Usually in Myanmar companies, there are licenses that cannot be transferred. There are assets that cannot be transferred to foreigners, like real estate and all kinds of stuff. So it is very complex and requires a vast knowledge of local law and practices.

From these examples, Dan stressed the importance of understanding local law and practices, as the ways to accomplish things in Myanmar are different from elsewhere. Instead of advocating for legal changes to fit international best practices, as newcomers do, he seems to accept the local law and practices and showcase his expertise in accomplishing things the local way.

Perhaps because of his emphasis on the eccentricity of local law and practices, Dan was clearly cautious in his legal practice. Compared to my interviews with the newcomers, his narrative focused much more on the prohibitions and pitfalls of doing business in Myanmar.

It was full of anecdotes about what can and might go wrong. In contrast to the newcomers who often disregard local law or find ways to work around it, Dan thinks that there is a “time bomb” problem with that type of attitude:

When I was practicing in [another developing country], I had a partner and he used to say to me—there is a time bomb ticking in there. Some of those things—things that we have done in the past—they might not hold up in the long run. Somebody in the future is going to say—wait a minute, you have this great idea but it violates Myanmar’s law.

There are people in this town now that are doing deals. Sometimes they just do deals and then they will say these are all enforceable under Myanmar’s law and then sign. What is going to happen in two years when somebody tries to enforce the securities and it turns out that the client could not enforce the securities that the lawyers say are enforceable? Who is going to pay that 50 million dollars? I am worried about this all the time.

I think we still have to do things based on law and not what we hope the law is going to be. These people are operating in ways they hope things are going to be. There are many people here who say the system will evolve. They are going to treat the system as if it were a functioning modern 20th century legal system and they will pretend that is the way it is. But the truth is: what about those time bombs?

Dan used the time bomb metaphor to make a point about being an honest broker to foreign clients. He stressed that his role is to manage the clients’ expectations—to help them correctly assess the risks and understand the limitations of doing business in Myanmar.

In other words, Dan saw himself as being a translator of Myanmar’s unique law and practices for foreign clients. He also viewed himself as an intermediary between foreign clients, native lawyers, and government officials. Native lawyers and government officials might not understand what foreign clients want to achieve. Likewise, foreign clients might not understand how best to achieve their goals under the local legal framework. Thus, the real value foreign lawyers like him provide is to translate and communicate diverging expectations and understandings among these different actors.

Dan acknowledged the rapid process of legal transplantation that has been underway since 2011. He recognized that this process might result in people like him losing a competitive edge to the new cadre of foreign lawyers:

From 1996–2011, maybe the military saw themselves as a caretaker. They did not see themselves as a provider of new laws. There are no new laws. Now a week does not go by without an announcement of a new law. They have been talking about Competition Law. All of a sudden it is effective. Things are changing extremely quickly. There were almost no changes in those days. Now they are also drafting the new Company Law which is a lot more modern. So I welcome it. I think it will do more good than harm. Maybe my new colleagues will know something that I do not know. But that is okay.

One of my colleagues has been with me for 20 years.²¹ Now she says it is changing so quickly and we do not know the law anymore. So, in effect, for new people that are rushing into the country and taking part in the gold rush, there are some values.

5. LEGAL CONSCIOUSNESS OF A NEWCOMER: THE PRACTICE NARRATIVE OF PATRICK

Patrick’s law firm is housed in one of the new tall buildings at the heart of the city. The office space was as impressive as a big law firm one could find in any major city of the world.

21. This colleague is a native lawyer.

A receptionist greeted me as I entered the firm and invited me to meet Patrick in a spacious conference room with the high-rise view of the city. Unlike Dan's office, no local teak furnishings could be seen. After I described my research in Myanmar, Patrick quipped: "It must be a very easy project for you. There is not much law here."

Patrick had practised in other emerging economies before deciding to come to Myanmar after the country opened its doors for foreign investment. In contrast to Dan, who expressed an appreciation of local law, Patrick portrayed Myanmar as a country with "a void of law." For him, Myanmar's law was only rediscovered and reinitiated after 2011. True, there were Myanmar's old laws, but they were rarely used in the past. It was almost like the whole legal system had been reset in 2011. In his own words:

We have a situation where the community rediscovers the old laws, which are still in force from the colonial period. The majority of the laws that are in force are pre-independence. 1962 was the beginning of the end for Myanmar because the country became socialist, then [there was] a coup, and they didn't write anything in English anymore. The law does not matter so much anymore. After 1963, why would you study law in a country where the law does not matter? There was very little demand for it. But actually, they have all these laws that are still in force. They are all in English but they can't read them. They do not know how to apply them. Now the rules matter again. All these texts matter again.

In Patrick's view, because the law did not matter for a long period, Myanmar is no different from Cambodia or Vietnam in terms of the lack of law, despite the fact that it has a comprehensive legal system dating back to the colonial period. Although the law in Myanmar had been in place for a long time, no one had paid attention or taken it seriously prior to 2011. Native lawyers did not know how to apply the law, especially in the business law area. It was only after the opening-up of the country in 2011 that the old law was rediscovered as the entire legal system was being rebuilt.

Contrary to an old hand like Dan, who relies on the help of native lawyers, Patrick believed that he needed to build his practice from scratch. As opposed to other countries where foreigners set up law firms by hiring the best native lawyers they can find, in Myanmar, there were almost no experienced corporate lawyers available before 2011. As Patrick explained:

Because in other emerging economies, you had good legal education. You had a vibrant legal community. You did not have only tiny litigations. You already had business lawyers. But in Myanmar, you did not have that. To illustrate my point, there has not been a court case on Company Law since 1967. So you missed two generations of lawyers. So here law graduates do not understand what a company is. They do not understand the difference between the directors and the shareholders, between debts and capital. They have difficulties understanding the clients. It is too tough. It is not their fault. They have never had a professor who can teach them properly.

So I had to learn everything myself. I did that by engaging with the government. I started working closely with the government—sometimes by doing very simple work such as helping them with the translations, drafting decrees and regulations for them, drafting joint venture documents with private sectors for them. This way I got to know their interpretations of the law and how the law works in reality.

Here, Patrick and Dan were similar in terms of emphasizing the importance of understanding how the law works in practice. But there is a subtle difference between the ways they recount their narratives. For Dan, the law in practice is a part of his broad notion of law. Thus, Myanmar in his view does not lack law. However, for Patrick, law means formal, written law

in the Western sense. The fact that there is a messy “law in practice” indicates that Myanmar lacks “law.” For him, understanding the practices (“how the law works in reality”) is a way of supplementing the incomplete and inadequate nature of the formal legal system. When Patrick talked about law and the lack of law, what he meant specifically was the law on the books—especially business law—which had largely been neglected during the closed period of the country and had not been developed since.

Since Patrick’s underlying perception is the void of law, his narrative revolves primarily around the ways he attempts to fill it. Besides actively engaging with the government to understand and influence how it interprets the law in practice, Patrick also took part in “rediscovering and rebuilding” the law:

Nobody here studied case laws in the past. Our firm compiled all these case laws and studied them. We wrote commentaries based on how these old Common Law rules from the colonial period have evolved in Britain and India. We really had to start from zero and learned all these legal sources and suggested ways of interpreting them ourselves.

In contrast to Dan, who relies on the help of native lawyers, Patrick believes foreign lawyers are more knowledgeable than native lawyers, since they know how the Common Law rules have evolved in other jurisdictions. The basic legal framework might derive from the colonial period, but their applications and interpretations are new. They are a product of comparative studies of other legal systems and international commercial customs.

In addition to interpreting and applying the old Common Law rules and compiling relevant case laws, Patrick has also actively participated in the drafting of new rules. He offered a vivid example:

Just this morning I finished a proposal for stamp duty reform. Stamp duty is very important. If you do not put a proper amount of stamp duty on the loan agreement, you cannot use it in a court. Stamp duty here is unclear, and it can be very high. So nobody wants to pay it. So it is difficult to raise money for a loan because it is a risk that one might not be able to go to court.

I talked with the Myanmar Investment Commission. They brought in their tax department. They said it is very difficult to match the Stamp Act in 1899 with modern financial securities instruments. I wrote a proposal for them. There are two types of stamp duty here. One is 3% stamp duty, which is crazy [too high]. One is 150 US dollars. So I told them you should interpret the modern financing documents as being in the latter category, not the first. And you should make that clear in the regulation. Then nobody has to be scared. Then they will just pay the stamp duty and do not have to worry about having the wrong stamp duty.

In these examples, Patrick portrays himself as actively assisting and engaging with the government to help fill the void of law and create a higher level of legal certainty for business transactions.

To redress the problems of legal uncertainty, corporate lawyers may design contractual provisions that provide more information on behavioural expectations of both parties, and allocate and minimize legal and business risks. As a result, in certain cases, foreign lawyers ultimately bypass the legal system and rely, instead, on contractual arrangements as a form of private legal ordering.²² Patrick described contract drafting as one of his key areas of “know-how.”

22. Cooter (1996).

He explained the importance of drafting elaborated contracts that fit both international standards and Myanmar's context:

Because you do not know what is going to happen when the contract goes to the government or to the court. They might completely misunderstand the point. So the drafting of the contract becomes much more important—the joint venture agreement, the shareholder contract, BOT agreement.²³ Whatever contract you are drafting, you have to think that, OK, I am now doing a project on the moon. There is no law. Everything has to be stated clearly in my contract, because I cannot leave any room for interpretation by a reasonable judge because I might not find one.

Thus, unlike Dan, Patrick sees a lot of value in an international M&A lawyer who is skilful in crafting contractual terms that meet international standards. Whereas Dan is highly sceptical and cautious about using international contractual forms or standards that might contradict Myanmar's law, Patrick views it as his core expertise and as a means to supplement the lack of law in Myanmar.

To conclude, Patrick perceives local law as sparse and incomplete. Based on this perception, he goes beyond the role of private lawyers to assume a more public role as a participant in and advocate of legal and regulatory reform. He also uses private contracts as a form of private legal ordering to transact around legal uncertainties. Rather than being a mere translator of local law and practices, newcomers like Patrick become active importers and educators of international business norms and practices.

6. REPRESENTATIVENESS OF THESE TWO NARRATIVES

The practice narratives of Dan and Patrick represent the extreme ends of the spectrum of legal consciousness that I found. Although other interviewees might fall short of their extreme position on the spectrum, overall, the other old hands tend to group near Dan's end, and the newcomers tend to group near Patrick's. Interviewees' legal consciousness does not primarily vary based on their nationality, seniority, or common-civil law background, but rather based on whether they are old hands or newcomers.

The other old hands recount narratives similar to Dan's, emphasizing the importance of local law and practices. For example, Michael reported how he hired and co-practised with a veteran native lawyer throughout the closed period. He relied heavily on this native lawyer. Unlike those of the newcomers, his narrative showed appreciation and respect for local law and practices. Similarly to Dan, he viewed himself mainly as a translator of local law and practices, rather than assuming any active role in legal reform or in promoting new business norms.

Nate, another old hand, acknowledged that Myanmar's law and legal education might seem underdeveloped if compared to Western standards. But, as he went on to emphasize, the old law in Myanmar is based on British colonial law that is quite good. He noted: "Myanmar's old Common Law is actually very good as a framework, and now these newcomers are screwing up with many unnecessary reforms." Whereas Dan seems to welcome the coming reform, Nate is more sceptical of the ability of newcomers. From his perspective, most newcomers are not law-reform experts and there is a chance that they might do more harm than good because of their lack of understanding of local practices. As he pointed out:

23. BOT Agreement refers to Build-Operate-Transfer Agreement.

“Many things that [these newcomers] want to do can actually be done under the current framework, but they just don’t know. And now they want to rewrite the whole thing from square one.”

The old hands are striking outliers compared with the rest of my interviewees, who are newcomers. All of these newcomers, regardless of their background, seemed to share Patrick’s form of legal consciousness. Compared with Patrick, some of them did talk more about the nitty-gritty peculiarities of Myanmar’s law and the importance of understanding the law in practice. But, even then, their perspective did not differ greatly from Patrick’s, since they seemed to use these peculiarities to demonstrate the underdevelopment and the lack of clear law in Myanmar. They did not view them, as Dan did, as evidence of the sophistication and complexity of local law. The gap between the written law and the law in practice is precisely why they express the feeling that the written law is not particularly relevant—and hence that they are practising in an environment without much law. For example, Lawrence, another newcomer, told me:

Just relying on law will not really get you anywhere. We always ask, how do we actually get this done in Myanmar? It is not at a point where you can read all the rules and regulations and know exactly how to complete transactions. You really have to understand the practical side of getting things done. Law published in 1914 is not indicative of how they do business here now.

Lawrence finds the gap to be problematic and frustrating, in contrast to the old hands, who seem to accept it as a coherent part of the complex legal system. For him, these peculiarities are not ideal and need changes to conform more closely to international practices.

For these newcomers, the discretionary nature of Myanmar’s legal system leads to a sense of the void of law. Like Patrick, many of them reported that the lack of subsidiary regulations creates uncertainty about how things are supposed to work in practice. In many cases, new laws are enacted but remain partially inoperative without subsidiary regulations. Lawyers must then consult government officials about what to do in practice.

Contrary to the old hands, who see themselves as mere translators and communicators of local law and practices, the newcomers go beyond the role of private lawyers to become active educators and promoters of international business norms. For example, Vincent, an Asian lawyer, noted that, not only did he consider communicating with government officials a learning process about local practices, he also saw it as a teaching process:

Sometimes I feel like I am a teacher. For example, if the client wants us to do this, I will go and discuss it with the relevant officials. I will show them this is how it is done in other jurisdictions. Can we do this in Myanmar? There is a possibility that we can because the law supports it, while in practice there might be unpublished policies that we do not know about. So we have to talk to the officials and try to educate them. Ok, this is how it is normally done in other countries and how similar things could be done here. See how they would respond. So it is that kind of interaction. That is how the education happens.

In addition to seeing their role as educators, newcomers also engage in law reform. Like Patrick, newcomers, especially the more prominent ones, shared accounts of how they advocate for and participate in legal and regulatory reforms in Myanmar. Some of these reforms have been reported in the news. Baker & McKenzie, for example, has received grant money from the Asian Development Bank to assist in drafting the model Company Law to

replace the current one, which has been in place since 1914.²⁴ Likewise, Singapore's Joseph Tan Jude Benny was appointed as a consultant to Myanmar's Ministry of Transport in March 2013 to draft the Maritime Law.²⁵

Whereas Dan, as an old hand, talked about the "time bomb" problem, the newcomers believe the system will evolve to accommodate their transactions in the long run. Standard contracts produced by these new law firms will gradually be circulated and accepted as commercial norms. Brian, who used to practise in Thailand and other countries in the region, offered this vivid explanation:

As a lawyer in a developing country, you do as much research as you can. You read everything—then create what is a legally defensible argument. On top of that, you layer in international practices and experiences which are well developed. So you end up building documents. For example, if you look at the loan agreement in Thailand, I suspect there has not been a court decision on a major loan agreement for the last 40 years. But there are these thick loan agreements with several conditions and opinions that lawyers give with reservations and qualifications. Everyone is using that all the time. Everyone is copying what everyone else is doing. So you build up a whole lot of things which become like customs. The development in Myanmar will be the same.

Compared to the old hands, who are generally more cautious and conservative in offering advice, the newcomers are willing to take calculated risks with the belief that the legal system will gradually evolve to accommodate their creative structures and transactions.

7. DISCUSSION: GLOBALIZATION AND LEGAL CONSCIOUSNESS

In this section, I will discuss two questions: (1) what might explain the difference between the legal consciousness of the old hands and the newcomers and (2) what is the implication of the newcomers' legal consciousness for the globalization of law? I will apply two theoretical models of legal consciousness—(1) the "communities of meaning" model and (2) the "power and resistance" model—to help shed light on each question respectively.²⁶

The communities of meaning model suggests that understandings of law and of community are mutually constitutive.²⁷ This model examines legal consciousness as part of the social construction of the studied community—connecting the individual understanding of law to the social construction of a community—to form "communities of meaning." One starting point to think about legal consciousness based on this model, then, is to ask whose legal consciousness is of interest in a particular study (i.e. which group or "imagined community").²⁸

24. Kyaw (2015).

25. Tan (2014).

26. In his 1998 article, David Engel made a distinction between these two theoretical models based on assumptions about the extent to which law matters to legal consciousness. Each model emphasizes different analytical categories in thinking about legal consciousness. However, they should not be viewed as mutually exclusive. Engel himself suggested that they both run on a continuum and may shade into one another. See Engel, *supra* note 4, pp. 130–9.

27. Examples of past studies that are based on this model include the following: Engel (1984) on personal injuries in Sander County; Greenhouse (1988) on the interplay between court and community in Hopewell; Yngvesson (1988) on complaint hearing in "Riverside"; Engel (2005) on personal injuries in Northern Thailand. Even though most of these studies do not explicitly use the term "legal consciousness," they are about examining law as part of the social construction of the studied communities.

28. "Imagined community" is a term originally used by Anderson (1991).

Given this model, the case-study of foreign corporate lawyers in Myanmar is intriguing. After all, to which group or community do they belong? Globalization has made possible the emergence of a new group of lawyers who have learned law in one country and come to practise in another. In a way, foreign corporate lawyers in Myanmar may belong to both a local and a foreign community. They can choose whether they want to depict themselves as belonging to the local community or the foreign one.

Old hands choose to join and assimilate into the local community of native lawyers while the newcomers choose to create their new, separate community. Social changes associated with economic globalization explain this difference. During the closed period prior to 2011, there were extremely few old hands. They also lacked social and economic capital due to the strict control of the military regime and the closed nature of the economy. Understandably, their best strategy was to join the community of local lawyers and to share the legal consciousness associated with that community, which placed an emphasis on local law and practices. In other words, they tried to assimilate themselves into the local community and the local legal system. In this sense, they became more passive, remaining as mere translators and communicators of local law and practices for foreign clients. They did not seek to actively change the legal consciousness or the legal system of the local community.

By contrast, since the country's exposure to the global economy in 2011, the number of foreign law firms and lawyers has grown exponentially within a short period, forming a critical mass sufficient to create their own separate community. They have also gained more prestige and power as they are connected to global capital that is in high demand from the new reformist government. Hence, they have formed their own community with a shared sense of legal superiority, representing what they perceive as more advanced legal systems and international business norms. They have also connected their identity with a larger community of international corporate lawyers outside of Myanmar. With their own community and legal consciousness, they have also begun to contest and shape the legal consciousness of the emerging community of corporate lawyers in Myanmar, which includes both themselves and native lawyers working in their firms.

In addition to the changes associated with the exposure to the global economy, another factor that might help explain the difference between the two groups is that their narratives correspond to the ways they wish to market themselves to clients. The old hands emphasize local law and practices because doing so fits with their comparative advantage of having practised in the country for a long period of time. In contrast, the newcomers lack experience and knowledge of local law. By portraying Myanmar as a country in which there is not much law and insisting that native lawyers do not know much law anyway, they justify their value. In turn, they also embark on a project of advocating for legal changes to transform Myanmar's legal system to adhere more to international standards that will benefit them and their clients in the long run. From this perspective, each community has its own underlying interests that explain their formulation and dissemination of certain legal narratives.

However, it is important to emphasize that the legal consciousness of the old hands in Myanmar is a product of their having practised in the closed period, rather than merely a product of the length of time of their practice. The finding of this study is not only that the old hands emphasize local law and practices, but also that they are more passive compared to the newcomers who actively promote the importation of foreign business law and norms. Newcomers are able to assume this more active role because the changes associated with

Myanmar's economic globalization enable them to form their own separate community and legal consciousness. One might very well find that the old hands in any country, with their years of experience, will similarly emphasize localized expertise. For example, in his paper on China, Sida Liu also found that corporate lawyers with extensive experience there tend to emphasize expertise that is highly adaptive to the local Chinese context.²⁹ It is true that perhaps the newcomers in Myanmar, after accumulating years of experience, may slowly shift to a greater engagement with the Myanmar's legal context. However, it is important to keep in mind that this very context will increasingly converge more with international norms. This will take place because of the newcomers' disdain for traditional norms and practices in this early stage of the country's development.

As such, in the end, it is important to think about the implication of these newcomers' legal consciousness for the process of the globalization of law. The "power and resistance" model of legal consciousness may help us shed light on this topic.³⁰ Based on this model, the concept of legal consciousness is used with the critical aim of exposing how the law sustains its institutional power and legal hegemony.³¹ The value of legal consciousness, according to proponents of this model, is that it illustrates how a variety of different experiences regarding law and legal practice become synthesized into a set of reinforcing schemas and beliefs. This theoretical model sees law as powerfully constitutive of legal consciousness and, in turn, contends that legal consciousness contributes to the shaping and reshaping of law within a given society. Individual resistance of law may counter law's hegemonic force and reshape law in the long run.

This theoretical model is often used to examine the legal consciousness of laypeople as they acquiesce to or resist and challenge the hegemonic force of law in their everyday lives. But the same theoretical model could also be applied to my case-study of foreign corporate lawyers in Myanmar in order to generate some insights into the nature of legal globalization. In this case, the newcomers' resistance to local law provides a basis for the globalization of law to take root in a traditional society. Their lack of local legal consciousness and their adherence to global business norms will likely disseminate among their local apprentices and serve to enable and reinforce the process of legal transplants and implantations that are underway. In this sense, the newcomers' dismissive attitude toward local law demonstrates law's weakness rather than the strength of its influence on these lawyers' legal consciousness.

The power and resistance model could, however, be applied to the legal consciousness of lawyers in Myanmar in a rather different way. In a very significant sense, the newcomers do represent a more powerful source of hegemonic power—global capital and the congeries of international business norms and practices associated with it. Thus, the process of deconstructing and marginalizing the authority of local law actually paves the way for a new type of truly hegemonic law based on international business norms.

29. Liu (2008).

30. Examples of past studies that are based on this model include the following: Ewick & Silbey (1998) on legal consciousness in everyday life; Sarat (1990) and Gilliom (2001) on legal consciousness under the state welfare system; Marshall (2005) on legal consciousness in situations of sexual harassment; and Chua (2014) on legal consciousness in relation to gay-rights advocacy.

31. For a discussion of this theoretical perspective of legal consciousness, see Engel, *supra* note 4, pp. 130–4; Silbey (2005).

Dezalay and Garth's comparative series on the globalization of law and lawyers presents institutional diffusion as a product of core-periphery hierarchy—where the core has underlying interests to engage actors in the periphery in legal and policy transformations that will advance global capital.³² My case-study of foreign corporate lawyers in Myanmar helps uncover this core-periphery imposition from the foundation—the dismissal of local law by the newcomers who act as agents of the globalization process.

The findings in this study also suggest that the legal consciousness of the newcomers is relatively uniform even though they come from both Western countries and neighbouring Asian ones. The type of “legal imperialism” evident in this case-study is not only the conventional imposition of the norms by lawyers from the North on those from the South, but also by lawyers from the more developed South (who have already welcomed and integrated international business norms into their elite practice) on those from the less developed South—that is, Myanmar.

8. CONCLUSION

This paper has explored the legal consciousness of foreign corporate lawyers in Myanmar. It finds that their legal consciousness does not vary based on their nationality, seniority, or common-civil law background, but rather based on whether they are old hands or newcomers. The old hands, though few in number, converge in their depiction of a relatively developed legal system in Myanmar and in their appreciation of local law and practices. By contrast, the more numerous newcomers, who came to Myanmar after the opening-up of the economy in 2011, provided accounts of the lack of law in Myanmar. With his perception of “doing deals on the moon,” a newcomer such as Patrick clearly sees a void to fill. In contrast to the old hands who are mere translators of Myanmar's local law and practices, the newcomers assume a more active role as importers and educators of modern business law and the new mode of legal practice focused on private legal ordering.

Theoretical models of legal consciousness are useful in explaining what led to the difference between the two groups and why the legal consciousness of the newcomers matters. Based on the “community of meaning” model, I argue that the old hands seek to join and assimilate into the community of native lawyers and adopt its shared legal consciousness of valuing local law and practices. On the contrary, the newcomers have now reached a critical mass and have formed their own community with a sense of legal superiority and a depiction of the void of law in Myanmar. I suggest that economic globalization associated with the opening-up of Myanmar's economy in 2011 may explain social conditions that lead to this shift in legal consciousness. Based on the “power and resistance” model, I argue that the legal consciousness of newcomers will play a role in reinforcing the process of the globalization of law—by resisting the authority of local law and, hence, laying the foundation for the imposition of a new hegemonic law based on international business norms.

This study of legal consciousness of foreign corporate lawyers in Myanmar thus exposes the ways that cosmopolitan and neoliberal legal ideologies may be disseminated and reinforced among foreign corporate lawyers who serve as agents of globalization at an early stage of a country's transformation. Future research must delve into the extent to which the legal

32. Dezalay & Garth, *supra* note 7; Dezalay & Garth, *supra* note 5.

consciousness of these foreign lawyers is transplanted into or resisted by native lawyers within their firms, as well as into the traditional bar outside of the corporate sphere.

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